

THE MANDATORY VICTIMS RESTITUTION ACT IS  
UNCONSTITUTIONAL. WILL THE COURTS SAY SO AFTER  
*SOUTHERN UNION V. UNITED STATES?*

*Judge William M. Acker, Jr.\**

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INTRODUCTION

On June 21, 2012, the scene changed dramatically with respect to the constitutionality of the Mandatory Victims Restitution Act (MVRA),<sup>1</sup> a statute that the writer of this Article has long thought unconstitutional but without any federal judges, except dissenters, agreeing with him. If this Article is grinding an axe, the axe was given a sharp edge on June 21, 2012, when the Supreme Court decided *Southern Union Co. v. United States*.<sup>2</sup>

The writer is a Senior United States District Judge who no longer takes criminal assignments. In years past, he has expressed himself officially on the MVRA, stating his view that the statute violates the Fifth and Sixth Amendments. He has no hesitancy in expressing himself again on the subject, this time unofficially, but with the hope of drawing attention to lingering serious constitutional issues.

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1. 18 U.S.C. §§ 3613A, 3663A (2006).  
2. 132 S. Ct. 2344 (2012).

When the Supreme Court, speaking through Justice Sotomayor, decided *Southern Union*, it, for the first time, flatly held that the Fifth and Sixth Amendments, given the importance to which the two amendments are entitled, as was elaborated in *Apprendi v. New Jersey*,<sup>3</sup> apply to the imposition of criminal fines, as well as to other criminal penalties.<sup>4</sup> It is past time for the Supreme Court and the other federal courts to apply the *Southern Union* and *Apprendi* reasoning to the MVRA. The Supreme Court now has before it such a prospect in *Allelyne v. United States*,<sup>5</sup> in which it granted certiorari to review the Fourth Circuit's unpublished opinion.<sup>6</sup> *Allelyne* will be mentioned again later in this Article.

In a line of cases focusing on the roles of judge and jury in fact-finding related to criminal sentencing, the Court in recent years has elevated the status of the jury trial guarantee of the Sixth Amendment, finding that judicial fact-finding as part of criminal sentencing is unconstitutional, and reemphasizing the importance of the "due process" provided by the Fifth Amendment.<sup>7</sup>

In 1999, the Court, after a long hiatus in its commentary on the subject at hand, decided *Jones v. United States*, where it acknowledged that its prior jurisprudence, properly understood, should have made it clear that the "due process" guaranteed by the Fifth Amendment and the jury trial promise of the Sixth Amendment, taken together, assure that any fact, other than a prior conviction, that increases the maximum criminal penalty must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>8</sup>

The very next term in 2000, in the watershed case of *Apprendi*, the Court seemed to carve into stone the *Jones* ruling. It repeated with renewed emphasis its conclusion that "any fact" other than that of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>9</sup> In *Apprendi*, the Court examined New Jersey's hate crime statute, which allowed the trial judge, upon a preponderance of the evidence, to make a factual determination as to whether the defendant committed his crime with the purpose of intimidating a person or group because of race, after which the sentencing court could use its said finding, if positive, to

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3. 530 U.S. 466 (2000).

4. *S. Union*, 132 S. Ct. at 2357.

5. 133 S. Ct. 420 (2012).

6. 457 F. App'x 348 (2012).

7. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi*, 530 U.S. 466.

8. 526 U.S. 227, 243 n.6 (1999).

9. *Apprendi*, 530 U.S. at 490.

increase the maximum sentence.<sup>10</sup> The defendant there had been convicted of a second degree weapons offense, but the sentence was imposed for a first degree offense as a result of the hate element found by the judge without a jury.<sup>11</sup> The Supreme Court held that the statute violated both the Fourteenth and the Sixth Amendments because, when taken together, these constitutional provisions require that all relevant factual determinations be made by a jury on the basis of proof beyond a reasonable doubt.<sup>12</sup>

In *Harris v. United States*, the Court in 2002 seemed to hesitate, upholding the constitutionality of a federal statute that increased the minimum sentence if a firearm had been brandished by the defendant during a drug-trafficking crime.<sup>13</sup> The statute consigned to the sentencing judge the determination of the brandishing question upon a mere preponderance of the evidence.<sup>14</sup> It is *Harris* that is being challenged in *Alleyne*. In this writer's opinion, the Supreme Court granted certiorari in *Alleyne* intending to reconsider and probably to overrule *Harris*.

In *Ring v. Arizona*, the Court in 2002, the same year that it decided *Harris*, unhesitatingly applied *Apprendi* to an Arizona law that authorized the death penalty if the judge, without a jury, found one or more of ten aggravating factors.<sup>15</sup> The Court, despite *Harris*, which immediately preceded it, held that the defendant's Sixth Amendment rights were violated after the judge imposed a sentence greater than the statutory maximum by employing non-jury fact-finding.<sup>16</sup>

In 2004, in *Blakely v. Washington*, the Court, reviewing the sentencing guidelines of Washington, further clarified *Apprendi*, holding that the words "statutory maximum" for *Apprendi* purposes mean the maximum sentence that a trial court can impose under the facts clearly established by the jury verdict or admitted by the defendant.<sup>17</sup> If *Apprendi* needed any reinforcement, *Blakely* provided it. The Court enunciated once again the core principle that a trial court cannot rely on any "additional findings" to increase punishment beyond what the evidence heard by and agreed to by the jury can justify.<sup>18</sup> The judge "exceeds his proper authority" if he "inflicts punishment that the jury's verdict alone does not allow."<sup>19</sup> The Court in *Blakely* concluded that the defendant's rights were compromised

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10. *Id.* at 468–69.

11. *Id.* at 470, 491.

12. *Id.* at 490.

13. 536 U.S. 545, 568 (2002).

14. *Id.* at 551.

15. 536 U.S. 584, 592–93 n.1 (2002).

16. *Id.* at 609.

17. 542 U.S. 296, 303 (2004).

18. *Id.* at 303–04.

19. *Id.* at 304.

when he was sentenced to more than three years above the statutory maximum after the trial judge had found, post-verdict, that the defendant had acted with “deliberate cruelty.”<sup>20</sup>

In the highly anticipated case of *United States v. Booker*, the Court in 2005 held that the Federal Sentencing Guidelines are also subject to the jury trial requirements of the Sixth Amendment.<sup>21</sup> Before *Booker*, district judges were obligated to impose sentences within the Federal Sentencing Guidelines range, absent certain exceptions.<sup>22</sup> In *Booker*, the Court once again applied *Apprendi* and held that a defendant’s Sixth Amendment right “is implicated whenever a judge seeks to impose a sentence that is not solely based on ‘facts reflected in the jury verdict or admitted by the defendant.’”<sup>23</sup> Justice Breyer, delivering the opinion of the Court in part, held that the provision of the Federal Sentencing Act making the Guidelines mandatory is incompatible with the Sixth Amendment.<sup>24</sup> The Court severed this unconstitutional provision and rendered the Guidelines merely advisory.<sup>25</sup> The key word for the purpose of reexamining the MVRA in relationship to *Booker* is the shared word “mandatory.”

In *Cunningham v. California*, decided in 2007, the Court had no problem in applying *Apprendi* to a California statute authorizing longer prison terms upon the trial judge’s finding of enumerated aggravating circumstances.<sup>26</sup> The Court called for a “bright-line rule,”<sup>27</sup> a rule that the lower courts as yet have not been able to find or to apply with any degree of consistency.<sup>28</sup>

The Supreme Court has, in these closely sequential decisions, advertized, once retreated from, and then re-advertized its belief that a trial judge cannot mete out any “punishment” for which the jury has not found the requisite “facts” upon which to base the sentence.<sup>29</sup>

In *Southern Union*, the reason for this Article, the Supreme Court granted certiorari to review the holding of the First Circuit that a criminal fine could be levied without all prerequisite facts having been found by a

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20. *Id.* at 313.

21. 543 U.S. 220, 244 (2005).

22. *See* 18 U.S.C. § 3553(b)(1) (2000), *invalidated by* *United States v. Booker*, 543 U.S. 220 (2005).

23. 543 U.S. at 232 (citing *Blakely*, 542 U.S. at 303). Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in *Booker*’s drug case was twenty-one years and ten months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence that mandated a sentence of thirty years. *Id.* at 221.

24. *Id.* at 266 (Breyer, J.).

25. *Id.*

26. 549 U.S. 270, 294 (2007).

27. *Id.* at 288.

28. *Id.* at 291–92.

29. *Blakely v. Washington*, 542 U.S. 296, 305 (2004).

jury.<sup>30</sup> The Court's reaction to the First Circuit's ruling was eye-widening. The First Circuit had framed the issue as follows: "whether a criminal fine must be vacated under *Apprendi v. New Jersey*, where a judge, and not a jury, determined the facts as to the number of days of violation under a schedule of fines."<sup>31</sup> Southern Union had been convicted of a single count of violating 42 U.S.C. § 6928(d)(2)(A), the provision of the Resource Conservation and Recovery Act (RCRA) that criminalizes conduct found to affect the environment adversely.<sup>32</sup> Southern Union was charged with storing hazardous waste without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days.<sup>33</sup> The jury was not asked to find, and did not find, the actual number of days of violation, or the duration of any particular violation.<sup>34</sup> Assuming that the trial court's instructions were understood by the jury in accordance with the rules of English grammar, there was no way the jury could find guilt for 762 days or for any lesser number of days, that is, except for one day. At sentencing, the trial court supplied its own answer to the enigma.<sup>35</sup> The penalty provision of RCRA, 42 U.S.C. § 6928(d), imposes a fine of "not more than \$50,000 for each day of violation."<sup>36</sup> The presentence report set the maximum fine at \$38.1 million, a sum arrived at by multiplying \$50,000 by 762, the full number of days of the "on or about" violation charged in the indictment, but not possibly found by the jury.<sup>37</sup> Southern Union strenuously objected to this calculation on the ground that a fine of more than \$50,000 representing more than one day of violation transgressed the Sixth Amendment.<sup>38</sup> The trial court did not disagree with Southern Union's contention that *Apprendi* required the jury alone to find the violation dates for calculating the maximum fine under §6928(d) but strangely proceeded to find no *Apprendi* violation because the "content and context of the verdict all together" indicated that the jury had determined the necessary dates.<sup>39</sup> The trial court, apparently wishing to honor the broad congressional intent and apparently believing that Congress meant to allow the trial court to read the jury's mind or to interpolate the jury verdict

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30. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2349 (2012).

31. *United States v. S. Union Co.*, 630 F.3d 17, 21 (1st Cir. 2010) (citation omitted), *rev'd*, 132 S. Ct. 2344 (2012).

32. *Id.* at 24.

33. 132 S. Ct. at 2349 (emphasis added) (citing Joint Appendix at 104, *S. Union Co. v. United States*, 132 S. Ct. 2344 (No. 11–94), 2012 WL 122801, at \*104).

34. *Id.*

35. *Id.*

36. 42 U.S.C. § 6928(d)(7)(B) (2006).

37. *S. Union*, 132 S. Ct. at 2349.

38. *Id.*

39. *Id.* (citing *United States v. S. Union Co.*, CR. 07-134 S, 2009 WL 2032097, at \*3 (D.R.I. July 9, 2009), *aff'd*, 630 F.3d 17 (1st Cir. 2010), *rev'd*, 132 S. Ct. 2344 (2012)).

extravagantly in order to accomplish the congressional purpose, came up with its own fine. Without explaining how its figure was arrived at, the trial court imposed a \$6 million fine and a \$12 million community service obligation on Southern Union, which promptly appealed to the First Circuit.<sup>40</sup>

The First Circuit rejected Southern Union's argument. It nevertheless affirmed the trial court but employed totally different reasoning to do so. It unabashedly held that "the *Apprendi* rule does *not* apply to the imposition of statutorily prescribed fines."<sup>41</sup> The First Circuit relied on the Supreme Court's decision in *Oregon v. Ice*,<sup>42</sup> in which that Court had rejected an *Apprendi* challenge to a state sentencing scheme that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences. The Court, in *Ice*, discussed the common law history of imposing sentences consecutively rather than concurrently and found that it was the judge and not the jury that had historically made such decisions.<sup>43</sup> In *Ice*, the Court used the following language:

Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution. Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.<sup>44</sup>

The First Circuit concluded that the above-quoted language from *Ice* was entitled to "great weight" and characterized it as "an express statement . . . that it is inappropriate to extend *Apprendi* to criminal fines."<sup>45</sup>

When the Supreme Court granted Southern Union's petition for certiorari, it was not just to clarify *Ice*, but to resolve the mounting conflict between the First Circuit's conclusion that *Apprendi* does not apply to criminal fines and the contrary conclusions reached by the Second Circuit in *United States v. Pfaff*,<sup>46</sup> and by the Seventh Circuit in *United States v.*

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40. *Id.*

41. *United States v. S. Union Co.*, 630 F.3d 17, 22 (1st Cir. 2010), *rev'd*, 132 S. Ct. 2344 (2012) (emphasis added).

42. *Oregon v. Ice*, 555 U.S. 160 (2009).

43. *Id.* at 170.

44. *Id.* at 171–72 (citation omitted).

45. *S. Union*, 630 F.3d at 34.

46. 619 F.3d 172 (2d Cir. 2010).

*LaGrou Distribution Systems*.<sup>47</sup> The latter two courts employed *Apprendi* to vacate criminal fines, not to justify them.<sup>48</sup> In reversing the First Circuit, the Supreme Court held unequivocally for the first time that *Apprendi* does apply to the imposition of criminal fines.<sup>49</sup> The Court explained that it had never distinguished one form of penal sanction from another, so that *Apprendi* applies to all criminal sanctions.<sup>50</sup> Although the punishments discussed in earlier Supreme Court Sixth Amendment opinions had involved imprisonment or the death sentence, and not a fine, the Court in *Southern Union* found that there is no principled basis for treating fines differently from other penalties.<sup>51</sup> The Court pointed out: “Instead, our decisions broadly prohibit judicial fact-finding that increases maximum criminal ‘sentence[s],’ ‘penalties,’ or ‘punishment[s]’—terms that each undeniably embrace fines.”<sup>52</sup>

What does *Southern Union* mean for a serious examination of the constitutionality of the MVRA? The MVRA *requires* courts, when sentencing defendants convicted of enumerated federal crimes, to order restitution to all identifiable victims in the full amount of the victims’ losses.<sup>53</sup> *Southern Union* is an arrow pointed at the heart of the MVRA. It reduces one tangential expression in *Ice* to a mere inadvertence and *Harris* to a mistake that needs to be rectified. As petitioner, *Southern Union* understandably disclaimed any contention that its case implicated the MVRA.<sup>54</sup> Justice Sotomayor makes no mention of the MVRA or of “restitution,” but court-ordered “restitution” is so similar to a “fine” that the question about *Apprendi*’s relationship to the MVRA was, in the writer’s view, spoken to by necessary implication.

After this writer twice, while operating as a judge, held the MVRA to be unconstitutional, the United States, presumably after consultation with the Solicitor General, decided in both instances not to appeal. The view of the writer has not been hidden from the United States, from lawyers, or from judges.<sup>55</sup> The light that *Southern Union* sheds on the question will

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47. 466 F.3d 585 (7th Cir. 2006).

48. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2349 (2012).

49. *Id.* at 2357.

50. *Id.* at 2352.

51. *Id.* at 2350–51.

52. *Id.* at 2350 (emphasis added).

53. 18 U.S.C. § 3663A(a)(1) (2006).

54. *See* Petition for Writ of Certiorari, *S. Union*, 132 S. Ct. 2344 (No. 11-94), 2011 WL 2877878, at \*17 n.10.

55. *See* *United States v. Searcy*, 293 F. Supp. 2d 1248 (N.D. Ala. 2003); *United States v. Bishop*, 228 F. Supp. 2d 1306 (N.D. Ala. 2002); *United States v. Kemp*, 938 F. Supp. 1554 (N.D. Ala. 1996) (appeal dismissed by the Eleventh Circuit on motion of the United States). *See also* *United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). Prior to the enactment of the MVRA, the writer held the Victim and Witness Protection Act, a precursor to the MVRA, discussed *infra*, unconstitutional on its face as violative of the right to a jury trial under the Seventh Amendment and violative of the Fifth

give pause to the federal courts, including the Supreme Court, when they are next confronted with a constitutional challenge to the MVRA.

### VICTIM AND WITNESS PROTECTION ACT

It goes without saying that a federal court can only order restitution to the extent authorized by statute. Prior to 1982, federal law authorized restitution only as a condition to a defendant's probation.<sup>56</sup> That was the year this writer became a federal judge.

In the 1970s and 1980s, a movement for victims' rights got underway. This influential but unthinking group believed that the justice system was too focused on the protection of the rights of offenders at the expense of victims.<sup>57</sup> In response to this movement, President Reagan established a Task Force on Victims of Crime.<sup>58</sup> The Task Force recommended that Congress "[r]equire restitution in all cases, unless the court provides specific reasons for failing to require it."<sup>59</sup>

In 1982, fluffing off the Sixth Amendment, Congress passed, and President Reagan signed, the Victim and Witness Protection Act (VWPA).<sup>60</sup> The VWPA provides federal courts with *discretionary* authority to order restitution to victims of most federal crimes.<sup>61</sup> Congress declared that one of the purposes of the VWPA 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*."<sup>62</sup> How to avoid infringing on a defendant's constitutional rights is the big, as yet unanswered, question. The VWPA codified many recommendations of the Task Force, including the use of a victim impact

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Amendment requirements of due process and equal protection. See *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *aff'd in part, rev'd in part sub nom. United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). The writer also expressed his view that restitution under the Victim and Witness Protection Act is impractical and unworkable in an article in the *Federal Sentencing Reporter*. See William M. Acker, Jr., *Making Sense of Victim Restitution: A Critical Perspective*, 6 *FED. SENT'G REP.* 234 (1993-1994).

56. Federal Probation Act of 1925, ch. 521, 43 Stat. 1259 (1925) (codified as amended at 18 U.S.C. § 3651 (1982)) (repealed 1984) ("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 . . .").

57. Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711, 2719-20 (2005).

58. *Id.* See also PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter FINAL REPORT].

59. FINAL REPORT, *supra* note 58, at 18.

60. Pub. L. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3663, 3664 (2006)).

61. 18 U.S.C. § 3663(a)(1)(A) (2006).

62. Pub. L. No. 97-291 § 2, 96 Stat. 1248, 1249 (1982) (emphasis added).

statement in presentence reports to furnish materials upon which the court can calculate the harm to a victim.<sup>63</sup> The VWPA obligates the trial court to consider both the amount of loss and the financial resources of the defendant.<sup>64</sup> Under the VWPA, the court can decline to order restitution upon a simple finding that the complication and prolongation of the sentencing process that results from formulation of a restitution order outweighs the need for restitution.<sup>65</sup>

In the years between the enactment of the VWPA and the enactment of the MVRA, federal judges ordered restitution in only 20.2% of the cases.<sup>66</sup> Judges more often than not invoked their discretion not to impose restitution in cases where the defendant was indigent.<sup>67</sup> This resistance by sentencing courts to the VWPA led Congress in 1996 to conclude that “[n]o longer [would] the defendant’s financial situation take precedence over his victim’s.”<sup>68</sup>

#### MANDATORY VICTIMS RESTITUTION ACT

Finding that the VWPA was not achieving its purpose, Congress amended the statute and largely replaced it with the MVRA, as part of the Antiterrorism and Death Penalty Act of 1996.<sup>69</sup> Unlike the VWPA, the MVRA is an absolutist statute. It *requires* the trial court to order restitution to all identifiable victims of certain crimes for the full amount of the victims’ physical losses, pecuniary losses, or both, without consideration of the defendant’s economic circumstances.<sup>70</sup> The operative word is “mandatory.” The MVRA, as a practical matter, eliminates all court discretion, and makes restitution obligatory, without a jury trial and without any burden upon the government or upon the victim to prove, beyond a reasonable doubt, the essential elements upon which the sanction of restitution can be fashioned.

Congress explained that the MVRA was needed to “ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due,” and further to “ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to

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63. Kleinhaus, *supra* note 57, at 2722.

64. § 3663(a)(1)(B)(i)(II).

65. § 3663(a)(1)(B)(ii).

66. Kleinhaus, *supra* note 57, at 2725.

67. *See* 141 CONG. REC. H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Conyers). *See also* Acker, *supra*, note 55.

68. 141 CONG. REC. H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Hyde).

69. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. § 3663A (2006)).

70. § 3663A(a)(1); *see also* 18 U.S.C. § 3664(f)(1)(A) (2006).

society.”<sup>71</sup> During the congressional consideration of the MVRA, representatives of the Judicial Conference of the United States warned that 85% of federal offenders were “indigent at the time of sentencing,” and that mandatory restitution would not lead to any increased benefit for victims.<sup>72</sup> The Senate responded: “[T]his 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.”<sup>73</sup>

Under the MVRA, restitution follows automatically when a defendant has been convicted of, or pleads guilty to, certain crimes.<sup>74</sup> In order to qualify as a “victim,” a person or business entity must, as in common law tort claims, have been directly or proximately harmed by the crime. Shades of *Palsgraf*.<sup>75</sup>

As with the VWPA, if the court finds from the record (whatever the “record” may consist of), in cases of offenses against property, including fraud and deceit, that the number of victims is so large as to make restitution impracticable, or that determining complex issues of fact related to the cause of the victim’s losses, or their amount, would complicate or prolong the sentencing process to a degree that the providing of restitution is outweighed by the burden on the sentencing process, the court may decline to order restitution.<sup>76</sup> This is meaningless ghost language left over from the VWPA. Courts have rarely attempted to employ this language as

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71. S. REP. NO. 104-179, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 925.

72. *Id.* at 18. The Judicial Conference of the United States was created by Congress in 1922 to aid in policy making that effects the administration of the federal courts. During congressional hearings on the MVRA, U.S. District Judge Maryanne Trump Barry, chair of the Committee on Criminal Law of the Judicial Conference, testified to Congress on behalf of the Judicial Conference. *See A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995).

73. S. REP. NO. 104-179, at 18.

74. § 3663A(c). The MVRA did not supplant the VWPA, so a court in its discretion may still order restitution to be paid to the victims of federal crimes provided for in the VWPA. Presumptively, the court cannot do both.

75. Congress explained this causation standard as follows:

The committee intends this provision to mean, except where a conviction is obtained by a plea bargain, that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under [the convicted offense(s)]. . . . In all cases, it is the committee’s intent that highly complex issues related to the cause or amount of a victim’s loss not be resolved under the provisions of mandatory restitution. The committee believes that losses in which the amount of the victim’s losses are speculative, or in which the victim’s loss is not clearly causally linked to the offense, should not be subject to mandatory restitution.

S. REP. NO. 104-179, at 19. The Supreme Court has held that restitution may only be ordered “for the loss caused by the specific conduct that is the basis of the offense of conviction.” *Hughey v. United States*, 495 U.S. 411, 413 (1990) (prior to the enactment of the MVRA, addressing restitution ordered pursuant to the VWPA).

76. § 3663A(c)(3).

an escape device from the ominous and overriding word “mandatory.” When Congress repudiated the VWRA by enacting the MVRA, it did not mean to let the courts side-step restitution. During the VWPA regime, this writer had pointed out why and how the courts could avoid the impossible task imposed upon them. Many courts took that advice.<sup>77</sup> If this recalcitrance led Congress to the MVRA, the writer regrets his small contribution to the disaster. On the few occasions in which this ghost from the VWPA has been laboriously employed by a trial court in an MVRA case, it has rarely met with success upon appellate review. “Mandatory” means “mandatory.” This writer cannot advise any court today how to escape the clutches of the MVRA, that is, without finding that the statute is unconstitutional, something the lower courts have been unwilling to do.

Section 3664 of the MVRA unsuccessfully attempts to establish procedures for issuing and enforcing the restitution order.<sup>78</sup> The process begins with the district court directing the probation officer to obtain and provide information in the form of a presentence report from which the court can attempt to fashion a restitution order.<sup>79</sup> The writer has never seen or heard of any such *written* order from a trial judge to a probation officer. After consulting all identified victims to the extent practicable, the United States Attorney is *required* to provide the probation officer, no later than sixty days before the sentencing hearing (whenever that may be), with a list of all victims and the amounts subject to restitution.<sup>80</sup> Prior to submitting the presentence report, the probation officer *must* provide notice to all identified victims of (1) the amounts subject to restitution; (2) the opportunity to submit information concerning the losses; (3) the scheduled date, time, and place of the sentencing hearing; (4) the availability of a lien in favor of the victim; and (5) the opportunity to file an affidavit relating to the amount of the victim’s losses.<sup>81</sup> The probation officer’s report must also include, to the extent practicable, a complete accounting of each victim’s loss, the amount of the restitution, if any, owed pursuant to a plea agreement, and information reflecting the economic circumstances of the defendant.<sup>82</sup> This procedure implies that the victim is precluded from participating in plea negotiations at the very time when looking after his interest is most critical to him. Victims are not promised that they can offer

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77. *See supra* note 55.

78. Section 3664 also governs the issuance and enforcement of orders of restitution authorized pursuant to the VWPA.

79. 18 U.S.C. § 3664(a) (2006). *See also* FED. R. CRIM. P. 32(c)(1)(B) (2009) (“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.”).

80. § 3664(d)(1).

81. § 3664(d)(2)(A)(i)–(vi).

82. § 3664(a).

evidence, except by affidavit, or informed how to disagree with the restitution amount suggested by the probation officer or with the amount set forth in a plea agreement to which they are not a party.

After reviewing the probation officer's report, the court may act on the report alone, request additional documentation, or conduct a separate restitution hearing.<sup>83</sup> Separate restitution hearings are rare. If the victim's losses cannot be determined by the trial court from the report alone, within ten days before the imposition of the sentence, the U.S. Attorney or the probation officer must so advise the defendant, and the court must then within ninety days after the imposition of a custodial or probationary sentence or a fine, set a hearing for the determination of every victim's compensable loss and the ordering of restitution.<sup>84</sup> The sequence of events is so unworkable as to be bizarre. The amount of restitution for numerous victims cannot be aggregated. It must be broken down among victims. If the MVRA is taken seriously, the Eighth Circuit was correct in *United States v. Chaika*, when it required the trial court to make findings and to divide \$6,077,795.30 properly among eight victims.<sup>85</sup> Different kinds of victims, primary and secondary, must be looked at differently according to the Ninth Circuit.<sup>86</sup> The government bears the burden of proving by a mere preponderance of the evidence the essential facts for fixing restitution.<sup>87</sup> Under these circumstances, the trial court predictably agrees with the plea agreement or the presentence report, or both, or, after a desultory hearing, finds that the government has met its burden of proof and routinely awards restitution at a figure somewhere between the maximum and minimum amounts being considered and without regard to the defendant's financial resources.<sup>88</sup> The court is not allowed to consider the fact, if it be a fact, that a victim has received, or is entitled to receive, compensation with respect to his loss from insurance or from any other source, or that he has filed a civil action against or obtained a judgment against the defendant.<sup>89</sup>

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83. § 3664(d)(4).

84. § 3664(d)(5). The Supreme Court has held, however, that even when the sentencing court misses the ninety-day deadline to make the final determination of the victim's losses and impose restitution, the court retains jurisdiction over restitution so as to be able to enter the order later, as long as the court made clear its intent to order restitution prior to the expiration of the deadline. *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010).

85. 695 F.3d 741, 749 (8th Cir. 2012).

86. *United States v. Williams*, 693 F.3d 1067, 1073 (9th Cir. 2012).

87. § 3664(e). The Supreme Court has stated that the preponderance of the evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence . . .'" *In re Winship*, 397 U.S. 358, 371 (1970).

88. § 3664(f)(1)(A).

89. § 3664(f)(1)(B).

In addition to fixing the amount of restitution, the court must fix a payment schedule.<sup>90</sup> At this juncture, the court may, for the first time, consider the defendant's financial circumstances.<sup>91</sup> The writer has found no decision that recognizes a defendant's right, the government's right, or a victim's right, to contest the "schedule" suggested in the presentence report. The court may direct the defendant to make one lump sum payment, an in-kind payment, partial payments at specified intervals, a combination of payments, or may allow nominal payments if the court finds that the defendant's financial situation calls for it.<sup>92</sup> The statutory language, if literally employed, would allow a soft-hearted and fun-loving trial judge to enter the following schedule: (1) the amount of the defendant's monthly prison income while he is in custody;<sup>93</sup> (2) fifty dollars a month while he is on supervised release; and (3) the entire balance (perhaps five million dollars) at the end of supervision or when the defendant wins one million dollars on the lottery, whichever event first occurs. After all, restitution is *mandatory*. Only the schedule is discretionary. The process is so haphazard that it not only frustrates the muddled congressional intent but also elicits snickers or snarls from the parties. Would it cruelly mock the MVRA to point out (1) that if more than one defendant contributed to the loss, the court may make each defendant liable for the full amount of the loss, or may apportion liability among the defendants to reflect their differing levels of contribution;<sup>94</sup> (2) that if more than one victim has sustained a loss and there are more contributing defendants than one, the court may provide a different payment schedule for each victim and each defendant;<sup>95</sup> (3) that the United States can be a victim, but the court must ensure that all other victims receive full restitution before the United States receives anything;<sup>96</sup> and (4) that if a victim has received compensation from insurance or any other source, the court *must* order that restitution be paid to the entity that provided, or is obligated to provide, that compensation?<sup>97</sup> If the insurance company forgets to insinuate itself into the case, the probation officer is supposed to discover it. The cost of administering orders like these will be discussed below.

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90. § 3664(f)(2).

91. *Id.*

92. § 3664(f)(3).

93. *But see* United States v. Rush, 853 F. Supp. 2d 159, 162 (D.D.C. 2012) (holding that a district court that ordered a defendant to pay restitution lacked the authority to set the defendant's monthly payments under the Inmate Financial Responsibility Program (IFRP) at the minimum amount possible because the amount that an inmate had to pay under the IFRP was a matter entrusted to the Executive Branch). *See also* United States v. Sawyer, 521 F.3d 792, 796 (7th Cir. 2008).

94. § 3664(h).

95. § 3664(i).

96. § 3664(i).

97. § 3664(j)(2).

The restitution order constitutes a final judgment, notwithstanding the facts that it can be (1) corrected; (2) appealed; (3) modified; (4) amended; or (5) adjusted.<sup>98</sup> Whether or not a postponement of the actual imposition of the restitution portion of the sentence elongates the time for an appeal is still a matter of debate. A full scale restitution hearing may take longer than the trial itself would have taken. This is a good reason why the Sixth Amendment's guarantee of jury trial, if honored, would contribute to negotiated settlements of the entire case, including the restitution element.

From the time restitution is ordered until it is paid in full, the defendant must inform the court and the Attorney General of material changes in his economic circumstances.<sup>99</sup> Meanwhile, the court can accept information on the subject from the government or from the victim, and, using such hearsay, adjust the defendant's payment schedule, including the ordering of payment in full.<sup>100</sup> The MVRA says absolutely nothing about a hearing, jury or non-jury, before an amended payment schedule can be ordered.

Upon finding that a defendant has defaulted on restitution, the court may revoke probation or supervised release.<sup>101</sup> In other words, the court can send a defendant to jail for debt.<sup>102</sup> The number of times sentencing courts have received financial updates and thereupon revoked a defendant is unknown. Self-reporting by a dead-beat or a well-off defendant is improbable. Financial resources take constant monitoring. Otherwise, the provision allowing amendment of restitution is meaningless. Although no empirical study has been performed, it can readily be deduced that the implementation of restitution is an impossible task for U.S. Attorneys, overworked courts, and administrative personnel.

#### VIOLENCE AGAINST WOMEN ACT

Shortly before enacting the MVRA, Congress made restitution mandatory for victims of sex crimes, child exploitation, and related crimes in the Violence Against Women Act,<sup>103</sup> (VAWA or Section 2259). As with

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98. § 3664(o)(1)–(2). Courts routinely hold that a defendant has waived his right to appeal a court's restitution order when a defendant has signed an appeal waiver in a plea agreement, even when the plea agreement says nothing about restitution. *See, e.g.*, *United States v. Gibney*, 519 F.3d 301, 306 (6th Cir. 2008) (because "restitution is a part of one's sentence under the statutory scheme," defendant waived right to appeal restitution order when he waived right to appeal sentence) (quoting *United States v. Vandenberg*, 201 F.3d 805, 814 (6th Cir. 2000)); *United States v. Johnson*, 541 F.3d 1064, 1067 (11th Cir. 2008) ("[A] waiver of the right to appeal a sentence necessarily includes a waiver of the right to appeal the restitution imposed.").

99. § 3664(k).

100. *Id.*

101. 18 U.S.C. § 3613A(a)(1) (2006).

102. 18 U.S.C. § 3614(a) (2006).

103. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2259 (2006)).

the MVRA, the offender under VAWA is absolutely and without exception *required* to pay restitution in the full amount of his victims' losses.<sup>104</sup> The defendant's financial situation is not considered.<sup>105</sup> The procedures for imposing and enforcing restitution orders under VAWA may have been used as a template by Congress in drafting the MVRA.<sup>106</sup> The Fifth and Sixth Amendment questions arising from the mandatory feature in both statutes are unavoidable. The constitutionality of the VAWA is beyond the scope of this Article. It is hoped that the VAWA's brooding presence will not intimidate the courts that are called upon to evaluate the MVRA in the light of *Southern Union*. The writer is not undertaking to kill two birds with one stone, but he does see the other bird. The VAWA problem that will eventually have to be faced was recently accented by stark disagreement between the en banc Fifth Circuit in *In re Amy Unknown* (in which that badly divided court decided under the VAWA that every convicted possessor of the same pornographic images must pay for all losses sustained by the imaged victim without proof of proximate cause and without regard to how many convicted or charged possessors there may be or how much the victim has already received from other convicts), and the Seventh Circuit in *United States v. Laraneta* (which requires that the trial court allocate the victim's losses among many defendants in accordance with the losses traceable to the conduct of particular defendants).<sup>107</sup>

#### CRIME VICTIMS RIGHTS ACT

Further complicating the inquiry, victims of federal crimes are provided with a bundle of rights by another statute, the Crime Victims Rights Act (CVRA), part of the Justice for All Act of 2004.<sup>108</sup> This statute overlaps and must be reconciled with the VWPA, the MVRA, and the VAWA. Crime victims have “[t]he right to full and timely restitution as provided in law,” specifically the MVRA and VAWA.<sup>109</sup> The CVRA provides victims a right to appear, to be heard, and to consult with the government attorney.<sup>110</sup> The CVRA requires the government to “make [its] best efforts to see” that the court in which the prosecution is pending

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104. 18 U.S.C. § 2259(b)(1) (2006).

105. *Id.*

106. § 2259(b)(2).

107. *In re Amy Unknown*, 701 F.3d 749, 774 (5th Cir. 2012); *United States v. Laraneta*, 700 F.3d 983 991–92 (7th Cir. 2012).

108. Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)).

109. 18 U.S.C. § 3771(a)(6) (2006).

110. § 3771(a).

permits the victim or victims to appear and be heard.<sup>111</sup> These rights may be enforced by motion made by the victim or by a private attorney on his behalf.<sup>112</sup> How will a trial court decide whether the United States has given its “best efforts,” and what will the court do about it if the United States has not discharged its obligation? The provision of the CVRA that allows victims to employ private counsel, if it was designed to solve or to palliate the inherent, obvious, automatic, and inescapable conflict of interest that federal prosecutors face when they are required to do the impossible and the unethical, fails in both respects.<sup>113</sup> It is both unethical and logically impossible to simultaneously represent the United States and the victim. In practice, not many victims retain private counsel. They rely on the U.S. Attorney, who they have no reason to believe is not representing them, that is, unless they are sophisticated Wall Street defendants. U.S. Attorneys, despite the unequivocal language in the MVRA, occasionally comply with the code of professional conduct by undertaking the unpleasant task of explaining to their “client” the seriousness of the conflict of interest. The only worthwhile “right” provided by the CVRA that the victim did not already have is the right to petition the appellate court for a writ of mandamus if the district court refuses to allow the victim to pursue a restitution claim.<sup>114</sup> Mandamus is a cumbersome procedure, but it beats having no standing whatsoever to seek appellate review.<sup>115</sup>

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111. § 3771(c).

112. § 3771(c)(2) (providing that the U.S. Attorney shall advise the crime victim that the victim can seek the advice of an attorney with respect to his or her rights); § 3771(d)(1) (allowing the crime victim, the U.S. Attorney, and/or the victim’s lawful representative to assert the victim’s rights). Before the CVRA was enacted, the Tenth Circuit rebuked a trial judge presiding over the Oklahoma City bombing prosecutions for permitting an attorney for the bombing victims to participate in oral argument at the sentencing hearing, stating that “[i]n the absence of any authority permitting the participation of victims’ counsel, we harbor concerns about the propriety of the district court’s rulings.” Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 882 (2007) (quoting *United States v. Fortier*, 242 F.3d 1224, 1230 (10th Cir. 2001)). However, the CVRA has changed that.

113. While in some cases eliminating the dual representation of the United States and the victims by the same lawyer, the CVRA has also created its own problems; namely, there is nothing stopping a victim, through his lawyer, from advancing a separate legal theory during the sentencing phase than was advanced by the prosecution during the trial. See *United States v. Hardy*, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010) (observing that the victim argued that no causation needed to be shown prior to his receiving restitution under VAWA, while the defendant and the government both agreed that causation was required); *United States v. Church*, 701 F. Supp. 2d 814, 824–25 (W.D. Va. 2010) (observing difference between the victim’s and government’s legal arguments).

114. § 3771(d)(3). For an example, see *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (granting petition for writ of mandamus filed by home purchasers who had paid mortgage brokerage fees to bank, holding that they qualified as victims under the CVRA and were thus entitled to appear and be heard in guilty plea proceeding for bank executive to charges of conspiracy to deprive bank of honest services, even though home purchasers were not mentioned in the information).

115. *United States v. Johnson*, 983 F.2d 216, 219 (11th Cir. 1993), *superseded by statute*, Mandatory Victim Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227

## THE SIXTH AMENDMENT

The importance of the Fifth Amendment to the criticism of the MVRA will be discussed after the Sixth Amendment's importance is explored. It is the Fifth Amendment that proscribes government interference with a fundamental right without first affording the affected person "due process."<sup>116</sup> The Sixth Amendment follows with the equally important guarantee of the right to a jury trial in all criminal proceedings.<sup>117</sup> As the Supreme Court said in *Apprendi*: "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"<sup>118</sup> After *Apprendi*, *Blakely*, *Booker*, and now *Southern Union*, there is more reason than ever to believe that *all of the facts essential to the imposition of any and all criminal penalties must be proven beyond a reasonable doubt to a jury*. The right of confrontation is, of course, part of the right to a jury trial. As it now stands, the imposition of restitution, mandated as an integral part of a defendant's sentence, is, as a practical matter, controlled by the probation officer in accordance with his levels of integrity, intelligence, and workload. The presentence report, which is based on hearsay, becomes the sole "evidentiary" source for the restitution order. A judge "may accept any undisputed portion of the presentence report as a finding of fact."<sup>119</sup> This means that unless the defendant or the victim has the fortitude to stand his ground with the court on the restitution issue, the court will simply rubberstamp the probation officer's report. The stage at which the defendant is allowed to dispute, or is required at his peril to dispute, the victim's claim, the probation officer's report, or both, is decided, if at all, on an ad hoc basis. If the defendant undertakes to protest the amount of restitution or the schedule of payment, before the judge imposes the custodial sentence, the fine, or both, the defendant might upset the prosecutor, or even worse, the judge. Trial judges are virtually forced to adopt "bureaucratically prepared, hearsay-riddled presentence reports."<sup>120</sup> The principles of *Apprendi*, reiterated most recently in *Southern Union*, cannot be squared with this casual and routine restitution practice. In

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(1996), as recognized in *United States v. Perry*, 360 F.3d 519, 528 (6th Cir. 2004); see also *United States v. Slovacek*, 699 F.3d 423, 425-26 (5th Cir. 2012).

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

117. See 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 . . .").

118. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

119. FED. R. CRIM. P. 32(i)(3)(A).

120. See *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting).

assessing the constitutionality of any statute “as applied,” the way it is usually applied is a necessary part of the inquiry. The MVPA is both unconstitutional on its face and unconstitutional in its usual or actual application.

There are many illustrations of the courts’ casual treatment of the Sixth Amendment in the MVRA context,<sup>121</sup> but the case decided by the Fourth Circuit the day after *Southern Union* was handed down is one that stands out. In *United States v. Jinwright*, the trial court had awarded restitution to the United States for its losses arising out of defendant’s conduct, some of which did not occur during the time period embraced within a charged conspiracy.<sup>122</sup> The trial court, all by itself, “attributed” all of the United States’ losses to the defendant’s “overall” conduct.<sup>123</sup> The defendant had been actually acquitted of some of the conduct alleged in the indictment.<sup>124</sup> The Fourth Circuit found that the trial court was allowed, in fashioning restitution, to consider the entire criminal scheme that had caused the harm, including activity not referred to in the indictment.<sup>125</sup> This was not unlike the Eleventh Circuit’s very recent decision in *United States v. Tobin*, in

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121. In *United States v. Smith*, the Fifth Circuit upheld the district court’s restitution order of \$346,946 imposed under the MVRA for a defendant convicted of conspiracy to commit wire fraud, as supported by the evidence. 528 F.3d 423, 425 (5th Cir. 2008). The court noted that although the defendant’s plea agreement said nothing about restitution, the defendant’s obligation to pay restitution was not clearly communicated during the Rule 11 colloquy, and at sentencing, the government did not present live testimony or a sworn affidavit from the victim regarding the total amount of the loss. The presentence report indicated that the probation officer had interviewed an employee of the victim, who identified the amount of loss attributable to each member of the conspiracy, including the \$58,301 attributable to the defendant, for a total loss of \$346,946.00. *Id.* The court rejected the defendant’s argument that the government was required to present live testimony or a sworn affidavit from the victim at the sentencing hearing regarding the total amount of the loss, noting that the defendant did not object to the presentence report, although noting that the defendant’s attorney did state that he had calculated the loss at a lower amount. *Id.* In *United States v. Hartstein*, the defendant’s indictment involving credit card fraud alleged a \$347,000 loss involving twenty-five alleged victims. He pled guilty to only two counts involving two specific victims and stipulated that the loss on these two counts was \$34,302; yet, the district court ordered restitution of \$2,089,455 to more than 180 “victims.” See Petition for Writ of Certiorari at 4–5, *Hartstein v. United States*, 500 F.3d 790 (2007) (No. 07-695), 2007 WL 4207136, at \*4–5, *cert. denied*, 552 U.S. 1102 (2008). See also *United States v. Amato*, 540 F.3d 153, 162–63 (2d Cir. 2008) (holding that the district court’s determination that a corporation was victimized by the defendant’s mail and wire fraud for purposes of awarding restitution under the MVRA was not clear error, when the corporation’s claimed losses of over \$3 million (comprised of attorney’s fees and accounting costs incurred in participating in the investigation and prosecution of defendant’s offenses) were “sufficiently documented” by a declaration made under penalty of perjury by a member of the law firm retained by corporation); *United States v. Ortiz*, 636 F.3d 389, 393–94 (8th Cir. 2011) (holding it was not error for the sentencing court to allow at defendant’s sentencing hearing representatives from stores that the defendant had stolen goods from to testify not only about offense-related losses, but also about retail theft losses the stores suffered annually nationwide from all organized retail thefts, stating that victims’ “right to be reasonably heard” at sentencing under the CVRA is not limited to presentation of relevant and admissible evidence).

122. 683 F.3d 471, 478 (4th Cir. 2012).

123. *Id.*

124. *Id.* at 475.

125. *Id.* at 485–86.

which that court found that conduct of which a defendant had been acquitted could be used as a sentencing factor.<sup>126</sup> The Supreme Court denied certiorari on November 26, 2012, and January 5, 2013, in *Tobin*.<sup>127</sup>

Another manifestation of the expanding debate over the MVRA comes from the Seventh Circuit. In *United States v. Breshers*, that court found that the trial court did not plainly err when it found that the words “physical injury” in the MVRA do not exclude mental injury.<sup>128</sup> The trial judge had found and assessed the amount of mental injury without a jury.<sup>129</sup> Fortunately for the Sixth Amendment, the Fourth Circuit did present an alternative and better rationale, namely, that the defendant did not object to the restitution order before he appealed.<sup>130</sup> When and how the victim was supposed to preserve his right to appeal was not made clear to him or to anyone else. Most law schools teach that criminal statutes must be construed in favor of a defendant and not in favor of the government or a victim.

In *Garrus v. Pennsylvania Department of Corrections*, the Third Circuit recently agonized over the reach of *Apprendi* and found that Pennsylvania’s “three strikes” law violated the Sixth Amendment because the number of the defendant’s prior convictions was found by the judge without jury participation.<sup>131</sup> This was a habeas corpus action, in which state courts are given great deference. The Third Circuit balked and, without saying so, took the direction suggested by *Apprendi* and *Southern Union*.

#### IS RESTITUTION A PENALTY, COMPENSATION, OR BOTH?

Where courts have found that the MVRA does not violate the Sixth Amendment, they have blithely assumed that restitution does not constitute criminal punishment and instead is compensation to the victim.<sup>132</sup> In 1986,

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126. *United States v. Tobin*, 676 F.3d 1264, 1309 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 647 (2012), *cert. denied*, 133 S. Ct. 648 (2012), *cert. denied*, 133 S. Ct. 658 (2012), *cert. denied*, 133 S. Ct. 666 (2012), *cert. denied*, No. 12-7218, 2013 WL 57445 (Jan. 7, 2013).

127. *Id.*

128. 684 F.3d 699, 702–03 (7th Cir. 2012).

129. *Id.* at 703.

130. *Id.* at 700.

131. 694 F.3d 394 (3d Cir. 2012).

132. *See United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009) (explaining that the purpose of restitution is not to “punish defendants or to provide a windfall for crime victims, but rather to ensure that victims, to the greatest extent possible, are made whole for their losses”); *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006) (noting that the Seventh Circuit “has consistently held that restitution is a civil remedy, not penal” and therefore the *Apprendi* line of cases does not apply); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) (stating that restitution in a criminal case is fundamentally a civil remedy, administered through the criminal process only for convenience); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) (“In the Tenth Circuit,

the Supreme Court in *Kelly v. Robinson*, albeit in the context of deciding whether restitution under the VWPA is subject to discharge in bankruptcy, held that restitution constitutes a criminal penalty and not compensation.<sup>133</sup> It there said:

Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant. . . . Because criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that restitution orders imposed in such proceedings operate “for the benefit of” the State. Similarly, they are not assessed “for . . . compensation” of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.<sup>134</sup>

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restitution is not criminal punishment.”); *United States v. Garcia-Castillo*, 127 F. App’x 385, 391 (10th Cir. 2005) (same); *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (“[W]hether restitution is a ‘penalty for a crime,’ [is] a question that has already been answered ‘no’ in this circuit because restitution for harm done is a classic civil remedy.”). If the purpose of restitution under the MVRA is compensatory and more akin to a civil judgment, there is no Sixth Amendment concern because the Amendment’s protections apply only to criminal trials. In that case, the MVRA would arguably violate the Seventh Amendment, which provides that “the right of trial by jury shall be preserved” in civil cases “where the value in controversy [exceeds] twenty dollars.” *See* U.S. CONST. amend. VII. However, courts of appeal have rejected Seventh Amendment challenges to the VWPA. *See, e.g., 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). *But see United States v. Welden*, 568 F. Supp. 516, 534 (N.D. Ala. 1983) (noting that the Sixth Amendment jury trial right had never been carried beyond the adjudication of guilt, thus holding that the VWPA violates the Seventh Amendment because an adjudication of criminal guilt does not take away from a defendant his civil right to a jury trial guaranteed to all other persons), *aff’d in part, rev’d in part sub nom. United States v. Satterfield*, 743 F.2d 827, 837 (11th Cir. 1984) (“Congress intended to make restitution an element of the criminal sentencing process and not an independent action civil in nature.”).

133. 479 U.S. 36, 52–53 (1986).

134. *Id.* The Court ultimately held that even if the restitution obligation was a debt subject to bankruptcy jurisdiction, it was automatically nondischargeable under § 523(a)(7) of the Bankruptcy Code. *Id.* at 53. Section 523(a)(7) provides that a discharge in bankruptcy does not affect any debt that “is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.” 11 U.S.C. § 523(a)(7) (2006). Quoting the Bankruptcy Judge who decided the underlying issue, the Court observed that “[u]nlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.” *Kelly*, 479 U.S. at 52 (quoting *In re Pellegrino*, 42 B.R. 129, 133 (Bankr. D. Conn. 1984)).

After *Kelly*, there was no longer any reason to believe that any penal sanction is *compensatory* for Sixth Amendment purposes. If restitution is punitive for one statutory purpose, it is punitive for all statutory purposes. Nevertheless, some courts continued to hold that restitution can be compensatory for some purposes, while punitive for others.<sup>135</sup> The Supreme Court will ultimately have to straighten out the imbroglio.

In 2005, shortly after MVRA appeared on the books, the Supreme Court expressed itself as follows in *Pasquantino v. United States*: “[t]he purpose of awarding restitution . . . [is] to mete out appropriate *criminal* punishment for that conduct.”<sup>136</sup> *Pasquantino* suggests that when the Court does categorically decide whether MVRA restitution constitutes punishment, the Court will join the lower courts that have held that it is.<sup>137</sup> The fact that there is a conflict among the circuits on how to categorize victim restitution is a joint plea for the Supreme Court to speak on the subject explicitly, finally, and unequivocally.<sup>138</sup>

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135. Different Third Circuit panels have issued conflicting opinions finding mandatory criminal restitution both punitive and compensatory. Compare *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001) (holding that a restitution order survived an abatement order because restitution embodies a compensatory rationale), with *United States v. Edwards*, 162 F.3d 87, 98 (3d Cir. 1998) (holding that it is unconstitutional to apply the MVRA retroactively because restitution is primarily punitive in nature and, therefore, a violation of Ex Post Facto Clause). However, the Third Circuit later issued *United States v. Leahy*, an en banc opinion in which a divided court held restitution under the MVRA and VWPA to be criminal rather than civil in nature. 438 F.3d 328, 334 (3d Cir. 2006).

136. 544 U.S. 349, 365 (2005) (emphasis added).

137. See *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006) (holding that restitution is penal and part of the defendant’s sentence); *United States v. Maestrelli*, 156 F. App’x 144, 146 (11th Cir. 2005) (noting that while restitution may seem civil in nature, it is actually a criminal punishment); *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) (“The nature of restitution is penal and not compensatory.”); *United States v. Edwards*, 162 F.3d 87, 92 (3d Cir. 1998) (“[W]hile criminal restitution resembles a civil remedy and has compensatory as well as punitive aspects, neither these resemblances to civil judgments, nor the compensatory purposes of criminal restitution, detract from its status as a form of criminal penalty when imposed as an integral part of sentencing.”); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (“[A]n order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes.”); *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993) (noting that restitution imposed under the VWPA “is not a civil affair; it is a criminal penalty meant to have deterrent and rehabilitative effects”); *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993) (explaining that an order of restitution is penal in nature, constituting punishment, like custody or probation); *United States v. Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988) (“Restitution is a criminal penalty.”); *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) (stating that a VWPA restitution order is a criminal, not civil, penalty).

138. See Kleinhaus, *supra* note 57, at 2755. That article advocates that restitution orders imposed by federal courts, even if they help 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. The article takes the position that, given that restitution orders are criminal punishment, and in light of the Supreme Court’s holdings in the *Blakely* and *Apprendi* cases, the VWPA and the MVRA impose restitution on criminal defendants in an unconstitutional manner. The article urges the Supreme Court to grant certiorari in a proper case and to rule that the VWPA and the MVRA are statutes that impose criminal punishment that are in addition to any other punishment that a court can legally inflict on a defendant.

Even courts which concede that restitution constitutes punishment nevertheless have upheld the constitutionality of the MVRA by finding that the MVRA does not violate *Apprendi* because, unlike the sentencing provisions addressed in *Blakely* and *Booker*, the MVRA does not contain a “prescribed maximum penalty.”<sup>139</sup> The Second Circuit is among the courts that have used this escape route from the Sixth Amendment. In *United States v. Reifler*, the Second Circuit held:

[T]he MVRA fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order. Thus, we conclude that the *Booker–Blakely* principle that jury findings, or admissions by the defendant, establish the “maximum” authorized punishment has no application to MVRA orders of restitution.<sup>140</sup>

Before *Southern Union* came along, Kleinhaus had recognized the inherent flaw in the argument that the MVRA does not violate *Apprendi*, *Blakely*, and *Booker*, because the MVRA does not contain a “maximum amount” beyond which a judge can impose a penalty.<sup>141</sup> Kleinhaus points out that *Blakely* only refines the *Apprendi* rule, which continues to require that “[o]ther than the fact of a prior conviction, any fact that increases the

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139. This rather formal theory was first articulated by Judge Easterbrook of the Seventh Circuit in *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (“[Section] 3663A does not include a ‘statutory maximum’ that could be ‘increased’ by a given finding.”); see also *United States v. Belk*, 435 F.3d 817, 819 (7th Cir. 2006) (“[The defendant’s] protest about the amount of restitution likewise fails to the extent it rests on *Booker*, for restitution lacks a ‘statutory maximum’ and the whole *Apprendi* framework (of which *Booker* is an instance) therefore is inapplicable.”).

140. 446 F.3d 65, 118 (2d Cir. 2006); see also *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) (noting prior Second Circuit holdings that *Apprendi* does not apply to criminal restitution or forfeiture based on court-determined loss or gain amounts because criminal restitution and forfeiture are indeterminate schemes without statutory maximums); *United States v. Lauersen*, 287 F. App’x 115, 116 (2d Cir. 2008) (relying on *United States v. Reifler*, 446 F.3d 65, 116 (2d Cir. 2006) to hold that “*Booker* identifies ‘no constitutional requirement that the facts needed for [a] district court’s fashioning of a restitution order be found by a jury or found beyond a reasonable doubt.’” (quoting *Reifler*, 446 F.3d at 116)); *United States v. Milkiewicz*, 470 F.3d 390, 404 (1st Cir. 2006) (holding that the statutory scheme for restitution does not trigger the principles underlying *Apprendi* because the jury’s verdict of guilt automatically authorizes restitution in the full amount of the victim’s loss); *United States v. Wooten*, 377 F.3d 1134, 1144 (10th Cir. 2004) (same); *United States v. Ross*, 279 F.3d 600, 608–09 (8th Cir. 2002) (differentiating the MVRA from other sentencing schemes “[b]ecause the ‘full amount’ authorized by statute will vary, [so] there isn’t really a ‘prescribed’ maximum,” but nonetheless holding that the outer limits of a restitution order are controlled by the scope of the indictment); *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002) (holding that *Apprendi* does not apply to restitution under the VWPA because the statute does not prescribe a maximum amount); *United States v. Bearden*, 274 F.3d 1031, 1042 (6th Cir. 2001) (holding that restitution in the full amount of each victim’s losses does not exceed the “statutory maximum”); *Behrman*, 235 F.3d at 1054 (reasoning that the VWPA is like a sentencing scheme “that permits the judge to impose any term of years”).

141. See Kleinhaus, *supra* note 57. See Melanie D. Wilson, *In Booker’s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379 (2006), for the view that the MVRA is invalid under the Sixth Amendment.

penalty for a crime beyond the . . . statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>142</sup> According to Kleinhaus, the Court in *Booker* only “further enhanced the relevancy of the *Blakely* understanding of the ‘statutory maximum’ for sentencing purposes” by “remov[ing] any mention of a ‘*statutory maximum*’ when it reaffirmed the *Apprendi* holding,” and, instead, made clear 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.”<sup>143</sup> It is not specific statutory language, but the language of the Sixth Amendment itself that limits the extent of a court’s authority to craft a defendant’s sentence and whatever criminal penalties, including restitution, are imposed.<sup>144</sup> Kleinhaus’s proposition was a good prediction of *Southern Union*.

Other courts still deny that *Blakely* altered the understanding of the term “statutory maximum.”<sup>145</sup> In *United States v. Carruth*, the Eighth Circuit followed the Second Circuit’s *Reifler* by finding that restitution does not violate *Apprendi* because the MVRA prescribes no “statutory maximum.”<sup>146</sup> However, Judge Bye entered a telling dissent, voicing his belief that *Apprendi* and *Blakely* “dictate[] a conclusion that any dispute over the amount of restitution due and owing a victim of crime must be submitted to a jury and proved beyond a reasonable doubt.”<sup>147</sup> Judge Bye said:

Once we recognize restitution as being a “criminal penalty” the proverbial *Apprendi* dominoes begin to fall. While many in the pre-*Blakely* world understandably subscribed to the notion *Apprendi*

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142. Kleinhaus, *supra* note 57, at 2757–58 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2005)).

143. *Id.* at 2758 (quoting *United States v. Booker*, 543 U.S. 220, 244 (2005)) (emphasis added).

144. *Id.* at 2759.

145. 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 decide this “important and complex question” because it was not raised by the parties); *United States v. Garcia-Castillo*, 127 F. App’x 385, 391 n.4 (10th Cir. 2005) (“Whether restitution is criminal punishment and whether restitution is subject to *Apprendi*, *Blakely*, and *Booker* are by no means settled questions in courts across the country.”); *United States v. Swanson*, 394 F.3d 520, 530 n.5 (7th Cir. 2005) (holding that based on Seventh Circuit precedent, restitution awards do not violate the statutory maximum understanding of *Blakely*, but acknowledging the possibility that its reasoning might not survive *Booker* as it was then being reviewed by the Supreme Court); *United States v. Vizinais*, 344 F. Supp. 2d 1310, 1316–17 (D. Utah 2004) (identifying that *Blakely* 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).

146. 418 F.3d 900, 904 (8th Cir. 2005).

147. *Id.* at 905.

does not apply to restitution because restitution statutes do not prescribe a maximum amount, this notion is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum. To this end, *Blakely*'s definition of "statutory maximum" bears repeating again, "*the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Applying this definition to the present case, it dictates a conclusion that the district court's order imposing a \$26,400 restitution amount violates the Sixth Amendment's jury guarantee because all but \$8,000 of said amount was based upon facts not admitted to by Carruth or found by a jury beyond a reasonable doubt.<sup>148</sup>

Similarly, in *United States v. Leahy*, a divided Third Circuit, sitting en banc, held restitution not to be the type of criminal punishment that evokes Sixth Amendment protection, finding that orders of restitution have little in common with prison sentences and instead combine features of both criminal and civil penalties.<sup>149</sup> Judge McKee, writing for a substantial minority, rejoined as follows:

The majority's analysis requires that we accept the proposition that an order of restitution rests upon the jury's verdict *alone*, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution in the amount of \$1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the additional penalty of \$1,000,000 in restitution. "*Apprendi* held[] [that] every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313, 124 S. Ct. 2531 (emphasis in original). Determining the amount of loss is "legally essential" to an order of restitution. . . . I therefore cannot accept the

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148. *Id.* at 906 (internal citations and footnote omitted) (emphasis in original).

149. 438 F.3d 328, 338 (3d Cir. 2006) ("In this sense, even though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged. Rather, restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner."). The Third Circuit was clearly wrong in finding restitution the same as disgorgement. *See United States v. Fair*, 699 F.3d 508 (D.C. Cir. 2012).

majority's attempt to suggest that restitution is "not really" additional punishment.<sup>150</sup>

These two eloquent dissents, even though not binding authority, prove that there is another, and strong, side to the story.

There is another as yet not fully explored reason for joining the above-quoted dissenters and Kleinhaus. The MVRA does, in fact, prescribe a "statutory maximum." After all, the MVRA is a "statute," and it does fix a "maximum restitution penalty," namely, the amount of the victim's loss. What difference would it make to a serious Sixth Amendment analysis if the MVRA had mandated restitution to the victim in the amount of his loss, but not to exceed five billion dollars? The MVRA provides that the *maximum* amount and the *minimum* amount of restitution are the same. This does not create a distinction with a difference. The MVRA contains a "statutory maximum," as well as a "statutory minimum," albeit the same. The terms of the *Apprendi* deniers are met.

In the midst of this judicial melee, *Southern Union* took center stage, undercutting all rationales previously used to find that the MVRA does not violate the Sixth Amendment. Justice Sotomayor, writing for her six-justice majority (including Justice Scalia), explained that for *Apprendi* purposes, there is no principled reason to treat criminal fines differently from the variety of sentences that had previously been struck down because they allowed judges to find facts that increased a defendant's penalty.<sup>151</sup> *Southern Union* stands for the all-inclusive proposition that there is no reasoned way (if there ever was a reasoned way) to distinguish between fines, which are clearly criminal penalties, and other criminal penalties.<sup>152</sup> A "fine" and "restitution" are both imposed as an integral part of the sentence. If there is a meaningful difference between a "fine" and "restitution," it is that the decision on a fine allows for an exercise of discretion. The sentencing court being reviewed in *Southern Union* could have exercised its discretion under the unique procedural circumstances of that case and imposed a \$50,000 fine, no fine, or something in between,<sup>153</sup> and the Supreme Court would have never been confronted with the problem it resolved in a way that hopefully reflects the direction in which the Court is moving in its Sixth Amendment jurisprudence.

A fine is paid directly to the government. Restitution is also paid to the government, received by it on behalf of the victims, and disbursed to the victims in accordance with some bureaucratic understanding of the

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150. *Leahy*, 438 F.3d.at 343–44 (McKee, J., concurring in part and dissenting in part, joined by Rendell, J., Ambro, J., Smith, J., and Becker, J.).

151. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012).

152. *See id.*

153. *See id.* at 2344.

restitution order, which is often ambiguous.<sup>154</sup> The amount of a criminal fine is most often calculated by reference to the amount of the defendant's gain or the victim's loss.<sup>155</sup> Willful failure to pay, whether a criminal fine or a restitution obligation, subjects a defendant to possible incarceration.<sup>156</sup> The two penalties are identical for Sixth Amendment purposes. Justice Sotomayor said, simply and straightforwardly, that going beyond what the jury actually found, is "exactly what *Apprendi* guards against."<sup>157</sup>

Some courts have either plainly not understood *Apprendi* before *Southern Union* came along, or they have been disingenuous in their finding that there is no lesson in *Apprendi* for the MVRA. Courts that suggest that "additional facts required to impose the penalty of restitution are not really 'additional facts' at all" fit nicely into this category.<sup>158</sup>

A ruling by the Supreme Court that the MVRA violates the Sixth Amendment would, of course, mean either that restitution as a penalty will disappear, or that the government must prove to a jury in all cases that the defendant caused the victim's loss, and the amount of that loss.<sup>159</sup> If Congress should wish to override such a Supreme Court decision and retain mandatory restitution, trial courts will either be required to keep the jury, if the jury has found a defendant guilty, or empanel a new jury for considering restitution. To inform the venire up-front that if the jury finds the defendant guilty, it will have further duties, would delight a guilty defendant. A bifurcation procedure would not be easy, but it is no different in kind from a state court's holding over a jury in a capital case for further findings during the penalty phase.

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154. See 18 U.S.C. § 3664(i) (2006).

155. See 18 U.S.C. § 201(b) (2006) (noting the fine for bribery of public officials of up to three times the value of the bribe); 18 U.S.C. § 645 (2006) (stating the fine for embezzlement by officers of United States courts of up to twice the value of the money embezzled); *S. Union*, 132 S. Ct. at 2351 & n.4 (noting that as an alternative, a fine may be based on "not more than the greater of twice the gross gain or twice the gross loss" (citing 18 U.S.C. § 3571(d) (2006))).

156. See 18 U.S.C. § 3614(a)–(b) (2006).

157. *S. Union*, 132 S. Ct. at 2352.

158. *United States v. Leahy*, 438 F.3d 328, 343 (3d. Cir. 2006) (McKee, J., dissenting).

159. Presumably, the defendant could also agree to pay restitution in a set amount to his victims in a plea agreement. Courts are already authorized to order any restitution amount agreed to by the parties in a plea agreement. 18 U.S.C. § 3663A(a)(3). Who are the parties? This practice raises many questions concerning the rights of crime victims as provided for in the CVRA. Is a trial judge (or a jury) relieved of making the complicated, required MVRA findings just because the plea agreement suggests the terms of restitution? Does a victim have a right to contest the amount of restitution agreed to by a defendant in a plea agreement? The CVRA gives victims "[t]he right to be reasonably heard at any public proceeding in the district court involving . . . [a] plea . . ." 18 U.S.C. § 3771(a)(4). For the view that the Federal Rules of Criminal Procedure should be amended to implement the rights articulated in the CVRA, including amending Rule 11(b)(4) to require a court to address any victim present when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting the plea, see Cassell, *supra* note 112, at 886.

The dissenters in *Apprendi*, *Blakely*, *Booker*, and now in *Southern Union*, speak of the confusion that may ensue if juries have to determine facts related to sentencing.<sup>160</sup> What about the confusion that exists today? Justice Breyer cautions that a defendant may be prejudiced by a prosecutor's producing witness after witness to testify during the guilt phase about victims' losses.<sup>161</sup> The Justice would only have a reason to worry if the victim's losses must be proven as part of the proof of guilt, something no one contemplates. Justice Breyer also warns that because 98% of federal convictions and 94% of state convictions are the result of guilty pleas, complex jury trial requirements may affect the strength of the government's bargaining position while it is negotiating pleas.<sup>162</sup> The Bill of Rights contains no language guaranteeing any bargaining rights for the government, or for the victims. The Sixth Amendment was designed to protect the defendants, not the victims, who had a civil remedy long before the Bill of Rights came along. The majority in *Southern Union* properly responds to Justice Breyer by pointing out that even if his dire predictions have merit, it is the Constitution that must be enforced.<sup>163</sup> Congress cannot, simply for public policy reasons, ignore the Sixth Amendment, which unabashedly precludes non-jury fact-finding whenever such a finding has the effect of increasing the penalty. Justice Sotomayor says that this "should be the end of the matter."<sup>164</sup>

#### THE FIFTH AMENDMENT

The MVRA violates the Fifth as well as the Sixth Amendment. The "Due Process Clause" promises that criminal statutes must operate on all defendants alike, and not be subject to arbitrary or uneven exercises of power.<sup>165</sup> Standards for decision-making must be reasonable and ascertainable. In the MVRA, Congress unleashed courts without providing them any meaningful guidance as to how to afford "due process." There are no rules of evidence and no rules of discovery. District courts have no

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160. See *S. Union*, 132 S. Ct. at 2371 (requiring juries to determine facts related to fines will cause confusion because expert testimony might be needed to guide the inquiry, or will be impractical in cases where the relevant facts are unknown or unknowable until the trial is completed) (Breyer, J., dissenting). See also *United States v. Booker*, 543 U.S. 220, 329 (2005) (Breyer, J., dissenting in part); *United States v. Blakely*, 542 U.S. 296, 318–20 (2004) (O'Connor, J., dissenting); *id.* at 330–40 (Breyer, J., dissenting); *United States v. Apprendi*, 530 U.S. 466, 555–59 (2000) (Breyer, J., dissenting).

161. *S. Union*, 132 S. Ct. at 2370.

162. *Id.* at 2371.

163. *Id.* at 2357.

164. *Id.* (quoting *Blakely*, 542 U.S. at 313).

165. *Sexton v. Barry*, 233 F.2d 220, 224 (6th Cir. 1956) (citing *Caldwell v. Texas*, 137 U.S. 692 (1891)).

choice but to proceed on an ad hoc basis. Many have often been reversed for procedural or substantive errors despite their futile efforts to comply with the MVRA. It was the understatement of the century when the Second Circuit said: “Congress’s passage of the [MVRA] in 1996 has introduced a touch of confusion into our caselaw.”<sup>166</sup> Although courts of appeal have told their trial courts that the determination of the restitution amount “is by nature an inexact science”<sup>167</sup> trial courts have at the same time been instructed to “engage in [both] an expedient and reasonable restitution process, with uncertainties resolved with a view toward achieving fairness to the victim.”<sup>168</sup> A district court must “explain its findings with sufficient clarity to enable [the court of appeals] to adequately perform its function on appellate review.”<sup>169</sup> Of course, all of this must be done “expediently.”

If a district court thinks, as it might very well think, that a resolution of the restitution issue will be too difficult or impossible, it can exhaust itself and spend more time trying to compose a persuasive opinion to justify its conclusion that restitution is to be avoided than to conduct the restitution hearing it wants to avoid. If the probation officer, with the concurrence of the U.S. Attorney, concludes that a restitution order in a particular case is impossibly complex, and recommends against it, the trial court will surely succumb to the temptation to apply the rubberstamp. The Second Circuit has concluded that Congress’s intent was that “sentencing courts not become embroiled in intricate issues of proof,” and that the “process of determining an appropriate order of restitution be ‘streamlined’ . . . .”<sup>170</sup> Trial courts have employed their varying versions of “streamlining.”<sup>171</sup>

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166. United States v. Harris, 302 F.3d 72, 75 n.3 (2d Cir. 2002).

167. United States v. Teehee, 893 F.2d 271, 274 (10th Cir. 1990).

168. United States v. Gordon, 393 F.3d 1044, 1048 (9th Cir. 2004).

169. United States v. Huff, 609 F.3d 1240, 1248 (11th Cir. 2010) (vacating restitution order and remanding for re-sentencing for restitution because district court did not make specific factual findings that enabled reviewing court to determine whether amount of restitution ordered exceeded victims’ actual losses). See also United States v. Pearson, 570 F.3d 480, 487 (2d Cir. 2009) (remanding “simply to secure a more thorough explanation from the district court as to the basis for its restitution determination”).

170. United States v. Reifler, 446 F.3d 65, 136 (2d Cir. 2006).

171. Although the MVRA provides for an “escape route” which states that restitution need not be imposed if the determination of complex issues of fact relating to the amount of the victims’ losses would unduly complicate or prolong the sentencing process, see 18 U.S.C. § 3663A(c)(3)(B), few district courts successfully employ this clause as a means to avoid having to fashion a restitution order without being reversed on appeal. See, e.g., United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2002) (holding that the district court abused its discretion by relying on the perceived complexity of the restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income, stating that “[t]he MVRA contemplates that some calculations may be complex, and, accordingly, authorizes the district court to ‘require additional documentation or hear testimony,’ or to ‘refer any issue arising in connection with a proposed order of restitution to a magistrate judge or a special master for proposed findings of fact.’”) (internal citations omitted). On the other hand, consider United States v. Ferguson, 584 F. Supp. 2d 447 (D. Conn. 2008), a complex securities fraud case, in which the district court refused to order restitution under the MVRA because identifying all of the

From a reading of *United States v. Murray*, a Ponzi-scheme case, the Fifth Circuit has just now joined the streamlining chorus on a discordant note. Following its probation officer's lead, the trial court, without articulating any rationale for denying restitution, simply echoed the probation officer's assertion that "restitution was 'not applicable'" because of 18 U.S.C. § 3663A(c)(3).<sup>172</sup> After lengthy custodial sentences were ordered, but, without any restitution, the sentences were appealed and affirmed by the Fifth Circuit.<sup>173</sup> Upon remand, the trial court thereupon attempted to correct its error by ordering restitution in the amount of \$17,564,524.21.<sup>174</sup> On a new appeal by the defendants, the Fifth Circuit held that the MVRA does not authorize the reopening of a final judgment for the purpose of correcting the error of failing to order restitution as part of the original sentence.<sup>175</sup> In effect, the probation officer cost the victims \$17,564,524.21, simply by referring enigmatically to § 3663A(c)(3).<sup>176</sup> Fixing full and fair restitution in a complex case is virtually impossible.<sup>177</sup> Collecting it is another virtual impossibility. Trial courts are left in a

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victims of the loss portfolio transfer fraud, if even possible, would severely complicate and prolong the sentencing process. *Id.* at 458. The court noted that fashioning an order would require a level of detail and precision that was not necessary to calculate a reasonable estimate of loss for the loss calculation, and stated "[t]hese complicated issues are better resolved in the several pending civil proceedings" that were taking place against the defendants at the time. *Id.* One of the victims filed a motion for reconsideration, which the court denied. No. 3:06CR137 (CFD), 2008 WL 5137320 (D. Conn. Dec. 5, 2008). There was no appeal.

172. 700 F.3d 241, 242–43 (5th Cir. 2012).

173. *United States v. Murray*, 648 F.3d 251, 252 (5th Cir. 2011).

174. *Murray*, 700 F.3d at 243.

175. *Id.* at 245.

176. *Id.* at 243.

177. Yet, most courts of appeal have held that if the precise amount of the victim's losses cannot be determined, the sentencing court should still estimate the loss as long as it has a "reasonable" basis upon which to do so. *See, e.g., United States v. Futtrell*, 209 F.3d 1286, 1292 (11th Cir. 2000) (restitution could be based upon a reasonable estimate of losses when it would be impossible to determine precise amount). For example, the Second Circuit vacated a district court's restitution order and remanded for re-sentencing on restitution, in a case involving a loss of \$192 million, about 10,000 victims, and a victim restitution report over 1,700 pages long. *United States v. Catoggio*, 326 F.3d 323, 328 (2d Cir. 2003). While the court found meritless the defendants' arguments on appeal that the victims were unidentifiable, that the number of victims was too large for restitution to be practicable, and that the issues involved in determining restitution were so complex that the need for restitution was outweighed by the burden on the sentencing process, the Second Circuit still found that the district court erred in awarding restitution to *unidentified*, as opposed to *unidentifiable*, victims in an amount (\$80 million) that may not represent the actual losses to those victims. *Id.* On the other hand, the Second Circuit has also held that a district court was within its discretion in approving a settlement agreement that established a \$715 million fund to compensate victims of securities and bank fraud perpetrated by defendants, even though the fund would not be sufficient to ensure that the victims were afforded full restitution as required under the MVRA, because there were potentially tens of thousands of victims, and the complexity of resolving a multitude of factual and causal issues to determine the amount of losses of those victims would extend the sentencing process inordinately. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 563–64. (2d Cir. 2005). Because of the difficulties in proving the defendants' culpability that the victims would face in effecting any recovery from the defendants, the court found that the settlement fund was appropriate. *Id.* at 564.

quandary unless they are willing to take the probation officer's advice, that, in 90% of the cases will be concurred in by the U.S. Attorney, who will neither have the time nor the inclination to duplicate the probation officer's efforts.<sup>178</sup>

#### POLICY CONSIDERATIONS: THE MVRA DEMANDS MIRACLES

The amount of federal criminal debt grew from approximately \$6 billion in 1996 to over \$50 billion in 2007.<sup>179</sup> Approximately 80% of this debt was comprised of restitution orders owed to third parties.<sup>180</sup> The federal criminal debt increased by only \$430 million per year during the roughly fourteen years that the discretionary VWPA provided the only federal restitution framework.<sup>181</sup> In 2009, under the MVRA, the debt was growing at a rate of around \$5 billion per year.<sup>182</sup> It is now out of control.

Reported collection rates of criminal debt under the VWPA reached as high as 13.3%.<sup>183</sup> However, the 2009 rate of criminal debt collection under the MVRA was just 3.5%.<sup>184</sup> The Department of Justice acknowledges that “[b]y far, the greatest impediment to collecting full restitution is the lack of relationship between the amount ordered and its corresponding collectibility.”<sup>185</sup> This inequity has been exacerbated by the MVRA's fanciful amendment to the VWPA, providing that sentencing courts *must*

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178. As a result, restitution decisions are so varied and peculiar as to be incomprehensible. For example, in Kleinhaus's article, *supra* note 57, he notes that criminal defendants will receive different treatment, under the MVRA, of their restitution order by judges in criminal sentencing proceedings by virtue of geography alone. For instance, 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 and not criminal punishment. *See* United States v. Nichols, 169 F.3d 1255, 1279–80 (10th Cir. 1999); United States v. Newman, 144 F.3d 531, 537–42 (7th Cir. 1998). In most other circuits the Ex Post Facto Clause will prohibit this type of judgment. *See* United States v. Seigel, 153 F.3d 1256, 1258–60 (11th Cir. 1998); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997); United States v. Baggett, 125 F.3d 1319, 1322–23 (9th Cir. 1997); United States v. Thompson, 113 F.3d 13, 15 (2d Cir. 1997). For the view that the retroactive application of the MVRA violates the Ex Post Facto Clause, see *id.* and Irene J. Chase, *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 (2001). For the opposing view, see Heidi M. Grogan, *Characterizing the Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079 (2005).

179. *See* Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, at 1691–92 (2009).

180. *Id.* at 1692.

181. *Id.* at 1693.

182. *Id.* at 1694.

183. *Id.*

184. *Id.*

185. *Id.* (citing Letter from Mary Beth Buchanan, Dir. of Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. of Fin. Mgmt. and Assurance, U.S. Gov't Accountability Office (Jan. 13, 2005), in U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 21 (2005)).

order restitution in the full amount of the victims' losses *without regard to the offenders' ability to pay*.<sup>186</sup> A report from the United States General Accounting Office on criminal debt in 2004 informed its few readers that "collection of the total restitution assessed may be unrealistic from the outset."<sup>187</sup>

Courts and other critics, including this writer, regularly poke fun at the MVRA.<sup>188</sup> Is it being hypocritical, or is it recognizing reality, to point out the unlikelihood that a criminal will pay his restitution obligation when he is indigent, as are 85% of federal criminal defendants?<sup>189</sup> A convict's economic condition does not improve during incarceration, and not much, if any, after release.<sup>190</sup>

This writer served on the short-lived Collection Task Force created by the Administrative Office of the United States Courts after the enactment of the MVRA. The members of the Task Force quickly learned that the government spends more money trying to collect restitution than the amount it collects. All of the expensive "bells and whistles" the Task Force helped to inaugurate were soon abandoned. They were pipe dreams. They did not work, and there is no other scheme that will work. The Congressional Budget Office found that when litigation and enforcement costs of the U.S. Attorneys are included, the total cost of imposing and implementing one restitution order is \$2,000.<sup>191</sup> This, of course, is an

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186. *Id.*

187. *Id.* at 1695 (quoting U.S. GEN. ACCOUNTING OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 5 (2004)).

188. *See* United States v. Vandenberg, 201 F.3d 805, 812 n.3 (6th Cir. 2000) ("By disregarding the defendant's financial condition for restitution purposes, the MVRA permits full payment of restitution in the possible, but unlikely, event that a defendant might win a lottery or otherwise strike it rich after sentencing."); United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999) ("The victim is entitled to an order directing restitution to him of his full loss, regardless of the defendant's present or even likely future circumstances, for the defendant might someday unexpectedly inherit money, win the lottery, or otherwise strike it rich.") (internal citations omitted).

189. Dickman, *supra* note 179, at 1695.

190. *Id.* As a U.S. Attorney quipped in a 2006 Associated Press news story: "We can't squeeze blood out of a turnip." Martha Mendoza & Christopher Sullivan, *U.S. Fails to Collect Billions in Fines*, REGISTER-GUARD (Eugene, Or.), Mar. 19, 2006, at A1, available at <http://news.google.com/newspapers?nid=1310&dat=20060319&id=NmBWAAAIBAJ&sjid=bfADA AAAIBAJ&pg=6799,4294755> (quoting Natalie Collins of the U.S. Attorney's Office in Las Vegas, Nevada).

191. Dickman, *supra* note 179, at 1708. This does not take into account the *time* it takes to administer one restitution order; in many cases more time than an adjudication of guilt. Weeks may need to be set aside for a judge to fashion a restitution order, especially in multi-defendant or multi-victim cases where the judge must determine not only the appropriate amounts of restitution but also the beneficiaries of the order and the priorities of payment. Indeed, after the United States attorney notifies all of the victims, encourages their attendance at a restitution hearing, listens to each victim separately complain and take the opportunity to prove his or her victimhood and the amount of his or her losses, the judge then begins the process of agonizing over how much each victim has proven by a preponderance of the evidence, and the order in which the defendant must pay each victim and on what schedule. Calculating an award of restitution may involve complicated expert medical or accounting

average and does not suggest that restitution is collected in a majority of cases.

District Judge Maryanne Trump Barry, representing the Judicial Conference of the United States, informed Congress that “[t]he costs associated with [the MVRA] are, in far too many cases, simply unjustified. . . . [I]t is simply a matter of bad policy to force the criminal justice system to make these expenditures where there is only a remote possibility restitution will ever be collected.”<sup>192</sup> The cost of implementation, unless curtailed, will create a need for more federal judges, more federal prosecutors, more and better trained probation officers, and more personnel in the collection clerks’ offices. In short, Congress utterly failed to comprehend the price tag for MVRA, and is still oblivious to the problems the MVRA has created.

Mandatory restitution simply fails to accomplish its stated purpose. It actually leads to *decreased* victim compensation because when the defendant, the victims, the judge, and the U.S. Attorney recognize that a defendant cannot pay, they lose heart.<sup>193</sup> In practice, there are few consequences to be suffered by an offender who does not meet the terms of his restitution. The Department of Justice, which is responsible for collecting both fines and restitution, has delegated its collection efforts to its Financial Litigation Units (FLUs).<sup>194</sup> While the FLUs’ case load has drastically increased as a result of the MVRA, its staff has not increased.<sup>195</sup> When a defendant believes, often with good cause, that the restitution portion of his sentence is illegal or fundamentally unfair, and learns, as a practical matter, that it is invulnerable to attack, he will lose whatever incentive he might otherwise have had to pay it.<sup>196</sup>

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testimony, such as proof of the victim’s compensation from other sources or calculation of the prejudgment interest due on a restitution obligation. If the order imposes joint and several obligations, it must also go into details such as whether one defendant gets credit for payment to the victim by another defendant, and, if so, whether an overpaying defendant is entitled to reimbursement from an underpaying defendant. Then the judge begins the onerous task of setting the payment schedule.

192. *Id.* at 1709 (quoting *A Bill to Provide for Restitution to Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 24 (1995) (statement of Judge Maryanne Trump Barry, Chair, Comm. on Criminal Law, Judicial Conf. of the United States)).

193. *See id.* at 1696–97.

194. *See* Timothy P. Jensen & Michael J. Pendell, *Eyes Wide Shut: The Perils of Failing to Take Action to Undo Fraudulent Transfers Before Entry of a Restitution Order*, 44 CONTEMPLATIONS 33, 38 (Winter 2012), <http://connecticutlawreview.org/files/2012/02/Pendell.pdf> (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 6 (2005)). FLUs try to enforce restitution orders by filing liens on criminal offenders’ real property, issuing restraining notices to prevent further transfer of assets, performing title searches, and reviewing financial information provided by the criminal offenders. *Id.* at 39.

195. Dickman, *supra* note 179, at 1711.

196. *Id.* at 1697. Numerous cases illustrate the absurdity of setting unrealistic repayment schedules for restitution. *See* *United States v. Bogart*, 576 F.3d 565, 575 (6th Cir. 2009) (district court did not err in imposing \$500 per month payment schedule on indigent defendant because he had a

Perhaps the most amusing piece of judicial sarcasm illustrating the futility of the MVRA is a case from the District of West Virginia, in which Judge Faber ordered the defendant to serve twelve and one-half years in prison and to pay \$515 million dollars in restitution.<sup>197</sup> The judge then told the defendant that if he would pay the \$515 million in fifteen days he would knock off the interest.<sup>198</sup> Judge Faber obviously got some perverse enjoyment at the expense of the draftsmen of the MVRA, but he was also acknowledging insurmountable problems.

“Let’s not kid ourselves,” wrote Judge Easterbrook of the Seventh Circuit:

It is hard, perhaps impossible, for a judge to know how much a given defendant will be able to pay years later. Schedules are guesswork. If the judge sets one that turns out to be too high, the defendant won’t pay (you can’t get blood from a stone); but if the judge errs on the low side, the defendant keeps the money and the victim loses out.<sup>199</sup>

A restitution order misleads the victim into thinking he will be compensated. He may forego his civil remedy by allowing the statute of limitations to run, or for the defendant to dissipate his assets, if he had any.<sup>200</sup> When restitution is not paid, the result “may compound victims’ pain and anger, and may increase the negative feelings that accompany the victimization and the criminal justice experience.”<sup>201</sup> Tellingly, probation officers and prosecutors often encourage victims to view the restitution order only as a “symbolic victory.”<sup>202</sup> The Judicial Conference has sternly

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college education and potential earning capacity, and although he lost his accounting license, he had once been an accountant and businessman); *United States v. Booth*, 309 F.3d 566, 576 (9th Cir. 2002) (no abuse of discretion where district court, although recognizing defendant’s present financial difficulties, set payments at \$500 per month as an amount that he might reasonably look forward to being able to pay after his imprisonment); *United States v. Viemont*, 91 F.3d 946, 951–52 (7th Cir. 1996) (district court did not err in ordering defendant to pay restitution of \$200,000, even where defendant had negative net worth of \$108,480 and a small monthly cash flow (\$370 a month), noting that the district court considered his education and entrepreneurial talents in setting a restitution payment schedule and finding important that the defendant had demonstrated significant skill in carrying out the fraudulent scheme that had led to his conviction, which indicated that he had a strong potential to generate income).

197. *See* *United States v. Graham*, CR-01:00226-01 (S.D.W. Va. Dec. 21, 2001).

198. *See id.*

199. *United States v. Sawyer*, 521 F.3d 792, 797 (7th Cir. 2008) (holding that a district court’s plain error in failing to set a restitution payment schedule at all and instead merely stating that restitution was due immediately did not affect defendants’ substantial rights, and thus did not warrant vacatur).

200. Dickman, *supra* note 179, at 1711.

201. Dickman, *supra* note 179, at 1698 (quoting Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9 JUST. Q. 393, 410 (1992)).

202. *Id.* at 1698–99.

warned Congress that imposing restitution orders without consideration of the defendant's ability to pay will "erode respect for the justice system on the part of victims."<sup>203</sup> While public policy is not the province of the courts, when public policy, as reflected by Congress, exceeds the bounds of the ability of the judicial system to handle what is thrust upon them (judges and judicial personnel are, after all, human), the courts must step in to save the system from total collapse.

Very few judges are asked to revoke supervised release for a defendant's violation of the restitution order. Good judges become impatient, if not downright grumpy, when a U.S. Attorney or a probation officer seeks revocation. Some courts even express the belief that incarceration after revocation violates the Eighth Amendment when there is no possibility that the defendant can pay.<sup>204</sup> To agree with these critics would call for another article.

The MVRA has also been criticized for multiplying the victims. Taking the broad definition of "victim" seriously, the District of Oregon in *United States v. VanBeenen* found that a false statement to a local bank proximately caused harm to Fannie Mae, because Fannie Mae had bought

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203. *Id.* at 1700 (quoting *A Bill to Provide for Restitution to Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 26–27 (1995) (statement of Judge Maryanne Trump Barry, Chair, Comm. on Criminal Law, Judicial Conf. of the United States)).

204. Federal law permits the court to revoke an offender's probation or supervised release "[u]pon a finding that the defendant is in default on a payment of a fine or restitution," see 18 U.S.C. § 3613A(a)(1), and to re-sentence a defendant to incarceration if the court expressly finds that the defendant "willfully refused to pay . . . or had failed to make sufficient bona fide efforts to pay" restitution, see 18 U.S.C. § 3614(b). In *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), the Supreme Court held that before sentencing a defendant to incarceration for failure to pay restitution or a criminal fine, the court must inquire into the defendant's ability to pay, and "[i]f the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay," he may be re-sentenced to jail time. But courts have concluded that a defendant "willfully refused to pay" a restitution order in surprising circumstances. In *United States v. Montgomery*, 532 F.3d 811, 814 (8th Cir. 2008), the Eighth Circuit affirmed the district court's decision to revoke the defendant's probation because she willfully failed to "acquire the resources to pay" her restitution order, and sentenced her to eleven months in prison. The defendant had been ordered to pay \$63,817.94 in criminal restitution for her conviction of using the mail to defraud charitable organizations that assisted victims of the September 11, 2001 terrorist attacks. *Id.* at 812–13. Her payment schedule was \$300 per month. *Id.* at 813. After two years, she had only paid \$474.16. *Id.* At her revocation hearing, she introduced testimony that she had made repeated efforts to keep a steady job, and a mental health counselor testified that he had "some concerns" about her employability due to a mental illness. *Id.* Nevertheless, the court found based on the preponderance of the evidence that she had not engaged in bona fide efforts to pay. *Id.* at 814. In any event, courts routinely uphold the MVRA against Eighth Amendment challenges. See *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008); *United States v. Lessner*, 498 F.3d 185, 205–06 (3d Cir. 2007) (dismissing argument that restitution orders violate the Excessive Fines Clause of the Eighth Amendment because the amount of the restitution award was grossly disproportionate to the gravity of the offense); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003) (same); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (rejecting argument that the MVRA's requirement of mandatory imposition of full restitution and the "extensive governmental oversight over the life of the defendant contemplated by the MVRA" offend the Eighth Amendment's prohibition on cruel and unusual punishment).

the bad loan from the lending bank.<sup>205</sup> What if Fannie Mae had resold the bad loan to a Spanish conglomerate? It would surely want its money back.

Offenders with restitution hanging over their heads are likely to recidivate.<sup>206</sup> The Supreme Court itself has expressed concern that a heavily enforced victim restitution policy “may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”<sup>207</sup>

#### A FEW RELEVANT QUESTIONS AS YET UNANSWERED

There are a hundred questions that courts will confront as they have to rethink the constitutionality of the MVRA in light of *Southern Union*. Here are a few:

- (1) At what point in the criminal proceeding does the victim have his first and/or his last opportunity to express himself on the restitution question?
- (2) If a victim or his private counsel wants to offer evidence on the proximate cause or the amount of the loss, but the U.S. Attorney thinks the evidence is inadmissible or unhelpful, who decides whether to offer it? Can the U.S. Attorney or the private counsel demand a *Daubert* hearing when the victim needs an “expert?”
- (3) How does a victim preserve the right of the United States to appeal and/or his own right to petition for a writ of mandamus? Can he rely on the U.S. Attorney to preserve and pursue his rights?
- (4) Although the trial judge cannot participate in plea negotiations, can he participate in a pretrial discussion of restitution, which must, of course, eventually be an integral part of the sentence?
- (5) While in prison, can a defendant, in anticipation of release, challenge the restitution portion of his sentence by habeas corpus, knowing that unless he can get the restitution obligation set aside or reduced, it will be around his neck for the rest of his life? Not all criminal defense lawyers have gone to school on “restitution.” A defendant’s lawyer may very

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205. 872 F. Supp. 2d 1084, 1087–89 (D. Or. 2012).

206. Dickman, *supra* note 179, at 1705. See also Woody R. Clermont, *It’s Never Too Late to Make Amends: Two Wrongs Don’t Protect a Victim’s Right to Restitution*, 35 NOVA L. REV. 363, 390 (2011) (“Incarceration, followed by supervised release, followed by incarceration upon failure to pay, seems to be perpetuating a jailhouse cycle.”).

207. *Bearden*, 461 U.S. at 671.

well be competent in all other aspects of the case, but wholly incompetent in his representation of the defendant on a crucially important, but arcane and often misunderstood subject.

- (6) What obligation, if any, does a Public Defender have to appeal from a restitution order that he and the defendant believe to be erroneous?
- (7) Does the restitution obligation survive the defendant, so that his estate remains liable? It would be ironic if a trial court imposed the death penalty and simultaneously ordered restitution. After all, restitution is “*mandatory*.” It would be equally ironic if a well-off defendant died after the imposition of a custodial sentence, but before the probation officer’s report with respect to restitution was complete. Under such circumstances, is the court required to order post-death restitution, and order the U.S. Attorney to open an estate for the deceased defendant so that his assets can be marshalled and properly disbursed?
- (8) If the restitution portion of the sentence is not imposed simultaneously with the custodial sentence, when does the time for an appeal begin to run, or are there separate triggering events?
- (9) Is the *victim* obligated to inform the court about the outcome of his post-judgment lien enforcement or his civil action against the defendant? If he is so obligated and fails to meet his obligation, what is his penalty?
- (10) Because the trial court enjoys deferential treatment of his restitution order on appellate review, how short and sweet can the trial court make it?
- (11) Is “interest” due on the restitution award? If so, do payments go first to accrued interest and only then to principal?
- (12) How can the sentencing court decide on the amount of a fine without first knowing the amount of restitution?
- (13) How can the sentencing court fix a period of supervised release without first establishing the amount of restitution and the payment schedule?

## CONCLUSION

Not long after the VWPA was enacted, this writer held that it was unconstitutional.<sup>208</sup> The government appealed, something it did not do after the writer reached the same conclusion with respect to the MVRA. The Eleventh Circuit found the VWPA to be constitutional, but presciently said: “As with any newly-enacted legislation, the courts will have to resolve many questions of interpretation, some of which have been foreshadowed by the district court in this case; but this *lack of precision* does not render the statute constitutionally deficient under the due process clause.”<sup>209</sup> The MVRA was enacted in 1996. It is no longer new. The VWPA was new when the Eleventh Circuit found it to pass constitutional muster, despite its dreadful imprecision. The MVRA is more vague and imprecise than the VWPA ever was. The deficiencies of the VWPA were greatly magnified by the MVRA’s *mandatory* language. During the sixteen years the MVRA has been on the books and never expressly evaluated by the Supreme Court for its constitutionality, the passage of time has not wiped out its imperfections. Instead, its shortcomings have become more severe and more glaring.

On June 21, 2012, *Southern Union* opened the door to a thorough re-examination of the MVRA. It will be interesting to see how the courts, including the Supreme Court, deal with *Southern Union* in application to the MVRA. The courts can face the constitutional questions squarely or continue to dance around them.

## POSTSCRIPT

After the editors accepted the above article for publication, and before the article reached the printer, several judicial events occurred that alter the MVRA landscape enough to prompt brief comment. Accordingly, the editors have graciously allowed this postscript.

On November 29, 2012, in *United States v. Duran*, the Eleventh Circuit created more hard work for district courts in restitution cases in which the United States is the victim.<sup>210</sup> It reversed the Southern District of Florida and held that the Federal Debt Collection Procedures Act required the court, which had ordered restitution in favor of the United States in the sum of \$87 million, to preside over the government’s collection efforts as to property in any state of the union in which the defendant is alleged to have

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208. *United States v. Welden*, 568 F. Supp. 516, 536 (N.D. Ala. 1983) *aff’d in part, rev’d in part sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

209. *United States v. Satterfield*, 743 F.2d 827, 841 (11th Cir. 1984) (emphasis added).

210. 701 F.3d 912 (11th Cir. 2012).

an interest subject to levy.<sup>211</sup> The trial court had declined to exercise jurisdiction over the hotly disputed ownership of real property located in New York. A judge in Florida now must try what is, in reality, a New York title dispute. If any recovery from this litigation over title pays for the cost of the effort, it will be a surprise. It certainly will not make a dent in the \$87 million.

On December 5, 2012, in *United States v. Wolfe*, the Seventh Circuit, despite *Southern Union*, stuck to its pre-*Southern Union* position, and again held that restitution is not a criminal penalty for *Apprendi* purposes.<sup>212</sup> The writer detects a degree of trepidation in the Seventh Circuit while it was rejecting defendant's argument, which was expressly based on *Southern Union*. The Seventh Circuit held that to agree with defendant would be to "overturn our long-standing [jurisprudence]."<sup>213</sup> In other words, the Seventh Circuit disagrees with this writer's reading of *Southern Union*.

Now pending in the Southern District of Texas is a six-year-old criminal case, *United States v. Citgo Petroleum Corp.*<sup>214</sup> After the Fifth Circuit affirmed Citgo's conviction for criminal violations of the Clean Air Act, the government and a sizeable group of individual would-be "victim" intervenors, sought megalithic and varied forms of restitution.<sup>215</sup> The restitution issue was not addressed by the trial court prior to the appeal.<sup>216</sup> On September 6, 2012, in *In re Allen*, the Fifth Circuit granted a writ of mandamus and ordered the trial court to consider the motion of the newly appearing individual complainants for leave to pursue their purported individual damage claims as part of the *Citgo* case.<sup>217</sup> The most startling feature of *Citgo* is that the government itself invoked *Southern Union* and joined the newly found alleged victims in demanding a jury trial.<sup>218</sup> Both the would-be intervenors and the government insist that a trial by jury is mandated by *Southern Union* for the determination of the various restitution amounts. If the "victims" succeed, this hoary criminal case will morph into a mass tort case, with the liability question apparently having already been decided in favor of the "victims." The writer presumes that the Solicitor General is aware of what is going on in the Southern District of Texas. At least arguably, it is now the official position of the United States after *Southern Union*, that the Sixth Amendment requires a jury trial for the purposes of imposing criminal restitution. On November 6, 2012,

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211. *Id.* at 915–16.

212. 701 F.3d 1206, 1217 (7th Cir. 2012).

213. *Id.* at 1218.

214. No. C-06-563 (5th Cir. filed Aug. 9, 2006).

215. *See, e.g., Citgo*, No. C-06-563, 2011 WL 1337101, at \*4 (S.D. Tex. April 5, 2011).

216. *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012).

217. *Id.*

218. *Citgo*, No. C-06-563, 2012 WL 5421303, at \*2 (S.D. Tex. Dec. 20, 2012).

the Southern District of Texas appropriately and wisely held that the undertaking of a trial of the restitution issue would unduly complicate the case, and would unduly prolong the sentencing process.<sup>219</sup> Accordingly, it denied restitution, obviating any need to consider the hairy demand for jury trial. The government moved for reconsideration, but on December 20, 2012, its motion was denied.<sup>220</sup> Not only is the government relying on *Southern Union* in *Citgo*, but it is inviting the purported intervenors to ride the government's coattails, even though the newly found "victims" were not known to the probation office at the time of *Citgo*'s conviction and only surfaced after *Citgo*'s conviction was affirmed.<sup>221</sup> Where the *Citgo* case will go from here is anybody's guess. At this moment, *Citgo* is a significant enigma because of the government's apparent 180 degree turn.

On January 14, 2013, the Supreme Court heard oral argument in *Alleyne v. United States*<sup>222</sup> on appeal from the Fourth Circuit.<sup>223</sup> *Harris v. United States*<sup>224</sup> is there under fire. In *Harris*, the Supreme Court held constitutional a federal statute that increases a minimum sentence if a firearm was brandished during the criminal act, even though the statute allowed the issue of brandishing to be decided by the sentencing judge based, without a jury, on a preponderance of the evidence.<sup>225</sup> During oral argument, the seminal case under discussion was *Apprendi*.<sup>226</sup> *Southern Union* was never mentioned by name, but the Deputy Solicitor General admitted that during the last term of court, the court decided that the factual requisites for the imposition of a fine can no longer be tried solely to the judge.<sup>227</sup> This was an indirect reference to *Southern Union*. Surprisingly, nothing whatsoever was said by either party on January 14, 2013, about *Citgo*. From this writer's reading of the argument and the briefs in *Alleyne*, including amici briefs, the writer does not feel sanguine enough to guarantee the outcome of *Alleyne*, except to predict that the decision will not be unanimous. The absence of consensus can be detected from the following colloquy:

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219. *Id.* at 6.

220. *Id.*

221. *See Citgo*, No. C-06-563, 2011 WL 1337101, at \*1 (S.D. Tex. Apr. 5, 2011) (noting that after *Citgo*'s conviction, the court ordered a presentence report at which point the government named 100 alleged victims).

222. 133 S. Ct. 420 (2012).

223. 457 F. App'x 348 (4th Cir. 2011).

224. 536 U.S. 545 (2002).

225. *Id.* at 568–69.

226. Transcript of Oral Argument, *Alleyne v. United States*, 133 S. Ct. 420 (2012) (No. 11-9335), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-9335.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-9335.pdf).

227. *Id.* at 45.

JUSTICE SOTOMAYOR [who wrote *Southern Union*]: Mr. Dreeben [Deputy Solicitor General], can I go back to a point you made earlier? You talked about a legislature not attempting to supplant the jury's role on the maximum. You don't see the same danger – we started out in a country where almost all sentencing was in the discretion of the judge; whatever crime you committed, the judge could decide where to sentence you. As *Apprendi* and its subsequent progeny laid out, these sentencing changes that have come into existence have really come into existence the latter half of the last century.

What – don't you fear that, at some point, the legislature will go back to the old system of supplanting the jury by just saying what it said in 924(c)? Every single crime has a maximum of life.

And all the – and every single fact that's going to set a real sentence for the defendant, a minimum, we're going to let the judge decide by a preponderance of the evidence.

The bottom line of my question is, when *Apprendi* was decided, what should be the driving force of protecting the jury system? The deprivation of discretion, whether that's permissible or not, or whether a sentence is fixed in a range, whatever it might be, by a jury?

MR. DREEBEN: Justice –

JUSTICE SOTOMAYOR: What's the better rule to keep both extremes from happening?

MR. DREEBEN: I think, Justice Sotomayor, that the Court recognized, in *Apprendi*, that its role was limited and to certain extent could be evaded by legislatures, if they were inclined to do so.

JUSTICE SCALIA [who joined Justice Sotomayor in *Southern Union*]: Mr. Dreeben, I think that history is wrong. In fact, the way the country started, there was no judicial discretion. There were simply fixed penalties for crimes. If you stole a horse, you were guilty of a felony, and you would be hanged. That's where we started.<sup>228</sup>

On December 20, 2012, the Fifth Circuit decided *United States v. Sharma*.<sup>229</sup> The trial court had ordered restitution in the amount of \$43,318,170.93, which was the exact amount recommended by the probation officer.<sup>230</sup> The Fifth Circuit reversed, holding (1) that an award of

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228. *Id.* at 38–40.

229. 703 F.3d 318 (5th Cir. 2012).

230. *Id.* at 322.

restitution greater than the victim's actual loss exceeds MVRA's "statutory maximum," and (2) that "every dollar must be supported by record evidence."<sup>231</sup> The concept of a "statutory maximum" has been used by several courts to protect the MVRA from the embrace of *Southern Union*.

On December 21, 2012, the Court of Appeals for the District of Columbia Circuit decided *In re Sealed Case*.<sup>232</sup> The defendant there had expressly waived his right to appeal the "sentence." After a whopping amount of restitution was thereafter ordered, defendant appealed the restitution amount. On appeal, the government argued that the "waiver of the right to appeal the 'sentence' waive[d] the right to appeal [the order of] restitution because 'restitution' is necessarily part of a 'sentence.'"<sup>233</sup> While the writer agrees with the government's position in *Sealed Case*, the appellate court did not.<sup>234</sup>

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231. *Id.* at 322–23.

232. 702 F.3d 59 (D.C. Cir. 2012).

233. *Id.* at 64.

234. *Id.* at 65.