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

*Brian Kleinhaus**

INTRODUCTION

Restitution has been described as a "court-imposed sanction,"[1] a "valuable and meaningful remedy,"[2] a "rehabilitative tool,"[3] a "punitive measure,"[4] and an "equity tool"[5] to help make "victims 'whole.'"[6] The concept of restitution—an offender compensating a victim for a wrong the offender inflicted on the victim—goes back millennia and is recorded in the writings of the early civilization of Sumer over four thousand years ago.[7] The treatment of restitution as a method of punishment and or compensation, and its incorporation into state criminal law has been inconsistent over time.[8] Recently, restitution has found a home in the federal criminal system, where it has the potential to expose criminal defendants to huge financial penalties.[9]

* J.D. Candidate, 2006, Fordham University School of Law. I would like to thank Professor Dan Richman for his excellent role as devil's advocate. I would also like to thank my parents, Annie and Sylvain Kleinhaus, and especially my wife Ariella and my daughter Dahlia, for all their support.

1. U.S. Dep't of Justice, Victim/Witness Legislation: An Overview 8 (1984).
2. *Id.* at 9.
3. Barbara E. Smith et al., Improving Enforcement of Court-Ordered Restitution: ABA Executive Summary 1 (1989).
4. *Id.*
5. *Id.*
6. *Id.*
7. *See* Robert Francis Harper, The Code of Hammurabi King of Babylon About 2250 B.C., at 13 (1904) ("If a man steal ox or sheep, . . . or boat—if it be from a god (temple) or a palace, he shall restore thirtyfold; if it be from a freeman, he shall render tenfold. If the thief have nothing wherewith to pay he shall be put to death.").
8. *See infra* Part I.A.
9. *See* United States v. Gordon, 393 F.3d 1044, 1048 (9th Cir. 2004) (upholding the majority of a $27,397,206.84 restitution order against a defendant who embezzled money and stock shares from the Cisco Corporation); United States v. Bedonie, 317 F. Supp. 2d 1285, 1311, 1329 (D. Utah 2004) (awarding restitution orders of $446,665 and $325,751, respectively, to two families of homicide victims to replace the lost

Since the passage by Congress of the Victims Witness and Protection Act of 1982 ("VWPA"),[10] defendants in the federal criminal system who are convicted of an offense at trial or who plead to an offense in a plea agreement have faced not only the prospect of jail terms and fines, but also the potential imposition of an order of restitution to pay money to the victims injured by their crimes.[11] The Mandatory Victim Restitution Act of 1996 ("MVRA")[12] partially superseded and augmented the VWPA and now requires that federal judges impose restitution on defendants convicted of certain offenses to the fullest extent possible, regardless of their ability to pay.[13]

The use of restitution as a tool in the arsenal of federal judges when sentencing a defendant has led to a contentious debate among the federal circuits over the exact purpose of a restitution order.[14] This discussion has centered around whether restitution imposed during sentencing is considered criminal punishment, a civil sanction designed exclusively to compensate victims without regard for the punitive functions of restitution, or some amalgam of these two goals.[15] The explicit function of restitution has not been defined by the U.S. Supreme Court in the context of the VWPA or MVRA.[16] And yet the answer to the civil-criminal question has direct

income of the deceased, even though the defendants had no assets); *see also* Michael J. Gilbert, *Restitution Issues Lurk in Federal Cases: Many Are Likely to Surface in Major Prosecutions and Will Also Be Relevant in Less Notorious, but Similar, Cases*, Nat'l Law J., Mar. 29, 2004, at S1 (noting that the "restitution laws are ripe for some significant activity," and "[i]t may well be that, with a few high-profile, expansive restitution orders, restitution will quickly be transformed from remaining an afterthought to becoming a central concern in federal criminal prosecutions") (emphasis added).

10. *See* Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in scattered sections of 18 U.S.C., with the restitution provision at 18 U.S.C. § 3663 (2000)).

11. Prior to 1982, federal judges could, at their discretion, impose restitution on defendants solely as a condition of probation. *See* 18 U.S.C. § 3651, *repealed by* Pub. L. No. 98-473, § 212(a)(1)-(2), 98 Stat. 1987 (1984).

12. *See* Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A (2000)).

13. *See* 18 U.S.C.A. § 3664(f)(1)(A) (2004) ("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."). Both the Victims Witness and Protection Act of 1982 ("VWPA") and the Mandatory Victims Restitution Act of 1996 ("MVRA") are to be enforced in accordance with § 3664. *See* 18 U.S.C. § 3663(d); *id.* § 3663A(d); *see also infra* Part I.C.

14. *See infra* Part II.

15. *See* United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001) ("A survey of case law illustrates that restitution is best classified as compensatory, punitive, or a combination of both according to the context in which the issue arises."); *see also infra* Part II.

16. *See* Hughey v. United States, 495 U.S. 411, 419 n.4 (1990) (stating in dicta that a goal of the VWPA is to compensate victims); Kelly v. Robinson, 479 U.S. 36, 49 n.10, 50-53 (1986) (holding that restitution imposed as part of a state criminal sentence was penal in nature and not dischargeable as a debt in a bankruptcy proceeding).

ramifications for convicted defendants facing sentences that include restitution orders.

Determining the civil or criminal purpose of restitution authorized by the VWPA and MVRA specifically affects the reach of two constitutional principles and a prudential doctrine: application of the Ex Post Facto Clause[17] of the United States Constitution to the restitution statutes, the extension of the abatement doctrine[18] to cover restitution orders, and the scope of the Sixth Amendment guarantee of having a jury—in a criminal trial[19]—find beyond a reasonable doubt all facts necessary for the punishment of a defendant.

Depending on the circuit in which a defendant is brought to stand trial, the classification of restitution will affect whether a convicted defendant can challenge a restitution order under the Ex Post Facto Clause. The Ex Post Facto Clause prevents the state and federal governments from passing laws that have a retroactive effect, but it only applies to statutes that increase criminal punishment for crimes that occurred before the passage of the statute.[20] A statute that increases the civil remedies that can be imposed upon a defendant will not be prohibited by the Ex Post Facto Clause, while one that increases criminal punishment will be.[21] The purpose of restitution orders authorized by the VWPA and MVRA becomes an issue when these statutes are applied to crimes that occurred prior to the statutes' passage or amendment.[22]

Courts also implicate the civil-criminal classification question when applying the abatement doctrine to the sentences of convicted defendants who die before their appeal as of right is heard. Generally, the abatement doctrine mandates that the indictment, conviction, prison term, and fine of a defendant who dies before his direct appeal is heard abate with his death, and become null and void.[23] However, there is a federal circuit split as to whether criminal restitution orders imposed under the VWPA or MVRA abate along with the rest of the defendant's record. In the same vein as the ex

17. U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); U.S. Const. art I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law."); *see also infra* Part II.A (discussing the relevance of the Ex Post Facto Clause to the VWPA and MVRA).

18. *See infra* Part I.F.2 (describing the abatement doctrine).

19. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

20. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91 (1798).

21. *See*, *e.g.*, Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (finding that a civil commitment of a sex offender did not violate the Ex Post Facto or Double Jeopardy Clauses).

22. *See* United States v. Schulte, 264 F.3d 656, 661-62 (6th Cir. 2001) (noting the circuit split and collecting cases from circuits on either side of the ex post facto argument).

23. *See* United States v. Estate of Parsons, 367 F.3d 409, 413 n.7 (5th Cir. 2004) (collecting cases from the federal circuits that follow the abatement doctrine).

post facto analysis, the issue of whether a restitution order abates with the death of a convicted defendant awaiting appeal is dependent, to a significant extent, on the circuit's view of restitution as either a criminal punishment or a civil remedy.[24]

The newest constitutional area involving restitution orders and a criminal defendant's ability to challenge his sentence stems from the Supreme Court's rulings in *Apprendi v. New Jersey*[25] and *Blakely v. Washington*.[26] These two cases, whose judgments were recently affirmed in *United States v. Booker*,[27] currently define the Court's understanding of the role of a jury in criminal cases, and the scope of the protection the Sixth Amendment affords to criminal defendants. Based on *Apprendi*, *Blakely*, and now *Booker*, defendants facing criminal sentences have recently raised a new challenge regarding the constitutionality of restitution orders authorized by the VWPA and MVRA. These appeals argue that restitution orders act as criminal, not civil, punishment, and thus constitute an increase in the punishment of a defendant based on facts found by a judge—not the jury—and by a lower standard of evidence than is required to convict;[28] therefore the VWPA and MVRA violate a defendant's Sixth Amendment right to have a jury determine all facts necessary for sentencing beyond a reasonable doubt.[29] Again, this novel Sixth

24. *See infra* Part II.B (discussing the abatement doctrine and how the federal circuits disagree over its application to restitution orders).

25. 530 U.S. 466, 490 (2000).

26. 124 S. Ct. 2531, 2537 (2004). Although *Blakely* was a case about Washington State sentencing guidelines, the decision had clear ramifications for the Federal Sentencing Guidelines—and potentially, for federal restitution statutes. *See id.* at 2549 ("The structure of the Federal Guidelines likewise does not . . . provide any grounds for distinction [from the Washington State guidelines].") (O'Connor, J., dissenting); *see also infra* Part II.D (regarding the potential application of *Blakely* to the federal restitution statutes). In fact, soon after *Blakely*, the Court granted certiorari and heard oral arguments on two cases where the Federal Sentencing Guidelines were challenged for violating the Sixth Amendment by allowing judges to sentence defendants to increased prison terms based on facts that were not put to a jury. United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (Aug. 2, 2004); Fanfan v. United States, No. 03-47, 2004 WL 1723114, at *1 (D. Me. June 28, 2004), *cert. granted before judgment by* United States v. Fanfan, 125 S. Ct. 12 (Aug. 2, 2004). The challenge was successful, as the Federal Sentencing Guidelines were declared unconstitutional in January 2005. *See* United States v. Booker, 125 S. Ct. 738, 756-57 (2005) (affirming the reasoning of *Apprendi* and *Blakely*, holding that their reasoning applied to the Federal Sentencing Guidelines, and finding that the Guidelines were only advisory).

27. *Booker*, 125 S. Ct. at 756-57.

28. *See* 18 U.S.C.A. § 3664(e) (2004) (requiring a judge to resolve any conflict as to the size of a restitution order by a preponderance of the evidence).

29. *See infra* Part II.D (analyzing the Sixth Amendment challenge to the VWPA and MVRA). At least one federal district court judge, without explicitly analyzing the Sixth Amendment issue, has held that the MVRA is unconstitutional on its face. *See* United States v. Kemp, 938 F. Supp. 1554, 1566 (N.D. Ala. 1996) (calling the MVRA "so fundamentally flawed and confused that it cannot be interpreted or judicially nudged into constitutionality"). The judge has reiterated the same opinion

Amendment argument against the VWPA and MVRA would be directly affected by categorizing restitution as either criminal punishment or a civil remedy.

The Ex Post Facto Clause, the abatement doctrine, and the Sixth Amendment constitutionality of the VWPA and MVRA demonstrate the current tension over determining if the restitution statutes are criminal or civil in nature.[30] The granting of a petition of certiorari by the Supreme Court on an appropriate case to decide the character of restitution authorized by the VWPA and MVRA would go a long way towards resolving this tension and creating uniformity in this facet of the sentencing of criminal defendants in the federal court system.

This Note argues that restitution is, and always has been, an additional method of punishing defendants that also increases society's recognition of the harm done to the individual victim of the crime, and that therefore restitution orders should be universally understood as criminal punishment. The legislative history of the VWPA and MVRA lends significant support to this Note's contention that Congress was aware of, and agreed with, the punitive and compensatory intent of restitution. The recent efforts by some federal courts to separate the underlying principle of restitution as punishment from its co-underlying principle of restitution as compensation have led to judicial decisions that are inconsistent with these original twin aims.[31] Therefore, this Note asserts that restitution should never be separated from its penal, rehabilitative core, even if it also has a compensatory core as well.

Part I of this Note provides a short overview of the historical background and purpose of restitution. Part I.A examines the use of restitution as a method of settling private conflicts in early human societies, and its decline over time in favor of a state-imposed and society-centered punishment regime. Part I.B briefly discusses the revival of interest in the use of restitution in the latter half of the

in multiple cases. *See, e.g.*, United States v. Bishop, 228 F. Supp. 2d 1306, 1314-15 (N.D. Ala. 2002). No other federal court has endorsed this line of reasoning to rule on the constitutionality of the MVRA.

30. An additional issue raised by the placement of restitution in the criminal sentencing process via the VWPA and MVRA is whether the Seventh Amendment right to a jury trial for suits at common law is violated. *See* Bonnie Arnett Von Roeder, Note, *The Right to a Jury Trial to Determine Restitution Under the Victim Witness Protection Act of 1982*, 63 Tex. L. Rev. 671, 673-74 (1984) (arguing that the VWPA violates the Seventh Amendment by not providing a jury trial for the determination of restitution amounts); *see also* Margaret Raymond, Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 Colum. L. Rev. 1590, 1591-92 (1984) (same). No federal circuit court of appeal that has considered this argument has accepted it. *See* United States v. Rostoff, 164 F.3d 63, 70-71 (1st Cir. 1999); United States v. Fountain, 768 F.2d 790, 800-01 (7th Cir. 1985) (finding that restitution as a criminal remedy "predates the Seventh Amendment"). See *infra* notes 304-10 and accompanying text for a further discussion of the Seventh Amendment and restitution.

31. *See infra* notes 34-35 and accompanying text.

twentieth century—including the rise of the victims' rights movement—as part of an overall increase in societal concern with violent crime and how to respond to it.

Part I.C describes the two main federal statutes that federal judges use to impose restitution on convicted defendants, the VWPA and the MVRA. This part reviews the legislative history of the statutes, and shows that the legislative record references the punitive and compensatory goals of restitution in many instances. The legislative history shows the dual interests of Congress in compensating crime victims through the penal imposition of restitution. Part I.D examines the Supreme Court's views on the intent of restitution. Part I.E presents the development of the Supreme Court's current test to evaluate whether a statute that imposes penalties serves a criminal or civil purpose. Part I.F gives the relevant background for the discussion in Part II of the Ex Post Facto Clause, the abatement doctrine, and the Sixth Amendment and their relation to restitution orders authorized by the VWPA and MVRA.

Part II of this Note examines three legal issues that are implicated by the federal circuit splits in determining whether restitution orders authorized by the VWPA and MVRA are criminal punishment. Specifically, Part II.A reviews early federal VWPA decisions and considers the circuit split as it applies to the ex post facto analysis of the VWPA and MVRA. Part II.B discusses the circuit divide on whether restitution orders should abate when a convicted defendant has appealed his conviction as of right, but dies before the court has ruled on his appeal. Part II.C details how the lack of consistency in the treatment of restitution orders by the federal courts has also led to incompatible decisions within individual circuits. Part II.D explores how the *Apprendi*[32] and *Blakely*[33] cases have led to a new legal challenge to restitution orders, namely that restitution orders pursuant to the VWPA and MVRA violate the Sixth Amendment by increasing punishment beyond the statutory maximum based on facts that have neither been presented to a jury nor found beyond a reasonable doubt.

Part III concludes that the use of the Court's test and legislative history to interpret the VWPA and MVRA ultimately results in an answer that restitution serves two masters—criminal and civil. This part contends that even though restitution can be interpreted to be all things to all people, restitution ordered under the VWPA and MVRA should never be deemed exclusively compensatory.

Part III then suggests that the Supreme Court should find a proper case to consider this matter and decide that although restitution has a compensatory function, it is too wrapped up historically in the concept

32. Apprendi v. New Jersey, 530 U.S. 466 (2000).
33. Blakely v. Washington, 124 S. Ct. 2531 (2004).

of punishment for restitution orders imposed by the VWPA and MVRA to be solely compensatory in nature. Barring a holding by the Supreme Court that all restitution orders under the VWPA and MVRA have a criminal penalty component that cannot be ignored, this Note proposes that for some restitution orders compensatory purposes will dominate over punitive interests, and vice versa. Determining the purpose of restitution orders under this proposal will hinge on differentiating between the types of victims who receive the benefits of restitution orders.

I. HISTORICAL BACKGROUND AND REVIEW OF THE VWPA AND MVRA

This part provides the setting necessary for discussing the conflicts in Part II over the definition of restitution orders as criminal or civil.

A. *A Brief Historical Review of Restitution*

Restitution was an early method of settling disputes between private parties.[34] The Code of Hammurabi[35] and the Bible[36] contain references to a preference for restitution over physical punishment for crimes of theft. These texts, which call for repayment over and above the value of the stolen item, imply that the purpose of restitution was more than victim compensation; it was also to punish the offender.[37]

Although the historical record is not complete, later evidence from Germanic tribes at the end of the Middle Ages indicates that restitution, as part of a system known as composition, was used as a method of settling feuds between tribes and was favored over violent means of retaliation for physical acts.[38] As part of the evolution of state criminal law, governments exerted their control over the composition system and began to demand part of the payment being made from one private party to the other.[39] In medieval England, a

34. *See supra* note 7 and accompanying text.

35. *See supra* note 7.

36. *See Exodus* 22:9 (King James), *available at* http://etext.lib.virginia.edu/etcbin/toccer-new2?id=KjvExod.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=22&division=div1 (last visited Mar. 20, 2005) ("For all manner of trespass, . . . or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour.").

37. *See* Stephen Schafer, Compensation and Restitution to Victims of Crime 3-4 (2d ed. 1970).

38. *See id.* at 5. Schafer makes the point that restitution in Germanic tribal society served to humiliate the offender and it could also be suitably viewed as a method of tort compensation rather than a part of "criminal procedure." *Id.*

39. *Id.* at 6.

person found guilty of an offense paid monetary compensation both to the injured person and to the feudal lord.[40]

Eventually, as criminal law became more developed, the idea of payments between individuals became associated with tort or civil law; the state completely took over the administration of criminal law, and restitution became mostly divorced from the arena of state punishment.[41] Although restitution became mostly separated from state-run criminal trials, writings by several influential thinkers over the past few centuries continued to display an interest in using restitution as a penal and compensatory tool.[42] Several international penal conferences during the late nineteenth century discussed placing restitution back into the sphere of criminal law, but the dialogue did not accomplish this goal.[43]

Yet restitution did not completely disappear from the criminal realm. Evidence exists that restitution continued to be meted out by judges in common law England as part of a criminal sentence.[44]

40. *See id.* at 7. The fine to the victim was known as the Bot, and the fine to the king was known as the Wite. *Id.*

41. *See id.* Schafer blames the separation of personal restitution from criminal law, and its original dual goal of punishment and compensation, on the avarice of feudal lords. The lords completely appropriated the fines that were once exchanged between individual parties for their state coffers; the concomitant result was that the rights of victims in the state criminal system were ignored and minimized. *Id.* at 8; *see also infra* Part I.B (discussing the victims' rights movement). *Compare* Schafer, *supra* note 37, at 8, *with* Gilbert Geis, *Restitution by Criminal Offenders: A Summary and Overview*, *in* Restitution in Criminal Justice 147, 150 (Joe Hudson & Burt Galaway eds., 1977) [hereinafter Criminal Justice] (arguing that the takeover of criminal justice by the state was less about greed and more about a "reaction to popular distress at the awfulness of existing criminal justice arrangements").

42. *See* The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law and Education 210-11 (Philip Schofield & Jonathan Harris eds., 1998). Bentham notes:

> Only, if, for the sake of the community at large, punishment is inflicted, if there be any shape by which, without encrease [sic] of suffering to the wrong doer, satisfaction to the individual wronged may be administered, that shape may be employed.
>
> By that shape, the apprehension of the eventual punishment may, moreover, be rendered the more impressive upon the mind of him on who the temptation to do the wrong is operating.

Id. See generally Bruce Jacob, *The Concept of Restitution: An Historical Overview*, *in* Criminal Justice, *supra* note 41, at 45, 48 (citing to Sir Thomas More's *Utopia* in 1516 and Jeremy Bentham's writings in the eighteenth century).

43. *See* Jacob, *supra* note 42, at 48-49.

44. *See* 4 William Blackstone, Blackstone's Commentaries 362-63 (St. George Tucker ed., 1803) (The Lawbook Exchange, Ltd. 1996) [hereinafter Tucker's Blackstone] (observing that under English common law, upon a conviction for larceny by a jury, a judge was authorized to issue a writ of restitution to the victim of the robbery to reclaim the value of his lost property out of the property of the offender, because the "law prefers the right of the owner"); *see also* J.H. Baker, An Introduction to English Legal History 440-41, 574-75 (3d ed. 1990) (referring to restitution as a criminal proceeding that had the dual result of punishing the defendant and restoring the stolen property to the victim).

Support for the use of restitution as a punitive tool in early federal criminal law in the United States exists as well. In 1802, the U.S. Congress passed a statute that criminalized any act of robbery, larceny, or trespass on Indian tribal territory by a U.S. citizen, and imposed a fine, jail time, and monetary restitution on any offender as punishment.[45] This statute adds support to the historical understanding and use of restitution as an effective element of state punishment of criminal acts.[46]

B. *Revival of Interest in Restitution in the Latter Half of the Twentieth Century*

Despite the historical record of the consideration of restitution as a criminal remedy, restitution existed as an infrequently used tool in the federal criminal system through most of the twentieth century.[47] Federal judges, acting pursuant to the Federal Probation Act of 1925,[48] could impose restitution on offenders only as a condition of probation.[49]

The modern revitalization of interest in reinstituting restitution as part of the criminal sentencing process traces its origins to the writings of Margery Fry[50] and the victims' rights movement in the 1970s and 1980s.[51] The victims' rights movement arose as a response to a

45. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, 2 Stat. 139 (1802), which states in part:

> That if any . . . citizen, or other person, shall go into any town, settlement or territory, belonging . . . to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States, . . . such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property . . . and if such offender shall be unable to pay [that sum], whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States.

Id. at 141. *See generally* 5 Tucker's Blackstone, *supra* note 44, at 72-73 n.14 (referring to the above statute as an example of Congress incorporating the concept of protecting foreign nationals from the Law of Nations into its own statutes).

46. *See infra* notes 305-10 and accompanying text.

47. *See* S. Rep. No. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 ("As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago.").

48. 18 U.S.C. §§ 3651-3656 (2000), *repealed or renumbered by* Pub. L. No. 98-473, § 212(a)(1)-(2), 98 Stat. 1987 (1984).

49. *See id.* § 3651 ("While on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.").

50. *See* Criminal Justice, *supra* note 41, at 151.

51. *See* Burt Galaway & Joe Hudson, *Introduction to* Criminal Justice, Restitution, and Reconciliation 1, 3 (Burt Galaway & Joe Hudson eds., 1990)

societal fear of crime in America.[52] The movement's main grievance was that all aspects of the criminal justice system, including the police, the district attorney's office, and the judge were too focused on protecting the civil rights of offenders at the expense of victims.[53]

The goal of the movement was to force the justice system to realign itself to better represent the interests of victims.[54] As part of that overall goal, the movement urged several substantive changes, including that offenders be required to make full monetary restitution to the victims of their criminal acts.[55] The movement's success and influence was evidenced by the formation of a task force on crime authorized by President Reagan, which, in its final report in 1982, echoed the desires of most victims: increased significance of victims' rights in the administration of criminal justice.[56]

The task force made numerous specific recommendations to the state and federal legislatures and executive branches, police, prosecutors, judiciaries, parole boards, and other groups regarding a

[hereinafter Restitution and Reconciliation] (pointing to the establishment of the Minnesota Restitution Center in 1972).

52. *See* Robert Reiff, The Invisible Victim: The Criminal Justice System's Forgotten Responsibility 21-22 (1979) (arguing that the true number of violent crimes in the United States in 1976 was close to two million, double what the official FBI statistics claimed, with an attendant three- to five-million victims); *cf.* U.S. Dep't of Justice, President's Task Force on Victims of Crime vi (1982) [hereinafter Task Force I] (citing dramatic crime statistics that show a murder in America happening every twenty-three minutes, a rape every six minutes, and claiming that half of violent crime goes unreported).

53. *See* Reiff, *supra* note 52, at xi. Reiff states:

> The police are required by law to respect concrete and specific rights of offenders but they are blind to the rights of victims . . . . If the police officer or district attorney decides not to . . . arrest, or not to prosecute an offender, or to allow the offender to plea bargain his way out of the charge, the victim has no legal recourse.
>
> The courts, too, conspire against victims by cheating them out of even the most civilized . . . forms of retribution thus robbing them of a sense of justice.

Id.; see also Lois Haight Herrington, U.S. Dep't of Justice, *Foreword* to Victim/Witness Legislation: An Overview iii (1984) ("The [criminal] system has always depended on the cooperation of victims . . . ; yet it has accorded victims none of the protections or rights guaranteed to defendants.").

54. *See* Reiff, *supra* note 52, at 15 (advocating that the "balance on the scale of justice is out of kilter").

55. *See generally id.* at 114 (listing a Victims' Bill of Rights, including a "right to be made whole again as a matter of social justice"). Congress has since codified rights of criminal victims. *See* The Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, §§ 501-06, 104 Stat. 4789, 4820 (codifying the right to restitution as part of a litany of rights afforded to crime victims at 42 U.S.C. § 10606 (2000)), *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, § 102, 118 Stat. 2260, 2261-64. The Justice For All Act placed a slightly revised version of the same list of rights in 18 U.S.C.A. § 3771 (2004). *See* § 102, 118 Stat. at 2261 (setting forth the revised list of rights, including restitution as right number six).

56. *See* Task Force I, *supra* note 52, at 16 ("The legislative and executive branches, at both the state and federal level, must pass and enforce laws that . . . recognize society's interest in assisting the innocent to recover from victimization.").

whole spectrum of issues.[57] Most important to the analysis of this Note, it pushed for mandatory restitution orders in all cases where victims had suffered a loss, including a requirement that a judge who did not impose restitution state compelling reasons on the record why restitution was denied in a specific case.[58] In urging restitution, the task force stated that "[t]he concept of personal accountability for the consequences of one's conduct, and the allied notion that the person who causes the damage should bear the cost, are at the heart of civil law. It should be no less true in criminal law."[59]

In 1986, the task force published a follow-up report that detailed the various changes that had occurred in the criminal justice system at the national, state, and local levels. It noted that the passage of the VWPA in 1982 had codified many of the pro-victim positions from the initial task force report, including the imposition of restitution orders.[60] The number of states requiring restitution had risen from eight to twenty-nine.[61] In a phrase that displays the movement's interest in ensuring that criminals continue to be held more personally accountable for their crimes, the foreword to the 1986 report exhorted society to "remember that the responsibility for crime lies with those who commit it, not with those forced to endure it."[62] The advocacy of criminal restitution orders was one factor the movement saw as an effective example of the increased personal accountability of criminals. The information contained in the task force report indicates that victims and their advocates wanted the legislature to change all aspects of the criminal justice system to be more sensitive to individual victims and less monolithic in its approach to dispensing justice. In pushing for criminals to pay restitution to their victims, the task force reports showed a desire for the legislature to more fully adopt the notion of personal responsibility from civil tort law into criminal law.[63]

The passage of the federal restitution statutes can be viewed as a principal part of Congress's response to these societal demands. By making restitution a part of the criminal sentencing process, Congress made defendants more personally liable to their victims. Part I.C will

57. *See id.* at 57, 63, 72, 83, 88.

58. *See id.* at 33, 72.

59. *See id.* at 79. There are contrary views of the efforts to bring victims' interests into the state criminal justice system. *See, e.g.,* Gregory P. Orvis, *The Evolving Law of Victims' Rights: Potential Conflicts with Criminal Defendants' Due Process Rights and the Superiority of Civil Court Remedies* 163, 170 *in* Current Issues in Victimology Research (Laura J. Moriarty & Robert A. Jerin eds., 1998) (arguing that the victims' rights movement, by merging "criminal and civil justice processes," has "diminish[ed] the purpose of both").

60. U.S. Dep't of Justice, President's Task Force on Victims of Crime Four Years Later 16-17 (1986) [hereinafter Task Force II].

61. *See id.* at 4.

62. *See id.* at iii.

63. *See supra* notes 57, 60 and accompanying text.

look at the VWPA and the MVRA and focus on whether adding restitution orders to defendants' sentences indicated Congress's intent to add a punitive measure to defendants' sentences, or a civil compensatory remedy for victims.

C. *The Federal Restitution Statutes*

The VWPA was passed in 1982.[64] Congress declared that one of the purposes of the act was to "ensure that the Federal Government does all that is possible . . . to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant."[65] The VWPA codified several recommendations of the Task Force on Crime, including the use of victim impact statements in pre-sentence reports to calculate the harm to any victim.[66] These pre-sentence reports would then be used to help the judge craft a restitution order.[67] In the original statutory text, a restitution order was available to the judge when sentencing a defendant who was convicted of any crime under Title 18 of the United States Code.[68] Restitution for any offense was completely discretionary, could be ordered "in addition or in lieu of any other penalty authorized by law," and could be imposed for only part of the victim's losses.[69] In crafting the amount of the order, a court was instructed to consider not only the loss to the victim, but also the financial situation of the defendant, including his ability to make a living and any dependents he might have.[70] An order could entail return of actual tangible property, or encompass any costs associated with lost income, medical services, and/or funeral expenses that a victim experienced; if the victim of the offense died, his estate would receive the restitution.[71] Any amount of restitution received by a victim was to be set off by compensation the victim received from an insurance payment or in a future civil suit.[72] If the

64. *See* Pub. L. No. 97-291 §§ 2-9, 96 Stat. 1248-58 (1982).

65. *Id.* § 2, 96 Stat. at 1249.

66. *Id.* § 3, 96 Stat. at 1249. The harm included "any harm, including financial, social, psychological, and physical . . . ." *Id.* See *supra* notes 56-62 and accompanying text for the discussion on the Task Force on Crime.

67. *See id.* § 5, 96 Stat. at 1255.

68. *See id.* § 5, 96 Stat. at 1253 (renumbered, amended, and currently codified at 18 U.S.C. § 3663 (2000)). Additionally, a court could impose a restitution order for crimes dealing with air piracy. *Id.* Title 18 of the United States Code is entitled "Crimes and Criminal Procedure."

69. *See id.*

70. *Id.*, 96 Stat. at 1255.

71. *See id.*, 96 Stat. at 1253-54.

72. *Id.*, 96 Stat. at 1254. If the victim received outside compensation, such as an insurance payment, the court was encouraged to order the offender to pay the outside source in an equivalent amount. *Id.* This would not only ensure that the victim did not receive double compensation, but also that the offender did not receive a benefit by paying a smaller restitution amount. *See also* S. Rep. No. 97-532, at 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2538.

court ordered no restitution, or only a partial order, it was required to state on the record its reasons for doing so.[73]

The original VWPA also stated that any conflict between the parties as to the quantity or type of restitution to be ordered was to be determined by the court using a preponderance of the evidence standard.[74] If a court placed a defendant on probation, or if the defendant was paroled, the restitution order was mandated to be a condition of either circumstance.[75] Either the federal government or a person named as a victim in the order was allowed to enforce the order "in the same manner as a judgment in a civil action."[76]

The legislative history of the VWPA noted that the "insensitivity and lack of concern for the victim" was a "tragic failing in [the] criminal justice system."[77] When discussing the need for restitution, the Senate Report on the VWPA stated the following:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.[78]

This statement, taken by itself, shows a punitive intent for restitution orders, as it indicates restitution should be part of "whatever else . . . society does to punish its wrongdoers."[79] It also indicates how restitution can operate to make society's efforts more focused on individual victims.

The Report lamented that the previous practice of federal criminal courts had "reduce[ed] restitution from being an inevitable, if not exclusive, sanction to being an occasional afterthought."[80] It added that the reason the VWPA provided various options for shaping a restitution order was to provide the court with "flexibility in determining the kind of restitution which would both satisfy the victim and provide maximum rehabilitative incentives to the offender."[81] The above statements from the legislative history show that Congress

73. *See* § 5, 96 Stat. at 1253.

74. *Id.*, 96 Stat. at 1255. This provision, originally at 18 U.S.C. § 3580, has survived intact with the exact same language in its current form at 18 U.S.C.A. § 3664(e) (2004). See discussion *infra* Part II.D regarding this evidence standard in the context of the potential violation by the VWPA and MVRA of the Sixth Amendment.

75. *See* § 5, 96 Stat. at 1255. Failure to pay restitution could lead to a revocation of either probation or parole. *Id.*

76. *Id.*

77. S. Rep. No. 97-532, at 10.

78. *Id.* at 30.

79. *Id.*

80. *Id.*

81. *Id.* at 32.

was aware of the punitive past of restitution. The statements support the notion that Congress had both offender punishment and victim compensation in mind when enacting the VWPA. They also point to the idea of restitution orders having the concurrent result of personalizing the impact of the crime on both the defendant and the victim.

The VWPA has been amended several times since its inception.[82] Two significant clauses were inserted in 1990, one of which defined a fraud victim for restitution purposes: "[A] victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."[83] The second change allowed a judge to order restitution beyond the scope of the victim's loss if the defendant agreed to do so in a plea agreement.[84] Both of these amendments served to significantly expand the class of victims for whom restitution could be ordered. The expansion of the restitution remedy to a larger class of victims does not by itself favor defining restitution as either criminal or civil. It could be viewed either as a punitive measure, in that Congress was interested in having a greater number of defendants pay a restitution penalty, or it could just as easily be interpreted as a victim-oriented statutory change not concerned with any penal effects. Other pertinent statutory amendments will be addressed in the following paragraphs, which discuss the language and passage of the MVRA.

On April 24, 1996, Congress passed the MVRA,[85] which mandated restitution for a swath of federal crimes.[86] The Senate Report on the MVRA noted that while the direct, economic costs to the victims of crime were "staggering," the real cost, encompassing the emotional

82. *See* 18 U.S.C. § 3663 (2000) (noting multiple amendments from 1984 through 2000).

83. *See* The Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4863.

84. *Id.* The plea agreement clause is exceptionally important. According to federal criminal statistics for the year 2002 from the Department of Justice, 89% of all criminal cases resulted in convictions. An astounding 96% of those convictions in the federal justice system resulted from defendants pleading guilty. Only 4% of the convictions came from trial verdicts. *See* The Dep't of Justice Statistics, Federal Justice Statistics, *available at* http://www.ojp.usdoj.gov/bjs/fed.htm (last visited Mar. 20, 2005); *see also infra* Part III.C (noting the implications of the high percentage of plea agreements on the Sixth Amendment argument about the restitution statutes).

85. Pub. L. No. 104-132, § 204, 110 Stat. 1227 (1996) (codified and amended at 18 U.S.C. § 3663A).

86. Congress first imposed mandatory restitution in 1994 for victims of sex crimes, child abuse, domestic violence, and stalking. *See* Pub. L. No. 103-322, § 40113(a)(1), 108 Stat. 1904 (1994) (codified as amended at 18 U.S.C. § 2248); *id.* § 40113(b)(1), 108 Stat. at 1907 (codified as amended at 18 U.S.C. § 2259); *id.* § 40221(a), 108 Stat. at 1928 (codified as amended at 18 U.S.C. § 2264); *see also infra* notes 93-94 and accompanying text.

and other intangible effects of crime, was "incalculable."[87] Although the nation had made "significant strides . . . toward a more victim-centered justice system," restitution still required more attention.[88] Under a purely discretionary restitution regime, federal judges had imposed restitution in only 20.2% of all criminal cases;[89] the only crime for which judges ordered restitution in a majority of the circumstances was robbery, at 55.2%.[90]

The House of Representatives passed the MVRA unanimously in a form that required mandatory restitution for all federal criminal convictions.[91] While the Senate was supportive of mandatory restitution, it was concerned with the amount of additional work the House version would require of the federal judiciary by compelling the courts to impose restitution on every federal criminal defendant.[92] Thus, the final version of the MVRA restricted mandatory restitution orders only to "identifiable . . . victims [who had] suffered a physical injury or pecuniary loss"[93] from a "crime of violence," an "offense against property . . . including any offense committed by fraud or deceit," or an offense related to tampering with consumer products.[94] Besides making restitution mandatory in these instances, the other goals of the legislation were the establishment of one unified process for the imposition of mandatory restitution, and the alignment of the procedural rules for the collection of restitution orders with those for collecting fines.[95]

With regard to the purpose of mandatory restitution, the legislative report contained several statements that are illustrative of the dual interests of Congress in passing the MVRA. In its purpose section, the report stated that

> [t]his legislation is needed to ensure the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage

87. *See* S. Rep No. 104-179, at 17 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 930.
88. *Id.* at 13.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 18 (stating that the Senate committee was "not unmindful of the costs to the justice system of this legislation").
93. 18 U.S.C. § 3663A(c)(1)(B) (2000).
94. *Id.* § 3663A(c)(1)(A).
95. *See* S. Rep No. 104-179, at 12-14. There is no dispute among federal judges that a fine, which is paid to the state and not the victim, is a criminal punishment. *See* United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999) (noting that a fine is "traditionally a criminal remedy"); *see also infra* Part III.D (advocating that restitution orders for government victims should be equated to fines).

> caused by the offense and pays the debt owed to the victim as well as to society.[96]

Additional language in the report's discussion section echoed the same thought, maintaining that the "essence of the committee's intent in favorably reporting"[97] on the House version of the bill was that it was "essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [sic] offender be held accountable to repay these costs."[98]

The discussion section of the report noted testimony from the Federal Judicial Conference that eighty-five percent of federal offenders were "indigent at the time of sentencing," and that therefore mandatory restitution would not really lead to any increased benefits for victims.[99] In response to this information, the Report asserted that "this position underestimates the benefits that even nominal restitution payments have for the victim of crime, as well as the potential penalogical benefits of requiring the offender to be accountable for the harm caused to the victim."[100] The Report referred at least twice to restitution as an "integral part"[101] of the criminal sentencing process. Thus, even if defendants were indigent or imprisoned, and therefore unable to make any real payments to their victims, "these factors [did] not obviate the victim's right to restitution or the need that defendants be ordered to pay restitution."[102] This is yet another suggestion that Congress had more than just a compensatory goal in mind for restitution orders.

At the same time the MVRA was passed, Congress made significant alterations to 18 U.S.C. § 3664,[103] the enforcement mechanism for restitution orders for both the VWPA[104] and MVRA.[105] Where § 3664 previously required judges to take the defendant's financial status into account in deciding the quantity of restitution, and whether to impose it at all,[106] it now directs the court to impose restitution "in the full amount of each victim's losses . . . and without consideration of the economic circumstances of the defendant."[107] The court is now only

96. *See* S. Rep No. 104-179, at 12. This statement provides additional support for the argument that restitution serves a punishment goal that makes victims feel that society is concerned about them individually in its fight against crime.

97. *Id.* at 18.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 20, 21.

102. *Id.* at 21.

103. *See* The Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 206(a), 110 Stat. 1232 (codified as amended at 18 U.S.C.A. § 3664 (2004)).

104. *See* 18 U.S.C. § 3663(d) (2000).

105. *See id.* § 3663A(d).

106. *See supra* note 70 and accompanying text.

107. 18 U.S.C.A. § 3664(f)(1)(A). Several circuit courts have relied on the fact that the statute no longer allows consideration of a defendant's financial status in crafting

allowed to consider the fiscal status of the defendant when deciding on a restitution payment schedule.[108] Even if a defendant has no ability to pay, currently or in the foreseeable future, the court can choose to impose nominal restitution payments.[109]

Another noteworthy change brought about by Congress's amendments to § 3664 was a change to the option of the victim to pursue the restitution order on his own. Prior to April 23, 1996, the VWPA allowed both the federal government and the individual victim to enforce the order of restitution "in the same manner as a judgment in a civil action."[110] In the current version of § 3664, the power to enforce the restitution order lies solely with the government.[111] However, a victim named in the restitution order may still use the judgment to get a lien on the defendant's property.[112]

Congress also amended the VWPA to expand the definition of a victim[113] to mirror the definition it wrote into the MVRA;[114] the provision defines a victim as any "person directly and proximately harmed as a result . . . of an offense," and includes the previous

the quantity of a restitution order as evidence that restitution imposed pursuant to the MVRA increases a defendant's criminal punishment. *See*, *e.g.*, *infra* notes 217-23. *But see* 18 U.S.C. § 3663(a)(1)(B)(i)(II) (where the VWPA seems to allow the court to consider the economic situation of the defendant when deciding to order restitution).

108. *See* 18 U.S.C.A. § 3664(f)(2)(A)-(C), (3)(A).

109. *Id.* § 3664(f)(3)(B).

110. 18 U.S.C. § 3663 (1994) (currently codified at 18 U.S.C. § 3663 (2000)).

111. *See* 18 U.S.C.A. § 3664 (m)(1)(A)(i); *see also* United States v. Phillips, No. CR.A. 97-68-B, 2001 WL 34046433, at *2 (M.D. La. July 3, 2001) ("The 1996 amendments [to the VWPA] removed the discretion of the victim to enforce the restitution order. Enforcement . . . now rests exclusively with the United States.").

112. *See* 18 U.S.C.A. § 3664(m)(B).

113. All federal courts have interpreted the victim definition in the VWPA and MVRA expansively to include governmental and other nonhuman entities. This is an important factor for the secondary alternative that is proposed in Part III in lieu of interpreting all restitution orders as criminal. *See* United States v. Ekanem, 383 F.3d 40, 42-44 (2d Cir. 2004) (finding that the U.S. Government fit the definition of a victim under the MVRA); United States v. Dickerson, 370 F.3d 1330, 1343 (11th Cir. 2004) (upholding an MVRA restitution order for the benefit of the Social Security Administration); United States v. Caldwell, 302 F.3d 399, 419-20 (5th Cir. 2002) (finding that the State of Mississippi was a victim of defendant's mail fraud scheme); United States v. Lincoln, 277 F.3d 1112, 1114 (9th Cir. 2002) (affirming a restitution order to the United States Post Office); United States v. Martin, 128 F.3d 1188, 1190-92 (7th Cir. 1997) (finding that the Illinois Department of Public Aid was a victim, and collecting numerous cases from the First, Third, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits); United States v. Campbell, 848 F.2d 846, 855 (8th Cir. 1988) (upholding a restitution order payable to the city of Kansas City, Missouri); United States v. Ruffen, 780 F.2d 1493, 1496 (9th Cir. 1986) (holding that a county was a victim and could receive restitution and that "[f]urthermore, since the government 'stands in the shoes' of the taxpayers, there are human victims of this crime—taxpayers—who were defrauded out of revenue which they had paid to the government"(citation omitted)).

114. *Compare* 18 U.S.C. § 3663 (B)(2), *with id.* § 3663A(a)(2). The provisions are identical.

language relating to fraudulent or conspiratorial activity.[115] Furthermore, Congress inserted an entirely new section into the VWPA, allowing courts to impose restitution orders on defendants convicted of certain drug offenses, even when there is no identifiable victim of the crime.[116] The restitution ordered in this type of case, referred to in the statute as "community restitution,"[117] is to be split between state agencies that manage crime victim assistance and substance abuse programs.[118] A restitution payment made to a state agency has many similarities to a criminal fine payment, which is also made to the government.

Lastly, Congress strengthened the enforcement of restitution orders under the VWPA and MVRA by adding a statute, 18 U.S.C. § 3613A, and amending another, 18 U.S.C. § 3614, in the subchapter of Title 18 concerned with the post-sentence administration of fines.[119] Section 3613A allows the court, upon finding that a defendant is in default on a fine or restitution order, to authorize various actions, including revocation of probation and parole, to "obtain compliance" with the order.[120] Section 3614 allows the court to reimpose a prison sentence on a defendant who "knowingly fails to pay" [121] an overdue restitution order in the same manner as an overdue fine.[122] Equating the enforcement of restitution orders with that of fines, a traditional criminal remedy, would suggest an understanding of restitution as at least partially penal in nature.

Restitution in federal sentencing is therefore not settled as either a criminal or civil doctrine. The above analysis of the VWPA and MVRA shows that the legislative history contains evidence of both penal and compensatory aims. It also shows how the payment of restitution from the criminal to the victim achieves both of those goals in a singular, focused, act between the two parties.[123]

115. *Id.* § 3663(a)(2); s*ee also supra* note 83 and accompanying text.

116. *See* 18 U.S.C. § 3663(c)(1)-(7).

117. *Id.* § 3663(c)(6).

118. *Id.* § 3663(c)(3)(A)-(B). See *infra* discussion Part III arguing that community restitution, in which there is no identifiable victim, and the money is paid directly to the state, is no different in substance from a criminal fine.

119. *See* 18 U.S.C.A. § 3664(o) (2004).

120. *See* 18 U.S.C. § 3613A(a)(1).

121. *See id.* § 3614(a).

122. Recall that a fine undeniably acts as criminal punishment. *See supra* note 95.

123. *See* 141 Cong. Rec. S38,451 (daily ed. Dec. 22, 1995). Senator Hatch stated that

> [r]estitution . . . can provide important closure to victims of crime. . . . Many crime victims have told me that until the criminal is directed to pay restitution, the wound of the crime is not completely healed.
>
> Restitution has an important penalogical function as well, providing a necessary reminder to the offender of the human consequences of his or her criminl [sic] act. . . . [E]ven if only a few dollars a month are collectd [sic], it forces the criminal to contemplate his criminal act and truly pay for the crime.

D. *The Supreme Court Discussion of Restitution as Part of Criminal Sentencing*

Although the Supreme Court has not had the occasion to decide whether restitution specifically authorized by the VWPA and MVRA is criminal or civil, it has dealt with restitution in the criminal sentencing process a number of times. In *Kelly v. Robinson*,[124] the Court reversed a Second Circuit decision and held that restitution orders imposed as part of a "criminal judgment" were not dischargeable in the same manner as personal debts in a Chapter 7 bankruptcy proceeding.[125] The decision referred to restitution as "an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused."[126] The Court found that it was the specific connection between the harm caused and the amount of the restitution ordered that gave restitution a "more precise deterrent effect than a traditional fine."[127]

An additional factor the *Kelly* Court focused on that supported their view of restitution as penal in nature was the placement of restitution within a state criminal sentencing proceeding. The Court stated that criminal proceedings focus on the "State's interests in rehabilitation and punishment, rather than the victim's desire for compensation."[128] The Court found it relevant to the definition of restitution as criminal punishment that a victim did not control the amount of restitution, or the decision whether to impose it, and that the decision "generally [did] not turn on the victim's injury."[129]

In a footnote, the decision in *Kelly* referred to the VWPA as another context in which courts had been compelled to decide whether restitution orders were compensatory or penal.[130] A

Id. at S38,456 (statement of Sen. Hatch). Senator Biden added the following:

> [The MVRA] says to victims: You are not alone. We will demand accountability from your wrongdoers, and we understand that criminals owe a debt not only to society but to you. This bill also sends an important message to criminals—you must take responsibility for our [sic] actions, and you will pay for the pain you have caused.

Id. (statement of Sen. Biden). Senator Feinstein concluded her statement by saying that the MVRA "will help victims, will help communities, and may well help to rehabilitate criminals." *Id.* at S38,459 (statement of Sen. Feinstein). Lastly, Senator McCain ended his remarks by stating that "[the MVRA] is an important bill which I believe will not only assist victims but will prove to be a formidable deterrent to crime." *Id.* at S38, 460 (statement of Sen. McCain).

124. 479 U.S. 36 (1986).

125. *Id.* at 52-53.

126. *Id.* at 49 n.10 (citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 937-41 (1984)).

127. *Id.*

128. *Id.* at 53.

129. *Id.* at 52.

130. *Id.* at 53 n. 14. (discussing how all federal circuit courts had held that having a judge impose restitution as part of a criminal sentence did not violate the Seventh Amendment right to a jury trial for common law matters).

reasonable interpretation of the context of the footnote is that restitution authorized by the VWPA would be considered penal as well. However, recall that *Kelly* was decided in 1986, when the decision to award restitution under the VWPA, and the size of the order, were still completely within a federal judge's power.[131] The current version of the VWPA constrains the discretion of courts to impose restitution by requiring mandatory restitution for certain crimes, and by the requirement that federal courts must impose the total amount of restitution without regard to the financial status of the defendant.[132] Some federal courts have seized on the difference in statutory language as an indication that the language in *Kelly* identifying restitution orders as universally penal is not applicable to restitution orders imposed under the MVRA.[133]

The Court seemed to limit *Kelly*'s holding, even though the decision claimed not to do so, when it ruled in *Pennsylvania Department of Public Welfare v. Davenport*[134] that the exception to discharge for penal restitution orders did not apply to certain Chapter 13 bankruptcy proceedings.[135] *Davenport* was distinguished from the *Kelly* holding because the Court interpreted Congress's intent in crafting the statutory language for bankruptcies under Chapter 13 to allow the discharge of restitution orders.[136] In an immediate response to *Davenport*, Congress made all restitution imposed as part of a criminal sentence non-dischargeable in all bankruptcy proceedings, regardless of what chapter of the bankruptcy code was used to file for bankruptcy.[137] In the legislative history from the House of Representatives, Congress equated criminal restitution with fines.[138]

131. *See supra* notes 67-71 and accompanying text.

132. *See supra* notes 103-09 and accompanying text; *see also Kelly*, 479 U.S. at 53 (noting that the state restitution statute in question was a "flexible remedy tailored to the defendant's situation," and did not "require imposition of restitution in the amount of the harm caused").

133. *See, e.g.*, United States v. Visinaiz, 344 F. Supp. 2d 1310, 1322 (D. Utah 2004) (contrasting the MVRA which mandates full restitution with the state statute in *Kelly* that allowed judges more leeway in deciding on the size of a restitution order).

134. 495 U.S. 552, 563-64 (1990) ("Our refusal to carve out a broad judicial exception to discharge for restitution orders does not signal a retreat from the principles applied in *Kelly*."), *partially overruled by* Criminal Victims Protection Act of 1990, Pub. L. 101-581, § 3, 104 Stat. 2865.

135. *Id.* at 555.

136. *Id.* at 563-64.

137. *See* § 3, 104 Stat. at 2865; S. Rep. No. 101-434, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4065, 4071 (overruling *Davenport*). Congress added an additional protection against discharge of restitution orders in 1994. *See* Pub L. No. 103-322, § 320934, 108 Stat. 2135 (1994) (codified as amended at 11 U.S.C. § 523(a)(13) (2000)) (exempting from discharge any order of restitution ordered under Title 18 of the U.S. Code for bankruptcies under Sections 727, 1141, 1228(a), 1228(b), or 1328(b) of the Bankruptcy Code).

138. *See* H.R. Rep. No. 101-681(I), at 181 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6587 (referring to the inability to discharge debts in bankruptcy proceedings, including debts "in the nature of a fine, forfeiture, or criminal restitution obligation").

This congressional action to eliminate criminal restitution from any debt discharge in a bankruptcy proceeding could be used by a person on either side of the civil-criminal debate on restitution orders. A person who sees restitution as civil could use Congress's actions to indicate that Congress was concerned with protecting the rights of victims to be made whole by monetary compensation. A person who sees restitution as criminal could use this statutory change as evidence of Congress's interest in preventing felons from escaping financial obligations of their criminal sentence by declaring bankruptcy.

In 1990, the Court addressed the reach of the VWPA in *Hughey v. United States*[139] in the context of extending restitution to offenses alleged in an indictment that were not part of the defendant's admitted offenses in a plea agreement. The Court held that Congressional intent as determined by the "language and structure"[140] of the VWPA was to limit restitution orders only to the "specific conduct that [was] the basis of the offense of conviction."[141] The possibility that a victim might receive less than a complete recovery because of a plea agreement that did not include all potential charges was an unavoidable side effect of a calculated decision made by the prosecution and defense to "avoid potential losses."[142] According to the Court, Congress did not show any intent to shield a crime victim from a plea agreement.[143] Congress again responded to the Court's interpretation by amending the VWPA to include expanded language about victims and plea agreements.[144]

The Court has not had the opportunity since *Kelly* to consider the nature of restitution in criminal sentencing. Although the Court's analysis of restitution in criminal proceedings has been limited, it has written widely and extensively on statutory interpretation. Part I.E briefly outlines the test the Court has used to help determine if an ambiguous statute is criminal or civil in nature.

139. 495 U.S. 411 (1990).
140. *Id.* at 413.
141. *Id.*
142. *Id.* at 421.
143. *Id.*
144. *See supra* note 81 and accompanying text. The MVRA contains the same language regarding plea agreements and victims. *See supra* notes 112-13 and accompanying text. This language has led to some tension regarding its use by federal courts. *See* Catharine M. Goodwin, *Grid & Bear It*, Champion, Sept./Oct. 2001, at 37. Federal courts have used the expanded victim definition and conspiracy language to, among other things, award restitution to victims not named in the indictment, for acts that the defendant was not convicted for, and for acts that occurred beyond the statute of limitations. *See, e.g.*, United States v. Dickerson, 370 F.3d 1330, 1337-43 (11th Cir. 2004) (collecting and discussing cases, and holding that the MVRA requires restitution to victims for the defendant's conduct that occurred beyond the statute of limitations). See *infra* Part II.D regarding the possible Sixth Amendment violation of these decisions.

E. *The Supreme Court Test to Determine the Civil or Criminal Nature of Ambiguous Statutes*

Deciding whether a statute is criminal or civil in nature is critical, because many constitutional protections only apply to criminal situations.[145] The foundational case for the modern court test—which sets out a general structure for making such determinations—is *Kennedy v. Mendoza-Martinez*.[146] *Mendoza-Martinez* stated that a court must first determine the congressional intent behind the statute before proceeding to interpret the statute itself.[147] If intent could not be ascertained, *Mendoza-Martinez*, relying on many older cases,[148] listed seven factors that the Court used in the past to interpret ambiguous statutes:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.[149]

The two-prong analysis that the Court elucidated in *Mendoza-Martinez* to decide a civil/criminal penalty has been approved of as a "useful framework"[150] many times since, and for different types of cases.[151] Although the factors were originally used in analyzing statutes for double jeopardy violations, they apply to a number of constitutional provisions, including the Ex Post Facto Clause.[152]

145. *See* United States v. Ward, 448 U.S. 242, 248 (1980) (listing the Fifth Amendment Self-Incrimination Clause and Double Jeopardy Clause, and the Sixth Amendment as examples of constitutional protections afforded criminal defendants); *see also infra* Part II.A (discussing the Ex-Post Facto Clause).

146. 372 U.S. 144, 168-69 (1963).

147. *See id.* 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.").

148. *See id.* at 168-70 nn.22-30.

149. *Id.* at 168-69.

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

151. *See, e.g.*, *id.* at 105-06 (registration of convicted sex offenders under the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause); Hudson v. United States, 522 U.S. 93, 105 (1997) (monetary penalty imposed by the Office of Comptroller of Currency did not violate the Double Jeopardy Clause); Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (civil commitment of a sex offender did not violate the Ex Post Facto or Double Jeopardy Clauses); United States v. Ward, 448 U.S. 242, 253-55 (1980) (proceedings under the Federal Water Pollution Control Act did not violate the Fifth Amendment).

152. *Doe*, 538 U.S. at 97.

The Court first looks to the legislative intent of the statute as "'a question of statutory construction,'"[153] because "considerable deference must be accorded to the intent as the legislature has stated it."[154] If the intent is determined to be the imposition of punishment, there is no need for any further discussion.[155] If the intent is determined to be civil, then the Court looks to whether the "statutory scheme [is] so punitive . . . as to negate that intention."[156] Only "'the clearest proof'"[157] is considered dispositive to overturn a civil classification of a penalty, because the Court "ordinarily defer[s] to the legislature's stated intent."[158]

The Court looks to the seven *Mendoza-Martinez* factors[159] to help with this analysis,[160] but the factors are "'neither exhaustive nor dispositive,'"[161] and often conflict with each other.[162] The civil-criminal test has generally been applied by the Court to civil statutes that were challenged as being so punitive in nature as to really be criminal.[163] Arguably, the test seems ill-suited to federal restitution, which the legislative history of the MVRA refers to as a fundamental component of the criminal sentence.[164] Perhaps this is why only one federal circuit court has used the test to determine whether restitution authorized by the MVRA is civil or criminal.[165]

153. *Id.* at 92 (citing *Hudson*, 522 U.S. at 99; *Hendricks*, 521 U.S. at 361); *see also Ward*, 448 U.S. at 248.

154. *Doe*, 538 U.S. at 93.

155. *Id.* at 92-93.

156. *Ward*, 448 U.S. at 248-49. At least one commentator has strongly criticized the Court's increasing deference to legislative labeling of sanctions as civil penalties that really serve penal purposes so as to avoid the application of criminal constitutional protections. *See* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 Buff. Crim. L. Rev. 679, 698-99 (1999) ("The fact is, however, that the Court is no longer trying to define punishment, . . . but is instead giving the government free reign to circumvent constitutional criminal procedure altogether."). Professor Klein also disapproves of actions by Congress to impose victims' rights (such as restitution) into criminal proceedings that are purportedly about harm to society and not harm to individual people. *Id.* at 688-89. Both of these activities serve to blur the line between civil and criminal proceedings and reduce the rights of defendants. *Id.* at 686-88.

157. *Hendricks*, 521 U.S. at 361 (citing *Ward*, 448 U.S. at 248-49).

158. *Id.*

159. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

160. *Doe*, 538 U.S. at 97.

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

162. *See supra* note 149 and accompanying text.

163. *See supra* note 151.

164. *See supra* notes 101-02 and accompanying text.

165. *See infra* notes 240-46 and accompanying text; *see also* Klein, *supra* note 156, at 719-20 (claiming that any test will ultimately fail when it is applied to "hybrid" statutes that have dual motives).

F. *The Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*

1. The Ex Post Facto Clause

The Ex Post Facto Clause of the U.S. Constitution simply states that "no ex post facto Law shall be passed" by the federal government.[166] In an early decision, *Calder v. Bull*,[167] the Supreme Court held that the meaning of the Ex Post Facto Clause was simply that a law should not be passed after the fact, and that this prohibition "necessarily require[d] some explanation."[168] Using Blackstone, the Federalist Papers, and several state constitutions for precedential support, the Court determined that the scope of the clause extended only to state laws that retroactively increased the punishment for a criminal act.[169]

The *Calder* decision listed four types of criminal statutes that if passed would be illegal under the Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.[170]

This analysis of the applicable range of the Ex Post Facto Clause, made just twelve years after the passage of the Constitution, has survived essentially unchanged to this day.[171] The consistent interpretation that the Ex Post Facto Clause applies only to statutes that increase criminal, not civil, penalties has made it a useful context for federal courts to determine if restitution is a punitive or compensatory measure.[172]

166. U.S. Const. art. I, § 9, cl. 3. A second clause in the Constitution also prohibits states from passing ex post facto laws. *See* U.S. Const. art. I, § 10, cl. 6.

167. 3 U.S. (3 Dall.) 386 (1798).

168. *Id.* at 390.

169. *Id.* at 391 ("But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease [sic] the punishment, or change the rules of evidence, for the purpose of conviction.").

170. *Id.* at 390.

171. *See* Stogner v. California, 539 U.S. 607, 611 (2003) (acknowledging the "authoritative account of the scope of the *Ex Post Facto* Clause" as set forth in *Calder*).

172. *See infra* Part II.A (discussing the Ex Post Facto Clause and the federal restitution statutes).

2. The Abatement Doctrine

The modern statement of the rule of abatement stems from the Supreme Court case *Durham v. United States*,[173] which held that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception."[174] The defendant in *Durham* died after filing a petition for a writ of certiorari; the Court granted the defendant's writ, vacated the judgment of the Ninth Circuit affirming his conviction, and remanded the case to the district court with instructions to dismiss the case.[175]

In *Dove v. United States*,[176] the Court backed away from its *Durham* holding and adopted the reasoning of Justice Blackmun's dissenting opinion in *Durham*.[177] In a concise opinion, the Court denied a petition for certiorari when the appellant died before the petition was heard, but did not dismiss the entire conviction.[178] The Court overruled *Durham* "to the extent that [it was] inconsistent" with *Dove*.[179]

The federal courts of appeal all followed the lead of the Seventh Circuit in *United States v. Moehlenkamp*,[180] which concluded that the *Dove* holding did not change the abatement doctrine, but merely declined to extend its application to a defendant who had received final appellate review of his case, but died while a petition for certiorari was pending.[181] A dismissal of a certiorari petition by the Supreme Court did not discriminate against a deceased criminal defendant, for he had already received appellate review of his case; a defendant so positioned would not have his conviction nullified.[182] In comparison, "fairness" and "justice" required that a criminal defendant who died while his direct appeal was pending "not stand

173. 401 U.S. 481, 483 (1971) (per curiam), *partially overruled by* Dove v. United States, 423 U.S. 325, 325 (1976) (per curiam); *see also* List v. Pennsylvania, 131 U.S. 396 (1888) (an early example of the abatement doctrine).

174. *Durham*, 401 U.S. at 483.

175. *Id.*

176. 423 U.S. at 325.

177. *Durham*, 401 U.S. at 483, 484-85 (Blackmun, J., dissenting) (arguing that a grant of the writ and dismissal of the case would incorrectly erase a conviction that had received a thorough review by an appeals court, whereas a denial of the petition would let the appealed judgment stand).

178. *Dove*, 423 U.S. at 325.

179. *Id.*

180. 557 F.2d 126 (7th Cir. 1977).

181. *Id.* at 127-28. "[T]he Court's cryptic statement in *Dove* was [not] meant to alter the longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him." *Id.* at 128 (citations omitted).

182. *Id.*

convicted without resolution of the merits of his appeal."[183] A defendant whose appeal was pending in the latter situation would have both his conviction vacated and his indictment dismissed.[184] This is the current unanimous view of the scope of the abatement doctrine in all the federal circuits.[185]

3. The Sixth Amendment

The Sixth Amendment provides, among other protections, a fundamental right to a jury trial in all criminal prosecutions.[186] The significance of this protection can be gleaned from its historical recognition as an unassailable right dating back at least to the signing of the Magna Carta in the year 1215.[187] Thomas Jefferson wrote about the English king's abuse of the jury right in the Declaration of Independence as one of the justifications for the American revolt against the British.[188] The right to a jury trial provides an "inestimable safeguard" for a criminal defendant against a "corrupt or overzealous prosecutor and against [a] compliant, biased, or eccentric judge," and applies to all non-serious offenses at the federal and state level.[189] The fundamental nature of this protection from government oppression in the criminal arena played a vital role in the founding of the United States, and the Supreme Court continues to acknowledge its critical importance in the modern era.[190]

The history of the Ex Post Facto Clause, the abatement doctrine, and the Sixth Amendment mentioned above provides a helpful framework within which the nature of restitution can be further explored.[191] Part II proceeds to outline how a consistent classification of restitution has eluded the federal circuits, at both the inter-circuit level and within some circuits as well.[192] Part II discusses the three areas of the law summarized above and how they are affected by the

183. *Id.*

184. *Id.*

185. *See* United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001) (adopting the basic function of abatement and acknowledging the unanimous acceptance of the doctrine, with the exception of restitution orders, by the other courts of appeal); *infra* Part II.B (discussing the application of the abatement doctrine to restitution orders).

186. *See supra* note 19 and accompanying text.

187. *See* Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968) (detailing the fundamental right to a jury trial in the criminal context and the historical record of its origin in common-law England).

188. *Id.* at 152.

189. *Id.* at 156. The Supreme Court has limited the coverage of this right to have a jury hear a criminal case to serious offenses only; crimes that carry a jail term of six months or less generally do not qualify for this safeguard. *Id.* at 159 ("Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." (citations omitted)).

190. *See infra* notes 327-34 and accompanying text.

191. *See supra* notes 166-90 and accompanying text.

192. *See infra* Parts II.A-D.

determination of whether restitution orders are criminal or civil in nature. Part II demonstrates that the lack of a coherent categorization of restitution as either a civil or criminal remedy has left the circuits in conflict with each other in an expanding set of circumstances. The attendant result of the overall conflict is that defendants facing similar restitution orders in different circuits will be treated differently depending on where their case is heard.

II. THE CIVIL-CRIMINAL DEFINITION OF FEDERAL RESTITUTION CAUSES CIRCUIT DISPUTES AND PLAYS A ROLE IN A NEW CONSTITUTIONAL CHALLENGE TO THE VWPA AND MVRA

In the ex post facto and abatement contexts, the courts are divided on how the constitutional and jurisprudential protections granted to criminal defendants are applied when restitution orders are involved. Although the courts are not divided in the Sixth Amendment context, the definition of restitution as a punitive or compensatory measure has significantly affected the courts' analysis of this newest legal challenge to the use of the restitution statutes. A deeper look at each of these areas shows the importance of reaching a consensus on whether restitution is a criminal or civil remedy, because of the impact of a restitution order imposed as part of a criminal sentence on a defendant may vary significantly simply because of a geographic detail of where the crime was committed.

A. *The Ex Post Facto Clause and the Retroactive Application of the VWPA and MVRA*

The Ex Post Facto Clause prevents retroactive application of a statute to a defendant's criminal conduct that increases the defendant's criminal punishment.[193] In the first few years after the VWPA became law, there was little discussion in the federal courts about the ex post facto implications of the statute. A circuit split developed, however, over the issue of imposing restitution on defendants for criminal activities that commenced before the passage of the VWPA, but concluded after its adoption.[194] The Second, Ninth,

193. *See supra* notes 166-71 and accompanying text.

194. *Compare* United States v. Corn, 836 F.2d 889, 895-96 (5th Cir. 1988) (finding that restitution ordered under the VWPA could only be applied to acts that occurred after the effective start date of the statute), United States v. Oldaker, 823 F.2d 778, 781 (4th Cir. 1987) (same), United States v. Martin, 788 F.2d 184, 188-89 (3d Cir. 1986) (same), *and* United States v. Forzese, 756 F.2d 217, 222 (1st Cir. 1985) (same), *with* United States v. Bortnovsky, 879 F.2d 30, 42 (2d Cir. 1989) (finding that the VWPA allowed restitution for a defendant convicted of criminal racketeering acts which began before the start date of the VWPA), United States v. Angelica, 859 F.2d 1390, 1392-93 (9th Cir. 1988) (VWPA could be applied to fraudulent activity that started before and ended after the start date of the VWPA), United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987) (same), *and* United States v. Barnette, 800 F.2d 1558, 1570-71 (11th Cir. 1986) (same).

Sixth, and Eleventh Circuits believed that the VWPA could be applied in this context, while the Third, Fourth, and Fifth Circuits believed that it could not.[195]

The Fifth Circuit, in *United States v. Corn*,[196] was the only circuit that mentioned the Ex Post Facto Clause in its analysis. *Corn* concluded that because the VWPA authorized federal judges to impose restitution separately and independently of a probation order, it increased punishment, and therefore could not be applied retroactively without violating the ex post facto prohibition.[197] No other case that considered the applicability of the VWPA to ongoing fraudulent activity discussed the Ex Post Facto Clause.[198] Discretionary restitution was accepted as simply another facet of the criminal sentencing process and, therefore, penal in nature.[199]

The federal circuits had another opportunity to address whether restitution imposed pursuant to the VWPA created an ex post facto problem when Congress amended the VWPA as part of the Crime Control Act of 1990.[200] In *United States v. Jewett*,[201] the Sixth Circuit held that applying the expanded definition of a victim from the recently amended VWPA to a defendant's restitution order for a crime that was committed prior to the amendment would violate the Ex Post Facto Clause.[202] In a footnote, the *Jewett* court referred to the legislative history of the amendments to support its holding.[203] The analysis of the amendments to the VWPA was in a subsection of the legislative history entitled "Enhanced Criminal Penalties,"[204] thus supporting the *Jewett* opinion that restitution was a criminal punishment.

The Sixth Circuit reaffirmed its holding in *United States v. Streebing*,[205] and the Fifth, Eleventh, and First Circuits soon followed.[206] In 1992, the Ninth Circuit, in *United States v. Snider*,[207]

195. *See supra* note 192.

196. 836 F.2d 889 (5th Cir. 1988).

197. *Id.* at 895-96.

198. The *Bortnovsky* case mentioned *Corn*'s ex post facto analysis, but provided no opinion of its own. *See Bortnovsky*, 879 F.2d at 42.

199. *See, e.g.*, *id.* at 42 ("The [VWPA] provides for restitution as a part of sentencing for an offense."); *Angelica*, 859 F.2d at 1393 ("The legislative history of the VWPA demonstrates that it was meant to fill the sentencing gap left by [the Federal Probation Act], which contains no restitution provision apart from probation."); *Martin*, 788 F.2d at 189 n.6 (restitution under the VWPA is part of the sentence for conviction).

200. *See supra* notes 82-84 and accompanying text.

201. 978 F.2d 248 (6th Cir. 1992).

202. *Id.* at 252-53.

203. *Id.* at 253 n.5.

204. *See* H.R. Rep. No. 101-681(I), at 172, 177 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6578, 6583.

205. 987 F.2d 368, 376 (6th Cir. 1993).

206. *See* United States v. Gilberg, 75 F.3d 15, 21 (1st Cir. 1996) (referring to the *Jewett* holding); United States v. Elliott, 62 F.3d 1304, 1314 (11th Cir. 1995) (referring

held that the language from the 1990 amendment to the VWPA that would allow a court to impose restitution for any crime pursuant to a plea agreement could not be applied retroactively to a defendant who pled guilty almost a year before the amendment.[208] In *Snider*, the statute that the defendant admitted to violating was not one for which the less expansive pre-1990 amendment VWPA allowed judges to impose restitution;[209] applying the amended plea agreement language would violate the Ex Post Facto Clause.[210] The *Snider* court avowed that although restitution served some of the same purposes as a civil remedy, it fulfilled the customary goals of punishment—deterrence of future acts, society's interest in achieving nonviolent retribution, and offender rehabilitation.[211]

While the VWPA received little ex post facto analysis, every circuit but the Fourth ruled on the issue of the Ex Post Facto Clause and retroactive application of the MVRA within a few years of its enactment.[212]

1. The Majority View

The majority of circuit courts hold that the Ex Post Facto Clause prevents retroactive application of the MVRA to defendants whose crimes occurred before the MVRA took effect, but were sentenced after it was enacted.[213] The Second Circuit, in *United States v.*

to the *Streebing* case); United States v. Stouffer, 986 F.2d 916, 929 n.19 (5th Cir. 1993) (referring to the *Jewett* holding).

207. 957 F.2d 703 (9th Cir. 1992).

208. *Id.* at 706.

209. *Id.*

210. *Id.* at 706 n.2.

211. *Id.* at 707 (citations omitted).

212. *See* United States v. Bollin, 264 F.3d 391, 419 n.19 (4th Cir. 2001) (noting the split in the circuits over the Ex Post Facto Clause and stating that the Fourth Circuit had not yet ruled on the issue). There is conflicting discussion of the ex post facto circuit split. *Compare* Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to The Civil/Criminal Divide*, 86 Iowa L. Rev. 1013, 1018 (2001) (concluding that Congress intended the MVRA to be a civil statute with only an ancillary punitive effect), *with* Irene J. Chase, Comment, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. Chi. L. Rev. 463, 489 (2001) (advocating that applying the constitutional avoidance doctrine to the MVRA leads to the conclusion that it should be interpreted as a criminal statute).

213. The Department of Justice agrees with the majority view, namely that restitution orders act as criminal punishment for the offender and cannot be applied retroactively under the MVRA. *See* Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance 2000, at art. V, § B, *available at* http://www.ojp.gov/ovc/publications/infores/agg2000/html/a5.html (last visited Mar. 20, 2005). The guidelines state:

> The Department of Justice has taken the position that any provision of the MVRA regarding the decision to impose restitution or the amount of the obligation must apply prospectively, . . . [as] the Ex Post Facto Clause

Thompson,[214] was the first to state that position, but did so with essentially no analysis.[215] The D.C. Circuit also dealt with the Ex Post Facto Clause in a perfunctory manner in *United States v. Bapack*, citing to the *Thompson* decision for its own conclusion that the MVRA could not be applied retroactively.[216]

The Ninth Circuit, in *United States v. Baggett*,[217] decided that the MVRA increased punishment in such a manner that it could not be used retrospectively as a statutory basis for a restitution order. The *Baggett* court found that the MVRA required full restitution without consideration of the defendant's financial status, only allowing the court to take that status into account when setting a payment schedule, whereas the VWPA allowed judges to take the defendant's economic status into consideration in deciding on the amount of restitution in the first place;[218] the resulting potential increase in restitution for the defendant would be an unconstitutional increase in punishment.[219]

The Eleventh Circuit followed the *Baggett* analysis that the MVRA increased punishment in *United States v. Siegel*.[220] The *Siegel* court also relied on its own circuit precedent from *United States v. Twitty*[221] for support that restitution was a criminal penalty.[222] The Fifth and Sixth Circuits have used similar logic to hold that the MVRA violates the Ex Post Facto Clause if it is applied retroactively.[223]

> prohibits application to offenses that were completed before [the date of passage of the MVRA].

Id.

214. 113 F.3d 13 (2d Cir. 1997).

215. *Id.* at 15 n.1. There was no debate on the ex post facto issue, as both parties agreed that the clause barred retroactive application of the MVRA to the defendant's activities. *Id.*

216. United States v. Bapack, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997).

217. 125 F.3d 1319, 1322-23 (9th Cir. 1997).

218. *Id.* at 1322.

219. *Id.*

220. 153 F.3d 1256, 1258-60 (11th Cir. 1998).

221. 107 F.3d 1482, 1493 n.12 (11th Cir. 1997); *see also infra* note 269 and accompanying text.

222. *Siegel*, 153 F.3d at 1260.

223. *See* United States v. Schulte, 264 F.3d 656, 661-62 (6th Cir. 2001) (relying on circuit precedent that restitution imposed under the VWPA was punishment, and that the MVRA increased punishment by requiring full restitution without consideration of the economic status of the defendant); United States v. Richards, 204 F.3d 177, 213 (5th Cir. 2000) (same). However, the Fifth Circuit holding that the MVRA violates the Ex Post Facto Clause is in some doubt. See United States v. Phillips, 303 F.3d 548, 551 (5th Cir. 2002), where the court wrote that the "[a]ppellant also argues that applying the MVRA to criminal acts before the MVRA's effective date violates the *Ex Post Facto* Clause. We disagree. The MVRA merely affects how appellant's punishment is collected; it does not increase appellant's punishment." *Id.* However, the *Phillips* opinion can probably be limited to its facts, because the case dealt with a procedural change in the collection of restitution, not a change in the amount of restitution imposed the defendant. *Id.* (citing Creel v. Kyle, 42 F.3d 955, 958 (5th Cir.

The Eighth Circuit, in *United States v. Williams*,[224] used a different path to reach the same conclusion that a restitution order under the MVRA was punishment for ex post facto purposes. It concluded that the "plain meaning"[225] of the MVRA statute that required restitution "in addition to . . . any other penalty authorized by law"[226] meant that restitution imposed as part of the sentencing process was punishment. The *Williams* court was able to distinguish an earlier case, *United States v. Crawford*,[227] where the Eighth Circuit held in the context of the Child Support Recovery Act of 1992 ("CSRA") that restitution was not punishment for ex post facto purposes. The *Williams* court found that because the CSRA's statutory restitution requirement was not contained in its statutory subsection labeled "punishment,"[228] it was not punishment and could therefore be applied retroactively.

The Third Circuit, in *United States v. Edwards*,[229] provided the most in-depth analysis of the view that retroactive application of the MVRA was unconstitutional. The *Edwards* court relied on several grounds for its holding. First, it decided that the statutory scheme of placing the restitution order within the sentencing process, and as an available condition of probation, indicated that restitution was a form of punishment.[230] Next, the court looked to the legislative history of

1995) (citing for the premise that statutory procedural changes that work against a criminal defendant do not violate the Ex Post Facto Clause).

224. 128 F.3d 1239, 1241 (8th Cir. 1997).

225. *Id.*

226. *Id.* (quoting the MVRA statute) (quotations omitted). By itself, the use of the word "penalty" does not necessarily imply an exclusively criminal remedy. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 99 (1997) (stating that "[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty" (quotation marks and citation omitted)).

227. 115 F.3d 1397, 1402-03 (8th Cir. 1997). *Crawford* held that restitution was not punishment, but that the Child Support Recovery Act of 1992 ("CSRA") requires that a person convicted of failing to pay child support under the statute would not only face imprisonment and a fine, but also be required to pay restitution in the amount of unpaid child support previously owed. *See* 18 U.S.C. § 228(a), (c)-(d) (2000). Past-due support was defined as any child support previously determined by a court order or an equivalent administrative order. *See id.* § 228(f)(3). The CSRA merely referred to the VWPA (the current version of the CSRA refers to the MVRA) as a means of enforcing a payment, which the defendant had already been obligated by a court to pay. As the *Crawford* court said, "even if we were to assume that the restitution order is punishment within the meaning of the *ex post facto* clause, Crawford is not being punished for acts that were innocent at the time they were committed, . . . nor is the punishment greater than that which was authorized" when the defendant committed the crime. *Crawford*, 115 F.3d at 1403. As a result, it is possible to make a distinction between restitution orders pursuant to the CSRA, and those restitution orders ordered under the VWPA or MVRA for a new offense.

228. *See* 18 U.S.C. § 228(c). In the version of the statute in force at the time of the *Edwards* decision, this subsection was at 18 U.S.C. § 228(b). *See* The Child Support Recovery Act of 1992, Pub. L. No. 102-521, § 2, 106 Stat. 3403.

229. 162 F.3d 87, 89-92 (3d Cir. 1998).

230. *Id.* at 91.

the MVRA[231] and interpreted the fact that Congress had placed restitution in the sentencing process as a response to calls to make the criminal justice system more sensitive to victims' needs by making the defendant more personally responsible for his crime.[232] Additionally, the *Edwards* decision cited Third Circuit precedent that held in other contexts that restitution was a type of criminal punishment.[233] Lastly, the *Edwards* court noted that the change in the MVRA which required full restitution without taking into account the economic status of the defendant had a retributive aspect.[234] Therefore, retrospective use of the MVRA violated the ex post facto prohibition.[235]

2. The Minority View

The Seventh Circuit, in *United States v. Newman*, was the first to hold, contrary to the view of the majority of the circuits, that retroactive mandatory restitution orders do not violate the Ex Post Facto Clause.[236] The *Newman* court admitted there was "little doubt" that application of the MVRA to the defendant's crimes operated as a disadvantage to the defendant, but it then engaged in an analysis of whether restitution was in fact criminal punishment.[237] An important distinction made in *Newman* between restitution and criminal punishment was that criminal punishment was imposed on behalf of society, while restitution payments from an individual defendant to a specific victim were an equitable device and did not have similar punitive effects.[238] The *Newman* court also cited to precedent from its own circuit and from other circuits stating that restitution was compensatory and not penal in nature.[239]

Next, the *Newman* court applied the two-prong, seven-factor *Mendoza-Martinez*[240] test to the MVRA to determine its civil or criminal nature.[241] For the threshold question of determining the intent of the VWPA and MVRA, the *Newman* court decided that neither statute depicted restitution payments as either criminal or

231. *See supra* notes 96-102 and accompanying text; *see also supra* note 123.
232. *Edwards*, 162 F.3d at 91.
233. *Id.* at 91-92 (citing United States v. Palma, 760 F.2d 475, 479-80 (3d Cir. 1985)) (finding that restitution under the VWPA was a criminal remedy and did not violate the Seventh Amendment); *see infra* notes 305-07 and accompanying text.
234. *Edwards*, 162 F.3d at 92 n.6.
235. *Id.*
236. United States v. Newman, 144 F.3d 531, 537-42 (7th Cir. 1998).
237. *Id.* at 537.
238. *Id.* at 538.
239. *Id.* at 538-39.
240. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *see also supra* notes 146-58 and accompanying text (discussing the two-prong, seven-factor test that the *Newman* court utilized).
241. *Newman*, 144 F.3d at 540-42.

civil;[242] referring to a restitution order as a penalty in the statutory language displayed no intent either way, because penalties could be imposed in either civil or criminal contexts.[243] Because it felt that the statutory language was essentially neutral, the *Newman* court then put the MVRA through the seven-factor test. It determined that six of the seven factors leaned towards defining restitution as a civil remedy. According to the *Newman* court, restitution orders: (1) did not act as an affirmative restraint; (2) were not viewed historically as punishment; (3) did not depend on a finding of scienter; (4) did not promote retributive and deterrent effects; (5) had an alternative, non criminal, compensatory purpose; and (6)were not excessive in relation to their alternative purpose.[244] The fifth of the seven *Mendoza-Martinez* factors, whether the behavior which the MVRA applied to was already a crime, was the only one that lent support to defining restitution as a criminal penalty.[245] The *Newman* court concluded that restitution permitted under the VWPA and required by the MVRA was not criminal punishment in the ex post facto context, and therefore could be used to impose restitution on a defendant whose criminal acts occurred before the effective date of the MVRA.[246]

The Tenth Circuit is the only other circuit to have joined the Seventh in the minority view that restitution under the VWPA and MVRA is a civil remedy.[247] In *United States v. Nichols*,[248] the Tenth

242. *Id.* at 540.

243. *Id.*

244. *Id.* at 540-42; *see infra* notes 309-10 and accompanying text (describing Seventh Circuit precedent that there is significant evidence that restitution has been historically viewed as punishment).

245. *Newman*, 144 F.3d at 541 n.10; *see infra* Part II.C (criticizing the Seventh Circuit's jurisprudence in analyzing restitution as a purely civil remedy in this manner).

246. *Newman*, 144 F.3d at 542. In applying the *Mendoza-Martinez* test and resolving that restitution authorized by the MVRA was non-punitive, the *Newman* court made a number of questionable moves. First, it wrote that courts used the seven-factor test "[i]f the legislature nominally designate[d] a penalty as civil or if the label [was] ambiguous." *Id.* at 540. The Supreme Court, however, has really only used these factors to analyze civil statutes that were challenged as being too punitive and has never used it on a statute that it felt was neutral in intent. *See supra* notes 151, 163 and accompanying text. Next, since "[o]nly the clearest proof" will be enough to supersede the legislative labeling of a statute as civil, *see supra* note 157 and accompanying text, the seven-factor test is necessarily skewed towards interpreting the statutory intent as a civil remedy barring some extraordinary situation. Lastly, in stating that restitution was historically a remedial measure, not serving the traditional punishment goals of retribution and deterrence, the Seventh Circuit neglected to reference Judge Posner's extensive analysis of the VWPA as a criminal statute in the Seventh Amendment context in *United States v. Fountain*, 768 F.2d 790, 800-02 (7th Cir. 1985), or the Supreme Court's treatment of restitution in *Kelly v. Robinson*, 479 U.S. 36, 49-53 (1986), both of which specifically mentioned that restitution has punitive and deterrent effects.

247. *But see infra* notes 298-300 (noting that a significant minority of the Fifth Circuit judges agrees with the Seventh and Tenth Circuits that restitution is a civil, non-punitive remedy).

Circuit reversed a district court ruling that held retroactive application of the MVRA to be an unconstitutional increase in punishment for the defendant.[249] In its conclusion that there was no ex post facto problem with the MVRA, the *Nichols* court provided little analysis of its own, relying instead on previous circuit cases that held that restitution was designed to make victims whole, not to punish the defendant,[250] and that therefore there was no ex post facto problem with the MVRA.

As the effective start date of the MVRA has receded into the past, there have been fewer ex post facto challenges to either restitution statute. However, this does not mean that this circuit split has diminished in significance. Although Congress has not amended the VWPA or MVRA since 2000, it might choose to do so at any time. For example, Congress might add additional crimes to the list that require mandatory restitution under the MVRA. If such an amendment became a law, the federal circuits would most likely see renewed challenges by defendants pursuant to the Ex Post Facto Clause, and the circuit split would re-emerge. Therefore, the circuit split as to the penal or civil nature of restitution orders still needs resolution. Part II.B discusses another circuit split that pertains to the abatement doctrine and restitution orders imposed as part of a criminal sentence.

B. *The Abatement Doctrine as Applied to Restitution Orders*

Just as the definition by courts of restitution orders as either penal or compensatory has caused a rift between the circuits over the applicability of the Ex Post Facto Clause,[251] a similar disagreement over restitution's purpose has caused a divergence of circuit opinions over the use of the abatement doctrine to eliminate the restitution obligations of deceased criminal appellants.[252] As detailed above,[253]

248. 169 F.3d 1255 (10th Cir. 1999). The defendant in *Nichols* was Terry Lynn Nichols, the co-conspirator with Timothy McVeigh in the bombing of the Oklahoma City federal building on April 19, 1995. *Id.* at 1260.

249. *Id.* at 1278-80 (quoting a bench ruling from the district court judge).

250. *Id.* *Nichols* cited to *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), which considered an ex post facto challenge to a restitution order authorized pursuant to the CSRA. *Nichols*, 169 F.3d at 1279; *see supra* note 227 (critiquing the application of the ex post facto analysis of a restitution order under the CSRA for a past-due court-ordered child support payment to a restitution order for an independently committed crime). The *Nichols* decision also expressly accepted the Seventh Circuit *Newman* view that applying the MVRA retrospectively did not conflict with the Ex Post Facto Clause and rejected the emerging majority opinion of the other circuits. *Nichols*, 169 F.3d. at 1280 n.9.

251. *See supra* Part II.A.

252. *See supra* Part I.F.2 (discussing the abatement doctrine). There has been discussion of the intersection of the abatement doctrine and criminal restitution orders. *See* Joseph Sauder, Comment, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution under the Abatement* Ab Initio

the federal courts unanimously apply the abatement doctrine to nullify a defendant's criminal indictment and conviction when that defendant dies awaiting a resolution of his direct appeal.

The circuit courts seemingly have had no opportunity to consider the survival of restitution orders under the VWPA following the death of a criminal defendant awaiting a decision on a direct appeal.[254] However, there is a disagreement among the circuits that have considered the application of the abatement doctrine to restitution orders imposed under the MVRA as part of a criminal sentence. This division, as in the context of the ex post facto debate, stems from the differing circuit views on whether restitution is punitive or compensatory.

1. The Majority View

In 1984, the Fourth Circuit ruled on whether a restitution order imposed under the VWPA abated along with the rest of a criminal sentence in *United States v. Dudley*.[255] The *Dudley* court decided that although a restitution order authorized by the VWPA had some punitive effects on the defendant, its main purpose was to compensate and reduce the impact of the defendant's actions on the victims.[256] A restitution order did not serve the traditional objectives of punishment—incarceration and rehabilitation—that were accomplished by the conventional aspects of a criminal sentence.[257]

Doctrine, 71 Temp. L. Rev. 347, 374 (1998) (concluding that a restitution order should abate with the rest of the criminal conviction when a defendant dies pending direct appeal of his case, except for when a defendant dies by his own hand); *see also* Opinion Memorandum from Walter Dellinger, Assistant Attorney General, Department of Justice (June 19, 1995) (holding that a restitution order abates upon the extension of a presidential pardon to a convicted offender), *available at* http://www.usdoj.gov/olc/pardon3.19.htm. This memo lends support to the view of a restitution order as an aspect of criminal punishment.

253. *See supra* Part I.F.2.

254. *See, e.g.*, United States v. Pogue, 19 F.3d 663, 664 (D.C. Cir. 1994) (mooting the issue of the abatement of a restitution order imposed under the VWPA because the defendant's estate was valueless); United States v. Cloud, 872 F.2d 846, 856-57 (9th Cir. 1989) ("*Cloud I*") (declining to consider the use of the abatement doctrine to a then-living defendant's appeal of a restitution order authorized by the VWPA that required payment of any remaining restitution upon his death). *But cf.* United States v. Cloud, 921 F.2d 225, 226-27 (9th Cir. 1990) ("*Cloud II*") (noting the penal and compensatory aspects of restitution orders under the VWPA, but deciding as a matter of statutory interpretation that the "'cease upon death' provision" of 18 U.S.C. § 3565(h) (2000) could not be interpreted to restrict restitution payments authorized by the VWPA).

255. 739 F.2d 175, 176-78 (4th Cir. 1984). Recall that the VWPA only became law in 1982. *See supra* note 64 and accompanying text.

256. *Dudley*, 739 F.2d at 177. The Fourth Circuit has yet to rule on whether retroactive application of the MVRA violates the Ex Post Facto Clause. *See supra* text accompanying note 210.

257. *Dudley*, 739 F.2d at 177. Such conventional aspects of a criminal sentence include a prison term, a fine, and a forfeiture order. *See id.* at 176 n.2, 177.

Pursuing these traditional penal objectives against a deceased criminal appellant would be futile, but allowing the compensatory restitution order to survive would not be.[258] Therefore, the restitution order did not abate with the death of the appellant.[259]

The Third Circuit, in *United States v. Christopher*, joined the Fourth Circuit in holding that compensatory restitution orders imposed under the VWPA and MVRA do not abate with the remainder of the criminal sentence when a defendant dies during his criminal appeal.[260] Although the Third Circuit previously held that the MVRA increases punishment for purposes of the Ex Post Facto Clause,[261] the *Christopher* decision relied on precedent from the circuit that showed that the purpose of restitution orders under the MVRA was to make victims whole,[262] and that restitution orders were distinguishable from fines.[263] However, neither the Fourth Circuit *Dudley* decision nor the Third Circuit *Christopher* decision attempted to analyze the inconsistency that exists between the wording of the VWPA and MVRA and the creation of an exception to the abatement doctrine for compensatory restitution orders.[264] Both statutes require an underlying predicate conviction of the defendant before an imposition of a restitution order.[265] If the conviction is treated as if it never existed, it is unclear on what basis the court is authorized to uphold a restitution order.

2. The Minority View

The Eleventh Circuit disagrees with the Third and Fourth Circuits on the abatement of restitution orders.[266] In *United States v. Logal*,[267] the Eleventh Circuit relied on three grounds to decide that restitution orders abate with the death of a criminal defendant awaiting

258. *See id.* at 177-78.

259. *Id.* at 178.

260. United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001).

261. *See* United States v. Edwards, 162 F.3d 87 (3d Cir. 1998); *see also supra* Part II.A (discussing the Ex Post Facto Clause).

262. *Christopher*, 273 F.3d at 298 (citing United States v. Diaz, 245 F.3d 294, 312 (3d Cir. 2001)).

263. *Id.* at 298-99 (citing United States v. Mustafa, 238 F.3d 485, 490 (3d Cir. 2001); United States v. Kress, 944 F.2d 155, 159 (3d Cir. 1991)).

264. *See infra* notes 283-85, 293 and accompanying text; *see also* United States v. Wright, 160 F.3d 905, 908-09 (2d Cir. 1998) (questioning the basis for the survival of a restitution order under the VWPA when the predicate conviction has been vacated); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (noting the same statutory problem with the VWPA). The MVRA similarly requires a conviction before a court can order restitution. *See* 18 U.S.C. § 3663A(a)(1) (2000).

265. *See* 18 U.S.C. § 3663(a)(1)(A), A(a)(1) (both requiring a defendant to have been convicted of a criminal offense before restitution can be ordered).

266. Although only the Eleventh Circuit has officially decided what this Note calls the minority opinion, the Second Circuit would probably support its position, given the proper set of facts. *See supra* note 262.

267. 106 F.3d 1547 (11th Cir. 1997).

resolution of his direct appeal.[268] First, the *Logal* court relied on circuit precedent that a restitution order imposed under the VWPA is a criminal penalty.[269] Second, the court pointed to the statutory problem that exists with allowing a restitution order to remain when the underlying conviction has been nullified.[270] Lastly, the *Logal* opinion believed that upholding a criminal restitution order when the defendant's death precluded completing the appeal process violated the finality principle.[271] Moreover, abating the restitution order would not give the defendant's estate a "windfall,"[272] because the victims of the defendant's crime could always sue the defendant's estate in civil court for damages.[273]

3. The Neutral View

The Fifth Circuit initially joined the Fourth Circuit majority opinion in *United States v. Asset*[274] in 1993. *Asset* held that if the goal of a restitution order was to punish the offender, the order abated upon his death along with the rest of his sentence and conviction.[275] However, if the primary objective of the restitution order was to compensate the victim, the order survived, because the abatement doctrine was only concerned with ending the punishment of offenders who died while their appeal was pending.[276] The *Asset* court concluded that the goal of restitution orders imposed pursuant to the VWPA, as opposed to restitution orders authorized by other statutes, was predominantly compensatory[277] and thus the restitution order survived abatement.[278] The *Asset* holding was reaffirmed in *United States v. Mmahat*.[279]

268. *Id.* at 1551-52.

269. *Id.* at 1552 (citing United States v. Johnson, 983 F.2d 216, 220 (11th Cir. 1993)); *see supra* Part II.A (noting that the Eleventh Circuit agrees that application of the MVRA violates the Ex Post Facto Clause); *see also* United States v. Twitty, 107 F.3d 1482, 1493 n.12 (11th Cir. 1997) ("Restitution is not a civil matter; it is a criminal penalty meant to have strong deterrent and rehabilitative effect." (citation omitted)).

270. *Logal*, 106 F.3d at 1552; *see also* United States v. Wright, 160 F.3d 905, 908-09 (2d Cir. 1998) (questioning the "analytical underpinnings" of a restitution exception to the abatement doctrine once the conviction has been vacated).

271. *Logal*, 106 F.3d at 1552; *see infra* notes 287-91 and accompanying text (further discussing the finality principle).

272. *Logal*, 106 F.3d at 1552.

273. *Id.; see also* United States v. Estate of Parsons, 367 F.3d 409, 416 n.17 (5th Cir. 2004) (noting the availability of civil remedies).

274. 990 F.2d 208, 210-15 (5th Cir. 1993) (citing to the *Dudley* decision multiple times).

275. *Id.* at 214.

276. *Id.*

277. *Id.* at 213-14 (citing United States v. Rochester, 898 F.2d 971, 982-83 (5th Cir. 1990)). The *Asset* holding was reaffirmed in *United States v. Mmahat*, 106 F.3d 89, 93 (5th Cir. 1997).

278. *Asset*, 990 F.2d at 214.

279. 106 F.3d 89, 93 (5th Cir. 1997).

The Fifth Circuit revisited the intersection of the abatement doctrine and restitution orders in *United States v. Estate of Parsons* ("*Parsons I*").[280] The *Parsons I* court recognized that although the compensatory civil purpose of restitution supported the circuit's precedent that restitution orders did not abate upon death, this holding did not seem to be consistent with the language of the VWPA, which requires a conviction before a restitution order can be considered.[281] Since the abatement doctrine treated the deceased defendant as if he "had never been indicted and convicted,"[282] there would appear to be no basis for the survival of the restitution order—punitive or compensatory.[283] Nevertheless, the *Parsons I* court upheld the circuit precedent, even though it was "not convinced"[284] that the precedent conformed to the language of the VWPA.[285]

The *Parsons I* decision was vacated for an en banc rehearing of the restitution issue.[286] In the rehearing ("*Parsons II*"),[287] the entire Fifth Circuit had a chance to reject or uphold the punitive/compensatory analysis of the *Mmahat* and *Asset* line of cases. Instead, the *Parsons II* court considered two rationales that it felt supported the abatement doctrine: the finality principle and the punishment principle.[288]

The finality principle "reasons that the state should not label one as guilty until he has exhausted his opportunity to appeal. The punishment principle asserts that the state should not punish a dead person or his estate."[289] While the punishment principle supported the survival of compensatory non-punitive restitution orders, it did not explain why the conviction and indictment—not just the sentence—of a deceased criminal appellant were also nullified by the abatement doctrine.[290]

The *Parsons II* court chose to apply the finality principle over the punishment principle, arguing that the crucial reason for the abatement doctrine was to "prevent[] a wrongly-accused defendant from standing convicted."[291] It reasoned that the presumption of innocence required that a defendant have access to an appeal before his conviction could be considered complete, and that in effect, abatement "abdicate[d] [the criminal court's] power over the former defendant," and treated the defendant as if he had never committed a

280. 314 F.3d 745, 748-50 (5th Cir. 2002) ("*Parsons I*"), *vacated for reh'g en banc*, 333 F.3d 549 (5th Cir. 2003).
281. *Parsons I*, 314 F.3d at 749; *see* 18 U.S.C. § 3663(a)(1)(A) (2000).
282. *Parsons I*, 314 F.3d at 748.
283. *Id.* at 749 (citing United States v. Wright, 160 F.3d 905, 908-09 (2d Cir. 1998)).
284. *Id.* at 750.
285. *Id.*
286. United States v. Estate of Parsons, 333 F.3d 549 (5th Cir. 2003).
287. United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004) ("*Parsons II*").
288. *Id.* at 413.
289. *Id.*
290. *Id.* at 414.
291. *Id.* at 415.

crime.[292] Therefore, either a compensatory or a penal restitution order based on a completely vacated conviction could not survive.[293]

In upholding the finality principle as the main reason for the abatement doctrine, *Parsons II* overruled the *Mmahat*[294] and *Asset*[295] holdings that compensatory restitution orders survive the death of a defendant who dies while awaiting resolution of his appeal.[296] But presumably, that does not imply that *Parsons II* overruled the opinion of those two cases that restitution orders authorized by the VWPA are chiefly compensatory in nature.[297] But a vigorous six-judge dissent opined that by holding the restitution order abatable, the majority was treating restitution as "impliedly punitive"[298] in nature. The dissent cited to cases from the Seventh and Tenth Circuits[299] in its conclusion that restitution orders pursuant to the MVRA and VWPA were "expressly compensatory, non-punitive, and equivalent to a civil judgment."[300]

Thus, a federal criminal defendant ordered to pay restitution under the VWPA or MVRA, who dies before his direct appeal is resolved, will have his restitution order treated in the following different ways. The Third and Fourth Circuit, based on their views that the main purpose of the VWPA and MVRA is to make victims whole, will hold that the restitution order was compensatory, and it will survive the vacation of the conviction and indictment.[301] The Fifth Circuit will abate the restitution order without determining if the restitution order was penal or compensatory.[302] The Eleventh Circuit will abate the restitution order along with the conviction because it holds that restitution is inherently a criminal penalty.[303] As of January 2005, no other circuit has passed judgment on this issue.[304]

292. *Id.* at 416.

293. *Id.* at 415 n.15 (noting that making distinctions between compensatory and punitive restitution orders was irrelevant for the abatement doctrine); *id.* at 416-17 (indicating the conflict between the statutory language of the VWPA requiring a predicate conviction and the carving out of an exception to the abatement doctrine for compensatory restitution orders).

294. United States v. Mmahat, 106 F.3d 89, 93 (5th Cir. 1997).

295. United States v. Asset, 990 F.2d 208, 213-14 (5th Cir. 1993).

296. *Parsons II*, 367 F.3d at 415.

297. *See supra* note 277 and accompanying text. *But see* United States v. Richards, 204 F.3d 177, 212-13 (5th Cir. 2000) (holding that the MVRA increases criminal punishment and that its retroactive application would violate the Ex Post Facto Clause).

298. *Parsons II*, 367 F.3d at 422.

299. *Id.* at 423-25 (citing United States v. Bach, 172 F.3d 520 (7th Cir. 1999); United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999); United States v. Newman, 144 F.3d 531 (7th Cir. 1998)).

300. *Id.* at 422.

301. *See supra* notes 255-65 and accompanying text.

302. *See supra* notes 286-93 and accompanying text.

303. *See supra* notes 266-73 and accompanying text.

304. A reasonable inference is that the Second Circuit would side with the Eleventh Circuit on this issue, given the proper facts in a case. *See supra* notes 264,

As is evident from Parts II.A and II.B, the definition of restitution is divided among the circuits in at least two areas of law that directly affect criminal defendants and their estates. But, as Part II.C shows, restitution has also not been characterized in a uniform fashion within several individual circuits. This type of circuit split regarding the purpose of restitution is another reason why a Supreme Court decision on this issue would be highly beneficial.

C. *Discrepancies in the Treatment of the VWPA and MVRA at the Circuit Level*

Federal circuit courts that considered defendants' appeals to restitution orders in the few years after the passage of the original VWPA universally agreed that restitution was a criminal penalty.[305] These appeals challenged the placement of restitution in the sentencing process on the grounds that it violated the Seventh Amendment right to a jury trial for civil matters.[306] The seven circuits that evaluated these challenges all agreed that judicial imposition of restitution, a traditional criminal remedy, as part of a criminal sentence did not violate the Seventh Amendment.[307] Additionally, most of these decisions specifically noted that the statutory language allowing a victim to enforce a restitution order in the same manner as

270. For the remaining circuits, this Note predicts that the respective circuits' view of restitution as a penal or compensatory tool will play a role in the analysis of restitution and the abatement doctrine. Based on the view of the Seventh and Tenth Circuits that restitution is a civil remedy, these two circuits would most likely rule that restitution orders would not abate when a criminal defendant dies while awaiting resolution of his appeal.

305. *See* United States v. Fountain, 768 F.2d 790, 801 (7th Cir. 1985) (calling restitution a "traditional criminal remedy"); United States v. Palma, 760 F.2d 475, 479-80 (3d Cir. 1985) (agreeing with five other circuits that a VWPA restitution order was a criminal, not a civil, penalty); United States v. Keith, 754 F.2d 1388, 1392 (9th Cir. 1985) ("Congress made restitution under the [VWPA] a criminal penalty."); United States v. Watchman, 749 F.2d 616, 617 (10th Cir. 1984) ("Restitution is a permissible penalty imposed on the defendant as part of sentencing."); United States v. Satterfield, 743 F.2d 827, 837 (11th Cir. 1984) ("[H]istory is replete with references to restitution as part of the criminal sentence."); United States v. Brown, 744 F.2d 905, 909 (2d Cir. 1984) (finding that "[r]estitution undoubtedly serves [the] traditional purposes of punishment" by adding to the deterrent effect of imprisonment and fines, serves "society's interest in peaceful retribution," and acts as a "useful step toward rehabilitation"); United States v. Florence, 741 F.2d 1066, 1067 (8th Cir. 1984) (stating that restitution is an "aspect of criminal punishment"). For a thorough analysis of the implications of the original VWPA, see generally Lorraine Slavin & David J. Sorin, Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507 (1984).

306. U.S. Const. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . . .").

307. *Fountain*, 768 F.2d at 801 ("What matters is that criminal restitution is not some newfangled effort to get around the Seventh Amendment but a traditional criminal remedy."); *Palma*, 760 F.2d at 480; *Keith*, 754 F.2d at 1392; *Watchman*, 749 F.2d at 617; *Satterfield*, 743 F.2d at 837; *Brown*, 744 F.2d at 908; *Florence*, 741 F.2d at 1068.

a civil action did not alter the criminal quality of the restitution.[308] A passage from the Seventh Circuit decision in *United States v. Fountain*[309] by Judge Richard Posner eloquently expresses the federal circuits' general understanding of the historical place of restitution in criminal law in the mid-1980s:

> If by "restitution" in criminal law (a distinct concept from civil restitution) we mean simply an order in a criminal case that the criminal restore to his victim what he has taken from him, we are speaking of a form of criminal remedy that predates the Seventh Amendment. *Restitution indeed is the earliest criminal remedy* . . . . Even after the rise of the state we find restitution used as a criminal remedy . . . .
>
> The question is, what does restitution as a criminal remedy comprehend? As the word implies and history confirms, the original conception is that of forcing the criminal to yield up to his victim the fruits of the crime. The crime is thereby made worthless to the criminal. *This form of criminal restitution is sanctioned not only by history but also by its close relationship to the retributive and deterrent purposes of criminal punishment. The fact that tort law may also have deterrent purposes . . . does not make every payment to the victim of crime a tort sanction; it just shows that tort and criminal law overlap*.[310]

308. *Fountain*, 768 F.2d at 800 (finding "unpersuasive" the argument that civil enforcement by the victim of the restitution order violated the Seventh Amendment); *Keith*, 754 F.2d at 1392 (statutory language including victim enforcement did not make a criminal sentencing proceeding into an "action at common law"(citation omitted)); *Watchman*, 749 F.2d at 617 ("The [civil] enforcement method does not . . . determine the nature of the order."); *Satterfield*, 743 F.2d at 838-39 (stating that "[c]ivil enforcement of criminal penalties is not a new concept," and that the extension of the civil enforcement right to a victim did not convert a restitution order into a civil remedy); *Brown*, 744 F.2d at 910 (victim enforcement of restitution order did not change order into a civil judgment, and congressional intent in including victim enforcement in the statute was to improve their chances of actually getting restitution); *Florence*, 741 F.2d at 1067 (finding that victim enforcement did not transform a restitution order into a civil action). As a further corroboration of the circuits' view of the criminal nature of restitution, the Ninth, Eleventh, and Eighth Circuits also cited to the Supreme Court's opinion in *United States v. Ward*, 448 U.S. 242 (1980), the case which reiterated the two-prong, seven-factor *Mendoza-Martinez* test for analyzing the criminal or civil nature of a statute. *See Keith*, 754 F.2d at 1391; *Satterfield*, 743 F.2d at 836; *Florence*, 741 F.2d at 1068; *see supra* notes 151-56 and accompanying text (discussing the *Ward* case and the *Mendoza-Martinez* test). The circuits' citation to *Ward* did not include evaluations of the VWPA under the seven factors from the second prong of the *Mendoza-Martinez* test. Because the first prong of the test requires a court to determine if the statute, on its face, imposes criminal punishment, a reasonable inference is that these courts felt that the intent of a restitution order under the VWPA was undeniably criminal, thus foregoing the need to go beyond the threshold question of the first prong of the test to reach the seven factors. *See supra* notes 147-60 and accompanying text (discussing the two-prong nature of the test used to evaluate the civil or criminal nature of statutes).

309. 768 F.2d 790 (7th Cir. 1985).

310. *Id.* at 800 (citations omitted).

To illustrate the Seventh Circuit's current view of restitution as a civil remedy in the context of the Ex Post Facto Clause, and how this view has changed dramatically from the circuit's view of restitution as a criminal remedy in the context of a Seventh Amendment challenge, this Note refers to the decision by Judge Posner in *United States v. Bach*,[311] where he upheld the *United States v. Newman*[312] decision that restitution under the MVRA was not constrained by the Ex Post Facto Clause:

> Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery . . . *Functionally, the [MVRA] is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished.* The [MVRA] enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution. We do not see why this procedural innovation . . . should trigger rights under the ex post facto clause. 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.[313]

In making his ruling in *Bach*, Judge Posner did not cite to his well reasoned and thorough *Fountain* opinion that in a Seventh Amendment challenge to the VWPA, restitution was a traditional criminal remedy. Judge Posner did not explain in *Bach* why his opinion about restitution in the context of an ex post facto challenge had changed so drastically from the *Fountain* context of a Seventh Amendment challenge. If restitution is a criminal penalty for one context, it seems logical and consistent that it should be for another as well.[314] It is unclear why Judge Posner thought that restitution imposed by the VWPA, which was discretionary and required the judge to take into account the defendant's financial status when deciding whether to order restitution, was a criminal punishment imposed as part of sentencing, while restitution ordered under the MVRA, which is mandatory and prevents the judge from considering

311. 172 F.3d 520 (7th Cir. 1999).

312. 144 F.3d 531 (7th Cir. 1998); *see supra* notes 236-46 and accompanying text (discussing the *Newman* case).

313. *Bach*, 172 F.3d at 523 (citations omitted); *see supra* note 29 for a contrary opinion regarding the streamlining effect of imposing restitution via the MVRA. Also, this passage, especially the reference to the historical understanding of restitution as a criminal remedy, clearly contradicts Judge Posner's own analysis of restitution in a Seventh Amendment context. *See supra* notes 309-10 and accompanying text.

314. *See* United States v. Visinaiz, 344 F. Supp. 2d 1310, 1319 (D. Utah 2004) (stating that "there appears to be no basis in the case law for distinguishing between what is a penalty for Sixth Amendment purposes as opposed to ex post facto purposes"); *see also Newman*, 144 F.3d at 539 ("[R]estitution cannot be punishment under only one statute but not the other.").

the defendant's financial status except when deciding on the restitution payment schedule, is merely a supplementary civil proceeding.

It is also not necessarily only a "detail"[315] from the defendant's standpoint, as Judge Posner wrote in *Bach*, whether the defendant pay the victim through a mandatory restitution order imposed as part of a criminal sentence, or through a civil jury trial. For example, an order of restitution, whether discretionary or mandatory, can be enforced in the same manner as a fine, which is a criminal remedy.[316] Such enforcement can include a revocation of parole,[317] and a re-sentencing of the defendant to prison if he is found to have willfully avoided the payment of restitution.[318] A civil judgment does not carry the same possibility of a prison sentence as a method of enforcement. Also, there is a distinct possibility that a jury in a civil trial might find that a different quantity of damages would compensate the victim as compared to a restitution order that a judge has crafted based on a pre-sentence report from a probation officer.[319]

When the Third Circuit, in *United States v. Christopher*,[320] considered an appeal to abate a deceased defendant's criminal sentence which included a restitution order, the court acknowledged its own holding in *United States v. Edwards*[321] that restitution was criminal punishment for ex post facto purposes. But, the *Christopher* court held that a restitution order authorized under the MVRA,

315. *Bach*, 172 F.3d at 523.

316. *See* 18 U.S.C.A. § 3664(m)(1)(A)(i) (2004).

317. *See* 18 U.S.C. § 3613A(a)(1) (2000) (effect of default of a fine or restitution).

318. *See* 18 U.S.C. § 3614 (resentencing upon failure to pay a fine or restitution).

319. *See, e.g.*, United States v. Bedonie, 317 F. Supp. 2d 1285, 1311-27 (D. Utah 2004). The judge in this case spent sixteen pages of the opinion determining the amount of restitution he would impose on two defendants to replace the two deceased victims' lost income to their respective families. The judge employed an actuarial expert to determine that the lost income of one victim was between $40,907 and $850,959. *Id.* at 1314. The lost income of the second victim was determined to be between $17,118 and $576,106. *Id.* at 1315. The court then considered, and rejected, making any race, sex, geographic, and/or consumption reductions in the potential restitution awards. *See id.* at 1315-27. The first victim was an aspiring artist. *Id.* at 1320. Based on the opinions of his art teachers, the judge concluded that this first victim would have succeeded at being a professional artist. *Id.* at 1321. But, the judge concluded, he would only have been employed as a professional artist for 60% of the time. *Id.* The judge then decided to take the "lowest race-neutral" future lost income estimate of this victim and to apply a 40% discount to it, resulting in a restitution award of $446,665 for the first victim's family. *Id.* It is well within the realm of possibility that a jury might have come up with a different restitution amount if it had considered the issue. The judge himself noted that the "assumptions one makes about the future of a victim . . . can make vast differences in the calculations." *Id.* at 1324; *see also* United States v. Booker, 125 S. Ct. 738, 790 (2005) (Scalia, J., dissenting in part) (criticizing pre-sentence reports as "bureaucratically prepared" and "hearsay-riddled").

320. 273 F.3d 294, 298-99 (3d Cir. 2001); *see supra* notes 260-63 and accompanying text.

321. 162 F.3d 87, 92 (3d Cir. 1998); *see supra* notes 229-35 and accompanying text.

unlike a criminal forfeiture or a fine, did not abate with the rest of the criminal sentence because it was compensatory in nature.[322] Inexplicably, the *Christopher* court simply stated that "our opinion in *Edwards* is not in conflict with our consideration of the abatement effect on restitution orders," without offering an attempt at reconciling the potentially contradictory results.[323]

In essence, after *Christopher*, if Congress amends the MVRA in the future so as to somehow increase the amount of restitution a defendant has to pay, the MVRA could not be applied to a defendant in the Third Circuit whose offense predated this hypothetical amendment (because restitution is a criminal penalty under the *Edwards* decision), but a restitution order would apply to a defendant whose offense postdated the amendment, but who died before his appeal was heard (because restitution is merely compensatory in nature under the *Christopher* holding). The defendant in *Edwards* was convicted of conspiracy, bank fraud, money laundering, and criminal forfeiture.[324] The defendant in *Christopher* was convicted of mail fraud, making false statements to the Social Security Administration ("SSA"), theft of cable services, and trafficking in counterfeit devices.[325] There does not seem to be a logical distinction to make as to why restitution is criminal punishment for an ex post facto analysis pursuant to bank fraud and money laundering, but is only compensatory for abatement purposes pursuant to mail fraud and lying to the SSA, and the *Christopher* court does not offer one.[326]

Parts II.A, II.B, and II.C have highlighted a range of conflicts that exist in and among the federal circuits that pertain directly to disagreement over the classification of restitution orders authorized by the VWPA and MVRA as either criminal or civil. Part II.D discusses a new Sixth Amendment challenge to the VWPA and MVRA that depends on the definition of restitution as criminal punishment. Although this new challenge has produced much less disagreement among federal judges than the ex post facto and abatement doctrines, it is another area that highlights the need for a Supreme Court decision categorizing the intent of the federal restitution statutes.

322. *Christopher*, 273 F.3d at 299.
323. *Id.*
324. *Edwards*, 162 F.3d at 88.
325. *Christopher*, 273 F.3d at 295.
326. *See also* United States v. Syme, 276 F.3d 131, 159 (3d Cir. 2002) (holding that restitution is criminal punishment in the context of a Sixth Amendment challenge to a restitution order); *infra* note 348.

D. *A Possible Violation of the Sixth Amendment by the VWPA and MVRA—A Novel Constitutional Challenge*

The Sixth Amendment provides for a right to a jury trial "[i]n all criminal prosecutions."[327] In the last few years, the Supreme Court has ruled on several cases that concern the violation of the protection that the Sixth Amendment affords to criminal defendants. The Court has focused on the respective roles of the judge and jury in fact-finding and criminal sentencing.[328] The rule that has evolved from this line of cases comes from the recent Court opinion in *Blakely v. Washington*,[329] which states that the maximum sentence a judge can impose on a defendant, without violating the Sixth Amendment, can only be based "*solely on . . . the facts reflected in the jury verdict or admitted by the defendant*."[330] The judge may not rely on any "additional findings" to increase punishment beyond the facts that the jury had at its disposal.[331] The judge "exceeds his proper authority" if he "inflicts punishment that the jury's verdict alone does not allow."[332] The facts that the jury relies on must be proved beyond a reasonable doubt.[333] The importance of this rule is to ensure that juries are allowed the full authority granted to them by the framers.[334]

The relevance of this line of cases to the context of restitution orders is apparent when one looks at the procedural statute for the enforcement of restitution orders imposed under the VWPA and MVRA.[335] Section 3664 of the MVRA requires a court to order the probation officer to compile a post-trial, post-conviction, pre-sentence report that the court will use to calculate a defendant's restitution

327. U.S. Const. amend. VI, § 1.

328. *See* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (citation omitted)); Ring v. Arizona, 536 U.S. 584, 589 (2002) ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."); Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000) (finding unconstitutional a "legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone"); Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (holding that under "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

329. 124 S. Ct. at 2531.

330. *Id.* at 2537.

331. *Id.*

332. *Id.*

333. *Id.* at 2536 (citing *Apprendi*, 530 U.S. at 490); *see also id.* at 2543 ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

334. *Id.* at 2539, 2543.

335. *See supra* notes 103-05 and accompanying text.

order.[336] The probation officer is in charge of collecting the relevant financial facts from the victim, defendant, and the U.S. attorney.[337] Most importantly, § 3664 provides in part: "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence."[338] Facially, if restitution is indeed a criminal penalty, the statutory construction of the enforcement mechanism of the VWPA and MVRA seems to be contradictory to the direction given by *Blakely* and its predecessor *Apprendi v. New Jersey*,[339] regarding the scope of the court's authority to inflict punishment based on facts not found by a jury or admitted by a defendant.

Although the *Blakely* and *Apprendi* decisions were concerned with the imposition of jail terms, and *Blakely* caused federal courts to treat the Federal Sentencing Guidelines in a number of different ways,[340] the cases have also led to a constitutional challenge to the imposition of restitution orders pursuant to the VWPA and MVRA. The core of the challenge is that assuming restitution orders are part of a defendant's criminal punishment,[341] an imposition of restitution increases a defendant's punishment based on facts found by a judge contained in a pre-sentence report which may not have been presented to a jury at trial, and the evidence standard the judge is required to use is constitutionally impermissible in a criminal case.[342] This challenge has yet to be upheld by any federal court.[343] Although there is no current circuit split on this specific restitution issue, it has

336. *See* 18 U.S.C.A. § 3664(a) (2004).

337. *Id.* § 3664(d)(1)-(3).

338. *Id.* § 3664(e) (emphasis added).

339. 530 U.S. 466 (2000).

340. *See* Laurie P. Cohen, *Double Standard: In Wake of Ruling, Disarray Plagues Federal Sentencing*, Wall St. J., Dec. 28, 2004, at A1 (noting that since the *Blakely* case, federal courts have "come up with a myriad of ways to sentence defendants"). Presumably, this "myriad" of sentencing schemes will now have to conform to the ruling from the Supreme Court that applied the *Blakely* case to the Federal Sentencing Guidelines. *See* United States v. Booker, 125 S. Ct. 738, 755 (2005) ("[O]ur holding in *Blakely* applies to the [Federal] Sentencing Guidelines.").

341. *See supra* Parts II.A-C (regarding circuit splits on the criminal/civil view of the restitution statutes).

342. *See* United States v. Tomlinson, 110 Fed. Appx. 835, 836 (9th Cir. 2004) (unpublished opinion) (vacating and remanding the defendants' sentences because "potential *Blakely* issues exist with regard to the loss and restitution calculations which were based in part on facts neither found by a jury nor admitted by the appellants"); United States v. Ross, 279 F.3d 600, 608 (8th Cir. 2002) (relying on *Apprendi*); *see also* Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sentencing Rep. 316, 317 (2004) (stating that "*Blakely* has thrown into doubt those decisions authorizing judges to make findings necessary for . . . restitution awards," and that "[r]estitution ordered as part of sentencing is open to the same sort of [constitutional] attack" as forfeiture awards).

343. The only possible exception to this assertion is the *Tomlinson* opinion. *See supra* note 341. However, this is an unpublished opinion that has limited precedential value.

prompted a significant and growing amount of discussion at the federal level, and needs to be resolved along with the ex post facto and abatement conflicts.

The issue of whether restitution orders are punishment for the purposes of *Blakely* and the Sixth Amendment is essentially determined by what the various federal circuits think about the civil/criminal issue when analyzing a potential ex post facto violation.[344] Although the majority of federal circuits hold that restitution is a criminal penalty,[345] all federal circuits that have considered the Sixth Amendment challenge to restitution orders have, as of January 2005, struck it down.[346] The circuits that believe restitution is a civil remedy have used that position as a specific reason to reject restitution appeals.[347] The Third, Sixth, and Eighth Circuits hold that restitution is a criminal penalty for *Apprendi* purposes, but have relied on other grounds to achieve the same goal.[348]

The importance of the *Blakely* decision to the constitutionality of the restitution statutes, and to the Federal Sentencing Guidelines, is that it has been interpreted as refining the *Apprendi* rule, which states that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the . . . statutory maximum must be

344. *See supra* Part II.A (discussing the Ex Post Facto Clause and the federal restitution statutes).

345. *See supra* Part II.A.

346. *See supra* notes 342-43 (noting one possible exception to date to this assertion).

347. *See* United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (relying on circuit precedent that restitution is a civil remedy, and therefore not punishment for *Apprendi* purposes, as one ground to deny a restitution appeal); United States v. Visinaiz, 344 F. Supp. 2d 1310, 1319 (D. Utah 2004) (relying on the "law of the [Tenth] Circuit" that restitution is compensatory, not punitive, to determine that the *Blakely* and *Apprendi* decisions did not apply to restitution). Although the Fourth Circuit has yet to rule on the application of the Ex Post Facto Clause to the MVRA, a federal district court in the circuit has said that *Blakely* does not require jury fact-finding for restitution orders because restitution is not a criminal penalty. *See* United States v. Burrell, No. 2:03CR10095, 2004 WL 1490246, at *5 n.3 (W.D. Va. July 6, 2004).

348. *See* United States v. Ross, 279 F.3d 600, 608-09 (8th Cir. 2002) (finding that restitution is a criminal penalty, but that the restitution statutes contain no "prescribed" maximum which could be violated); United States v. Syme, 276 F.3d 131, 159 (3d Cir. 2002) (holding that "restitution ordered under [the VWPA] constitutes 'the penalty for a crime' within the meaning of *Apprendi*," but finding that the restitution order did not go beyond any statutory maximum); United States v. Bearden, 274 F.3d 1031, 1042 n.4 (6th Cir. 2001) (concluding that the opinion that restitution was a civil remedy was "clearly at odds with the case law" from other circuits that restitution was, at least in part, punishment, but that no statutory maximum was violated); *see also* United States v. Einstman, 325 F. Supp. 2d 373, 382 (S.D.N.Y. 2004) (finding that there is an "element of sophistry in stating that something imposed as part of a sentence in a criminal case is in fact not punishment for the crime," but finding that the MVRA had no statutory maximum that a judge could overstep).

submitted to a jury, and proved beyond a reasonable doubt."[349] *Blakely* strongly declared the rule that the "statutory maximum" for sentencing purposes was not what was listed in a statute as the absolute maximum punishment in the jurisdiction for that specific offense, but rather the maximum punishment that could be imposed by a judge based only on facts that the jury had found beyond a reasonable doubt.[350]

If anything, *United States v. Booker*,[351] which applied the Court's reasoning from *Blakely* to the Federal Sentencing Guidelines, has arguably further enhanced the relevancy of the *Blakely* understanding of the "statutory maximum" for sentencing purposes. *Booker* removed any mention of a "statutory maximum" when it reaffirmed the *Apprendi* holding.[352] *Booker* stated that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[353] Thus, the *Booker* rule reiterated that it is the facts put to a jury, not statutory language, which controls the legal extent of a judge's authority to craft a defendant's sentence, whether it be jail time or any other associated criminal penalty.

The vast majority of federal judges that have heard Sixth Amendment challenges to federal restitution orders have used the "statutory maximum" language from the *Apprendi* decision as one method of striking down the challenges.[354] The reasoning these courts have used is that the language of the MVRA and VWPA does not

349. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (confirming the same statement written in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

350. Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004); *see also Visinaiz*, 344 F. Supp. 2d at 1326 (referring to "*Blakely*'s expansive interpretation of what constitutes a statutory maximum").

351. 125 S. Ct. 738, 755-56 (2005) (concluding that *Blakely* applies to the Federal Sentencing Guidelines).

352. *Id.* at 756 (reaffirming the *Apprendi* rule without the "statutory maximum" language).

353. *Id.*

354. *See* United States v. Trala, 386 F.3d 536, 547 n.15 (3d Cir. 2004) (finding that no statutory maximum was violated because there was no disputed issue of fact as to the amount of restitution); United States v. Wooten, 377 F.3d 1134, 1144 n.1 (10th Cir. 2004) (noting that the defendant's restitution argument failed because the award did "not exceed any prescribed statutory maximum"); United States v. Ross, 279 F.3d 600, 609-10 (8th Cir. 2002) (same); United States v. Syme, 276 F.3d 131, 159 (3d Cir. 2002) (same); United States v. Bearden, 274 F.3d 1031, 1042 (6th Cir. 2001) (same); United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (same); United States v. Einstman, 325 F. Supp. 2d 373, 382 (S.D.N.Y. 2004) (finding that the MVRA contains no statutory maximum that a judge can go beyond). At least two state courts have used the same reasoning to strike down appeals to state restitution orders. *See* People v. Horne, 767 N.E.2d 132, 138-39 (N.Y. 2002) (no statutory maximum was violated); State v. White, No. W2003-00751-CCA-R3-CD, 2004 WL 2326708, at *23-24 (Tenn. Crim. App. Oct. 15, 2004) (finding that restitution is criminal punishment under Tennessee law, but that no statutory maximum was violated).

contain a maximum restitution amount beyond which a judge may not impose restitution; rather, the restitution order is based on the maximum amount of each specific victim's loss, so that a restitution order can never go beyond the maximum in the statute.[355] This reasoning arguably contradicts the understanding of how *Blakely*, and now *Booker*, have altered the understanding of the *Apprendi* use of the term "statutory maximum."[356] Therefore, the contestable issue debatably is not what the restitution statutes state is the maximum amount of restitution available for a judge to impose, but the maximum based on facts put to a jury and found beyond a reasonable doubt.

As of January 2005, only one federal district court, in *United States v. Vizinais*,[357] has specifically identified that *Blakely* has altered the understanding of the term "statutory maximum" for the purposes of punishment, calling it a "difficult question" whether *Blakely* changed the understanding of that term in a manner that might require fact-finding by a jury for restitution orders.[358] The *Visinaiz* decision observed that courts that had addressed this issue had used a pre-, rather than a post-, *Blakely* view of the "statutory maximum" term.[359] Although the *Visinaiz* decision acknowledged the issue, it avoided addressing the conflict by finding *Blakely* not applicable to restitution orders on other grounds.[360] How future courts in other circuits will deal with the "difficult question"[361] of the *Blakely* decision remains to be seen.[362]

355. *See* 18 U.S.C.A. § 3664(f)(1)(A) (2004) (ordering the court to impose restitution in the "full amount of each victim's losses").

356. *See* King & Klein, *supra* note 342, at 317.

357. 344 F. Supp. 2d 1310 (D. Utah 2004).

358. *Id.* at 1326.

359. *Id.*

360. *Id.* (concluding that restitution is not a criminal penalty, and that the relevant historical record showed a predilection that judges, not juries, determined restitution awards).

361. *Id.; see also* United States v. Swanson, 394 F.3d 520, 526 n.2, 530 n.5 (7th Cir. 2005) (finding that based on precedent, restitution awards do not violate the statutory maximum understanding of *Blakely* et al., and noting in a footnote that a restitution order, as part of the sentencing phase of a trial, does not require more than a preponderance of evidence standard to be enforceable, but acknowledging the possibility that its reasoning might not survive the *Booker* and *Fanfan* cases currently being reviewed by the Supreme Court). *See supra* note 26 (discussing the *Booker* and *Fanfan* cases).

362. Following the release of the *Booker* decision in January 2005, several federal courts have now acknowledged the emerging conflict between the federal restitution statutes and the *Booker* case. *See* United States v. McDaniel, 398 F.3d 540, 554 n.12 (6th Cir. 2005) (noting that "there is some question as to whether *Booker* requires us to reconsider our analysis of criminal defendants' jury trial rights with respect to restitution orders," but declining to express an opinion on this "important and complex question" because the parties had not addressed it in their briefs or oral arguments); United States v. Garcia-Castillo, No. 03-2166, 2005 WL 327698, at *5 n.4 (10th Cir. Feb. 11, 2005) (recognizing the conflict between the federal circuits and

Part II has outlined three areas of the law that would be significantly affected by a Supreme Court decision on the criminal or civil function of restitution orders imposed under the VWPA and MVRA. Part II has also detailed the inconsistency of judicial treatment of restitution orders by federal judges between the circuits, and within circuits as well. Part III offers this Note's conclusions about restitution, advocates a single, unified classification of all restitution orders, and proposes a potential secondary alternative solution.

III. ALL VWPA AND MVRA RESTITUTION ORDERS SHOULD BE CONSIDERED CRIMINAL PUNISHMENT OR, ALTERNATIVELY, RESTITUTION ORDERS TO GOVERNMENTAL ENTITIES SHOULD BE EXEMPTED FROM ANY RULING THAT RESTITUTION ORDERS ARE CIVIL

Considering the inter-circuit divisions analyzed in Parts II.A and II.B,[363] the examples of contradictions within the Third and Seventh Circuits discussed in Part II.C,[364] and the innovative Sixth Amendment constitutional challenge in Part II.D,[365] the nature of restitution authorized by the VWPA and MVRA needs to be addressed by the Supreme Court in an appropriate case. The conflict over the nature of restitution is not a minor dispute that can be ignored in the hopes that it will once more recede into a forgotten corner of the criminal justice system.[366] This is because however widely split the federal circuits are on the purpose of restitution, they agree that Congress intended courts to increase the use of restitution as a remedy.[367] The more restitution is ordered by judges, the more pressing the need to have it imposed in an equal fashion on defendants in similar situations. Defining restitution as criminal punishment or a civil remedy pursuant

stating that "whether restitution is subject to *Apprendi*, *Blakely*, and *Booker* [is] by no means [a] settled question[] in courts around the country").

363. *See supra* Parts II.A-B.

364. *See supra* Part II.C.

365. *See supra* Part II.D.

366. *See Gilbert*, *supra* note 9 (noting the possibility of restitution assuming a significant role in federal prosecutions); *supra* note 80 and accompanying text (quoting the legislative history of the VWPA to show congressional intent in making restitution more than an "afterthought").

367. *See* United States v. Ekanem, 383 F.3d 40, 44 (2d Cir. 2004) (finding an expansive interpretation of the term "victim" to be "consistent with the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy"); United States v. Dickerson, 370 F.3d 1330, 1338 (11th Cir. 2004) ("The courts have held that by defining 'victim' expansively in scheme-based crimes, Congress . . . expanded district courts' authority to grant restitution." (internal quotation and citation omitted)); United States v. Martin, 128 F.3d 1188, 1190 (7th Cir. 1997) (stating that the VWPA and, by implication, the MVRA, "demonstrate a clarion congressional intent to provide restitution to as many victims and in as many cases as possible," and that the history of the restitution statutes was "marked . . . by [a] constant expansion of the restitution remedy").

to these statutes would help resolve the ex post facto and abatement circuit contradictions, and significantly advance or diminish the strength of the Sixth Amendment argument against the VWPA and MVRA.

A. *The Scope of the Problem*

The breadth of the use of restitution by federal judges as outlined in this Note indicates that restitution certainly has become much more than an "afterthought"[368] in the federal sentencing process. Courts have included in restitution orders such items as the fee for the services of a Navajo medicine man at a funeral.[369] A large restitution order can be a significant burden on a defendant who has served the incarceration aspect of his criminal sentence, especially if the defendant has little or no assets to his name.[370] Many victims will be compensated, at least in a symbolic manner, for their financial loss associated with the actual offense, and the expenses of dealing with the prosecution and criminal trial of the offender.[371]

There should be a consistent interpretation of the VWPA and the MVRA statutes by all the federal circuits. A criminal defendant in the Seventh and Tenth Circuits will have the MVRA or VWPA applied to his crimes retroactively, because those circuits consider restitution orders civil remedies,[372] while in most other circuits the Ex Post Facto Clause will prohibit this type of judgment.[373] In the Third and Fourth Circuits, restitution orders survive the death of a criminal defendant awaiting resolution of his direct appeal,[374] while the Fifth and Eleventh Circuits extend the abatement doctrine to include restitution orders imposed as part of a criminal sentence.[375] The Third Circuit will apply the Ex Post Facto Clause to restitution orders under the MVRA, because they act as criminal punishment, but it will not apply the abatement doctrine to those same restitution orders when they act to compensate victims.[376]

It seems inherently unreasonable as a matter of public policy that a criminal defendant will receive different treatment, under the identical federal statute, of his or her restitution order by judges in criminal sentencing proceedings by virtue of geography alone. In the

368. *See supra* note 78 and accompanying text.
369. *See* United States v. Bedonie, 317 F. Supp. 2d 1285, 1327-29 (D. Utah 2004).
370. *See supra* note 9 and accompanying text.
371. *See* 18 U.S.C. § 3663A(b) (2000) (restitution order requires repayment for property loss, medical costs for any bodily injury, and costs associated with participation of the victim in the investigation and prosecution of the case, including child care, transportation, and lost income).
372. *See supra* Part II.A.2.
373. *See supra* Part II.A.1.
374. *See supra* Part II.B.1.
375. *See supra* Part II.B.2.
376. *See supra* Part II.C.

same way that the Federal Sentencing Guidelines are intended to ensure a level of uniformity in jail sentences for defendants convicted of the same federal crimes throughout the country, it seems logical that the federal courts should be required to treat restitution imposed on defendants as part of a criminal sentence in an equivalent manner.

B. *Restitution Orders Are Criminal Punishment*

It also seems intrinsically incorrect that as a matter of statutory language and legislative history, some federal judges have marginalized and isolated the penal core of the federal restitution statutes, while concurrently advancing the compensatory goal of these statutes as proof of their civil nature. However, this error goes beyond misconstruing the modern legislative record of the dual goals of restitution. It essentially ignores the more than four-thousand-year record of restitution serving as an effective mechanism for fulfilling society's dual goals of disciplining the offender and restoring the victim.[377]

Restitution imposed as part of a criminal sentence pursuant to the VWPA and MVRA may or may not be an exclusively criminal punishment; it may also serve to compensate victims for their losses due to the criminal acts of an offender. However, the fact that restitution can also help to restore a victim to the state he was in before he was injured by the offender's criminal actions does not somehow remove the penal characteristics of restitution, and the case law and legislative history have recognized this concept in many instances.[378] The restitution ordered pursuant to the MVRA or VWPA is a valid, significant display of the police power of the federal

377. *See supra* notes 7, 36-43 and accompanying text.

378. *See* Kelly v. Robinson, 479 U.S. 36, 52 (1986) (the fact that restitution "resemble[s] a judgment 'for the benefit of' the victim" did not take away its penal aspects); United States v. Edwards, 162 F.3d 87, 91 (3d Cir. 1998) (finding that the statutory language and legislative history of the MVRA indicated that restitution was criminal punishment that also had compensatory aspects); United States v. Satterfield, 743 F.2d 827, 837-38 (11th Cir. 1984) (stating that Congress intended restitution to be part of the criminal sentence and help make victims whole); United States v. Brown, 744 F.2d 905, 910 (2d Cir. 1984) (finding that the fact that Congress wanted, through the VWPA, to ensure that victims had the best chance to receive the full amount of restitution from their offenders did not remove the punitive characteristic of restitution); *supra* note 78 and accompanying text (quoting language from the Senate Report on the VWPA that refers to restitution as always having been part of criminal justice, and that restitution, as part of society's authority to punish, helps to restore victims); *supra* note 81 and accompanying text (quoting language from the Senate Report on the VWPA that restitution could satisfy victims and help rehabilitate defendants); *supra* note 96 and accompanying text (quoting language from the Senate Report on the MVRA that mandatory restitution ensures that society recognizes the harm done to crime victims, and that the defendant pay a debt to both society at large and the individual victim); *supra* note 123 (quoting four different United States senators from the legislative history of the MVRA emphasizing that restitution serves both penal and compensatory goals).

government to impose criminal punishment on violators of federal statutes. In the same manner that Congress imposed restitution in the earliest years of the nation as part of criminal sentences for citizens that committed offenses against Native Americans,[379] Congress intended federal courts to use the VWPA and MVRA to augment the criminal punishment of modern day offenders. Therefore, this Note advocates that restitution orders imposed by federal courts under the VWPA and MVRA, even if they simultaneously help compensate and restore victims to their pre-victim status, should be considered criminal punishment for purposes of the Ex Post Facto Clause, the abatement doctrine, and the Sixth Amendment.

C. *Implications for the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*

There are several implications of this Note's position that restitution orders act as criminal punishment. First, in order not to violate the Ex Post Facto Clause, no federal circuit should apply any future, non-procedural, amendments of the restitution statutes retroactively to punish defendants for criminal acts that ended prior to those amendments.

Additionally, a restitution award should abate upon the death of a defendant awaiting completion of his direct appeal of his criminal conviction—along with all other aspects of a criminal case. This Note supports the reasoning of the federal circuits that have identified the logical conflict of upholding restitution orders as compensatory when the underlying conviction upon which the restitution order stands has been obliterated from a deceased defendant's record.[380] Even if courts decide that the compensatory purposes of certain restitution orders outweigh their punitive effects in certain circumstances, and decline to extend the abatement doctrine to them for that reason, the fact that all federal circuits hold that the underlying indictment and conviction abates with the defendant's death[381] weakens the holding of the federal circuits that believe that compensatory restitution orders survive the death of a defendant.[382]

As for the Sixth Amendment issue, the position that restitution orders act as criminal punishment, along with the holdings from the *Blakely*[383] and *Apprendi*[384] cases, leads to the conclusion that the

379. *See supra* note 45 and accompanying text.

380. *See supra* Part II.B. The Second, Fifth, and Eleventh Circuits have reasoned that upholding a restitution order against a deceased defendant that by statute requires a predicate conviction (which every federal court agrees is erased by the abatement doctrine) is illogical.

381. *See supra* note 185 and accompanying text.

382. The Fourth and Third Circuits currently hold this opinion. *See supra* notes 255-65 and accompanying text.

383. Blakely v. Washington, 124 S. Ct. 2531 (2004).

restitution statutes, as currently enacted, impose restitution on criminal defendants in an unconstitutional manner.[385] The restatement of the *Apprendi* holding by the Supreme Court in *United States v. Booker*[386] only makes the conflict between the statutory language of the restitution statutes requiring post-conviction judicially calculated restitution orders based on "bureaucratically prepared, hearsay-riddled presentence reports" written by probation officers and the mandate given by the Court for jury determination of all facts necessary for punishment even starker.[387] For the most part, federal courts have not truly comprehended, or have chosen to avoid, the understanding of the *Blakely* analysis of the unconstitutionality of judicial fact-finding acting to increase the punishment of criminal defendants and its logical application to restitution orders.[388]

Thus, the VWPA and MVRA should be amended to place the fact-finding authority for the quantity of restitution awards in the hands of the jury to comply with the requirements of the Sixth Amendment.[389] However, repercussions of this opinion on the unconstitutionality of the restitution statutes as currently written will most likely be minimal in nature. First, the overwhelming majority of criminal cases at the federal level never involve a jury. Ninety-six percent of all federal criminal convictions result from a plea agreement by the defendant.[390] The VWPA and MVRA both contain language authorizing courts to impose restitution orders on defendants solely based on plea agreements.[391] Because there is no reason to think that the percentage of criminal convictions resulting from plea agreements is going to decrease drastically in the future, the suggestion to amend the VWPA and MVRA to include jury fact-finding would probably affect only an extremely small number of criminal cases.[392]

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

385. *See supra* Part II.D (discussing the applicability of the *Blakely* and *Apprendi* holdings to the federal restitution statutes).

386. 125 S. Ct. 738, 756 (2005).

387. *Id.* at 790 (Scalia, J., dissenting in part).

388. *See supra* note 361 and accompanying text.

389. *See supra* note 334 and accompanying text (regarding the Court's opinion of the authority of jurors as the framers understood it).

390. *See supra* note 84 and accompanying text (citing Department of Justice criminal conviction statistics from 2002).

391. *See supra* note 84 and accompanying text; *see also* 18 U.S.C. § 3663(a)(1)(A) (2000) ("The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."); *id.* § A(a)(3) ("The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.").

392. *See Booker*, 125 S. Ct. at 774 (Stevens, J., dissenting in part, joined by Souter, J., and in part by Scalia, J.) (stating that the applicability of the *Blakely* holding to the Sentencing Guidelines would be "consequential only in the tiny portion of prospective sentencing decisions that are made after a defendant has been found guilty by a jury").

As a simpler alternative to Congress amending the language of the VWPA and MVRA, federal prosecutors, in the small percentage of criminal cases that empanel a jury, could take the same path to avoid violating defendants' Sixth Amendment rights regarding restitution as they have regarding defendants' jail terms. As Justice Stevens wrote in his dissenting opinion in *Booker*, "[i]n many cases, prosecutors could avoid an [*Apprendi*] problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence."[393] Justice Stevens pointed out that federal prosecutors have already been "[e]nhancing the specificity of indictments" in just such a manner in order to comply with the Court's *Blakely* and *Apprendi* decisions.[394] The same reasoning is readily applicable to facts that a judge requires for crafting restitution orders. Prosecutors could allege these obligatory restitution facts in the indictment, prove them to a jury beyond a reasonable doubt, and thereby avert any Sixth Amendment problem with the VWPA and MVRA. This suggestion would be easier to implement than a congressional amendment of the VWPA and MVRA, as it would simply require a memo from the Department of Justice advising the U.S. Attorneys to put it into practice.

D. *A Secondary Alternative to Finding All Restitution Orders Criminal*

As a secondary option, even if the Supreme Court rules in a future case that restitution orders under the VWPA and MVRA are a civil remedy, it should exempt from this civil classification any restitution orders that entail defendants paying back money that they have stolen from a state or federal governmental entity.[395] While the United States is mentioned as a victim in the restitution statutes,[396] it is clear from the legislative history of both the VWPA and MVRA that Congress was overwhelmingly concerned with human, not governmental, victims of crime.[397] There is no specific, identifiable,

393. *Id.* Justice Thomas did not join Justice Stevens's opinion but agreed with his "proposed remedy and much of his analysis." *Id.* at 795 (Thomas, J., dissenting in part).

394. *Id.* at 775.

395. *See supra* note 113 (discussing the unanimous understanding of the federal circuits that governmental agencies are considered victims for restitutionary purposes).

396. *See* 18 U.S.C.A. § 3664(i) (2004) ("In any case in which the United States is a victim . . . .").

397. *See supra* note 123 (noting remarks by senators regarding the MVRA and the emotional damage suffered by human crime victims); *see also* S. Rep. No. 104-179, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 926 (criticizing the low percentage of restitution ordered by courts for crimes such as murder, kidnapping, robbery, and sexual assault cases); *id.* at 17-18 (discussing violent crime, the psychological injuries of victims of violent crime, and the benefits that even nominal restitution will have for crime victims); S. Rep. No. 97-532, at 30-31 (1982), *reprinted in* 1982 U.S.C.C.A.N.

individual human "victim of crime" in the way the legislative history uses that term when a defendant steals from a state agency.

When making restitution to the government, restitution is in many ways equivalent to a fine, a traditional criminal remedy, which is paid to the state as a representative of the society at large.[398] In fact, criminal restitution orders and criminal fines can be enforced in an identical manner under the same statutes.[399] The injury that an offender commits by stealing money from the government is a generalized, nonspecific type of damage that really only has financial implications. When a defendant pays money directly out of his pocket to a human victim, the defendant is more likely to see how his actions have directly hurt another living person, and that his criminal actions have a specific consequence for them. A restitution order paid out to the government will not make any human "victim" feel vindicated or emotionally compensated as effectively as a payment from an offender directly to a victim.

The VWPA has a provision for community restitution, where no "identifiable victim" exists.[400] Whose dignity would a payment under this provision restore when a drug defendant pays money to a state agency that then distributes the money to the community? It would seem to be reasonable to label a restitution order to a governmental unit as criminal punishment for an offense against the state, apart from any future Supreme Court ruling that would categorize restitution orders as civil. When the government demands money from defendants as part of their criminal sentence, it is equivalent in some sense to a loss of their personal freedom and liberty. If the Supreme Court decides that restitution orders serve a civil purpose, it should exempt those made to governments from that decision.

CONCLUSION

Restitution serves the traditional aims of punishment—retribution, deterrence, and rehabilitation—as well as the minimum goal of symbolic victim compensation, with the single act of having the offender make payments directly to the victim.[401] The fact that some

2515, 2536-37 (using a victim of a purse snatching as an example of a human crime victim that would benefit from a restitution award).

398. *See supra* note 95.

399. *See supra* notes 95, 119-22 and accompanying text; *see also* United States v. Brown, 744 F.2d 905, 909 (2d Cir. 1984) (equating the "penal purposes" of restitution orders to that of fines "payable to the Treasury").

400. *See supra* notes 116-18 and accompanying text.

401. *See Brown*, 744 F.2d at 909; Reiff, *supra* note 52, at 138 (noting that the value of restitution is not in paying victims but as an "instrument to make the offender more conscious of his debt to the victim"); Schafer, *supra* note 37, at 122 ("Restitution is not intended for the recovery of a debt but for the reparation of a criminal injury."); *id.* at 124-25 (advocating that restitution directly to a victim has a greater internal punishment value to the offender than the payment of a fine to the state); *see also*

federal courts have attempted to detach, separate, and minimize restitution's punitive nucleus from its companion goal of victim compensation lacks an historical and logical foundation. The Supreme Court should grant a petition of certiorari on the proper case to rule that the VWPA and MVRA are statutes that impose criminal punishment that are in addition to any other punishment that a court can legally inflict on a defendant. By doing so, the Court would reduce inconsistent federal judicial opinions, and bring a measure of predictability to the imposition of restitution orders nationwide.

Laurie Ervin & Anne Schneider, *Explaining the Effects of Restitution on Offenders: Results from a National Experiment in Juvenile Courts*, *in* Restitution and Reconciliation, *supra* note 51, at 183 (reporting on a study that showed that juvenile offenders who participated in restitution programs showed significantly less recidivism than those that participated in traditional programs without restitution).