Nova Law Review

Volume 35, *Issue* 2 2011 *Article* 1

Nova Law Review 35, 2

Nova Law Review*

*

Copyright ©2011 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). http://nsuworks.nova.edu/nlr

NOVA LAW REVIEW

ARTICLES

Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections?
Victor Hansen

Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated
Michael J. Dale
Louis M. Reidenberg

It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution
Woody R. Clermont

The Law and Economics of Mutual Fund Investment-Adviser Fiduciaries: *Jones v. Harris Associates L.P.*
George Steven Swan, S.J.D.

Taking on Big Money: How *Caperton* Will Change Judicial Disqualification Forever
Scott B. Gitterman

LEGAL SCHOLARSHIP

Legal Scholarship Introduction
John Sanchez

Clarion Call or Sturm Und Drang: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship
David R. Cleveland

Reflections on Rothko and Writing: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship
Olympia Duhart

NOTES AND COMMENTS

Is *Miranda* on the Verge of Extinction? The Supreme Court Loosens *Miranda's* Grip in Favor of Law Enforcement
Illan M. Romano

Virtual Adoption: The Inequities of the Equitable Doctrine
Jaime P. Weisser

VOLUME 35 SPRING 2011 NUMBER 2

NOVA LAW REVIEW

VOLUME 35 SPRING 2011 NUMBER 2

ARTICLES

Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections? .... *Victor Hansen* 281

Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated .... *Michael J. Dale*, *Louis M. Reidenberg* 305

It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution .... *Woody R. Clermont* 363

The Law and Economics of Mutual Fund Investment-Adviser Fiduciaries: *Jones v. Harris Associates L.P.* .... *George Steven Swan, S.J.D.* 393

Taking on Big Money: How *Caperton* Will Change Judicial Disqualification Forever .... *Scott B. Gitterman* 475

LEGAL SCHOLARSHIP

Legal Scholarship Introduction .... *John Sanchez* 501

Clarion Call or Sturm Und Drang: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship .... *David R. Cleveland* 503

Reflections on Rothko and Writing: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship .... *Olympia Duhart* 513

NOTES AND COMMENTS

Is *Miranda* on the Verge of Extinction? The Supreme Court Loosens *Miranda's* Grip in Favor of Law Enforcement .... *Illan M. Romano* 525

Virtual Adoption: The Inequities of the Equitable Doctrine .... *Jaime P. Weisser* 549

IT'S NEVER TOO LATE TO MAKE AMENDS: TWO WRONGS DON'T PROTECT A VICTIM'S RIGHT TO RESTITUTION

WOODY R. CLERMONT*

BASSANIO
Why dost thou whet thy knife so earnestly?

SHYLOCK
To cut the forfeiture from that bankrout there.+

I. INTRODUCTION 363
II. THE HISTORY OF CRIMINAL RESTITUTION AND THE FEDERAL PROBATION ACT OF 1925 369
III. THE CHANGING NEEDS OF AMERICAN SOCIETY AND RESTITUTION IN FEDERAL SENTENCING 374
IV. *DOLAN v. UNITED STATES* 381
V. WHO SAID THERE WAS NO SUCH THING AS "DEBTOR'S PRISON"? 385
VI. CONCLUSION 391

I. INTRODUCTION

The Mandatory Victims Restitution Act (MVRA),[1] which took effect on April 24, 1996, requires a sentencing court to order a defendant to make restitution to victims of crimes for the full amount of their losses, without consideration of the defendant's economic circumstances.[2] On June 14, 2010, the Supreme Court of the United States rendered its decision in *Dolan*

* Assistant General Counsel, Office of the General Counsel, J.D., University of Miami School of Law, 2002. It is with warm sentiment that I express that this article be dedicated to the late Professor John Arthur, whose teachings left an indelible mark on me, to this day. Having taught for 30 years prior to his death, not only was he a highly respected professor of philosophy at Binghamton University, State University of New York, he served for 18 years as its Director of the Program in Philosophy, Politics, and Law. He is an immortal among great minds and teachers.

+ WILLIAM SHAKESPEARE, *The Merchant of Venice*, *in* THE COMPLETE WORKS OF SHAKESPEARE, act 4, sc. 1, lines 121–122 (George Lyman Kittredge ed., 1936).

1. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227–1241(codified as amended at 18 U.S.C. § 3663 (2006).

2. *Id.* Its predecessor was the Victim and Witness Protection Act of 1982 (VWPA). *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253.

v. United States,[3] deciding five to four, in favor of allowing MVRA restitution to be imposed, even after the expiration of 90 days, in federal criminal cases.[4] One might have expected to see a split of justices, along the lines of the conservative wing against the liberal wing. That would result in a theoretical majority of Chief Justice Roberts, and Justices Scalia, Thomas, Alito, and Kennedy. The corresponding minority would have been Justices Breyer, Stevens, Ginsberg, and Sotomayor. However, anyone harboring such expectations would have been soundly disappointed, as the actual majority opinion was written by Justice Breyer, joined by Justices Thomas, Ginsberg, Alito, and Sotomayor.[5] The dissenting opinion was written by Chief Justice Roberts, joined by Justices Stevens, Scalia, and Kennedy.[6]

The split represented a divergence in views that could not be easily reconciled by a simplistic rank and file orientation of ideology. Rather, the conflict drew lines as to those members of the Court willing to impose a flexible interpretation of the federal statute, versus those who refused to deviate even an iota from the plain text. Another way to frame the divisions is between those who felt the statute removed restitution from the general rule of sentencing finality, versus those who did not.

The MVRA, codified largely at 18 U.S.C. §§ 3663A and 3664, requires the court, with few exceptions, to enter an order of restitution to the victims of certain crimes.[7] "If the law permits restitution, the probation officer must conduct an investigation and submit a report [containing] sufficient information for the court to order restitution."[8] Section 3663A(a) provides, in pertinent part, that:

> (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .
>
> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspira-

3. 130 S. Ct. 2533 (2010).
4. *Id.* at 2537.
5. *Id.* at 2536.
6. *Id.* at 2544.
7. *See* Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227–1241.
8. FED. R. CRIM. P. 32(c)(1)(B) (2009).

> cy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme [or] conspiracy . . . .[9]

Hence, because of the narrow definition of who constitutes a "victim," section 3663A(a)(1) does not authorize a court to order a defendant to pay restitution to any person not a victim of the offense to which the defendant is ultimately convicted of.[10] However, should the parties so choose to enter into a plea agreement, restitution may be ordered to be paid to persons other than the victim of the offense.[11]

Subsection (c)(3) also provides, however, that:

> [t]his section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—
>
> . . . .
>
> (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.[12]

The restitution order "shall be issued and enforced in accordance with section 3664."[13] The burden is on the government to identify the victims of the defendant's offense.[14] Additionally, "The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."[15] The sentencing court is required to "order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct," among other things, "to the extent practicable, a complete accounting of the losses to each victim."[16] The probation officer must obtain victim information from the prosecuting attor-

---

9. 18 U.S.C. § 3663A(a)(1)–(2).

10. *See, e.g.*, United States v. Rand, 403 F.3d 489, 493 (7th Cir. 2005) (citing Hughey v. United States, 495 U.S. 411, 413 (1990), *superseded by statute*, Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789).

11. 18 U.S.C. § 3663A(a)(3).

12. *Id.* § 3663A(c)(3).

13. *Id.* § 3663A(d).

14. *See id.* § 3664(d)(1), (e).

15. *Id.* § 3664(e).

16. 18 U.S.C. § 3664(a).

ney.[17] The prosecuting attorney is required to consult with all identified victims and "promptly provide the probation officer with a listing of the amounts subject to restitution."[18]

If it is clearly impracticable to satisfy or comply with this requirement, the probation officer "shall so inform the court."[19] If the victim's losses cannot be determined by ten days before sentencing, "the attorney for the Government or the probation officer shall so inform the court," and the court shall set a date for a final determination, the date of which is "not to exceed 90 days after sentencing."[20] The summary determination proceeding should not constitute a full blown evidentiary hearing.[21] A private settlement of an involved or related amount will not bar restitution, but restitution must be offset against the civil settlement amount.[22] When determining restitution, regardless of the defendant's financial circumstances, section 3664 provides that the court "shall order restitution to each victim in the full amount of each victim's losses as determined by the court."[23]

Criminal restitution under the MVRA differs from other forms of sentencing, particularly in that, judges—not juries—make factual determinations as to the amounts imposed.[24] Many unsuccessful defendants have brought challenges that determinations of this nature, as opposed to those based on findings by a jury beyond a reasonable doubt or on the defendants' own admissions, violate Sixth Amendment principles as spelled out in *Blakely v.*

17. *Id.* § 3664(d)(1).

18. *Id.*

19. *Id.* § 3664(a).

20. *Id.* § 3664(d)(5).

21. S. REP. NO. 104-179, at 20 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 933. ("The committee is concerned that without this clarification, the restitution phase of the sentencing process could devolve into a full-scale evidentiary hearing. The committee believes that such a development would be contrary to the interests of the swift administration of justice.").

22. United States v. Gallant, 537 F.3d 1202, 1250 (10th Cir. 2008) (quoting United States v. Harmon, 156 Fed. App'x 674, 676 (5th Cir. 2005) (per curiam) (court shall reduce restitution award under the MVRA by civil settlement amount); United States v. Doe, 374 F.3d 851, 856 (9th Cir. 2004) (citing United States v. Bright, 353 F.3d 1114, 1122 (9th Cir. 2004)) ("Where victims covered by a restitution order later recover 'compensatory damages' in a civil proceeding for the same loss, the restitution order is accordingly reduced.").

23. 18 U.S.C. § 3664(f)(1)(A).

24. *See* Kelly v. Robinson, 479 U.S. 36, 53 n.14 (1986) (citing Bonnie Arnett Von Roeder, Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 684–85 (1984) ("Under [the federal Victim and Witness Protection Act], defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case.").

Washington.[25] Further, considering the Supreme Court's 2005 holding in *United States v. Booker*,[26] there have been a number of arguments brought to the courts calling for the application of *Booker* to orders of restitution.[27] The gist of these arguments is that entering restitution orders solely based on judicial findings constitutes sentencing error violating the Sixth Amendment, as enunciated in *Apprendi v. New Jersey*,[28] the predecessor to *Blakely* and *Booker*.

One circuit court of appeals in the decision of *United States v. George*,[29] which rejected such an *Apprendi-Blakely-Booker* challenge to the process of a bench determination of restitution, described criminal restitution as "a civil remedy administered for convenience by courts that have entered criminal convictions."[30] Other courts of appeal have similarly observed that there is no Sixth Amendment right to a jury trial,[31] likewise describing criminal restitution as either being civil or not constituting criminal punishment.[32] However, these opinions would appear to be treating wording to the contrary in *Pasquantino v. United States*[33] as dicta, in so doing. The Supreme Court of the United States opined, "The purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for that conduct."[34] Nonetheless, the circuit courts of appeal have uniformly decided that there is no right to a jury trial, not only in restitution proceedings under the MVRA, but also under other similar restitution statutes.[35]

---

25. 542 U.S. 296, 303 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 491–97 (2000)).

26. 543 U.S. 220 (2005).

27. *See e.g.*, United States v. King, 414 F.3d 1329, 1330 n.1 (11th Cir. 2005) (per curiam) (citing United States v. George, 403 F.3d 470, 473 (7th Cir. 2005)) ("Every circuit that has addressed this issue directly has held that *Blakely* and *Booker* do not apply to restitution orders.").

28. 530 U.S. 466 (2000).

29. 403 F.3d 470 (7th Cir. 2005).

30. *Id.* at 473 (citing United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999); United States v. Newman, 144 F.3d 531, 542 (7th Cir. 1998)).

31. 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 of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .").

32. United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005) (holding restitution is not criminal punishment for purposes of the Sixth Amendment); United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005) ("[I]t is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.").

33. 544 U.S. 349 (2005).

34. *Id.* at 365.

35. United States v. Sabhnani, 599 F.3d 215, 260 (2d Cir. 2010) (holding a criminal defendant statutorily required to pay restitution under 18 U.S.C. § 1593 for peonage, slavery,

Moreover, the degree of proof in MVRA criminal restitution is less than for a criminal conviction; the latter requires proof beyond a reasonable doubt, whereas the former does not.[36] Like the degree of proof in a civil matter, "[t]he burden is on the government to prove the amount of restitution based on a preponderance of the evidence."[37] Such a standard has been summarized, as when the finder of fact believes it is more probable that a fact exists, than the fact not existing.[38] If an order of a district court determining the amount of restitution is challenged on appeal, the standard is whether the determination amounts to clear error.[39] Although one could argue that an order to pay restitution is a financial burden constituting a restraint on liberty, restitution has no effect on a defendant's custody status, and courts have not permitted the use of the writ of habeas corpus to challenge a restitution order.[40]

Additionally, even in cases where restitution under the MVRA was imposed, where the crime had been committed under prior versions of the federal statute, such impositions did not violate the Ex Post Facto clause of the Constitution because restitution did not constitute criminal punishment.[41] Despite the mandatory nature of this restitution, and the financial burden it imposes on defendants, MVRA restitution is not considered "cruel and unusual punishment" and does not violate the Eighth Amendment of the Constitution.[42]

---

or trafficking in humans is not entitled to a jury trial under the Sixth Amendment on the amount of restitution due).

> Suffice it to say that the issue of whether an employer has a Seventh Amendment right to a jury in a civil case in which an employee or the government is seeking back pay and liquidated damages is analytically distinct from the question whether a criminal defendant who is required by statute to pay restitution is entitled to a jury trial under the Sixth Amendment on the amount of restitution due. This court has already held that the answer to the latter question is "no" in the context of awards made pursuant to other restitution statutes.

Id. (citing United States v. Tin Yat Chin, 476 F.3d 144, 147 (2d Cir. 2007)).

36. McMillan v. Pennsylvania, 477 U.S. 79, 98 n.2 (1986).

37. United States v. DeRosier, 501 F.3d 888, 896 (8th Cir. 2007).

38. *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring).

39. United States v. Statman, 604 F.3d 529, 535 (8th Cir. 2010).

40. *See, e.g.*, Arnaiz v. Warden, Fed. Satellite Low, 594 F.3d 1326, 1329–30 (11th Cir. 2010) (per curiam); *see also* Mamone v. United States, 559 F.3d 1209, 1211 (11th Cir. 2009) (per curiam) (holding that a section 2255 motion could not be used to collaterally attack a noncustodial part of a sentence like restitution).

41. United States v. Wells, 177 F.3d 603, 610 (7th Cir. 1999); United States v. Nichols, 169 F.3d 1255, 1280 (10th Cir. 1999).

42. United States v. Arledge, 553 F.3d 881, 899–900 (5th Cir. 2008); United States v. Lessner, 498 F.3d 185, 205–06 (3d Cir. 2007); United States v. Newsome, 322 F.3d 328, 342 (4th Cir. 2003); United States v. Williams, 128 F.3d 1239, 1242 (8th Cir. 1997).

This article will initially focus on the development of the concept of restitution historically, leading to the eventual development Federal Probation Act of 1925. The next part of this article will explain the changes in the law of restitution with the enacting of the VWPA and the subsequent MVRA. The fourth part will describe the course of the *Dolan v. United States*[43] appeal, the majority decision, and the dissent. Then in the fifth and final part, the article will explore the effect of the case outcome, and any potential future implications.

II. THE HISTORY OF CRIMINAL RESTITUTION AND THE FEDERAL PROBATION ACT OF 1925

Criminal restitution, which focuses on the recovery of losses attributable to criminal conduct, dates as far back as biblical times, if not further.[44] In fact, the rules given in these times "resulted in one of the first moral statutes of criminal restitution."[45] These rules additionally served to appease the victim and helped to prevent retaliation by the victim or victim's family against the criminal defendant.[46] Biblical traditionalists for centuries embraced "a premodern notion of natural law molded by Biblical scripture and Judeo-Christian doctrine."[47] Under the traditionalist approach, restitution was very

---

43. 130 S. Ct. 2533 (2010).

44. *See* Leviticus 6:1–5 (NIV). The following appears in the Book of Leviticus:

> The LORD said to Moses: "If anyone sins and is unfaithful to the LORD by deceiving his neighbor about something entrusted to him or left in his care or stolen, or if he cheats him, or if he finds lost property and lies about it, or if he swears falsely, or if he commits any such sin that people may do—when he thus sins and becomes guilty, he must return what he has stolen or taken by extortion, or what was entrusted to him, or the lost property he found, or whatever it was he swore falsely about. He must make restitution in full, add a fifth of the value to it and give it all to the owner on the day he presents his guilt offering."

Id. (internal cross references omitted).

45. Lionel M. Lavenue, *The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victim and Witness Protection Act by the Federal Sentencing Guidelines for Organizations*, 18 J. CORP. L. 441, 514 (1993).

46. *See generally* Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 686–90 (1984) [hereinafter *Victim Restitution and Its Constitutionality*].

> The harsh and destructive blood-feud eventually gave way to a process known as composition, with the offending group paying the victim pursuant to an agreement produced by negotiations between the two groups. The advent of economic stability has been credited with spanning the transition from blood-feud to composition. The system of composition, said to have begun in the Middle Ages primarily in Germanic areas, marked the beginning of restitution in a proper sense, that is, as being closely related to the concept of punishment.

Id.

47. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 33 (2006); *see also* 2 THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 174 (Fathers of the English

closely intertwined with retribution because by paying for one's crime, "the suffering experienced via the infliction of criminal punishment acts as a penance which helps the wrongdoer atone for his or her crime, thereby becoming morally reformed."[48] With time, however, secular philosophy would come to replace religion; as religions clashed, the safer course, was to isolate morality from the plurality of belief systems:

> In *Cosmopolis: The Hidden Agenda of Modernity*, Stephen Toulmin argues that the Enlightenment (usually seen as the beginning of Modernity) had two beginnings. The Renaissance humanists from Erasmus on, who are too often ignored, constituted the first beginning. He characterizes the humanists as embracing a more modest understanding of reason (thought and conduct must be reasonable rather than certain) that is more tolerant of "social, cultural, and intellectual diversity." The seventeenth century rationalists constituted the second beginning of the Enlightenment as a "Quest for Certainty." Contrary to conventional accounts of rationalists as engaged in pure abstract thought, Toulmin maintains that the rationalist theories of 17th-century philosophers were "a timely response to a specific historical challenge—the political, social, and theological chaos embodied in the Thirty Years' War." For example, René Descartes gave up on the modest skepticism of the 16th century humanists and attempted to provide "clear, distinct, and certain" foundations for knowledge that provided "a new way of establishing . . . central truths and ideas: one that was independent of, and neutral between, particular religious loyalties." Similarly, Grotius "reorganized the general rules of practical law into a system whose principles were the counterparts of Euclid's axioms" and in the *Leviathan*, Thomas Hobbes tried to establish political theory on principles established with the same kind of geometrical certainty.[49]

However, restitution and retribution became increasingly discrete concepts, which were rarely intermingled by this point; retribution often exceeded civil restitution, and by imposing additional concerns such as deterrence, criminal punishment sought to protect society.[50] While Utilitarians

Dominican Province, trans., Benzinger Bros. 1918) [hereinafter 2 SUMMA THEOLOGICA] ("On the contrary, Restitution belongs to justice, because it re-establishes equality.").

48. Henry F. Fradella, *Mixed Signals and Muddied Waters: Making Sense of the Proportionality Principle and the Eighth Amendment*, 42 CRIM. L. BULL. 498, 502 (2006).

49. Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 174–75 (2007) (footnotes omitted).

50. Albin Eser, *The Nature and Rationale of Punishment*, 28 CARDOZO L. REV. 2427, 2430, 2433–34 (2007).

such as Jeremy Bentham argued against the distinction, Lord Mansfield contended "that there is no distinction better known, than the [difference] between" criminal and civil redress.[51] The focus shifted away from remedies like restitution, and torture, humiliation, and death, became common forms of punishment within the penal system, particularly in early America.[52]

Incarceration was becoming increasingly popular as well, and reformer John Howard, wrote chilling details about the horrors he encountered during his 1777 tours of various British prisons.[53] America responded by moving towards the development of solitary cells for serious offenders, and larger cells for other inmates to avoid overcrowding conditions.[54] John Augustus, in the mid-19th century, promoted rehabilitation rather than jail, and was able to convince a number of courts to release first-time offenders capable of being reformed, into his custody to be supervised.[55] Probation as a criminal sentence was the product of a movement in America to find alternatives to incarceration for those who were confined.[56] Though arguably, the new placement of emphasis on the offender shifted the focus away from the victim.[57]

---

51. Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982).

52. Joshua Logan Pennel, Comment, *The End of Indeterminate Sentencing in New York: The Death and Rebirth of Rehabilitation*, 58 BUFF. L. REV. 507, 511–12 (2010).

> New York, during the colonial period, had more than 200 crimes which could result in the death penalty. Long-term incarceration was rare. 'County jails were reserved primarily for pretrial detainees and debtors.' Harsh penalties that consisted of public shaming or death were 'intended to frighten, and thereby deter, the would-be offender from committing a crime.

Id.

53. Hadar Aviram, *Defining the Problem*, 7 HASTINGS RACE & POVERTY L.J. 161, 161 (2010).

54. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 469 (2009).

55. Major Tyesha E. Lowery, *One "Get Out of Jail Free" Card: Should Probation Be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 169–70 (2008).

> Augustus' probationers performed remarkably well and seemingly reformed their lives. Even then, Augustus frustrated law enforcement officials 'who wanted the offenders punished, not helped.' Nevertheless, it was difficult to argue with his success and his ideas spread. 'In 1878, Massachusetts was the first state to adopt a formal probation law for juveniles.' By 1910, twenty-one states had probation statutes . . . .

Id.

56. Kellie Brady, *Some People Just Shouldn't Have Kids!: Probation Conditions Limiting the Fundamental Right to Procreate and How Texas Courts Should Handle the Issue*, 16 TEX. WESLEYAN L. REV. 225, 227 (2010).

57. Kelly, *supra* note 47, at 686. "'History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim.'" *Id.* (quoting STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 12 (2d ed. 1970)).

The notions of probation and rehabilitation became popular and spread across the states.[58] In the late 1800's, many federal courts were resorting to the use of a suspended entry of sentence, which led to a legal issue that would be decided after the turn of the century.[59] Congress had attempted to pass a probation statute in 1916, but met great difficulties:

> Establishing probation as a sentencing option in the federal courts did not happen quickly or easily. Opinion on the wisdom of doing so was sharply divided. Some federal judges were for probation, seeing it as an alternative to the sometimes harsh penalties they were compelled to impose. Other federal judges were against probation, finding it too lenient. Congress could not reach agreement on a national plan. The first bills for a federal probation law had been introduced in Congress in 1909. But it was not until 1925—and after more than [thirty] bills had been introduced—that one such bill became law.[60]

In 1916, in the decision of *Ex Parte United States*,[61] the Supreme Court of the United States, in addressing a writ of mandamus brought by both the U.S. Attorney General and the U.S. Solicitor General, held that a district court judge named John M. Killits was without power to suspend a sentence indefinitely.[62] This ruling became more commonly known as the "Killits decision" and became the impetus for the enactment of the Federal Probation Act of 1925 (FPA),[63] which allowed the courts to suspend the imposition of a sentence and place an offender on probation.[64] District courts were now free to place offenders on probation up to an amount of time not to exceed five years "upon such terms and conditions as they . . . deem[ed] best" when the

58. *See Beginnings of Probation and Pretrial Services*, U.S. COURTS, http://host4.uscourts.gov/fedprob/history/beginnings.html (last visited Apr. 20, 2011).

59. *Id.* ("Increasingly, however, the U.S. Department of Justice disapproved of the use of the suspended sentence, believing that it infringed upon executive pardoning power and therefore was unconstitutional.").

60. *Id.*

61. 242 U.S. 27 (1916).

62. *Id.* at 51–52 (1916), *superseded by statute*, Federal Probation Act of 1925, ch. 521 § 1,, 43 Stat. 1259 (codified as amended at 18 USC § 3651) (repealed 1987), *as stated in* Affronti v. U.S., 350 U.S. 79 (1955) ("[W]e can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.").

63. Federal Probation Act of 1925, ch. 521, § 1.

64. *Id.*

court was satisfied that "the ends of justice and the best interests of the public, as well as the defendant," would be served thereby.[65]

The discretionary power of this new law also "permitted federal courts to issue restitution orders as a condition of probation."[66] To be sure though, there was no specific mention of restitution or reparation on the statute books of most laws of many states or in the federal code, even going into the late 1930s. Nonetheless, the power to grant restitution had been implicitly read into the statutory provisions permitting suspended sentence and probation conditions, notwithstanding silence on the issue.[67] Subsequent amendments to section 3651 would change this condition from an implied one to an expressed one, as it provided that a probationer "[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."[68] Also, by implication, a district court was not authorized to order restitution while a defendant was incarcerated since "the FPA authorizes a district court to impose restitution only as a condition of [a] defendant's probation."[69]

However, the judicial determination of the offender's ability to pay compensation was a requirement of any imposition of restitution.[70] Also it was impermissible to order compensation in excess of the actual loss.[71] The Government could qualify as a victim where the offense involved defrauding the Internal Revenue Service, but the restitution still had to be limited to only that which stemmed from the offenses for which the defendant was actually convicted.[72] If a district court ordered restitution for amounts which were not determined to be due and owing, that order would not only be premature, but in excess of the statutory authority.[73] The ability to impose restitution also

65. *Id.*

66. Kelly, *supra* note 47, at 691.

67. *Id.*; *see also* Federal Probation Act of 1925, § 1.

68. 18 U.S.C. § 3651 (1948), *repealed by* Pub. L. No. 98-473, 98 Stat. 1837 (1984).

69. United States v. Angelica, 859 F.2d 1390, 1392 (9th Cir. 1988).

70. United States v. Boswell, 605 F.2d 171, 175 (5th Cir. 1979); United States v. Wilson, 469 F.2d 368, 370 (2d Cir. 1972); United States v. Taylor, 321 F.2d 339, 341 (4th Cir. 1963).

71. *See* Karrell v. United States, 181 F.2d 981, 987 (9th Cir. 1950).

72. United States v. Taylor, 305 F.2d 183, 187 (4th Cir. 1962).

> The judge could, however, properly require, as a condition of probation, payment of those taxes reported by the defendant as due for 1958, 1959 and 1960 since such liability is admitted and no question of restitution of fraudulently evaded taxes would be involved. Amounts in excess of defendant's admitted tax liability may not, as a condition of probation, be directed to be paid during the probationary period prior to the time such amounts are finally and legally determined, and then only if collection is not barred by a statute of limitation.

Id.

73. United States v. Stoehr, 196 F.2d 276, 284 (3d Cir. 1952).

extended to probation sentences under the Federal Youth Corrections Act.[74] The district courts had the discretion to impose restitution in combination with probation as a sentencing alternative to juveniles.[75] Probation with restitution was even extended in a case involving criminal liability of a corporation.[76]

However, as to most, it was infrequently used as a tool between 1925 and 1982, and a clarion call for change would revolutionize this cumbersome approach that dominated the early to mid-twentieth century.[77] Margery Fry, a criminal justice reformer and one of the first women in Britain to become a magistrate, championed the cause of restitution and brought it to the forefront of both English and American thinking.[78]

III. THE CHANGING NEEDS OF AMERICAN SOCIETY AND RESTITUTION IN FEDERAL SENTENCING

Centuries before the dialogue on restitution came to penal law in America, Bentham, in his work, *Theory of Legislation*, laid the groundwork for restitution within the criminal justice system.[79] It, therefore, is ironic that he is cited as having laid the foundations for the shift towards a greater retributive model and that Fry had to re-raise the dialogue about victim compensation.[80] Fry was aided by two other proponents, Stephen Schafer and Albert Eglash, who also suggested newer paradigms for a model of criminal jus-

---

74. United States v. Hix, 545 F.2d 1247, 1247 (9th Cir. 1976) (per curiam) ("Although a fine is inherently punitive, restitution is not. So long as repayment is made to the victim and does not exceed the damage caused by the offense, restitution is essentially rehabilitative, and hence consistent with the purpose of the Youth Corrections Act.").

75. United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977).

> In any event, the youth will have learned the first lesson that society—in its effort to rehabilitate *all* offenders—tries to teach: society, whenever it can help it, will not allow crime to pay. In view of substantial scholarly support for the proposition that restitution may be rehabilitative in certain cases, we decline the invitation to read the Federal Youth Corrections Act as proscribing it.

Id. (footnote omitted).

76. United States v. Atlantic Richfield Co., 465 F.2d 58, 61 (7th Cir. 1972) ("If suspension of the imposition of a fine to enable an individual to make restitution is appropriate in certain cases, a similar suspension may well be suitable for corporate defendants in appropriate cases as well.").

77. *See* S. REP. NO. 97-532, at 30 (1982) ("As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago.").

78. *See* THE VICTIM IN INTERNATIONAL PERSPECTIVE 12 (Hans Joachim Schneider ed., 1982).

79. JEREMY BENTHAM, THEORY OF LEGISLATION 288 (R. Hildreth trans., Trubner & Co. 2d ed. 1864).

80. *See* Thad H. Westbrook, Note, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575, 578 n.23 (1998).

tice.[81] The ensuing victims' rights movement began to alter the role of the victim, as follows:

> The goal of the movement was to force the justice system to realign itself to better represent the interests of victims. 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. 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.[82]

Thus, in the decade prior to the Reagan task force on crime, the movement reflected public sentiment that the criminal justice system had become overly focused on the offender and not focused enough on the victim.[83] With the Supreme Court handing down decisions in *Mapp v. Ohio*,[84] *Gideon v. Wainwright*,[85] and *Miranda v. Arizona*,[86] the public feared for its protection because it perceived that the law had made it easier for criminals to escape on legal technicalities.[87] As a response, the President's Task Force conducted a national study of the plight of crime victims and proposed recommendations in the improvement of compensation to ameliorate their condition.[88] Taking this advice, Congress passed legislation—which had been sorely needed—granting direct authority to federal courts to order restitution

---

81. *See generally* Stephen Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605 (1974); Albert Eglash, *Creative Restitution: Some Suggestions for Prison Rehabilitation Programs*, 28 AM. J. CORRECTION 20 (1958).

82. Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2720 (2005) (footnotes omitted).

83. *Id.* at 2719–20 ("The victims' rights movement arose as a response to a societal fear of crime in America.").

84. 367 U.S. 643, 655 (1961) (establishing the exclusionary rule suppressing the evidentiary fruits of unlawful police action, which violated the Fourth Amendment).

85. 372 U.S. 335, 344 (1963) (mandating that the indigent criminally accused who faces the risk of incarceration is entitled to the right to counsel under the Sixth Amendment).

86. 384 U.S. 436, 444 (1966) (holding that under the Fifth Amendment, the exclusionary rule applies to confessions extracted when law enforcement has not first advised persons under arrest of their rights).

87. *See* David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 660 (1985).

88. *See Final Report of the President's Task Force on Victims of Crime*, OFFICE FOR VICTIMS OF CRIME, http://www.ojp.usdoj.gov/ovc/publications/presidentstskforcrprt/welcome.html (last visited Apr. 20, 2011).

to victims of crime in the Victim and Witness Protection Act.[89] Congress intended with the Act to make restitution an integral part of the federal sentencing process.[90]

By both authorizing courts to impose restitution independent of probation, the VWPA was a groundbreaking alteration of the federal restitution framework. However, there were many opposed to it that challenged its constitutionality because of the lack of a provision providing for a jury trial complying with the Seventh Amendment.[91] As one commentator opined:

> The restitution provisions of the Victim and Witness Protection Act will in some cases violate the seventh amendment right of the offender to a civil jury trial. Where the restitution amounts to first category relief under the VWPA, it may constitutionally be ordered without a jury trial. Courts ordered this type of relief without a separate civil action in England in 1791 and the seventh amendment, being historically grounded, permits actions to be tried without a jury when they were so tried at the time of the amendment's ratification. Where, however, the restitution amounts to compensatory damages, awarding it without a jury trial violates the seventh amendment. The structure of the VWPA and its legislative history reflect that the restitutionary remedy was intended to replace the civil remedy; given this, the protections attached to that civil remedy must attach to any replacement of it. Moreover, restitution awards under the VWPA cannot be viewed as the adjudication of a public right, which would render the seventh amendment inapplicable.[92]

The circuit courts rejected Seventh Amendment challenges.[93] The VWPA was also attacked on Fifth Amendment grounds[94] that it did not pro-

89. *See* Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253 (1982) (codified as amended at 18 U.S.C. § 3663 (2006)).

90. *See* S. REP. NO. 97-532, at 30 (1982) ("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 [sic] that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.").

91. The Seventh Amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

92. Margaret Raymond, Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590, 1615 (1984).

93. *See* United States v. Keith, 754 F.2d 1388, 1391–92 (9th Cir. 1985); United States v. Watchman, 749 F.2d 616, 617 (10th Cir. 1984); United States v. Brown, 744 F.2d 905, 908

vide adequate due process.[95] Such due process challenges have also been disallowed.[96] The VWPA was also attacked under Fourteenth Amendment grounds that it did not provide equal protection under the law.[97] This ground was rejected because it is necessarily the case that individualized circumstances pertaining to victims and defendants will result in different treatment, and mere disparity alone is insufficient to violate equal protection.[98] Likewise, Sixth Amendment criminal jury trial and Eighth Amendment cruel and unusual punishment challenges were also largely unsuccessful.[99]

Though the VWPA greatly enhanced federal courts' discretionary power to order restitution, there were drawbacks. Under section 3664(a), when deciding whether to impose restitution and the amount of restitution, courts were required to consider the amount of the loss sustained by any victim as a result of the offense, as well as "the financial resources of the defendant, . . . financial needs and earning ability of the defendant and the defendant's dependents, and such other . . . factors as the court deems appropriate."[100] As the court in *United States v. Copple*[101] observed, this provision had the practical effect of ensuring that restitution judgments did not exceed offenders' ability to pay.[102] Defendants could not be set up to fail, so to speak.[103] The

---

(2d Cir. 1984); United States v. Satterfield, 743 F.2d 827, 836–37 (11th Cir. 1984); United States v. Florence, 741 F.2d 1066, 1067–68 (8th Cir. 1984).

94. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

95. Under the Fifth Amendment, "A criminal defendant must be afforded . . . due process at a sentencing proceeding." United States v. Palma, 760 F.2d 475, 477 (3d Cir. 1985) (citing Townsend v. Burke, 334 U.S. 736 (1948)).

96. *Id.*

97. *See* United States v. Satterfield, 743 F.2d 827, 841 (11th Cir. 1984). It is not constitutionally impermissible to treat similarly situated defendants differently. *Id.*

98. *Palma*, 760 F.2d at 478–79.

99. *See, e.g.*, United States v. Keith, 754 F.2d 1388, 1390–92 (9th Cir. 1985).

100. 18 U.S.C. § 3664(d)(3) (2006).

101. 74 F.3d 479 (3d Cir. 1996).

102. *Id.* at 485.

> Even if the government is correct that Copple has retained $623,334 in assets, under the court's order Copple must come up with over $3.6 million in five years to satisfy the restitution order, plus an additional $665,859 to pay off back taxes. Copple is currently incarcerated, has a wife and two children to support after he completes his term, and faces his employment prospects with fraud and tax evasion convictions in tow. The value of a college degree notwithstanding, we cannot say—in the absence of the factual findings discussed—that on substantive review we could conclude the court's order to be factually supportable.

Id.

103. *See id.*

> The relevant determination in favor of an order of restitution, therefore, is not a court's vague appreciation of a defendant's "potential to succeed" financially at some point in the undefined future, but, rather, its finding by a preponderance of the evidence that there exists a realistic prospect that defendant will be able to pay the required amount within five years.

Copple court understood that crafty offenders might well be very good at hiding the ill-gotten proceeds:

> We do not suggest that a defendant who has become expert at secreting the proceeds of the crime can avoid the obligation to disgorge them. The proceeds from a defendant's illegal conduct that the defendant still retains or can recoup are certainly encompassed within the "financial resources of the defendant," 18 U.S.C. § 3664(a), that the district court should consider in fashioning a restitution order. Of course, the continued existence of such proceeds is a factual issue that should be accompanied by "specific findings."
>
> Although we have not seen it applied elsewhere, we believe there is a method by which the court can fashion a restitution order that accounts for the court's reasonable belief that there are secreted assets and that satisfies the court's obligation to make the necessary supporting findings. Under 18 U.S.C. § 3664(d), the sentencing court has broad discretion to assign to either party "[t]he burden of demonstrating such other matters as the court deems appropriate" in the course of its fact-finding. It would be sufficient for a district court that believes, based on the record, that such proceeds are still available to determine the amount properly attributable to the defendant with reasonable precision.[104]

Therefore, the court of appeal believed that the district court could not skirt its burden to specifically demonstrate how it believed the defendant could pay, notwithstanding the defendant's resourcefulness at concealing his assets.[105] Still, in some cases, this could pose some difficulty in doing.[106]

Id.

104. *Copple*, 74 F.3d at 484.

105. *Id.* Judge (now Justice) Alito's concurrence is of great interest, in that, while he concurred with the majority, he suggested that the burden of proof be on the defendant, and not the Government. *See id.* at 485–86 (Alito, J., concurring). He wrote:

> Defendants convicted of fraud offenses are sometimes masters at hiding assets. Therefore, if the government bore the burden of proving that such defendants still possess illegally obtained assets, the government would be unable to locate hidden assets, those assets would not be taken into account in framing the restitution orders, and the defendants would continue to profit at the expense of the innocent victims. This would be unconscionable.

Id. at 486. The solution is to place the burden of proof on the defendant to show what has happened to all of the illegally obtained assets. *See* 18 U.S.C. § 3664(d)(3) (2006). All the assets for which the defendant cannot account may be included in the amount of restitution ordered. *See id.* To the extent that records are unavailable, the risk of inaccuracy should be borne by the defendant rather than the victims. *See id.* As the MVRA was enacted the same year as the *Copple* decision, Congress saw fit to do that: The change placed the entirety of the

Another further issue that also posed some difficulty with interpretation of the VWPA was that "[t]he statutes did not further define what constituted the financial resources of the defendant."[107] Additionally, most governmental agencies can qualify as victims under the VWPA to whom restitution must be paid.[108] However, a governmental agency could not be a victim under the VWPA when it actively created the conditions leading to the loss, due to a law enforcement sting operation.[109]

With the exception of several minor amendments, the federal restitution structure remained relatively intact until Congress passed the Mandatory Victims Restitution Act (MVRA) in 1996.[110] The MVRA made restitution mandatory in almost all cases where the victim suffered an identifiable monetary loss from an enumerated crime.[111] The MVRA removed from the district courts the ability to fashion restitution orders based on an offender's ability to pay.[112] The MVRA was and now remains "all about *mandating* restitution" and removing the power to decide otherwise from a district

---

burden on ability to pay on offenders, by eliminating it as a consideration altogether from the amount determination. *Compare id.* (placing the entirety of the burden on ability to pay on offenders), *with* United States v. St. Gelais, 952 F.2d 90, 98 (5th Cir. 1992) (holding Defendant fully responsible for entire amount of substantiated loss, where court attempted to ascertain Defendant's ability to pay, but Defendant was uncooperative and not forthcoming).

106. I had the experience of prosecuting a defendant in a Florida state circuit court for first-degree felony grand theft exceeding $100,000. While in the middle of a lengthy evidentiary hearing to determine the amount of restitution and the repayment schedule, during cross-examination, I posed a question to the defendant concerning the whereabouts of the proceeds from her home. The home had been sold for more than $400,000. Florida law required that the state establish the defendant's financial resources and ability to pay when ordering a schedule of repayment. The defendant promptly and incredulously replied that she had squandered the money, and was now living in poverty. She then gratuitously injected, "Being poor isn't something people like you would ever understand." The court admonished the defendant, directing her to better spend her time answering the questions, and to avoid answers attacking the prosecutor. Suffice it to say, based on the many theft and fraud cases that I previously prosecuted, I am quite aware of just how difficult many offenders can be, and the lengths of evasiveness they will go to in avoiding revealing the extent of their financial affairs.

107. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION § 9:10 (2010 ed. 2010).

108. *See* § 3664(i); *see also* United States v. Lincoln, 277 F.3d 1112, 1114 (9th Cir. 2002) (noting that the language of § 3664(i) refers to cases in which the government is a victim).

109. United States v. Gibbens, 25 F.3d 28, 35–36 (1st Cir. 1994) (holding the VWPA applies to passive victims, not active ones, and that the ambiguity had to be resolved in favor of the offender under the rule of lenity).

110. *See generally* Mandatory Victims Restitution Act of 1996, Pub. L. No. 104–132, § 204, 110 Stat. 1214, 1227–41.

111. *See* United States v. Lessner, 498 F.3d 185, 201 (3d Cir. 2007) (finding that a restitution order in the amount of $938,965.59 was mandatory where defendant is convicted of a Title 18 offense against property and the victim has suffered pecuniary loss).

112. United States v. Williams, 612 F.3d 500, 509 (6th Cir. 2010).

court.[113] "No longer is the decision whether to order restitution for certain crimes left to the discretion of the district court."[114]

A district court is now required to "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."[115] However, the MVRA does require judges to consider the defendant's financial resources when putting together a schedule of repayment.[116] There had been the belief that the prior VWPA had often times left victims with an incomplete recovery of their losses.[117] By removing judicial discretion and mandating that judges order restitution in the full amount of victims' losses, Congress attempted to ensure adequate compensation.[118] While it might be argued that restitution served other purposes, such as rehabilitation of the offender,[119] this was not the primary purpose of the MVRA. The MVRA reflected a shift towards a more victim-centric system of justice, one that was well received by the public, and which remains to this day the law of restitution in federal sentencing.[120] However, the drawback with the wording of the statute is that it has been difficult to determine whether the MVRA is a crim-

113. United States v. Dolan, 571 F.3d 1022, 1026 (10th Cir. 2009), *aff'd by* 130 S. Ct. 2533 (2010).

114. *Id.*

115. 18 U.S.C. § 3664(f)(1)(A) (2006); United States v. Taylor, 41 F. App'x. 380, 383 (10th Cir. 2002).

116. § 3664(f)(2)(A).

117. H.R. REP. NO. 104-116, at 4 (1995) (stating that the new statute needed "to ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime").

118. Heidi Grogan, Comment, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1101 (2005).

> Most illuminating are the opening remarks by one of the co-sponsors of the Senate bill, Senator Orrin G. Hatch, at the initial Senate Hearing on mandatory victim restitution: "[R]ecompense for loss is unrelated to a judge's discretion to fashion a sentence. Restitution is not an alternative to punishment, nor is it even part of the sentence imposed. Rather, it is what the victim is due irrespective of any *other* punishment." Senator Hatch's use of the word "other" is similar to the language of the MVRA. It is unfortunate that this careless choice of words ("any other punishment") is reflected in the MVRA's statutory language, because it is clear that Senator Hatch did not wish to make restitution an addition to a defendant's criminal punishment. Rather, by giving a victim "what he is due," Senator Hatch intended restitution to restore a victim to his pre-crime state.

Id. at 1102 (alteration in original) (footnotes omitted).

119. S. REP. NO. 104-179, at 12 (1995) (pointing out that the MVRA "ensure[s] that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society").

120. *See, e.g.*, United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999) ("[T]he intended beneficiaries are the victims, not the victimizers.").

inal punishment or civil compensation for purposes of many of the challenges that were mounted against it.[121]

Nonetheless, aside from the previously mentioned attacks on the constitutionality of the MVRA, a new issue would unfold: the statute's proscription that restitution should be imposed at the time of sentence, or no later than 90 days thereafter.[122] Even where additional losses become ascertainable at a later date, section 3664(d)(5) provides for an amended order of restitution within 60 days after discovery of the losses.[123] What would happen in those restitution cases, where adhering to this time deadline would not be possible?

IV. *DOLAN v. UNITED STATES*

In September of 2006, Brian Russell Dolan, a member of the Mescalero Apache Indian Tribe, while intoxicated, severely injured a fellow tribe member, Evan Ray Tissnolthtos, in a fight which took place on tribal reservation grounds.[124] When Dolan's sister learned of the fight, she contacted the local police who discovered Tissnolthos bleeding on the side of the road.[125] Tissnolthos was transported by helicopter to a hospital and treated for his injuries.[126] His medical bills were paid by the Indian Health Service medical program, a governmental agency.[127] Dolan was charged federally[128] with

---

121. Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1041 (2001).

> Finally, the resolution of this debate brings into focus the challenge of determining whether statutes are criminal or civil. In this endeavor, courts should not forget the purposes behind the Supreme Court's civil/criminal test. This test is needed only because Congress has sometimes sought to evade the procedural protections defendants receive in criminal proceedings by giving criminal sanctions civil labels.

Id.

122. *See* United States v. Stevens, 211 F.3d 1, 4–5 (2d Cir. 2000) (addressing whether a restitution order issued 117 days after sentencing was invalid).

123. 18 U.S.C.§ 3664(d)(5) (2006); *see also* United States v. Minneman, 143 F.3d 274, 284 (7th Cir. 1998).

124. United States v. Dolan, 571 F.3d 1022, 1024 (10th Cir. 2009) *aff'd by* 130 S. Ct. 2533 (2010); Brief for Petitioner at 5, Dolan v. United States, 130 S. Ct. 2533 (2010) (No. 09-367).

125. Brief for Petitioner, *supra* note 125, at 5.

126. *Id.*

127. *Id.*

128. *See* 18 U.S.C. § 1153(a) (2006).

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country,

assault resulting in serious bodily injury, and was prosecuted in the United States District Court of New Mexico.[129] Dolan pled guilty on February 8, 2007.[130] In May of 2007, the Office of Probation filed its Presentence Investigation Report (PSR), but was unable to provide any amounts for restitution pertaining to the victim's medical bills, because the Indian Health Service failed to respond timely to their requests for documentation.[131]

The district court attempted to set the matter for sentencing on June 28, 2007, but on June 27, 2007, the Government requested a continuance of the sentencing.[132] The sentencing was reset and eventually took place on July 30, 2007.[133] The district court sentenced Dolan to twenty-one months in prison followed by three years supervised release, but was unable to determine the amount of restitution[134] because the Government was still unable to provide documentation of victim restitution.[135]

The district court first gave the impression that it wanted to reset the matter for another 90-days, but then proceeded to verbally order restitution on the date of sentencing, but left the matter open due to insufficient information before it.[136] On August 8, 2007, the district court entered judgment, using the standard Administrative Office form but left the restitution amount blank and indicated the following in the section regarding payment schedule: "'Pursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.'"[137]

On October 5, 2007, the probation office created an addendum to the PSR indicating that the total of the victim's medical bills was $105,559.78.[138] The 90-day deadline from the sentencing hearing date expired on October 28, 2007.[139] The district court did not hold a hearing to determine restitution

---

> shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Id.

129. Dolan v. United States, 130 S. Ct. 2533, 2537 (2010).

130. *Id.*

131. *Id.*; Brief for Petitioner, *supra* note 125, at 6.

132. Brief for Petitioner, *supra* note 125, at 6.

133. *Dolan*, 130 S. Ct. at 2537.

134. *Id.* The Government's victim advocate indicated the victim allegedly had an outstanding bill of $80,000, but was unable to obtain confirmation or reach the victim. Brief for Petitioner, *supra* note 125, at 6.

135. *Dolan*, 130 S. Ct. at 2537.

136. *Id.*; Brief for Petitioner, *supra* note 125, at 7.

137. *Dolan*, 130 S. Ct. at 2537.

138. *Dolan*, 571 F.3d at 1024.

139. *Id.* at 1025.

until February 4, 2008.[140] At the time, Dolan objected on grounds of jurisdiction, as more than six months had elapsed since sentencing.[141] The court requested the parties submit briefs on the 90-day limitation provision, and later held oral argument on the jurisdiction issue.[142]

The district court determined that it retained jurisdiction and entered an opinion and restitution order requiring Dolan to pay the Indian Health Service $104,649.78, with scheduled payments of $250 per month.[143] Dolan timely appealed the restitution order to the Tenth Circuit Court of Appeals, arguing *inter alia*, that the district court erred in imposing a void order.[144] The court of appeals affirmed on the grounds that the congressional intent of section 3664 would be frustrated if jurisdiction could be lost due to timing.[145] Thus, it held that because section 3664 is in the nature of a claims processing rule, it was never intended that somehow an offender's due process rights and need for sentencing finality could outweigh the victim's right to restitution.[146] Dolan filed a writ for petition of certiorari; the Supreme Court granted the petition.[147]

The Tenth Circuit was not alone in its line of thinking at the time. The Sixth Circuit held that the 90-day provision is not a jurisdictional limitation, because this would be inconsistent with the 60-day provision for an amended order at a later date.[148] The Second and Third Circuits permitted tolling of the 90-day provision, where the reason for delay is occasioned by the offender.[149] The First and Fourth Circuits also held the passing of the 90-day deadline did not divest the district court of further subject matter jurisdiction.[150] The Ninth Circuit further held that violation of the timing requirements of section 3664 did not result in a loss of jurisdiction to order restitution.[151]

---

140. *Id.*
141. *Id.*; Brief for Petitioner, *supra* note 125, at 8.
142. *Dolan*, 571 F.3d at 1025.
143. *Id.*; Brief for Petitioner, *supra* note 125, at 8–9.
144. *Dolan*, 571 F.3d at 1025.
145. *Id.* at 1029–30.
146. *Id.* at 1031.
147. *See* Dolan v. United States, 130 S. Ct. 2533, 2537 (2010).
148. United States v. Vandeberg, 201 F.3d 805, 814 (6th Cir. 2000).
149. United States v. Terlingo, 327 F.3d 216, 222–23 (3d Cir. 2003) (allowing for time greater than the 90-day time period, where the defendant's actions are cause for the delay); United States v. Stevens, 211 F.3d 1, 6 (2d Cir. 2000) (also tolling 90-day deadline for defendant's delay); *see also* United States v. Douglas, 525 F.3d 225, 252–53 (2d Cir. 2008).
150. *See* United States v. Johnson, 400 F.3d 187, 199 (4th Cir. 2005); United States v. Cheal, 389 F.3d 35, 48–49 (1st Cir. 2004).
151. United States v. Cienfuegos, 462 F.3d 1160, 1162–63 (9th Cir. 2006).

However, the Sixth Circuit decided the matter differently in another opinion.[152] The Seventh Circuit also held that a late entered restitution order was void for failing to observe the 90-day requirement.[153] The Eleventh Circuit likewise found that a restitution order violating the deadline was without jurisdiction.[154] There was a true split within the circuits.

On review, Justice Breyer delivered the majority opinion, holding that even when a sentencing court misses MVRA's 90-day deadline to make final determination of victim's losses and impose restitution, it retains jurisdiction over restitution, where that court made clear prior to the deadline's expiration that it would order restitution.[155] The Court seeks to strike a balance, but admits that the victim's right to mandatory restitution outweighs the offender's need for finality.[156] The Court advises that an offender can use mandamus as a remedy for any transgressions by the district court, where the sentencing court has truly failed to observe the requirements of section 3664.[157] Finally, the Court dismisses the "rule of lenity" argument, finding that there is no ambiguity within the MVRA in need of resolution.[158]

Chief Justice Roberts delivered a powerful dissent.[159] He cautioned that Rule 35 of the Federal Rules of Criminal Procedure do not permit the indefinite extension of time to comply with ordering restitution under the MVRA, which the majority ignores.[160] He reminded the majority, that all sentencing must be completed on the date of sentencing; any extension of time beyond that must be specifically provided for by rule.[161] He scathingly summarized

152. United States v. Jolivette, 257 F.3d 581, 584 (6th Cir. 2001).

> Accordingly, we hold that when the 90-day clock runs out, the judgment of conviction and sentence, including the restitution provision, becomes final by operation of the statute. We therefore have jurisdiction to review the judgment of conviction and sentence. It follows that because there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision.

Id. at 584-85.

153. United States v. Farr, 419 F.3d 621, 625–26 (7th Cir. 2005) (invalidating restitution order for lack of jurisdiction. However, the court noted that had the government proposed theories for the delay, the result may have been different).

154. United States v. Maung, 267 F.3d 1113, 1122 (11th Cir. 2001) (finding no authority to enter a restitution order beyond the ninety days).

155. Dolan v. United States, 130 S. Ct. 2533, 2542 (2010).

156. *Id.*

157. *Id.*

158. *Id.* at 2544.

159. *Id.* "[T]wo wrongs do not make a right, and that mistake gave the court no authority to amend Dolan's sentence later, beyond the 90 days allowed to add a sentencing term requiring restitution." *Dolan*, 130 S. Ct. at 2549 (Roberts, C.J., dissenting).

160. *Id.* at 2545 (Roberts, C.J., dissenting).

161. *Id.* at 2546 ("Section 3664(d)(5) is self-executing: It grants authority subject to a deadline, and if the deadline is not met, the authority is no longer available.").

the rule announced by the majority: "[O]nce the camel's nose of some permitted delay sneaks under the tent, any further delay is permissible."[162] He cautioned that the majority does not seem "to need [section] 3664(d)(5) at all."[163] He concluded, if there is any balancing to be done, the job belongs to Congress, not to the Court.[164] Although he never referenced the term, it is clear that Chief Justice Roberts' impression of the majority decision is that it is a dangerous move of judicial activism.

V. WHO SAID THERE WAS NO SUCH THING AS "DEBTOR'S PRISON"?

The obvious effect of the *Dolan* decision is that less offenders will be able to escape the imposition of restitution based on legal technicality. Considering the Congressional intent behind the MVRA, this serves its purpose because the MVRA was a reactionary measure to the public backlash against those Supreme Court decisions that afforded greater protections to the criminal accused in America. However, one has to question the wisdom of a rule, which allows a district court to suggest that it is thinking about ordering restitution, to sufficiently serve to toll the 90-day deadline. The offender has little expectation of finality.

The decision seemed more of a Solomonic compromise, rather than a true reading of the statute in question. If the government were right, then it should not matter whether the district court announces on the record, to alert an offender that it wants to impose restitution in the future. The deadline should not apply at all. Restitution should be ordered, when the Government has sufficient information to bring the matter before the court. However, it is said that the 90-day suggestive deadline is for the benefit of the victim, in that it encourages the courts to address these matters sooner than later.

If the defendant were right, then the 90-day deadline should be strictly adhered to, as restitution is purely a creature of statute. Failure to observe the statute should result in the court lacking jurisdiction over the defendant because the court's authority cannot exceed what is provided for in the statute.

The Supreme Court, in supplanting its own directive, appears to be legislating what Congress did not provide for.[165] If Congress wanted to devise

---

162. *Id.*

163. *Id.* at 2548.

164. *Dolan*, 130 S. Ct. at 2549.

165. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 487–88 (1979) (Powell, J., dissenting). The dissent stated:

> Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect to a subject so inherently difficult and so politically sensitive that the prospect of

such a convoluted rule, it would have provided for it directly in the MVRA. The *Dolan* decision, read in the negative, stands for the proposition that the district court loses jurisdiction if it fails to announce at any time during sentencing, or the 90 days thereafter, that it intends to impose restitution.[166] Therefore, offenders have some right to insist upon escaping restitution if the district court fails to make at least some type of signal of how it intends to proceed prior to the deadline expiration.[167] Two cases that were decided after *Dolan* have tried to clarify what is sufficient enough to constitute that signal.

In *Fu Sheng Kuo v. United States*,[168] the Supreme Court reviewed on petition for writ of certiorari the court of appeals' affirming decision of the timing of a district court's restitution order exceeding the 90-day deadline.[169] The Court vacated the judgment and remanded the case for consideration in light of its prior decision in *Dolan*.[170] On remand, the Ninth Circuit in *United States v. Fu Sheng Kuo*,[171] held that even where the written order did not reflect that the district court ordered restitution, the transcript reflected that the district court orally pronounced this and that the oral pronouncement controlled.[172]

Shortly prior to the *Fu Sheng Kuo* decision, the Second Circuit Court of Appeals reviewed a district court's imposition of a restitution amount eight days after the expiration of the 90-day deadline in *United States v. Pickett*.[173] Referring to the decision of the Supreme Court in *Dolan*, the court of appeals affirmed, pointing to the record which reflected that the district court intended to order restitution, but delayed only as to the determination of the amount.[174] "Those statements, each of which was made before the expiration of the ninety-day period, left no doubt that restitution would be imposed."[175] More likely than not though, absent total misstep and silence, it does not

---

> others confronting it seems inviting. Federal courts no longer should encourage this deference by the appropriate authorities—no matter how willing they may be to defer.

Id.; *see also* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1472 (2004) ("In short, courts are less competent policy-making bodies than the legislature.").

166. *See Dolan*, 130 S. Ct. at 2537.

167. *Id.* at 2541 ("Though a deliberate failure of the sentencing court to comply with the statute seems improbable, should that occur, the defendant can also seek mandamus.").

168. 130 S. Ct. 3458 (2010).

169. *Id.* at 3458.

170. *Id.*

171. 620 F.3d 1158 (9th Cir. 2010).

172. *Id.* at 1163.

173. 612 F.3d 147, 148 (2d Cir. 2010) (per curiam).

174. *Id.* at 149.

175. *Id.*

seem likely that there will be an occasion where a district court will fail to be deemed as ordering restitution.

Moving away from subsequent decisions, to more carefully explore the implications of *Dolan*, one has to look towards failure: What happens when the offender fails to pay restitution imposed? While there are a variety of recourses, the most common and harsh sanction is to revoke probation and sentence the offender to incarceration. The Supreme Court in *Bearden v. Georgia*[176] outlined the test district courts are to follow in considering revocation based on violation of repayment conditions of supervised release.[177] Justice O'Connor delivered the majority opinion of the Court.[178] Reviewing such cases under a due process "fundamental fairness" analysis under the Fourteenth Amendment,[179] the Court held that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he [or she] lacked the resources to pay it."[180] However, should a district court find that the failure to repay has been willful, then the court need not take into consideration whether the defendant lacks the resources or not.[181] Making it abundantly clear that a defendant's poverty status in no way protects him or her from punishment the Court concluded:

> We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused

176. 461 U.S. 660 (1983).

177. *See id.* at 666–67.

178. *Id.* at 661.

179. The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

180. *Bearden*, 461 U.S. at 667–68.

181. *Id.* at 668.

> This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.

Id. at 668–69 (citation omitted).

> to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.[182]

The Court reversed the revocation of probation, holding that the trial court's finding that the defendant knew for a long time what he had to do, and failed to do so, was insufficient to demonstrate how the defendant failed to make bona fide efforts to repay.[183]

Yet contrast the result in the *Bearden* decision with the outcome of the offender in *United States v. Montgomery*.[184] The defendant had pled to "four counts of using the mails to defraud charitable organizations [that assisted] victims of the September 11, 2001, terrorist attacks."[185] After serving a 21-month prison sentence, the defendant started her 3-year term of supervised release, the conditions of which involved keeping a steady job and repayment of $63,817.94 in restitution, at the rate of $300 a month.[186] After two years, she had only paid $474.16, failed to keep a steady job, and told her probation officer that she could not keep applying for a job because she was seeking Social Security benefits.[187]

Montgomery introduced testimony that she had made repeated efforts to keep steady employment, and a mental health counselor testified to the extent of her mental illnesses.[188] When the Government's vocational rehabilitation counselor was asked about Montgomery's employability, he responded he had "'some concerns.'"[189] The district court found, based on a preponderance of the evidence, that Montgomery had engaged in a pattern of manipu-

182. *Id.* at 672–73.
183. *Id.* at 674.
184. 532 F.3d 811 (8th Cir. 2008).
185. *Id.* at 812–13.
186. *Id.* at 813.
187. *Id.*
188. *Id.*
189. *Montgomery*, 532 F.3d at 813.

lation and did not find her efforts to be bona fide,[190] revoking supervised release and sentencing her to an additional eleven months of incarceration.[191]

The Eighth Circuit Court of Appeals affirmed the revocation, finding the district court did not commit clear error.[192] The circuit court applied the *Bearden* analysis but found that the district court had found Montgomery willfully failed "'to acquire the resources to pay'" and, in light of such willfulness, did not need to consider fundamental fairness or "alternative measures of punishment," as argued by her counsel.[193] The question is, however: Should someone suffering from mental illness be factually found to be willfully not attempting to make bona fide efforts?[194] In a factual close call, the circuit courts of appeal are in no position to disturb the rulings of a district court judge based on a cold record.[195]

Are we moving in the right direction? "If poverty tends to criminalize people, it is also true that criminalization inexorably impoverishes them."[196] Professors Baird and Jackson described the laws of early English history as "'viciously punitive from the perspective of the debtor.'"[197] History has not been kind to deadbeats, as:

---

190. *Id.* at 814. Particularly of note to the district court was the fact that she had found work at varying times, but then lost her jobs subsequently thereafter. *Id.*

191. *Id.*

192. *Id.* at 815.

193. *Montgomery*, 532 F.3d at 814.

194. *See* Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 520 (2004).

> Today's evidence reveals that the problem posed by mentally ill offenders goes beyond the narrow question of how many raise the defense, successfully or not, in their court cases because this number remains very small. But millions of severely mentally ill persons are warehoused in the modern-day equivalent of the sanitariums of the 1930s and 1940s, dark "pest-houses" where "patients" were held for custody, not cure. Despite congressional recognition in the 1950s that such conditions were barbaric, today many sick individuals exist in an equally repugnant environment, often locked away in solitary confinement where self-mutilation, suicide attempts, and other desperate cries for help are answered with inhumane punitive measures justified under findings of "rule violations." Political reaction to unfounded fears wound up creating a situation many times worse, and much more intractable, than that originally imagined.

Id. at 520–21 (footnotes omitted).

195. *See, e.g.*, United States v. Morin, 889 F.2d 328, 331 (1st Cir. 1989) (stating decision revoking probation "will not be reversed absent a clear showing of an abuse of discretion").

196. Barbara Ehrenreich, Op-Ed., *Is It Now a Crime to Be Poor?*, N.Y. TIMES, Aug. 9, 2009, at 9.

197. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 n.12 (1995) (quoting DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 27–28 (2d ed. 1990)).

> English law was not unique in its lack of solicitude for debtors. History's annals are replete with tales of draconian treatment of debtors. Punishments inflicted upon debtors included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment, and death. In Rome, creditors were apparently authorized to carve up the body of the debtor, although scholars debate the extent to which the letter of that law was actually enforced.[198]

History indicates that in the United States, imprisonment for debt was abolished at the federal level in 1833.[199] However, the decisions of the Supreme Court in *Tate*, *Williams*, and *Bearden* suggest that it was not, where the offender is morally culpable and where sentenced to probation or supervised release, willfully fails to satisfy repayment orders, as determined by the district courts.[200] The decisions in *Dolan*, *Fu Sheng Kuo*, and *Pickett* suggest that mandatory restitution means no less than mandatory restitution, regardless of due process concerns.[201] It would seem the direction we are moving in is the direction of our past.

Incarceration, followed by supervised release, followed by incarceration upon failure to pay, seems to be perpetuating a jailhouse cycle.[202] Moreover, the presumption that jailing a probationer for nonpayment of debt is the best way to ensure repayment falls short when as Justice O'Connor suggests in *Bearden*, that to avoid more prison, the probationer may well resort to criminal activity to repay his or her obligations.[203] The "tough on crime" selling point of the victims' rights movement and the statutes enacted in response,

---

198. Tabb, *supra* note 198, at 7. "Imprisonment for debt was the order of the day, from the time of the Statute of Merchants in 1285, until Dickens' time in the mid-nineteenth century." *Id.*

199. *Id.* at 16.

200. *See* Bearden v. Georgia, 461 U.S. 660, 670 (1983); Tate v. Short, 401 U.S. 395, 400–01 (1971); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997).

201. *See* Dolan v. United States, 130 S. Ct. 2533, 2539 (2010); United States v. Fu Sheng Kuo, 620 F.3d 1158, 1163 (9th Cir. 2010); United States v. Pickett, 612 F.3d 147, 149 (2d Cir. 2010).

202. *See* Wendy McElroy, *The Return of Debtors' Prison?*, FREEMAN Apr. 2008, at 30, 34.

> Imprisonment . . . is an unnecessary and dangerous exception to the due process to which every individual is entitled both by the Constitution and by natural right. It also involves a confusing, inconstant maze of laws that collapse the traditional distinction between criminal and civil courts. As Justice Black observed, "It would be no overstatement . . . to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law."

Id.

203. Bearden v. Georgia, 461 U.S. 660, 670–71 (1983).

are questionable at best.[204] "The most salient points of this statement should be underscored—America has increased its incarceration rate 500% in twenty-five years, it has 5% of the world's population but 25% of its prisoners, and it competes only with Russia for world leadership in putting people in prisons and jails."[205] This may well cast a dystopian shadow on the efficacy of the MVRA itself, despite the well wishes of the public.

VI. CONCLUSION

When the public considers the damage and harm caused by white collar criminals such as Martin Frankel—looted more than $200 million from the insurance industry, Kenneth Lay—participated in Enron's fraud of more than $1 billion from its shareholders, Bernard Ebbers—complicit with WorldCom's accounting practices, which resulted in the theft of $3.8 billion from its shareholders, and Bernard Madoff—ordered to pay $170 million in restitution of the $64.8 billion in investment fraud he orchestrated, then the MVRA seems like a blessing and a godsend, and the decision of the Supreme Court in *Dolan* seems like a wise and proper outcome.[206] However, few offenders have a decent enough education to commit large-scale sophisticated crimes dreamt up in the confines of remote ivory towers.

For the rest of society, consider that mandatory restitution has placed a Herculean burden on many offenders, particularly the indigent ones. This actually discourages offender rehabilitation, and the "corresponding economic hardship can directly and indirectly cause recidivism."[207] A policy of admittedly acquiescing to a jailhouse cycle surely implicates whether our constitution protections of fundamental fairness have been stripped to the bone. Additionally, are we doing ourselves any favors when we turn prisons into warehouses for the sick and indigent, at a heavy price, that we all bear?

Therefore, the outcome of *Dolan* is another victory for victims, but a substantial loss for the rehabilitation movement once led by reformers like Augustus. Augustus was careful to only choose those offenders he felt had a chance to turn their lives around and make a difference. Augustus never chose people that arguably would be set up for failure. If we intend to pur-

---

204. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1689, 1704 n.119 (2009) (discussing that Congress was made aware that recidivism would increase, but declined to address it).

205. Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 309 (2004–2005).

206. *See generally* Henry Shea, *Top 10 List: Lessons Learned From White-Collar Criminals*, ST. THOMAS LAWYER, *available at* http://www.stthomas.edu/lawmagazine/2008/winter/top10list.html (last visited Apr. 20, 2011).

207. Dickman, *supra* note 205, at 1707.

sue the slippery slope of the redolent path returning to victim-centric approach of yore, where will we stop? The Constitution will become meaningless if Congress lacks the political courage to draw the line when remedies like restitution erode the protections of the Bill of Rights as well as the Due Process Clause. The High Court does no better when it engages in activism. If we are going to move towards the past, perhaps it is time we start to carefully scrutinize which past we choose.