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Laura Munster Sever

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NOTE

THE VICTIM AND WITNESS PROTECTION ACT OF 1982: WHO ARE THE VICTIMS OF WHICH OFFENSES?

When government took over the prosecution of criminal offenses, the victim of the crime became a forgotten entity in the criminal justice system.¹ The victim's only function after reporting the crime was to serve as a witness, and all too often the government ignored the fact that the victim had suffered.² In the past few decades, several states have recognized the victim's needs with the passage of victim restitution statutes.³ Victim restitution statutes attempt to provide for reimbursement of the victim through payments from the offender for injury or loss resulting from the offense. Congress has responded to the crime victim's needs by enacting the Victim and Witness Protection Act of 1982 (the VWPA).⁴ The VWPA requires the offender in Title 18 crimes⁵ to pay restitution to the victim for property loss

1. S. REP. NO. 532, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2515, 2516 [hereinafter cited as SENATE REPORT].

2. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL* 295, 297-99 (R. Barnett & J. Hagel eds. 1977).

3. *See, e.g.*, ALA. CODE §§ 15-18-65 to -78 (1982 & Supp. 1984); ALASKA STAT. § 12.55.045 (1980); ARIZ. REV. STAT. ANN. § 13-603.C (Supp. 1984-1985); FLA. STAT. ANN. § 775.089 (West Supp. 1985); GA. CODE ANN. §§ 17-14-1 to -16 (1982); HAWAII REV. STAT. § 706-605(1)(e) (Supp. 1984); ILL. ANN. STAT. ch. 38, § 1005-5-6 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 35-50-5-3 (Burns 1985); IOWA CODE ANN. §§ 910.1-910.5 (West Supp. 1985); KY. REV. STAT. ANN. § 431.200 (Baldwin 1985); ME. REV. STAT. ANN. tit. 17A, §§ 1321-1330 (1983 & Supp. 1984-1985); MD. ANN. CODE art. 27, § 640 (Supp. 1984); MISS. CODE ANN. §§ 99-37-1 to -23 (Supp. 1984); MO. ANN. STAT. §§ 546.630, .640 (Vernon 1949); N.J. STAT. ANN. § 2C:44-2, 43-3 (West 1982 & Supp. 1985); N.M. STAT. ANN. § 31-17-1 (1981); N.C. GEN. STAT. § 15A-1343 (1983); N.D. CENT. CODE § 12.1-32-02(1) (Supp. 1983); OHIO REV. CODE ANN. § 2929.11 (Baldwin Supp. 1984); OR. REV. STAT. §§ 137.103, .106, .109 (1983); PA. STAT. ANN. tit. 18, § 1106 (Purdon 1983); R.I. GEN. LAWS §§ 12-19-32 to -34; S.C. CODE ANN. § 24-23-210 (Law. Co-op. Supp. 1984); S.D. CODIFIED LAWS ANN. §§ 23A-28-1 to -12 (1979 & Supp. 1984); UTAH CODE ANN. § 76-3-201 (Supp. 1983); WASH. REV. CODE ANN. § 9.94A.140 (Supp. 1984); W. VA. CODE §§ 61-11A-1 to -7 (1984). Victim restitution programs are distinguished from victim compensation programs in that compensation programs depend on state or federal government payments to the victim. For the purposes of this paper, the term "restitution" refers to payments directly from the offender to the victim.

4. The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in various sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)) [hereinafter cited as VWPA].

5. Examples of Title 18 crimes include embezzlement, murder, mail fraud,

or personal injury.⁶ One purpose of the VWPA is to give more legal protection to victims and witnesses of federal crimes.⁷ Another purpose of the VWPA is to serve as a model code for the states because Congress realized that most serious crimes are within the jurisdiction of state and local law enforcement agencies.⁸

Although the goals of the VWPA are laudable, a major problem is the lack of specific definitions, which must be remedied before the VWPA can function effectively.⁹ The basic terms "victim" and "offense" are not clearly defined in the VWPA itself, its legislative history,¹⁰ or in the Justice Department Guidelines.¹¹ Such terms are vital to the VWPA's interpretation in that they determine who may receive restitution and to what extent. The further importance of clearly defining these terms is evident due to the fact that the VWPA requires the judge to order restitution in every case involving Title 18 crimes, unless he states the reason for not doing so.¹²

This note will focus on the restitution sections of the VWPA and examine the terms "victim" and "offense" in an attempt to provide working definitions for those terms. The first section of this note

burglary, kidnapping, bank robbery, interstate transportation of stolen vehicles, and violations of civil rights. See Merritt, *Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982*, 20 CRIM. L. BULL. 44, 45 (1984); Krasno, *The Victim and Witness Protection Act of 1982—Does it Promise More than it Can Deliver*, 66 JUDICATURE 468 (1983).

6. SENATE REPORT, *supra* note 1, at 9, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2515.

7. *Id.* at 9-10, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2515-16.

8. *Id.*

9. At least two commentators agree that one of the major problems with the restitution section of the VWPA is the lack of definitions. Krasno, *supra* note 5, at 469-71; Merritt, *supra* note 5, at 45. Merritt noted that another critical problem of VWPA is that studies reveal that most offenders barely make enough money to sustain themselves and their dependents, let alone make restitution payments even in small amounts. Merritt, *supra* note 5, at 47. Krasno also lists problems, such as the possibility of the offender filing for bankruptcy or requiring the offender's family to make restitution payments for an offense they did not commit, that arise as a result of the VWPA's imprecise language. She goes on to conclude that the problems involved in implementing the statute are so great that the public benefits of the VWPA may be diminished significantly. Krasno, *supra* note 5, at 469-71.

10. SENATE REPORT, *supra* note 1.

11. Justice Department Guidelines, 48 Fed. Reg. 33,774 (July 25, 1983) (codified in 18 U.S.C. § 1512 note) [hereinafter cited as Justice Department Guidelines].

12. 18 U.S.C. § 3579(a)(1), (2) (1982). Section 3580(a) permits the judge when ordering restitution to consider the financial needs of the offender and his dependents, the earning ability of the offender, and the financial loss suffered by the victim as a result of the offense.

discusses the history and the purposes of victim restitution, the emergence of the VWPA, and the outcome of recent constitutional challenges to the VWPA. To be effective, restitution programs must stress the correctional benefits to offenders as well as the more obvious benefits to victims. The second section examines the term "offense." The definition of "offense" is essential in determining the amount of restitution and the recipients of restitution. "Offense" should be restricted to the narrow definition of the Federal Probation Act,¹³ to the "offense of conviction" standard.¹⁴ If "offense" is more broadly construed to include either the original offenses charged, offenses included in the entire criminal transaction, or even offenses that are not charged, the VWPA will fail for lack of due process.¹⁵

The third section of the note concentrates on who or what may be considered a "victim" for purposes of the VWPA. The victim's family should be entitled to restitution when they have suffered a loss as a result of the offender's actions,¹⁶ but some state and federal courts have disallowed restitution to anyone other than the direct victim.¹⁷ Insurers and other organizations who reimburse the victim¹⁸ should also be entitled to restitution, especially when the compensators are legally obligated to reimburse the victim for his losses.¹⁹ Otherwise, the public actually pays the offender's debt through increased insurance premiums or taxes.²⁰ Similarly, the government should be entitled to restitution in some circumstances.²¹ Additionally, charities should be the recipients of restitution in cases where there are no

13. Federal Probation Act, 18 U.S.C. § 3651 (1982).

14. *Id.*

15. See *infra* notes 236-240 and accompanying text.

16. See *infra* notes 191-203 and accompanying text.

17. See, e.g., *United States v. Clovis Liquor Dealers Trade Ass'n.*, 540 F.2d 1389 (10th Cir. 1976) (restitution ordered to a charitable organization disallowed because it was not the aggrieved party); *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950) (error to order restitution for counts for which defendant was indicted, but not convicted); *Montgomery v. State*, 292 Md. 155, 438 A.2d 490 (1981) (the term "victim" did not include third party payors such as private insurance companies); *People v. Grago*, 24 Misc. 2d 739, 204 N.Y.S. 2d 774 (1960) (union, from which union officer appropriated money, and not bank which improperly credited money to officer's account, was the "aggrieved party" for restitution purposes); *State v. Eilts*, 23 Wash. App. 39, 596 P.2d 1050 (1979), *aff'd* 94 Wash. 2d 489, 617 P.2d 993 (1980) (restitution limited to losses suffered by investors who were named in information).

18. Examples of others who reimburse the victim might be state agencies through state compensation programs, private agencies set up to aid victims of crime, family members, or friends.

19. See *infra* notes 205-213 and accompanying text.

20. See *infra* note 213.

21. See *infra* notes 214-219 and accompanying text.

readily identifiable victims.²² In sum, the vague definition of "victim" in the VWPA should be construed broadly to include all entities that suffer as a result of the offender's actions.

The final section of the note will propose clear definitions of the terms "victim" and "offense" that will further the goals of the VWPA. These definitions will provide relief to the broadest class of victims, and at the same time, protect the due process rights of the offender.

I. THE HISTORY AND PURPOSES OF RESTITUTION AS A CRIMINAL SANCTION

A. History

Restitution is not a new idea in the theories of criminal justice. Studies of ancient civilizations reveal that restitution was used among groups to punish a crime by a member of one group to avoid blood feuds.²³ As primitive cultures became socially organized, private retaliation was replaced with group vengeance, which in turn was replaced by compensation systems called "composition."²⁴ When communities became more structured, certain types of anti-social behavior were sanctioned, and specific monetary amounts were set for repaying a victim of those behaviors for his loss.²⁵ As centralized leadership became stronger, the leaders of the community took over the negotiation process between the parties and demanded a portion of the compensation for their services.²⁶ Eventually, the central authorities completely dominated the criminal justice process and collected all of the payment as a fine.²⁷ At that point, the victim's only hope to recover damages was through the civil law of torts.²⁸ The offender no longer reimbursed the victim as a criminal sanction.

Restitution did not reappear in the criminal context until the late nineteenth century, when it could only be ordered as a condition of probation, and not in conjunction with a prison sentence.²⁹ In the

22. See *infra* notes 220-226 and accompanying text.

23. Nader & Combs-Schilling, *Restitution in Cross Cultural Perspective*, in *RESTITUTION IN CRIMINAL JUSTICE* 27, 28 (J. Hudson & B. Galaway eds. 1977).

24. Jacobs, *The Concept of Restitution: An Historical Overview*, in *RESTITUTION IN CRIMINAL JUSTICE* 45 (J. Hudson & B. Galaway eds. 1977).

25. *Id.* at 46.

26. *Id.* at 47.

27. *Id.*

28. *Id.*

29. *Id.* at 49-50. Conferences were held in Stockholm in 1878, in Rome in 1885, and in Brussels in 1900, all of which recommended the return to the use of restitution.

1950's the English Parliament renewed consideration of restitution as a means to make the victim whole.³⁰ However, the Parliament decided that the difficulties with victim restitution, such as the offender's inability to pay, were too great.³¹ Instead, the Parliament turned their efforts toward victim compensation programs.³² Several states in the United States followed the lead of the English by enacting victim compensation statutes in the 1960's.³³ However, many commentators continued to write on the benefits of restitution as a criminal sanction and to encourage its adoption.³⁴ Today, several states combine both victim compensation programs and victim restitution programs as a method to indemnify the victim and to make the offender recognize his responsibility.³⁵

The federal government has allowed restitution as a sentencing option under the Federal Probation Act since 1925.³⁶ Under the Probation Act restitution may only be ordered as a condition of probation; there is no option to order restitution independently or in conjunction with a prison sentence.³⁷ One advantage of the Probation Act is its very specific language concerning restitution. The offender may be ordered to "make restitution or reparation to aggrieved parties for actual loss or damage caused by the offense for which conviction was had."³⁸ In addition to limiting restitution to probation, another

Because the 1900 conference members could not agree on any specific restitution proposals, they merely readopted a resolution which encouraged the victims of crime to seek civil remedies. *Id.* at 49.

30. This change in attitude is largely credited to the works of Margery Fry, an Englishwoman who wrote extensively on restitution in 1951 and again in 1957. M. FRY, *ARMS OF THE LAW* (V. Gollancz ed. 1951); Fry, *Justice for Victims*, *The Observer* (London), July 7, 1957. Jacobs, *supra* note 24, at 51.

31. The major problem with restitution programs was the offender's inability to pay. One of the reasons the offender lacked resources was that prison wages were too low and that prisons could not offer better wages because of the inability to compete in the private market with goods produced by prisoners. Jacobs, *supra* note 24, at 50.

32. "Compensation" means payments administered to a victim through a state administered program while "restitution" refers only to payments made by the offender to the victim. Ms. Fry felt that society owed compensation programs to victims of crime as a matter of social welfare policy. *Id.* at 51.

33. *Id.* at 53.

34. Jacobs mentions the works of K. SMITH, *A CURE FOR CRIME* (1965); Eglash, *Creative Restitution: Some Suggestions for Arson Rehabilitation Programs*, 20 *AMERICAN JOURNAL OF CORRECTIONS* 20-34 (Nov.-Dec. 1958); and S. SCHAFER, *THE VICTIM AND HIS CRIMINAL* 82-83 (1968). Jacobs, *supra* note 24, at 53-55.

35. *See supra* note 2.

36. Federal Probation Act, 18 U.S.C. § 3651 (1982).

37. *Id.*

38. *Id.*

major drawback of the Probation Act is that restitution orders are not mandatory.³⁹ Congress finally reacted to the perceived need for mandatory restitution orders with the VWPA in 1982.⁴⁰

B. The Victim and Witness Protection Act of 1982

The restitution sections of the VWPA allow the judge to consider the needs of the victim in the sentencing process. The legislative history of the VWPA indicates that equity requires that the victim have some role or rights in the criminal justice process in light of the offender's cautiously guarded rights.⁴¹ At first glance, the principle of restitution does not seem feasible because one would think that the criminal offender is simply without the resources to pay his victim. Nevertheless, advocates of restitution have shown that the average dollar losses suffered are in the hundreds of dollars, not thousands of dollars.⁴² The lower dollar amounts will more likely be within the means of the criminal offender. The VWPA, by requiring a "victim impact statement,"⁴³ informs the authorities of the victim's losses and encourages the inclusion of restitution orders in sentencing.⁴⁴ Restitution orders are a method of restoring the victim to his original status to the extent of the offender's ability to pay.

39. SENATE REPORT, *supra* note 1, at 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2536.

40. 18 U.S.C. §§ 3579, 3580 (1982). The VWPA was introduced in response to "Crime Victim's Week," which was declared by President Reagan in April of 1982. SENATE REPORT, *supra* note 1, at 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2516.

41. SENATE REPORT, *supra* note 1, at 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2516.

42. *Id.* at 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2536.

43. Pub. L. No. 97-291, § 3(a), 96 Stat. 1238 (1982) amends FED. R. CRIM. P. 32(c)(2) to provide:

The presentence report shall contain: any prior criminal record of the defendant; a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior; information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

In October, 1984, this rule was amended to include even more detailed information about the defendant, his circumstances, and his resources. The amendment takes effect on November 1, 1986. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 215(a), 235, 98 Stat. 2014, 2031 (1984).

44. SENATE REPORT, *supra* note 1, at 31, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2537.

Sentencing judges can use the VWPA to order a convicted offender to pay restitution in lieu of or in addition to any other penalty.⁴⁵ Restitution may be ordered for damage, loss, or destruction of property of the victim and/or necessary medical and related expenses for bodily injury of the victim, including lost income.⁴⁶ If the offense results in the victim's death, the offender may be ordered to pay the cost of the funeral expenses and additional restitution may be paid to the victim's estate.⁴⁷ However, restitution may be ordered only if "imposition of such order will not unduly complicate or prolong the sentencing process."⁴⁸ Congress added this proviso recognizing that although victimization may have lifelong cost implications, it may be necessary to limit the amount of restitution.⁴⁹ The various restitution options offer flexibility to the judge and allow him to take into consideration the circumstances of each case.

Once the restitution order has been made, the VWPA provides some remedies for noncompliance with the order. If the offender is placed on probation or parole and he fails to comply with the condition of restitution, then his parole or probation may be revoked.⁵⁰ However, the court or the Parole Commission should consider the offender's present ability to pay when deciding whether to revoke parole or probation.⁵¹ The restitution order itself may also be enforced by the United States or the victim in the same manner as a civil judg-

45. 18 U.S.C. § 3579(a) (1982). However, the sentencing judge must take into consideration such factors as the offender's ability to pay and his financial resources before ordering restitution. *Id.* § 3580(a).

46. *Id.* § 3579(b)(1), (2).

47. *Id.* § 3579(b)(3), (c). Restitution may be made in services to the victim or to any organization or individual the victim designates, if the victim (or his estate) consents. *Id.* § 3579(b)(4).

48. *Id.* § 3579(d).

49. SENATE REPORT, *supra* note 1, at 31-32, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2537-38. The amount of restitution may be limited because of the offender's inability to pay. If the restitution order is beyond the offender's means, the order may have a negative impact on the offender. An additional reason for limiting the amount of restitution is that it may be too difficult to establish causation between the offense and the harm which might unduly complicate or prolong the sentencing process.

50. 18 U.S.C. § 3579(g) (1982).

51. *Id.* The circumstances the court or Parole Commission must consider are "the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that have a bearing on the defendant's ability to pay." *Id.* In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court held that the fourteenth amendment forbids a state from revoking an indigent's probation for failure to pay a fine and make restitution in absence of a determination that he had not made bona fide efforts to pay or that there were

ment.⁵² Thus, the offender may not ignore the restitution order because of the enforcement mechanisms of the VWPA.

The VWPA also provides limitations on the time in which restitution is to be paid, on the payment of restitution to others who compensate the victim, and on the total amount of damages the victim may receive from the offender. If no specific time period for payments is set by the court, restitution must be made immediately.⁵³ Otherwise, the court may order the offender to make all payments by the end of his probation term, five years after release from prison, or five years from the date of sentencing.⁵⁴ Furthermore, when the victim has been or will be compensated by someone other than the offender,⁵⁵ the court might not order the offender to make restitution to the victim at all.⁵⁶ Instead, the offender may be ordered to make restitution to the one who compensated the victim, provided the offender's resources prove sufficient.⁵⁷ The VWPA mandates that the court's priority be that all the victims receive restitution before payment will be ordered to anyone who has suffered a loss indirectly.⁵⁸ The VWPA also limits the total amount of damages the victim may receive from the offender.⁵⁹ If the victim decides to sue the offender in a civil proceeding, any restitution received under the VWPA will be set off against any amount the victim may be awarded in the civil action.⁶⁰ This practice prevents the victim from receiving double damages.⁶¹ These limitations offer some protections to ensure that vic-

alternative forms of punishment. *Bearden*, 461 U.S. at 668-69. In other words, the Supreme Court held that the considerations mentioned in § 3579(g) are essential considerations for the court before parole or probation may be revoked.

52. 18 U.S.C. § 3579(h) (1982). To enforce a civil judgment, the victim or the United States must go to the home state and/or county of the offender and sue for a lien on the offender's property. The exact method of this procedure depends on the laws of the particular state. Under civil law, the debtor has certain exemptions, such as homestead and life insurance exemptions, which may not be attached by the creditor. It is unclear whether these exemptions would apply to enforcement of a restitution order under § 3579(h). See also Krasno, *supra* note 5, at 471.

53. 18 U.S.C. § 3579(f)(3) (1982).

54. *Id.* § 3579(f)(2).

55. See *supra* note 18 for examples of others who might compensate the victim.

56. 18 U.S.C. § 3579(e)(1) (1982).

57. *Id.* Although it would seem that the victim's rights should be subrogated by the compensator, § 3579(e)(1) makes it clear that all of the victims will be reimbursed first. The compensator will only receive restitution if the offender has adequate resources to reimburse everyone.

58. *Id.*

59. 18 U.S.C. § 3579(e)(2) (1982).

60. *Id.*

61. SENATE REPORT, *supra* note 1, at 32, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2538.

tims receive the benefits of the VWPA and at the same time prevent the victim from abusing those benefits.

Courts have considerable flexibility in determining the needs of the offender as well as the needs of the victim when making a restitution order.⁶² Section 3580 allows the court to consider the loss suffered by the victim, the financial resources, needs, and earning ability of the offender and his dependents, as well as any other factors the court deems appropriate.⁶³ The court is also given broad discretion in settling any disputes that may arise over the amount of restitution.⁶⁴ The result of such broad discretion is that in most cases, the victim's needs are given priority over the offender's needs.⁶⁵ Thus, although the VWPA appears to balance the needs of all parties involved, the factors considered might not be given equal weight.

Further assistance in exercising their discretion under the VWPA is given judges by the Justice Department Guidelines. The VWPA requires the Attorney General of the United States to issue guidelines for the implementation of the VWPA in the federal court system.⁶⁶ The Justice Department Guidelines respond to the perceived need for fair and sympathetic treatment of victims and witnesses of federal crimes.⁶⁷ Little attention is paid to the restitution sections of the VWPA, although the background statement indicates a desire to assist victims in recovering their losses.⁶⁸

62. 18 U.S.C. § 3580 (1982). This section outlines the procedure for issuing restitution orders.

63. *Id.* § 3580(a).

64. *Id.* § 3580(d). Most disputes over the amount of restitution arise when the offender challenges the restitution order as being too high. One case in point is *Richard v. United States*, 738 F.2d 1120 (1984). See *infra* note 236.

65. Apparently, the court must at least *consider* the offender's resources. See *United States v. Durham*, 755 F.2d 511, 515 (6th Cir. 1985). However, even a finding of the offender's indigency may not bar a restitution order. See, e.g., *United States v. Fountain*, No. 84-1939 (7th Cir. July 8, 1985) (available Oct. 1, 1985, on LEXIS, Genfed Library, Cir file) (indigency is not a defense to a restitution order); *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985) (The VWPA does not prohibit imposing a restitution order on one who is indigent at the time of sentencing); *United States v. Wyzynski*, 581 F. Supp. 1550 (E.D. Pa. 1984) (restitution order of \$25,000 upheld even though the defendant was unemployed).

66. VWPA, *supra* note 4, at § 6.

67. Justice Department Guidelines, *supra* note 11. The guidelines were issued on the last possible day, July 9, 1983. It should also be noted that these guidelines have no binding effect on the courts. This disclaimer is included in the guidelines. *Id.* at 33,777.

68. *Id.* at 33,775. Specifically, one of the stated purposes of the guidelines was to "enhance the assistance which victims and witnesses provide in criminal cases and to assist victims in recovering from their losses to the fullest extent possible consistent with available resources." *Id.* However, other than the attempt to define

The guidelines suggest that the instances when restitution would be appropriate are those situations in which a serious crime is involved.⁶⁹ The definition given for a "serious crime" is a "criminal offense that involves personal violence, attempted or threatened personal violence, or significant property loss."⁷⁰ Oddly, the guidelines address only "serious crimes" while § 3579 refers to "offenses" under Title 18 or of air piracy that result in property loss or bodily injury.⁷¹ Regardless of the definition, the guidelines fail to offer concrete assistance in determining those offenses for which restitution may be ordered.⁷²

Additionally, the guidelines offer little assistance to sentencing judges in defining who may receive restitution. However, the guidelines go beyond the VWPA somewhat in defining "victim."⁷³ The definition includes those who suffer direct harm and family members of a minor homicide victim.⁷⁴ The guidelines go on to state that in many circumstances a case-by-case determination will be necessary to define the victim, especially where there are multiple victims.⁷⁵ In

"victim" and "serious crime," the guidelines give only one short paragraph to the subject of restitution, which is filled with conditions. It reads as follows:

IV. Restitution

Restitution may be ordered under 18 U.S.C. 3579. *Consistent with available resources and their other responsibilities*, federal prosecutors should advocate fully the rights of victims on the issue of restitution *unless such advocacy would unduly prolong or complicate the sentencing proceeding.* (Emphasis added.)

Id. at 33,777.

69. *Id.* at 33,775.

70. *Id.*

71. 18 U.S.C. § 3579(a)(2). The term "serious crime" indicates that higher dollar amounts would be involved. Because of the offender's limited ability to pay in most circumstances, § 3579 would be most effectively applied to crimes that were less serious in nature and involved lower dollar amounts.

72. The offense may be the presentence offense, the offense for which conviction was had, the offenses which were originally charged, or offenses unrelated to the charged offenses. *See infra* note 168 and accompanying text.

73. *See infra* notes 178-180 and accompanying text.

74. Justice Department Guidelines, *supra* note 11, at 33,775. The definition also states that federal agencies shall not be considered victims for purposes of Part II of the guidelines, which address personal services rendered to a victim. *Id.* *See also* United States v. Fountain, No. 84-1939 (7th Cir. July 8, 1985) (Available Oct. 1, 1985, on LEXIS, Genfed Library, Cir File). This definition still leaves many unanswered questions. What happens to families of victims who must provide lifelong care for the victim because of the nature of the victim's injuries? Nor is mention made of insurers or other possible compensators.

75. The example given is a mail fraud case. There may be several victims, many who may be difficult to identify. *Id.*

some cases, the full range of victim assistance may not be available because of the nature of the victim,⁷⁶ but the guidelines prompt Justice Department personnel to "err on the side of providing rather than withholding assistance."⁷⁷ While the guidelines offer some additional clarification beyond the VWPA itself of who may be considered a victim,⁷⁸ the definition is far from exhaustive.

The absence of specific standards to determine restitution has prompted at least one district court to rule that the VWPA is unconstitutional as violative of the fifth, seventh, and fourteenth amendments. In *United States v. Welden*,⁷⁹ three defendants were convicted of violating 18 U.S.C. § 1201(a)(1), the kidnapping statute.⁸⁰ At the sentencing hearing, the defendants challenged the constitutionality of the restitution order.⁸¹ The *Welden* court held that the VWPA violated the defendants' constitutional rights and thus refused to order restitution.⁸²

Even though *Welden* has subsequently been overruled,⁸³ the questions raised by the case have generated considerable discussion. Several courts⁸⁴ and commentators⁸⁵ have continued to discuss the con-

76. See *supra* note 75.

77. Justice Department Guidelines, *supra* note 11, at 33,775.

78. See *infra* notes 190-192 and accompanying text.

79. 568 F. Supp. 516 (N.D. Ala. 1983), *rev'd sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied* 105 S. Ct. 2362 (1985).

80. *Id.* at 517. The defendants murdered one of their victims, kidnapped and sexually assaulted another victim, and damaged the car of a third victim. A condition of their sentence was that the defendants make restitution to one of the victims. *Id.*

81. *Id.* The defendants alleged that their fifth, sixth, seventh, and fourteenth amendment rights had been violated by the VWPA. *Id.* at 526. The court answered that it would not sidestep the important constitutional challenge. *Id.* at 517. In fact, the court went beyond the pleadings of the petitioners and considered the constitutionality of the VWPA in light of the eighth amendment, as well as the fifth, sixth, seventh, and fourteenth amendments. *Id.* at 532-35.

82. *Welden*, 568 F. Supp. at 534-36.

83. *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

84. See *United States v. Fountain*, No. 84-1939 (7th Cir. July 8, 1985) (Available Oct. 1, 1985, on LEXIS Genfed Library, Cir File); *United States v. Palma*, 760 F.2d 475 (3d Cir. 1985); *United States v. Watchman*, 749 F.2d 616 (10th Cir. 1984); *United States v. Brown*, 744 F.2d 905 (2d Cir.) *cert. denied*, ___ U.S. ___, 105 S. Ct. 599, 83 L. Ed. 2d 708 (1984); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984); *United States v. Ciambone*, 602 F. Supp. 563 (S.D.N.Y. 1984); *United States v. Brown*, 587 F. Supp. 1005 (E.D. Pa. 1984).

85. Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301 (1984); Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590 (1984); Note, *Where Offenders Pay for Their Crimes—Victim Restitution and its*

stitutionality of the VWPA. The VWPA has been challenged as violative of the seventh amendment for failure to provide a jury trial on the issue of damages,⁸⁶ and as violative of fifth and fourteenth amendments for lacking ascertainable standards so as to offend due process and equal protection.⁸⁷ Another problem with the VWPA is the possibility of revocation of probation or parole for failure to pay restitution, which has led to challenges based on the eighth amendment that forbids cruel and unusual punishment.⁸⁸ Thus, the VWPA continues to be challenged on many constitutional grounds.

The seventh amendment challenges to the VWPA are based upon the argument that its provisions turn a restitution order into a civil judgment, and as such, the offender is entitled to a jury trial.⁸⁹ There are three prongs to this assertion. The first prong is that the VWPA is compensatory in nature, and therefore the penalty imposed is civil rather than criminal.⁹⁰ The second prong is that the provision which forbids the offender from denying any essential allegations in a subsequent civil proceeding gives a collateral estoppel effect.⁹¹ Thus, if the offender is denied the opportunity to challenge any of the facts leading to the restitution order in subsequent proceedings, he should be entitled to a jury trial in the first instance.⁹² Finally, the third prong of the argument is that the provision allowing for enforcement of the restitution order in the same manner as a civil judgment transforms the order to a civil judgment.⁹³ Hence, the restitution order is a civil

Constitutionality, 59 NOTRE DAME L. REV. 685 (1984); Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671 (1984); Recent Decisions, *The Constitutionality of the Victim and Witness Protection Act of 1982*, 35 ALA. L. REV. 529 (1984); Recent Cases, *Criminal Law—Sentencing—Restitution—The Restitution Provisions of the Victim and Witness Protection Act of 1982 Violate the Fifth and Seventh Amendments to the Constitution of the United States—United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), 53 CIN. L. REV. 263 (1984).

86. See *supra* note 84.

87. See, e.g., *Palma*, 760 F.2d at 477-79; *Satterfield*, 743 F.2d at 839-43; *Florence*, 741 F.2d at 1068-69; *Ciambrone*, 602 F. Supp. at 566-67.

88. See *Ciambrone*, 602 F. Supp. at 568-69.

89. *Welden*, 568 F. Supp. at 533-34. See also Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590, 1615 (1984); Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 691 (1984).

90. See Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 673 (1984).

91. *Welden*, 568 F. Supp. at 533-34. The *Welden* court incorrectly referred to this effect as "*res judicata*." *Id.*

92. *Id.*

93. *Id.*

judgment because the amount in controversy exceeds twenty dollars.⁹⁴ Each prong of this argument leads to the conclusion that the VWPA violates the seventh amendment because the offender does not have the benefit of a jury determination of the amount of restitution.

However, the courts that have examined the seventh amendment challenge to the VWPA have concluded that the offender is not entitled to a jury determination of the amount of restitution.⁹⁵ Even though the restitution order may be compensatory in nature, it cannot be equated to a civil proceeding because the victim has no control over the outcome of the case.⁹⁶ Additionally, there is no constitutional requirement that a jury determine a defendant's sentence.⁹⁷ Congress may decide whether a penalty is to be characterized as civil or criminal,⁹⁸ and the legislative intent is clear in the context of the VWPA.⁹⁹ As to the challenge that the restitution order has collateral estoppel effect, courts have rejoined that collateral estoppel applies only to the underlying criminal offense and not to the facts leading to the restitution order.¹⁰⁰ Jury determinations of fact have always been accorded this effect.¹⁰¹ Finally, civil enforcement does not transform a criminal penalty into a civil judgment.¹⁰² The federal government is able to enforce criminal penalties in civil actions under 18 U.S.C. § 3565, and the VWPA merely extends this right to crime victims.¹⁰³ Thus, there is considerable authority to support the proposition that the VWPA does not violate the seventh amendment.

Another challenge to the constitutionality of the VWPA is that it lacks sufficient standards to guide judges during sentencing, and thus violates the due process requirements of the fifth amendment.¹⁰⁴ However, the due process that is required at sentencing is somewhat

94. *Id.*

95. *See supra* note 84.

96. *See Palma*, 760 F.2d at 479; *Brown*, 744 F.2d at 910. The victim is not allowed to cross-examine the defendant, nor is he able to testify about the extent of his losses. *Id.*

97. *Brown*, 744 F.2d at 909.

98. *Palma*, 760 F.2d at 479; *Satterfield*, 743 F.2d at 836-37; *Florence*, 741 F.2d at 1068.

99. *Satterfield*, 743 F.2d at 836-37.

100. *Palma*, 760 F.2d at 479; *Brown*, 744 F.2d at 910; *Satterfield*, 743 F.2d at 837-38; *Ciambrone*, 602 F. Supp. at 567; *Brown*, 587 F. Supp. at 1007.

101. *See supra* note 100.

102. *Brown*, 744 F.2d at 910; *Satterfield*, 743 F.2d at 838; *Florence*, 741 F.2d at 1068.

103. *Satterfield*, 743 F.2d at 838.

104. *Palma*, 760 F.2d at 477; *Satterfield*, 743 F.2d at 839; *Florence*, 741 F.2d at 1067; *Ciambrone*, 602 F. Supp. at 565.

less than required during the trial.¹⁰⁵ The offender's due process rights are limited at sentencing to avoid full scale evidentiary hearings which could unduly prolong or complicate the sentencing process.¹⁰⁶ Under the VWPA, the offender is given the opportunity to contest the facts relied upon to support the restitution order.¹⁰⁷ Moreover, the offender may only challenge the VWPA as it affects *his* rights.¹⁰⁸ Thus, the mere possibility of due process violations in the future will not render the VWPA unconstitutional on its face.¹⁰⁹ Courts agree that the VWPA contains sufficient standards to protect the offender's due process rights at sentencing.¹¹⁰

The fourteenth amendment challenge to the VWPA also relates to the alleged lack of ascertainable standards to guide judges during sentencing. Under the aegis of equal protection, offenders allege that the lack of standards in the VWPA leads to disparate sentencing results.¹¹¹ But the Eleventh Circuit Court of Appeals points out that it is constitutionally permissible to treat similarly situated people differently at sentencing.¹¹² Moreover, an advantage of the VWPA is that the judge can individualize the restitution order to the circumstances of each case.¹¹³ Therefore, the VWPA does not violate equal protection because disparate sentencing results are expected.¹¹⁴

The final constitutional challenge to the VWPA is that it violates the eighth amendment. Offenders allege that the possibility of revocation of parole or probation for failure to pay restitution is cruel and unusual punishment.¹¹⁵ Before revoking parole or probation, the VWPA requires that the parole board or probation officer consider the good

105. See, e.g., *Palma*, 760 F.2d at 477; *Satterfield*, 743 F.2d at 840; *United States v. Stephens*, 699 F.2d 534, 537 (11th Cir. 1983); Note, *Where Offenders Pay for Their Crimes—Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685, 714-15 (1984).

106. *Satterfield*, 743 F.2d at 840.

107. *Id.* The offender may challenge the information in the victim impact statement concerning his resources and needs as well as the losses alleged by the victim. See *Ciambrone*, 602 F. Supp. at 566-67.

108. *Palma*, 760 F.2d at 477.

109. *Satterfield*, 743 F.2d at 839.

110. *Satterfield*, 743 F.2d at 841; *Florence*, 741 F.2d at 1069; *Ciambrone*, 602 F. Supp. at 566-67.

111. *Palma*, 760 F.2d at 478; *Ciambrone*, 602 F. Supp. at 565; *Welden*, 568 F. Supp. at 535.

112. *Satterfield*, 743 F.2d at 841 citing *Williams v. Illinois*, 399 U.S. 235 (1970). See also *Ciambrone*, 602 F. Supp. at 567.

113. *Palma*, 760 F.2d at 478; *Satterfield*, 743 F.2d at 841.

114. See *supra* note 113.

115. *Ciambrone*, 602 F. Supp. at 568.

faith attempts of the offender to pay restitution and to consider his financial resources.¹¹⁶ However, the recent Supreme Court decision in *Bearden v. Georgia*¹¹⁷ also requires that the officials consider alternative forms of punishment before revocation of parole or probation for failure to pay a fine.¹¹⁸ Although the VWPA does not expressly require consideration of alternative forms of punishment, the list of factors to consider in § 3579(g) is not exclusive.¹¹⁹ To meet the requirements of the eighth amendment, courts applying the VWPA must not only consider the good faith attempts of the offender to pay restitution, but they must also consider alternative forms of punishment before revoking parole or probation.¹²⁰

Although some courts have admitted that the VWPA could be applied unconstitutionally, the statute has been upheld as valid on its face.¹²¹ Sentencing judges must be careful to avoid due process problems under the fifth amendment,¹²² and they must also comply with the requirements of *Bearden* before revoking parole or probation to avoid eighth amendment violations.¹²³ Thus, while the VWPA has survived constitutional challenges to date, problems in applying it constitutionally could occur in the future.

C. The Purposes of Restitution

Judges must not only consider the constitutional demands of the criminal justice system when applying the VWPA, but they must also consider the purposes of punishment that restitution serves. Restitution as a criminal sanction has many and varied purposes. The political impetus behind most restitution statutes seems to be a reawakening of the need to make the victim financially whole.¹²⁴ The goal of restor-

116. 18 U.S.C. § 3579(g) (1982).

117. 461 U.S. 660 (1983).

118. 461 U.S. at 668-69.

119. *Satterfield*, 743 F.2d at 843; *Ciambrone*, 602 F. Supp. at 569.

120. *Palma*, 760 F.2d at 479; *Satterfield*, 743 F.2d at 843; *Ciambrone*, 602 F. Supp. at 569.

121. *Satterfield*, 743 F.2d at 839; *Florence*, 741 F.2d at 1068.

122. *Brown*, 744 F.2d at 909 (the difference between restitution and a civil judgment is that restitution occurs only after an adjudication of guilt); *Satterfield*, 743 F.2d at 839 n.10 (due process violations may occur if the offender is required to pay restitution for crimes of which no jury found him guilty).

123. *Satterfield*, 743 F.2d at 843 (the court must consider alternative forms of punishment before revoking probation or parole); *Ciambrone*, 602 F. Supp. at 569 (the VWPA's list of factors is not exclusive; the court must consider alternative forms of punishment as well).

124. For example, the legislative history of the VWPA is filled with comments about the plight of the forgotten victim. Generally there is a perceived need to make

ing the victim to his pre-crime status often fails in restitution programs because of the failure to apprehend the offender and because of the offender's limited resources.¹²⁵ Operationally, the goals of most restitution programs must include rehabilitation of the offender.¹²⁶

Historically, there were six goals of restitution in small scale societies.¹²⁷ The first purpose was prevention; restitution prevented the perpetration of an offense from escalating into a feud between groups.¹²⁸ This purpose of preventing feuds between groups is no longer useful in modern society. The second goal of restitution was rehabilitation; in small scale societies it was necessary to reintegrate the offender into the community as a useful participant.¹²⁹ While the offender does not have to be an economically productive asset to modern society, rehabilitation is often mentioned as a goal of restitution.¹³⁰ Rehabilitation is used in modern penal theories as a method for the offender to regain his self-respect and to return the offender

the victim feel as if he has a role in the criminal justice system and to make the offender pay for the victim's losses. See SENATE REPORT, *supra* note 1, at 10, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2515-16.

125. H. Edelhertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63-64 (J. Hudson & B. Galaway eds. 1977). In many instances the offender may not be apprehended, and if he is, the plea bargaining process may reduce the charges brought against him. Both of these factors reduce the victim's chances for receiving restitution. Galaway, *Toward the Rational Development of Restitution* in RESTITUTION IN CRIMINAL JUSTICE 77, 82 (J. Hudson & B. Galaway eds. 1977). Edelhertz suggests that state compensation programs can better serve the victims' interest in receiving full reparations in the broadest range of cases. Edelhertz, at 63. Congress has faced the shortcomings of restitution with the enactment of the Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2171 (1984). The Victims of Crime Act authorizes the allocation of federal funds to state victim compensation programs that are non-discriminatory in the treatment of victims of crime. The federal funds allow greater compensation to crime victims regardless of whether the offender is apprehended or whether the offender has adequate funds to reimburse his victim.

126. Edelhertz, *supra* note 125, at 64. Programs that concentrated only on the benefits to the victim would disregard the offender's limited resources, which might lead the offender to further criminal acts to find the resources to pay the victim. *Id.*

127. Nader & Combs-Schilling, *supra* note 23, at 34-35.

128. *Id.* at 34.

129. *Id.*

130. See, e.g., Galaway, *supra* note 125, at 83-84. Galaway propounds four purposes of modern restitution, as well as the historical purpose of reintegrating the offender into society. The four purposes listed by Galaway include: less severe or alternative methods of punishment thereby reducing the size of prison populations; rehabilitation of the offender which provides a positive method for the offender to regain his self-respect; reductions of the demands on the criminal justice system; and reduction of society's need for retribution. *Id.* at 83-84.

to an equal status with non-offenders.¹³¹ The third purpose of restitution in small scale societies was restitution itself; the needs of the victim were addressed.¹³² According to the legislative history of the VWPA, this purpose is the primary motivation for passage of the VWPA.¹³³ The restitution purpose is also encompassed in the theory of retribution as it offers the victim a method to express his hostility within the criminal justice system.¹³⁴ Thus, many of the historical and modern purposes of restitution amend the offender's relationship with society and the victim.

Additional purposes of restitution in small scale societies, some of which are still viable today, were designed to protect and advance society's interest as a whole. Another purpose of restitution in small scale societies was the restatement of values; by requiring restitution, the community's rules were articulated.¹³⁵ An additional purpose was socialization; formation of the society's rules educated the community of the norms and values of the society and eventually provided a form of social control.¹³⁶ Neither of these purposes is dominant in modern society because our laws are rather set and well-known. However, the legislature may change the laws and types of punishment, a prime example being the VWPA itself. Therefore, these purposes may have nominal validity today. The final purpose of restitution historically was regulation and deterrence; those closely associated with the offender were forced to share the punishment, thus, they

131. *Id.* See McAnany, *Restitution as Idea and Practice: The Retributive Process* in OFFENDER RESTITUTION IN THEORY AND ACTION 15, 20 (B. Galaway & J. Hudson eds. 1978).

132. Nader & Combs-Schilling, *supra* note 23, at 34.

133. SENATE REPORT, *supra* note 1, at 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 2516.

134. McAnany, *supra* note 131, at 20-21. McAnany feels there are several types of retribution. Expressive retribution denounces the criminal activity, although this in itself is not sufficient "punishment." Formal retribution punishes the offender simply because he has broken the law. Equalizing retribution is the type discussed in the text, it returns the offender to an equal status with non-offenders after the punishment. Desert retribution punishes the offender because he deserves it; limits on punishment are set by the legislature. Requitel retribution exacts a morally right act from a morally wrong act; it offers the offender a chance for moral reform. *Id.* McAnany argues that retribution is the only justifiable form of punishment. *Id.* at 20. In a sense, his classifications encompass many of the other theories of punishment. For example, equalizing retribution closely parallels rehabilitation. See also Rothnard, *Punishment and Proportionality* in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 259, 270 (R. Barnett & J. Hagel eds. 1977) (Rothnard believes that "equal treatment for equal crime" is the only just means of punishment).

135. Nader & Combs-Schilling, *supra* note 23, at 34.

136. *Id.* at 35.

were motivated to deter the offender from further crime.¹³⁷ Deterrence and regulation certainly are valid goals today with the hope that offenders will cease criminal activity if they must literally "pay" for their crimes.¹³⁸ All three of these goals, restatement of values, socialization, and regulation and deterrence, serve to protect society from the offender.

Whatever the goals or purposes of restitution, it is apparent that the need for victim-oriented relief is only one aspect of restitution. Some state courts have gone so far as to conclude that rehabilitation of the offender and deterrence from further crime are the primary duty of the court, as opposed to reimbursement of the victim.¹³⁹ Thus, even in the VWPA, where the stated goals are victim-oriented, the correctional aims of restitution must be noted. It is essential to remember the purpose of victim restitution when determining who should receive restitution for which offenses.

II. THE DEFINITION OF "OFFENSE" IN THE VWPA

The VWPA employs the term "offense" to describe a criminal act for which restitution may be ordered.¹⁴⁰ The VWPA specifically states that, "the court, when sentencing a defendant *convicted of an offense* under this title, . . . may order . . . that the defendant make restitution to any victim of the offense."¹⁴¹ This wording implies that the offender may be ordered to make restitution only for those offenses for which he was convicted. However, the VWPA also refers to offenses that "result in" either bodily injury or property damage.¹⁴² These subsequent phrases cast doubt on the original implication, and it may be that the *results* of the offense, rather than the offense for which conviction was had, is to be the touchstone for the restitution order. Unfortunately, the results of an offense may spring from actions by the offender that were not included in the offense for which he

137. *Id.* The immediate family or group of the offender were usually involved with the payment of restitution, thus considerable pressure was put on the group to deter the offender from further criminal activity. *Id.*

138. See, e.g., Title, *Restitution and Deterrence: An Evaluation of Compatibility* in OFFENDER RESTITUTION IN THEORY AND ACTION 33 (B. Galaway & J. Hudson eds. 1978).

139. *Coles v. State*, 48 Md. App. 647, 429 A.2d 1029, 1034 (1981) (the primary duty of the court is to rehabilitate the defendant); *In Re Trantino Parole Application*, 89 N.J. 347, 446 A.2d 104, 113 (1982) (restitution is meant to be a compelling reminder of the harm done, for the purposes of rehabilitation and deterrence, rather than the mitigation of the harm done).

140. 18 U.S.C. § 3579(a)(1), (b) (1982).

141. *Id.* § 3579(a)(1) (emphasis added).

142. *Id.* § 3579(b)(1), (2) (emphasis added).

was convicted. An example of a situation where the results of an offense are not included in the offense of conviction might be where personal property is damaged in the course of a bank robbery. Should the owner of a car used in the getaway receive restitution for damage caused by fire to the car even though the offender was convicted only of bank robbery?¹⁴³ Consequently, sentencing judges implementing the VWPA may be faced with a dilemma; should they order restitution only for the offense for which conviction was had, or may they include related offenses that *resulted* in victimization?

There are two major approaches to the problem of interpreting "offense" as it is used in the VWPA. First, there is the limited approach found in the Federal Probation Act, which restricts the definition to the "offense of conviction" standard.¹⁴⁴ Second, there is the unlimited approach which may include a variety of related offenses.¹⁴⁵ The definition of "offense" is relevant to the ultimate interpretation of the VWPA because "offense" is a prerequisite to the definition of the victim.

A. *The Limited Approach*

The limited approach, which defines "offense" as the "offense for which conviction was had," originated in the Federal Probation Act which authorizes judges to order restitution only as a condition of probation.¹⁴⁶ The VWPA does not have such limiting language, although there may be sufficient justification for applying the limitations to the VWPA. There is a long history of case law support for the imposition of restitution only for the "offense of conviction."¹⁴⁷ The

143. These are the actual facts of *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985). For a discussion of the holding in this case, see *supra* note 211 and accompanying text.

144. 18 U.S.C. § 3561 (1982), which states that as a condition of probation, the defendant "may be required to make restitution or reparations to aggrieved parties for actual damages or loss caused by the offense for which conviction was had" *Id.*

145. Related offenses might include offenses that are not formally charged. See Krasno, *supra* note 5, at 470; Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *MISS. L.J.* 515, 536 (1982).

146. 18 U.S.C. § 3561 (1982). The judge may not order restitution separately or in addition to any other penalty under the Probation Act. The Judiciary Committee saw this as a shortcoming of the current state of federal law because restitution is often an afterthought rather than an inevitable sanction. Resolving this problem was one of the motivations for the VWPA. SENATE REPORT, *supra* note 1, at 30, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2536.

147. See, e.g., *United States v. Orr*, 691 F.2d 431 (9th Cir. 1982) (restitution limited to the amount for which defendant was convicted); *Dougherty v. White*, 689 F.2d 142 (8th Cir. 1982) (restitution could not be ordered for counts that were dis-

basic policy behind this specific standard is that it ensures that the offender is ordered to pay restitution only for those offenses for which he has had the opportunity to adjudicate his guilt.¹⁴⁸ However, there are difficulties with this approach because the restriction to the "offense of conviction" standard may have a negative effect on the prosecutor's willingness to negotiate a plea bargain.¹⁴⁹ Despite its drawbacks, the limited approach to the definition of "offense" appears to best serve the interests of justice.

A landmark case in support of the "offense of conviction" standard is *United States v. Follette*.¹⁵⁰ In *Follette*, the defendant was convicted on charges of embezzlement and conversion of United States postal funds in the amount of \$203.99.¹⁵¹ As a condition of her suspended sentence, the court ordered the defendant to make restitution of \$466.28 to the surety company that had reimbursed the government.¹⁵² By the end of her probation period the defendant had not made complete restitution. Therefore, she petitioned the court for an extension of probation so that she could complete her payments

missed); *State v. Labure*, 427 So. 2d 855 (La. 1983) (erroneous to order restitution to a victim of burglary for which defendant had not pled guilty); *Mason v. State*, 46 Md. App. 1, 415 A.2d 315 (1980) (restitution limited by the losses established by the conviction, which serves as a predicate for the sentence). Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 517 (1984). The author feels that no legislative reform is needed to maintain the "offense of conviction" standard, because of the judicial construction that has applied to § 3561. *Id.* He cites to other authors who believe that the "offense of conviction" case precedents of § 3561 have relevance to the interpretation of the VWPA. *Id.* at 517 n.51 citing A. PARTRIDGE, A. CHASET & W. ELDRIDGE, *THE SENTENCING OPTIONS OF FEDERAL DISTRICT JUDGES* 9 (rev. ed. 1983).

148. Project, *Congress Opens a Pandora's Box—The Restitution Provision of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 511 (1984). Other policies behind a limited approach to "offense" include: 1) it guarantees that the restitution order is directly related to the criminal act; 2) the rehabilitative effect of restitution may be diminished or eliminated if the offender doesn't recognize the relationship between the restitution order and the offense; and 3) if the offender has not been found guilty of a particular offense and is then ordered to make restitution for that offense, he may feel no responsibility for the consequences of his actions. *Id.* at 511-12.

149. *Id.* at 512. If the prosecutor's goal is to obtain the highest amount of restitution possible for the victim, he may be unwilling to enter into plea bargaining with the offender under the "offense of conviction" standard. Lessor offenses bargained for would lower the victim's restitution. Another problem with the limited approach is that victims of related offenses that do not fall under Title 18 crimes would not receive restitution under the VWPA. *Id.* However, those victims might be able to receive restitution under state programs.

150. 32 F. Supp. 953 (E.D. Pa. 1940).

151. *Id.* at 953-54.

152. *Id.* at 954.

without further penalty.¹⁵³ When considering the petition, the court questioned, *inter alia*, the amount of the original restitution order.¹⁵⁴ The *Follette* court ruled that restitution must be limited to the "actual damages or loss caused by the offense for which conviction was had."¹⁵⁵ The court would not stretch the convicted offense to cover similar offenses committed by the defendant against the same or various parties.¹⁵⁶ Many other courts have followed the lead of *Follette* by restricting the amount of restitution to the "offense of conviction" standard.¹⁵⁷

While these and other courts have strictly construed the definition of "offense" under the Probation Act, some courts have created inroads on the limited approach to restitution. The potential for flexibility first became apparent in *United States v. Taylor*,¹⁵⁸ where although the court upheld the "offense of conviction" standard, they concluded that upon remand the lower court could consider restitution for offenses that were admitted, but not charged.¹⁵⁹ Thus, an admission of restitutionary liability is allowed as an exception to the "offense of conviction" standard in some courts.¹⁶⁰ Several states have codified

153. *Id.*

154. *Id.* at 955.

155. *Id.* The order of restitution was modified to \$203.99.

156. *Id.* The *Follette* court cited *People v. Funk*, 117 Misc. 778, 193 N.Y.S. 202 (1921), in support of its holding. In *Funk*, the court upheld restitution of \$3.08, the amount for which the defendant had been convicted of embezzling, although the employer estimated the defendant had stolen \$1,500.00 over the years.

157. *See, e.g., United States v. Johnson*, 700 F.2d 699 (11th Cir. 1983) (in multiple count indictments, restitution could be ordered only for those counts that resulted in conviction); *United States v. Orr*, 691 F.2d 431 (9th Cir. 1982) (without a plea agreement to pay, restitution cannot be ordered for dismissed counts); *United States v. Beuchler*, 557 F.2d 1002 (3d Cir. 1977) (limitations on the Probation Act prevented a discussion of due process issues, restitution beyond the offense of conviction was struck down); *State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 7 (1981) (restitution for other crimes may constitute imprisonment for debt).

158. 305 F.2d 183 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962).

159. *Id.* at 187. The defendant was indicted for tax evasion and the sentencing court ordered restitution for periods that were not covered in the indictment. The *Taylor* court struck down the order, but with the conditions stated in the text. *Id.* Thus, *Taylor* became a case on which other courts could rely for a judicially created exception to the "offense of conviction" rule.

160. *See, e.g., United States v. McMichael*, 699 F.2d 193 (4th Cir. 1983); *United States v. Davies*, 683 F.2d 1052 (7th Cir. 1982). Another judicially created exception is when the offender agrees to restitutionary liability during the plea bargaining phase for conduct other than that for which he is charged. Project, *supra* note 148, at 512-13. *See Phillips v. United States*, 679 F.2d 192 (9th Cir. 1982); *United States v. McLaughlin*, 512 F. Supp. 907 (D. Md. 1981). Arguably, these two exceptions are the same, merely the timing of the admission is varied.

the admissions exception in their restitution statutes as well.¹⁶¹ Some have argued that the admissions exception makes sense as applied to the Probation Act and that the exception should be extended to the VWPA.¹⁶² Others have contended that, because the admission may occur at any time, before prosecution has begun or even unintentionally, the exception should be strictly monitored.¹⁶³ Without careful enforcement of the admissions exception, the exception may give rise to restitution that is not limited to the "offense of conviction" at all.

The "offense of conviction" standard has been at issue in very few cases under the VWPA. In those cases where it has been touched upon, the controversy centers around the meaning of the "results" of the offense.¹⁶⁴ Courts have questioned how far they may take the causal connection between the crime and the damage caused.¹⁶⁵ However, the majority of courts dealing with the issue have limited restitution to the results of the offense for which the offender was convicted.¹⁶⁶ Even those courts that have ordered restitution for results beyond the "offense of conviction" have qualified their holdings.¹⁶⁷ Therefore, although not directly stated, courts construing the VWPA tend to follow the "offense of conviction" standard.

161. See, e.g., ALA. CODE § 15-18-66(1) (1982); IOWA CODE ANN. § 910.1(3) (West Supp. 1985); MISS. CODE ANN. § 99-37-3(1) (Supp. 1984); N.M. STAT. ANN. § 31-17-1(A)(3), (4) (1981); OR. REV. STAT. § 137.103(1) (1984); S.D. CODIFIED LAWS ANN. § 23A-28-2(3) (Supp. 1984); UTAH CODE ANN. § 76-3-201(3)(a) (1983).

162. Project, *supra* note 148, at 513-14. One author believes that there are not any problems in determining restitutionary liability when the defendant confesses responsibility. N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* § 6.37 (1983).

163. Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 516 (1984). The author argues that unless both the prosecutor and the defendant benefit from the bargain, the admission exception will not function properly. *Id.*

164. See, e.g., *United States v. Keith*, 754 F.2d 1388, 1393 (9th Cir. 1985) (possible threat from the offender's mother which caused the victim to miss work was a result of the offense); *United States v. Richard*, 738 F.2d 1120, 1123 (10th Cir. 1984) (loss of money on the day of the robbery resulted from the offense); *United States v. Ciambrone*, 602 F. Supp. 563, 570 (S.D.N.Y. 1984) (expenses claimed must result directly from the offender's actions).

165. *United States v. Trettenaro*, 601 F. Supp. 183, 185 (D. Colo. 1985) (expenses connected with recovery of stolen property are not compensable); *United States v. Ciambrone*, 602 F. Supp. 563, 570 (S.D.N.Y. 1984) (Congress did not intend all consequences of the offender's act to be covered by the restitution order).

166. See, e.g., *Keith*, 754 F.2d at 1393 (restitution ordered was for expenses for nonmedical treatment for assault for which offender was convicted); *Richard*, 738 F.2d at 1123 (restitution ordered for unrecovered money resulting from bank robbery of which the offender was convicted); *United States v. Hendley*, 585 F. Supp. 458 (D. Colo. 1984) (offender ordered to pay costs of arresting him for trespass for which he was convicted).

167. See *United States v. Durham*, 755 F.2d 511, 513-14 (6th Cir. 1985) (restitu-

B. The Unlimited Approach

The unlimited approach to the definition of "offense" might include any offense related to the offense of conviction that resulted in victimization.¹⁶⁸ Such an interpretation of "offense" would further one of the goals of the VWPA by providing greater relief to the victims.¹⁶⁹ But while furthering that goal, the courts must also refrain from infringing on the offender's rights.¹⁷⁰ Additionally, the rule of lenity requires that federal criminal statutes be construed against the party seeking to impose a penalty and in favor of the party against whom the penalties are to be imposed.¹⁷¹ Despite these restrictions, the unlimited approach remains at issue because of the lack of specific language within the VWPA. Several states have adopted the unlimited approach in regard to victim restitution, and the federal courts may draw authority from the rulings in those states.¹⁷²

The rationale behind the statutes and rulings incorporating the unlimited approach is that the court is not bound by the adjudication of guilt because the sentencing phase is a separate part of the trial.¹⁷³ But an important caveat to the unlimited approach is that it has only been utilized in conjunction with probation or parole.¹⁷⁴ The application of the unlimited approach may not be proper when applied to the VWPA because restitution may be ordered as an exclusive sanction.¹⁷⁵ When restitution is ordered as an exclusive sanction, the due

tion ordered for arson for which the offender was not convicted, however, the court realized there could be constitutional problems because his guilt on the issue had not been fully adjudicated); *United States v. Allison*, 599 F. Supp. 958, 959 (N.D. Ala. 1985) (although the court urged the broadest interpretation of the victimization, the judge realized that the criminal activity must be clearly demonstrated in criminal trial).

168. *Krasno*, *supra* note 5, at 470. "Offense" might mean the offenses contained in the presentence report, the entire conduct as alleged in the indictment, offenses admitted in a guilty plea, or admissions made to a probation officer. *Id.*

169. *Project*, *supra* note 148, at 515.

170. Justice Department Guidelines, *supra* note 11, at 33,774.

171. *See United States v. Bell*, 349 U.S. 81, 83 (1955).

172. Some states that have codified this unlimited approach are: ARIZ. REV. STAT. ANN. § 13-603(c) (Supp. 1984); CAL. PENAL CODE § 1203.1 (West Supp. 1984); ILL. ANN. STAT. ch. 38 § 1005-5-6(b) (Smith-Hurd 1982 & Supp. 1984); WIS. STAT. ANN. § 973.09(1)(a) (West Supp. 1984). *See People v. Lent*, 15 Cal. 3d 481, 487, 124 Cal. Rptr. 905, 909, 541 P.2d 545, 549 (1975) (the defendant was acquitted on some counts of check fraud, and convicted of others; the court ordered restitution for all counts); *see also People v. Cummings*, 120 Ariz. 69, 583 P.2d 1389 (1978); *People v. Miller*, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967); *People v. Pettit*, 88 Mich. App. 203, 276 N.W.2d 878 (1979); *Garski v. State*, 75 Wis. 2d 62, 248 N.W.2d 425 (1977).

173. *See supra* note 172.

174. N. COHEN & J. GOBERT, *supra* note 162, at 289.

175. Several authors have found the unlimited approach unacceptable in conjunction with restitution-only programs or with the VWPA. *See* N. COHEN & J. GOBERT,

process rights of the offender become an overriding consideration, and the unlimited approach to the definition of "offense" is inappropriate.¹⁷⁶ Thus, although an unlimited definition of "offense" may be acceptable in some jurisdictions, the policies behind such systems are not applicable to the VWPA.

III. WHO SHOULD BE CONSIDERED A "VICTIM" UNDER THE VWPA?

Once the definition of the term "offense" is narrowed, the next question is who should be considered a "victim" for purposes of the VWPA. The legislative history of the VWPA clearly states that its major goal is to provide restitution to the victims of Title 18 crimes.¹⁷⁷ Unfortunately, the VWPA does not clearly define who should be considered a "victim." The VWPA merely states that restitution may be ordered to "any victim" of an offense under Title 18.¹⁷⁸ The VWPA also mentions that those who compensate the victim¹⁷⁹ may receive restitution if all of the other victims have first been reimbursed for their losses.¹⁸⁰ But doubts exist whether compensators themselves may be considered victims if they suffer a financial loss due to the offender's actions. Other questions are whether family members of the victim who suffer a loss may receive restitution from the offender and whether the government may receive restitution for the expenses of prosecuting the offender. A further inquiry is whether charities are eligible to receive restitution if the victims cannot be easily identified. These questions must be answered before the VWPA can function effectively.

supra note 162, at 289; Project, *supra* note 148, at 515-16; Note, *Restitution in the Criminal Process: Procedures for Fixing the Offenders' Liability*, 93 YALE L.J. 505, 513 (1984).

176. Although the court did not deal directly with the issue of definitions within the VWPA, Judge Kravitch in *United States v. Satterfield* mentioned that the lack of a definition of the "victim of the offense" is likely to cause litigation in the future. Judge Kravitch specifically states, "If a defendant were held liable for restitution to victims of crimes of which no jury found him guilty a due process violation may very well occur." 743 F.2d 817, 839 n.10 (11th Cir. 1984). Additionally, the court in *United States v. Durham* realized that due process violations may exist when the offender is ordered to pay restitution on charges for which his guilt has not been adjudicated. But the *Durham* court refused to consider these possible constitutional violations in the specific restitution order because the offender had not properly preserved the issue for appeal. 755 F.2d 511, 514 (6th Cir. 1985).

177. SENATE REPORT, *supra* note 1, at 10, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2516.

178. 18 U.S.C. § 3579(a) (1982).

179. See *supra* note 18 for examples of possible compensators.

180. 18 U.S.C. § 3579(e)(1) (1982).

A. *Direct Victims*

To qualify for restitution as a direct victim of a Title 18 crime, the victim must have suffered a property loss or bodily injury.¹⁸¹ It would seem that the qualification of a direct victim would be obvious from the criminal proceedings. For example, if the victim was injured during the course of a burglary, he should qualify for restitution in the amount of his property loss, medical expenses incurred, as well as related expenses for therapy and lost income. A problem arises because, other than the section that refers to compensators,¹⁸² no other classification of "victim" is mentioned in the VWPA. Therefore, all other entities that might be victims under the VWPA must qualify under a "direct victim" analysis.¹⁸³

The Federal Probation Act authorizes restitution to "aggrieved parties" who suffer as a result of the "offense for which conviction was had."¹⁸⁴ This definition suffers from the same problem as "victim" in the VWPA; persons entitled to qualify as "aggrieved parties" are not defined. However, the Probation Act does have a history of case analysis from which to draw. In *Karrell v. United States*,¹⁸⁵ the defendant was convicted of six out of seventeen counts alleging fraudulent claims under the Servicemen's Readjustment Act of 1944.¹⁸⁶ As a condition of probation, the defendant was ordered to pay restitution to each of eighteen veterans, including one who was not named in the indictments.¹⁸⁷ The court held that only the six veterans who had successfully brought their claims against the defendant were entitled to restitution as "aggrieved parties."¹⁸⁸ Limitation to the victim of the offense of conviction is common in many state courts as well.¹⁸⁹

181. *Id.* § 3579(b).

182. *Id.* § 3579(e)(1).

183. Other classifications of victims include the family of the victim, insurers and other compensators, the government, and charities. It may be difficult to qualify as a direct victim even when the individual is injured at the scene of the crime. For example, in the illustration given in the text, if the victim is merely an innocent bystander, he may not qualify for restitution because he was not the "direct victim" of a Title 18 crime.

184. 18 U.S.C. § 3561 (1982).

185. 181 F.2d 981 (9th Cir. 1950).

186. *Id.* at 982-83 n.1. She filed false claims for veteran's home loan guaranty benefits.

187. *Id.* at 983.

188. *Id.* at 987. The analysis in *Karrell* is a good example of how the definitions of "offense" and "victim" are related. The victims will be defined in terms of the offense of conviction.

189. See, e.g., *People v. Grago*, 24 Misc. 2d 739, 741, 204 N.Y.S.2d 774, 777 (1960) (restitution may only be made to those "directly concerned in the counts of the indict-

Assuming that the goal of the VWPA is to compensate victims to the greatest extent possible, the "aggrieved party" interpretation of "victim" does not meet these needs. Alternatively, the Justice Department Guidelines indicate that third parties may also be considered "victims" for purposes of the VWPA.¹⁹⁰

B. Immediate Family of the Victim

While the Justice Department Guidelines and the legislative history of the VWPA offer some clarification of the definition of "victim," the definitions given conflict. The Justice Department Guidelines of the VWPA provide for restitution for "the immediate family of a minor or a homicide victim."¹⁹¹ The Judiciary Committee went further to indicate that restitution could be ordered to third parties including "friends, family members, or other individuals who have assisted the victim or the victim's family."¹⁹² Regardless of whether the Justice Department Guidelines or the legislative history of the VWPA control the definition of "victim," neither give a judge adequate direction in determining when family members of the victim should receive restitution. Thus, case law from state courts must be analyzed to solve this problem.

State courts are widely split on the issue of whether the family of the victim may benefit from restitution. In state courts where restitution is allowed to family members of the victim, the cases usually involve homicide victims.¹⁹³ The rationale for allowing restitution to family members is that the parents or spouse of the victim have suffered a loss because of the offender's criminal act, and the offender should reimburse the family for such loss.¹⁹⁴ Usually state courts that deny restitution to family members of the victim are bound

ment upon which the defendant stands convicted"); *State v. Calderilla*, 34 Or. App. 1007, 580 P.2d 578 (1978) (a bank was a direct victim when it absorbed the loss on a former employee's forged check).

190. Justice Department Guidelines, *supra* note 11, at 33,775.

191. *Id.* at 33,775.

192. SENATE REPORT, *supra* note 1, at 33, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2539.

193. N. COHEN & J. GOBERT, *supra* note 162, at 285. See, e.g., *Shenah v. Henderson*, 106 Ariz. 399, 476 P.2d 854 (1970) (restitution to parents of deceased is proper because they suffered a loss at her death); *State v. Green*, 29 N.C. App. 574, 225 S.E.2d 170, cert. denied, 290 N.C. App. 665, 228 S.E.2d 455 (1976) (same); *State v. Gunderson*, 77 Wash. 2d 226, 444 P.2d 156 (1968) (same).

194. See *supra* note 193.

by specifically worded statutes that allow restitution only to the immediate and direct victim.¹⁹⁵

However, one court has effectively circumvented that limitation. In *People v. Deadmond*,¹⁹⁶ the Colorado Supreme Court overruled the order of restitution to the husband of the victim of vehicular homicide.¹⁹⁷ But the court remanded the case for a determination of which portion of the restitution should have been awarded to the victim, payable to her representative.¹⁹⁸ Hence, the husband would eventually benefit from the restitution order. In 1977, Oregon amended its restitution statute to include restitution for persons other than the direct victim.¹⁹⁹ Thus, previous Oregon cases which denied restitution to family members of the victim have no effect on cases commencing after 1976.²⁰⁰ The trend in state courts appears to be moving toward allowing restitution to family members of the victim, regardless of strictly worded statutes.

Despite this trend, the federal courts have not offered any guidance on the issue,²⁰¹ and the VWPA itself does not mention family members.²⁰² Conversely, both the Justice Department Guidelines and the legislative history of the VWPA indicate that family members may be eligible for restitution.²⁰³ But both sources offer different situations where family members of the victim could receive restitution.²⁰⁴ The solution that would best meet the victim-oriented goals of the VWPA is to combine the suggestions of the legislative history and the Justice Department Guidelines. Family members of a deceased victim obviously suffer a loss and should be reimbursed by the offender. If the victim is a minor, his losses are absorbed by his

195. *E.g.*, OKLA. STAT. ANN. tit. 22, § 991 (a) (West 1984); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (Vernon Supp. 1985).

196. 683 P.2d 763 (Colo. 1984).

197. *Id.* at 774.

198. *Id.*

199. OR. REV. STAT. § 137.103(4) (1983). "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities. . . ."

200. *E.g.*, *State v. Stalheim*, 275 Or. 683, 552 P.2d 829 (1976) (husband and father of victims was not an "aggrieved party" and therefore, he could not receive restitution).

201. Before the VWPA, restitution could not be ordered in federal courts unless it was a condition of probation. 18 U.S.C. § 3651 (1982). Homicide cases, where the family members of the victim are usually awarded restitution in the state courts, are generally not encountered in conjunction with probation.

202. *See supra* notes 181-183 and accompanying text.

203. *See supra* notes 191-192 and accompanying text.

204. *Id.*

parents, who in turn should receive restitution, especially if the parents must provide medical care for the minor. Additionally, family members who compensate the victim should be eligible for restitution because they have suffered a financial loss resulting from the offender's actions. The VWPA itself should clearly include in its definition of "victim" family members of the victim who suffer a loss.

C. Insurers and Others Who Compensate the Victim

Insurers who compensate the victim, like family members of the victim, have received disparate treatment from the courts. Again, the decision of whether or not to allow restitution to insurers depends upon the definition of "victim."²⁰⁵ If the jurisdiction involved interprets the relevant statute to allow restitution to parties who suffer a loss as a result of the offender's crime, restitution has been ordered to insurers.²⁰⁶ On the other hand, in jurisdictions where restitution is allowed only to the "direct victim" or "aggrieved party," insurers have been denied restitution.²⁰⁷ A few courts have taken the approach that while the insurer might not receive restitution directly, the victim should be obligated to reimburse the insurer indirectly once the victim has received restitution from the offender.²⁰⁸ This approach seems to be the most sensible because the "direct victims" are made financially whole and the insurers are compensated as well.

The VWPA does provide that insurers and others who compensate the victim²⁰⁹ may receive restitution after all of the "direct

205. See *supra* notes 177-180 and accompanying text.

206. E.g., *United States v. Follette*, 32 F. Supp. 953 (E.D. Pa. 1940) (surety is an "aggrieved party"); *People v. Calhoun*, 145 Cal. App. 3d 568, 193 Cal. Rptr. 394 (1983) (restitution allowed to insurance company under California probation law); *People v. Alexander*, 35 Cal. App. 2d 626, 6 Cal. Rptr. 153 (1960) (restitution to insurer in arson case); *State v. Behrens*, 204 Neb. 785, 285 N.W.2d 513 (1979) (restitution to insurer for medical bills of victim); *Flores v. State*, 513 S.W.2d 66 (Tex. Crim. App. 1974) (restitution to insurer for medical payments made to victim).

207. E.g., *People v. King*, 648 P.2d 173 (Colo. Ct. App. 1982) (restitution to insurers is not allowed under Colorado adult sentencing law); *People v. Grago*, 24 Misc. 2d 739, 204 N.Y.S.2d 774 (1960) (victim's insurance company is not an "aggrieved party"); *State v. Getsinger*, 27 Or. App. 339, 556 P.2d 147 (1976) (same).

208. See *People v. Daugherty*, 104 Ill. App. 3d 89, 432 N.E.2d 391 (1982) (insurance company may have right of subrogation for amounts paid directly to the insured as restitution); *State v. Rose*, 45 Or. App. 879, 609 P.2d 875 (1980) (insured may be contractually obligated to repay insurer who compensated insured when the insured receives restitution payments).

209. Others who compensate the victim may be public or private agencies or simply individuals who have some kind of obligation, moral or otherwise, to help the victim. An example where restitution was allowed is *Ballance v. State*, 447 So. 2d

victims" have been reimbursed.²¹⁰ However, the VWPA adds the caveat in § 3580 that the offender's ability to pay must be considered when ordering restitution.²¹¹ Thus, if the offender has limited resources, it is unlikely that insurers or other compensators will receive restitution. This result is unfair, especially when the insurer or compensator is obligated by law, contractually or by statute, to compensate the victim.²¹² When the compensator is legally obligated to compensate the victim, the compensator becomes a victim of the offender's crime as well. The VWPA should treat the compensator who is legally bound to compensate the victim on a basis equal to that of the "direct victim."²¹³

D. Government

Despite the confusing statement in the Justice Department Guidelines that government agencies or departments should not be considered a "victim" for purposes of the VWPA,²¹⁴ there are situations where the government is a victim. In cases like *United States v. Follette*,²¹⁵ where the government was the target of embezzlement, the government is a direct victim. The taxpaying public pays the offender's debt if the offender is not ordered to make restitution.

974 (Fla. App. 1984). In *Balance*, the court allowed restitution to a company which incurred costs to protect an employee who was the victim of extortion. *Id.* at 976. See also *State v. Yost*, 232 Kan. 370, 654 P.2d 458 (1982) (restitution allowed to person who reimbursed the victim for a worthless check). But see *State v. Garrett*, 29 Or. App. 505, 564 P.2d 726 (1977) (restitution denied to humane society that treated dogs in a conviction for cruelty to animals).

210. 18 U.S.C. § 3579(e)(1) (1982). See *supra* note 180 and accompanying text.

211. 18 U.S.C. § 3580(a) (1982). There is one federal court that has ordered restitution to an insurer under the VWPA. *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985). In *Durham*, the court ordered restitution to the insurer of an automobile that was damaged, but the case was remanded for failure to consider the offender's resources. *Id.* at 513-15. Therefore, the insurer may not receive restitution after all. But the Sixth Circuit Court of Appeals has also considered the insurer in *United States v. Davenport*, No. 84-3376 (6th Cir. May 9, 1985) (available Oct. 1, on LEXIS, Genfed Library, Cir file) where the court remanded the case for a determination of whether the victim had already been compensated by an insurer. If so, the insurer rather than the victim would be eligible for restitution. *Id.*

212. Examples of legal obligations include an insurance company bound by an insurance contract, state compensation programs bound by statute to aid victims of crime, and family members bound by their legal relationship to provide for the victim.

213. One author suggests that insurance companies should be eligible for restitution because the insurance buying public pays for the offender's crimes through increased insurance premiums if the insurer is not reimbursed. Project, *supra* note 148, at 525.

214. Justice Department Guidelines, *supra* note 11, at 33,775.

215. 32 F. Supp. 953 (E.D. Pa. 1940).

Another situation where the government is a direct victim is when public funds are used to pay the victim through state compensation programs.²¹⁶ The government is legally bound by statute to compensate the victim, and thus the government should be treated as others who are legally bound to compensate the victim.²¹⁷ Therefore, situations exist where the government is a direct victim of the offender's crime and the government should be allowed restitution.

Some states have ordered restitution for expenses incurred by the government for investigating the offender's crime.²¹⁸ In addition, one federal court has ordered restitution under the VWPA to a corporation under contract with the government for expenses of arresting a trespasser.²¹⁹ If the offender has sufficient resources to reimburse all of his victims, then the government should receive restitution for investigation and prosecution expenses. This result is justified because the expenses would not have been incurred but for the offender's actions. In summary, the VWPA should allow restitution to the government when it is a direct victim, otherwise restitution for prosecution and investigation expenses should be granted to the government only after the other victims are reimbursed.

E. Charities

Under the Federal Probation Act, charities have occasionally been the recipients of restitution in instances where the victims of crime are not easily ascertainable,²²⁰ a result which could be extended to

216. State compensation programs would pay a victim if the offender is not apprehended. This discussion applies to instances where the victim has already been compensated by the state, the offender is later apprehended, tried, convicted, and ordered to make restitution.

217. See *supra* notes 211-213 and accompanying text.

218. *Gonzales v. State*, 608 P.2d 23 (Alaska 1980) (restitution to government ordered for money spent by undercover agent to buy illegal drugs); *Milton v. State*, 453 So. 2d 137 (Fla. App. 1984) (assessment for expenses incurred by city to investigate defendant's sale of cannabis); *Cuba v. State*, 362 So. 2d 29 (Fla. App. 1978) (restitution allowed for investigative expenses).

219. *United States v. Hendley*, 585 F. Supp. 485 (D. Colo. 1984). The court ordered restitution to Rockwell International, who was under contract with the Department of Energy to operate a nuclear power plant, for expenses of arresting a trespassing protester. *Id.* at 459.

220. The victims are not always ascertainable when the public as a whole suffers from corporate price-fixing schemes which would make it administratively impossible to reimburse every victim. See, e.g., *United States v. William Anderson Co.*, 698 F.2d 911 (8th Cir. 1982) (the court rejected the government's argument that restitution could only be ordered to aggrieved parties for actual damages; upheld sentence ordering corporation to make charitable contributions); *United States v. Mitsubishi*

the VWPA. These cases generally involve corporate offenders convicted of price-fixing schemes, which results in higher taxes or prices for goods paid by the public.²²¹ However, the legislative history of the VWPA clearly states that the provisions of § 3579 are not designed to extend to cases arising under antitrust laws, securities laws, or the laws of other regulatory agencies.²²² The rationale behind this exclusion is that these statutes have their own means of restoring the victim, such as the authorization of treble damages.²²³ This analysis ignores the fact that often the public, in addition to the offender's competitors, suffer from violations of antitrust and securities laws.²²⁴ A stronger argument against allowing charities to benefit from corporate restitution is that the charity is not a "victim" in any sense, and because actual damages have never been assessed.²²⁵ The best solution to this conflict would be to allow charities as recipients of restitution only in cases where it can clearly be shown that the public has suffered because of the corporate offenses, such as in price-fixing schemes, and that there are no easily ascertainable victims. Since it would be impossible to reimburse every individual, the general public can benefit from the increased benefits flowing from the charitable organization. However, restitution to charities should be avoided under the VWPA where it can be shown that corporate competitors, as well as the public, suffered directly and measurably.²²⁶

Thus, there are several categories of individuals and entities that should be eligible for restitution under the VWPA. The strongest arguments for inclusion in the classification of "victim" apply to those

Int'l. Corp. 677 F.2d 785 (9th Cir. 1982) (corporation ordered to make contribution of \$90,000 to an ex-offender's program as restitution); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983) (court upheld condition of probation that defendants make contributions of pastry to charities for conviction on price-fixing schemes).

221. See *supra* note 220.

222. SENATE REPORT, *supra* note 1, at 33, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2539.

223. *Id.*

224. Such violations artificially inflate prices, which the public is forced to pay.

225. Some of the cases that have adopted this rationale and denied restitution from corporate offenders to charities include: *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984); *United States v. Wright Contracting Co.*, 728 F.2d 648 (4th Cir. 1984); *United States v. Prescon Corp.*, 695 F.2d 1236 (10th Cir. 1982); *United States v. Clovis Retail Liquor Dealers Trade Ass'n.*, 540 F.2d 1389 (10th Cir. 1976).

226. Corporate competitors who suffer as a result of the offender's violation of antitrust or securities laws would then appropriately benefit from the penalties under those laws, such as receiving treble damages. The public may also suffer in these cases but corporate competitors can benefit more directly from the damages mentioned above.

who suffer a loss of a family member and to those who are legally obligated to compensate the victim. The language of the VWPA should specifically indicate who those additional "victims" are.

IV. PROPOSAL FOR PROVIDING ADEQUATE DEFINITIONS FOR THE VWPA

The vague definitions of the VWPA preclude its providing adequate assistance to crime victims.²²⁷ Unfortunately, restitution programs that have as their only purpose victim relief historically fail because of the limitations on the nature of restitution.²²⁸ Thus, correctional aims should be added to the goals of the VWPA to aid in its usefulness.

There are a variety of theories that can be applied to restitution as a correctional tool.²²⁹ The theory that most closely aligns with victim-oriented goals is the theory of retribution. In its most primitive form, retribution demands revenge for the wrong caused,²³⁰ which requires that the offender "disgorge his ill-gotten gains"²³¹ or pay for the injury he has caused. The offender is forced to restore the status quo at his expense, thus the victim exacts his revenge.

The retributive theory of punishment can be expanded to encompass other correctional goals, such as rehabilitation. As noted by Professor Patrick McAnany, "[E]very system [of punishment] will tend to collect all justifications within it. But the caution is that we should try to be precise as possible about how and where these justifications are invoked."²³² In his categorization of retributive thought, McAnany includes "equalizing retribution," which closely parallels the definition of rehabilitation.²³³ The thrust of "equalizing retribution" is to return the offender to an equal status with society after he has been punished by paying the price for his crime.²³⁴ In summary, the retributive theory of punishment can be incorporated into the goals of the VWPA to meet its stated ends; the victim will receive a

227. The victim oriented goals are discussed in SENATE REPORT, *supra* note 1, at 10, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2516.

228. See *supra* notes 125-126 and accompanying text.

229. See *supra* notes 127-139 and accompanying text.

230. McAnany, *supra* note 131, at 20.

231. J. MOORE, 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[2] (1985).

232. McAnany, *supra* note 131, at 21.

233. "Rehabilitation" is defined as, "Investing or clothing again with some right, authority, or dignity. Restoring to a former capacity; reinstating; qualifying again." *Black's Law Dictionary* 1157 (5th ed. 1979).

234. McAnany, *supra* note 131, at 21.

measure of revenge because his needs are met by the offender, and the offender can regain a sense of self-respect through rehabilitation.²³⁵

The dual offender and victim oriented purpose of the VWPA is the stepping stone from which "offense" and "victim" can be defined to provide a just federal restitution statute. "Offense" must be defined in a succinct manner in order to effectuate the goals of the VWPA without violating due process. The indefiniteness of the VWPA has already led to constitutional challenges,²³⁶ and further challenges are likely to ensue. In order to withstand further constitutional challenges, the term "offense" in the VWPA must be construed to mean the "offense of conviction." To allow any other interpretation invites due process challenges under the fifth and fourteenth amendments.²³⁷ Due process requires that the offender have notice and the opportunity to be heard.²³⁸ If the offender is ordered to make restitution for offenses for which his guilt was not adjudicated, his constitutional right of due process has been violated. Although the standard of due process required at sentencing may be less than during a criminal trial,²³⁹ courts must distinguish the offender's opportunity to contest the *extent* of injury from his ability to contest the *fact* of injury.²⁴⁰ Due pro-

235. This conclusion does not ignore the difficulties with the actual collection of restitution. The offender must first be apprehended, charged with, and convicted of an offense before restitution can be ordered. Even after restitution is ordered, the offender's ability to pay must be taken into consideration. As indicated *supra* note 125 and accompanying text, restitution may not be the best program to return the victim to his pre-crime status. However, this note focuses on the problems of the VWPA in an attempt to aid in the VWPA's most advantageous implementation.

236. See *supra* notes 84-123. The definition of "offense" was first challenged in *Richard v. United States*, 738 F.2d 1120 (1984). In *Richard*, the defendant was convicted of armed bank robbery. After stealing approximately \$113,000, the defendant hid the money in a men's room in a nearby university building. The police later found the money and returned it to the bank. However, a bank audit revealed that almost \$13,000 was still missing. The defendant argued that he should not have to make restitution in that amount, because it had never been proved that he had the missing money. The court ruled that the money was missing *as a result* of his offense, therefore, restitution was proper. *Richard*, 738 F.2d at 1120-23. In this case, the offender had been convicted of bank robbery. Therefore the "offense of conviction" standard was not at issue. Yet, this is the first challenge to the interpretation of "offense" in the VWPA.

237. See *supra* notes 104-110 and accompanying text for a discussion of due process issues as applied to the VWPA.

238. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

239. *United States v. Stephens*, 699 F.2d 534, 537 (11th Cir. 1983). See also Note, *Where Offenders Pay for Their Crimes—Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685, 714-15 (1984).

240. See, e.g., *United States v. Brown*, 744 F.2d 905, 909 (2d Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 599, 83 L. Ed. 2d 708 (1984) (where the court states, "The

cess at sentencing does exist.²⁴¹ To be fair to the offender, the "offense of conviction" standard must be adopted by the VWPA.

Furthermore, the admissions exception to the "offense of conviction" rule must be strictly limited so that due process rights are not infringed upon.²⁴² Admissions that are not part of the prosecution stage should be disallowed. If the offender admits restitutionary liability without the benefit of a plea bargaining situation, his admission may be one of criminal liability as well. If an admission of restitutionary liability is not strictly enforced, and the admission becomes one of criminal liability, the offender will likely refrain from such admissions. This result defeats the VWPA's goal of reimbursing the victim to the greatest extent possible.

The VWPA should be amended so that it clearly states an "offense of conviction" standard. This standard, as used in the Federal Probation Act, has withstood numerous constitutional challenges²⁴³ and at the same time provides some flexibility stemming from a strictly enforced admissions exception.

Because the necessary restriction to the "offense of conviction" standard limits the victim-oriented goals of the VWPA,²⁴⁴ the definition of "victim" should be given a broad interpretation. A broad interpretation of "victim" will enable more victims to receive restitution from losses they have suffered. A broad interpretation of "victim" will also further the correctional goals²⁴⁵ of restitution because it helps the offender realize the far reach of his criminal actions. Unfortunately, the vague language of the VWPA does not adequately reflect who should receive restitution under any interpretation of "victim";²⁴⁶ thus, clarification is needed.

The VWPA should be amended to clearly include family members, insurers, and other compensators of the victim as "victims" themselves. Family members of the victim should receive restitution

fundamental and obvious difference [between restitution and civil judgment] is that restitution occurs only after an adjudication of guilt."); *United States v. Satterfield*, 743 F.2d 827, 840 (11th Cir. 1984) (due process "assures the defendant he will be given adequate notice and an opportunity to contest the facts relied upon to support his criminal penalty.").

241. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (due process is required at sentencing as well as at the trial).

242. See *supra* notes 238-241. See also notes 160-163 and accompanying text.

243. See *supra* note 157 and accompanying text.

244. See *supra* notes 237-242 and accompanying text.

245. See *supra* notes 128-138 and accompanying text.

246. See *supra* notes 180-182 and accompanying text.

when the offense is homicide, when the family must provide for care of the victim, and when the family members have a legal obligation through their relationship to the victim to absorb the victim's financial loss.²⁴⁷ Insurers and others who compensate the victim should be considered victims when they are legally bound to compensate the victim. At the very least, victims who have been compensated by insurers and others should be required to reimburse the compensator upon receiving restitution.²⁴⁸ Classification as "victims" will enable family members, insurers, and other compensators to receive restitution on an equal footing with the other victims.

The VWPA should also be amended to include the federal government and charities as "victims" in certain circumstances. The government should be considered a "victim" when it is the target of a crime and when a government agency is legally obligated to compensate the victim. The government should receive restitution for investigation and prosecution expenses only when all of the other victims have received restitution.²⁴⁹ Charities should be eligible for restitution when corporate offenders have no easily ascertainable victims, but charities should not be granted restitution when a corporate competitor is shown to have suffered a direct and quantifiable loss.²⁵⁰ By including the government and charities as "victims" in certain situations, the general public benefits and the offender is forced to realize that his actions are not limited in their effect.

V. CONCLUSION

Congress was well-intentioned in its desire to aid the victims of crime by the passage of the VWPA. However, to implement the VWPA fairly and effectively, sentencing judges must carefully balance the needs of both the offender and the victim. Correctional benefits to the offender must be emphasized because of the limited success of restitution programs that concentrate solely on the victims' needs. To effectuate a balanced restitution program, concise definitions of the terms "victim" and "offense" are also needed. The definition of "offense" must be limited to the "offense of conviction" standard to protect the due process rights of the offender. The rights of the victim can be protected by construing the term "victim" to include the greatest class of victims possible who have suffered as a result of

247. See text accompanying notes 201-204.

248. See *supra* notes 208-213 and accompanying text.

249. See *supra* notes 215-219 and accompanying text.

250. See *supra* notes 220-226 and accompanying text.

the offense for which the offender was convicted. By limiting the definition of "offense" and by expanding the definition of "victim," the VWPA can operate effectively to best serve the needs of all participants in the criminal justice system.

LAURA MUNSTER SEVER