

Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996

Matthew Dickman†

INTRODUCTION

The victims' rights movement significantly altered the role of the victim in the criminal justice system.¹ Beginning in the 1970s, the movement reflected public sentiment that the criminal justice system had become overly offender-focused and sought "to make the justice system more sensitive to victims' needs and concerns."² At the apex of the campaign, President Reagan commissioned a Task Force on Victims of Crime, which conducted a national study of the plight of crime victims and made a series of policy recommendations to improve their situation.³ A central component of the reforms suggested by both the President's Task Force and the victims' rights movement was the right of victims to receive restitution from the perpetrator of the crime.⁴ Heeding that advice, Congress enacted legislation over the last twenty-five years that significantly enhanced the authority of federal courts to order restitution to victims of crime.⁵

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† J.D., University of California, Berkeley, School of Law (2009); B.A., University of Michigan (2005). I would like to thank Professors Kathy Abrams and Mary Louise Frampton for their invaluable guidance on early drafts of this Comment. Thanks also to the talented members of the *California Law Review* for their painstaking edits and insightful comments, and to my family and friends for their unwavering support and encouragement during this writing process and beyond.

1. For a detailed discussion of the evolution of victim participation in criminal justice, see Edna Erez & Julian Roberts, *Victim Participation in the Criminal Justice System*, in *VICTIMS OF CRIME* 277 (Robert C. Davis et al. eds., 3d ed. 2007).

2. *Id.* at 279.

3. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982).

4. See *id.* at 78–80; Barbara E. Smith & Susan W. Hillenbrand, *Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation*, in *VICTIMS OF CRIME* 245, 246–49 (Robert C. Davis et al. eds., 2d ed. 1997).

5. See VALIANT R.W. POLINY, A PUBLIC POLICY ANALYSIS OF THE EMERGING VICTIMS'

Restitution first became part of the federal sentencing structure after the 1982 passage of the Victim and Witness Protection Act (the “VWPA”).⁶ Prior to that time, judges could order restitution only as a condition of probation, and such orders were “infrequently used and indifferently enforced.”⁷ By both authorizing and encouraging courts to impose restitution “independent of probation,” the VWPA significantly altered the federal restitution framework.⁸ Though the VWPA greatly enhanced federal courts’ discretionary power to order restitution, it also imposed limitations on that authority. In particular, when deciding whether to impose restitution and the amount of restitution, courts were required to consider “the financial resources of the defendant, [and] the financial needs and earning ability of the defendant and the defendant’s dependents.”⁹ This provision had the practical effect of ensuring that restitution judgments did not exceed offenders’ ability to pay.

With the exception of several minor amendments,¹⁰ the federal restitution structure remained unaltered until Congress passed the Mandatory Victims Restitution Act (the “MVRA” or the “Act”) in 1996.¹¹ The MVRA made restitution mandatory in almost all cases in which the victim suffered an identifiable monetary loss, which removed judicial discretion from the imposition of restitution orders.¹² The MVRA also removed judges’ ability to fashion restitution orders based on an offender’s ability to pay, by mandating that the court “order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the

RIGHTS MOVEMENT 227–42 (1994); *see also* Sara Manaugh, *The Vengeful Logic of Modern Criminal Restitution*, 1 L. CULTURE & HUMAN. 359, 369 (2005).

6. *See* Smith & Hillenbrand, *supra* note 4, at 248.

7. S. REP. NO. 97–532, at 30 (1982).

8. *See* Bonnie Arnett Von Roeder, Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 671–72 (1984).

9. Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, § 5, 96 Stat. 1248, 1255 (codified as amended at 18 U.S.C. § 3664 (2006)).

10. Amendments to the federal restitution framework occurring between the VWPA and the MVRA include: Criminal Fine Improvements Act of 1987, Pub. L. No. 100–185, 101 Stat. 1279 (transferring responsibility for processing criminal debt from Department of Justice to the courts) (codified in scattered sections of 18 & 28 U.S.C.); Criminal Fine Enforcement Act of 1984, Pub. L. No. 98–596, 98 Stat. 3134 (1984) (requiring offenders to pay interest on certain economic sanctions and establishing the Attorney General as responsible for receiving sanction payments) (codified in scattered sections of 18 U.S.C.); Victims of Crime Act of 1984, Pub. L. No. 98–473, § 1401, 98 Stat. 1837, 2170 (creating the Crime Victims Fund) (codified at 42 U.S.C. § 10601 (2006)). *See also* U.S. GEN. ACCOUNTING OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 84 app. II (2001) [hereinafter GAO, CRIMINAL DEBT 2001].

11. *See* S. REP. NO. 104–179, at 13 (1995) (“The legislation enacted in 1982 was the subject of modest amendments in the years since, but remains substantially intact as enacted 13 years ago.”).

12. In addition to requiring full restitution for several specific crimes of violence and offenses against property, the MVRA’s most sweeping provision mandated full restitution in any case “in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.” Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A(c)(1)(B) (2006).

economic circumstances of the defendant.”¹³ The MVRA did, however, require courts to consider the offender’s financial means when devising the schedule by which the offender would pay restitution.¹⁴

Congress’s primary motivation in enacting the MVRA was the belief that the VWPA’s restitution framework had not adequately compensated crime victims.¹⁵ By mandating that judges order restitution in the full amount of victims’ losses, Congress aspired to ensure that victims “receive the restitution that they are due,”¹⁶ and thereby increase victim satisfaction with restitution orders.¹⁷ Some legislators also touted the purported penological benefits of restitution, though only as an ancillary aim of the Act.¹⁸ The MVRA was hailed as part of a move “toward a more victim-centered justice system,”¹⁹ which would help transform a criminal justice system that Congress believed was ignoring the plight of victims.²⁰

Despite the significant impact of the MVRA on the federal restitution scheme, little has been written about the practical effects of the Act. Instead, the great weight of the literature has focused on the constitutionality of the bill. In particular, commentators have debated whether retroactive application of the MVRA violates the Ex Post Facto Clause²¹ and whether the MVRA’s requirement that judges impose restitution violates the Sixth Amendment’s guarantee of a jury trial for all elements of a crime.²² While these constitutional concerns are certainly worthy of debate, they fall outside the scope of this

13. *Id.* § 3664(f)(1)(A).

14. *Id.* § 3664(f)(2)(A).

15. *See, e.g.*, H.R. REP. NO. 104-16, at 4 (1995) (stating that the MVRA was needed “to ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime.”).

16. S. REP. NO. 104-179, at 12 (1995).

17. 141 CONG. REC. H1302, H1309 (1995) (daily ed. Feb. 7, 1995) (statement of Rep. Gekas).

18. *See* S. REP. NO. 104-179, at 18 (1995) (citing “the potential penological [sic] benefits of requiring the offender to be accountable for the harm caused to the victim”).

19. *Id.* at 13.

20. *See A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) [hereinafter *MVRA Hearing*] (statement of Sen. Hatch). *See also* 141 CONG. REC. H1302, H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Foley) (“For far too long we have forgotten the innocent victims of crime.”).

21. For the view that the retroactive application of the MVRA violates the Ex Post Facto Clause, see Irene J. Chase, Comment, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463 (2001) and Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005). For the opposing view, see Heidi M. Grogan, Comment, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079 (2005).

22. For the view that the MVRA is constitutionally invalid under the Sixth Amendment, see Kleinhaus, *supra* note 21, and Melanie D. Wilson, *In Booker’s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379 (2006).

Comment.

The purpose of this Comment is to analyze the practical efficacy of the MVRA and thereby address a deficiency in MVRA scholarship. This Comment provides a critical assessment of the MVRA by looking at its effects in the decade since its passage. The first two Parts of this Comment focus on whether the MVRA has achieved its stated purposes. In particular, Part I addresses the legislative ambition to increase victim compensation, and Part II examines mandatory restitution through the lens of victim satisfaction. These Parts conclude that while the MVRA may have led to marginally more compensation for victims of crime, it has decreased victim satisfaction with restitution. The next two Parts of this Comment focus on some of the ramifications of the MVRA that Congress considered only secondarily prior to passing the legislation. To that end, Part III discusses the MVRA's effect on offender rehabilitation, revealing that mandatory restitution impedes offenders' reintegration into society. Part IV addresses the viability of mandatory restitution as a means to provide victim compensation and illustrates that the MVRA is often an inefficient and impractical method of recompensing victims. Ultimately, this Comment concludes that the MVRA has been detrimental to both victims and offenders and correspondingly recommends an immediate return to a VWPA restitution framework. This Comment also provides guidance for the future direction of restitution research and policy with a focus on restorative justice.

I

VICTIM COMPENSATION UNDER THE MVRA

In the years leading up to the MVRA's enactment, Congress came to view the VWPA as lacking "judicial backbone."²³ In cases of offender indigence, federal judges often invoked their discretion not to impose restitution judgments, leading Congress to conclude that the VWPA had created a system in which the "defendant's financial situation [took] precedence over his victim's."²⁴ Though the Judicial Conference²⁵ testified to Congress that federal judges were copiously ordering restitution in light of offender indigence,²⁶ the

23. Courtney J. Linn, *What Asset Forfeiture Teaches Us About Providing Restitution in Fraud Cases*, 10 J. MONEY LAUNDERING CONTROL 215, 219 (2007).

24. 141 CONG. REC. H1302, H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Hyde).

25. The Judicial Conference of the United States was created by Congress in 1922 to help shape policy concerned with the administration of the U.S. courts. The conference is headed by the Chief Justice of the United States and is composed exclusively of federal judges. During congressional hearings on the MVRA, Maryanne Trump Barry, a U.S. district court judge and chair of the Committee on Criminal Law of the Judicial Conference, testified to Congress on behalf of the Judicial Conference. For Judge Barry's full testimony, see *MVRA Hearing*, *supra* note 20, at 12–27.

26. *Id.* at 14 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States) (concluding that federal judges were doing "extraordinarily well" at ordering restitution by citing evidence that judges ordered restitution

overwhelming sentiment in the legislature was that the rate at which the federal judiciary was imposing restitution was “simply not enough.”²⁷

Congress’s view that judges were deficiently imposing restitution corresponded with its assessment that victims of crime were being inadequately compensated. Accordingly, a primary impetus behind the enactment of the MVRA was the desire to better recompense victims.²⁸ During debate over the bill, Congress concluded that the VWPA had proven insufficient to “make victims [financially] whole” and endorsed the MVRA as a superior method for accomplishing that end.²⁹ Congress viewed the MVRA’s mandate that judges order full restitution regardless of the offender’s financial circumstances as a means “to ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime.”³⁰ Despite acknowledging the inherent impracticality of trying to collect restitution in excess of an offender’s ability to pay, Congress thought that the “small cadre [of offenders with] a significant amount of dollars” and those offenders who would later improve their financial situation would enable the MVRA to enhance victim compensation.³¹

In the decade since the passage of the MVRA, the amount of outstanding federal criminal debt has grown more than eightfold, from approximately \$6 billion in 1996³² to over \$50 billion in 2007.³³ Though the nation’s criminal

and/or fines in 62 percent of criminal cases with an identifiable victim, despite 85 percent of offenders being indigent).

27. 141 CONG. REC. S19273, S19277 (daily ed. Dec. 22, 1995) (statement of Sen. Hatch). *But see* 141 CONG. REC. S19273, S19280 (daily ed. Dec. 22, 1995) (statement of Sen. Simon) (“Federal judges are already doing a good job of ordering restitution when practicable.”). Congress’s view that judges were not ordering sufficient restitution is consistent with a modern trend in criminal justice where the judiciary is blamed for being “too prone to individualize justice to suit the particular circumstances of defendants in ways that limit[] punishment and diminish[] deterrence.” JONATHAN SIMON, *GOVERNING THROUGH CRIME* 127 (2007). This sentiment is reflected in much recent criminal legislation, including the MVRA, mandatory minimum sentencing laws, and mandatory guidelines for calculating prison sentences, all of which significantly reduce judicial discretion to fashion sanctions. *See id.* at 127–30. The pervasive attitude among politicians that judges are “soft on crime” has not only produced the aforementioned legislation, but also a general “decline in autonomy, power, and prestige” for the judiciary. *Id.* at 113, 140. This loss of standing can be seen throughout much of the MVRA’s legislative history, as Congress consistently rejected the Judicial Conference’s views on mandatory restitution. *See infra* notes 94–95, 119, 154–59 and accompanying text.

28. H.R. REP. NO. 104-16, at 4–5 (1995).

29. *Id.* at 4.

30. *Id.*

31. *MVRA Hearing, supra* note 20, at 18 (statement of Sen. Biden); *id.* at 7 (statement of Sen. Hatch) (“[T]he existence of the [restitution] order preserves the possibility of compensation for the victim if the offender does later come into resources, however unexpectedly.”).

32. The Government Accountability Office reported the outstanding criminal debt to be “about \$5.6 billion as of September 30, 1995.” GAO, *CRIMINAL DEBT* 2001, *supra* note 10, at 22. The MVRA, however, did not become operational until 1996, at which time the federal criminal debt was around \$6 billion. *See Criminal Restitution Improvement Act of 2006: Hearing on H.R. 5673 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 1 (2006) [hereinafter *Criminal Restitution Improvement Act Hearing*] (statement of Rep. Howard Coble, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security).

debt is comprised of a combination of unpaid restitution and fines, approximately 80 percent of the federal criminal debt is the result of uncollected restitution orders owed to third parties.³⁴ Thus, of the approximately \$50 billion in uncollected criminal sanctions, nearly \$40 billion is victim restitution.³⁵ The overwhelming proportion of unpaid restitution relative to the entire federal criminal debt incontrovertibly demonstrates that the MVRA restitution framework has been the driving force behind the recent surge in uncollected criminal sanctions.³⁶

As the MVRA has become better integrated into our legal system, the rate of increase of the federal criminal debt has swelled. For a period of time following the passage of the MVRA, many court officials and prosecutors were unfamiliar with the statute's provisions and thus did not fully implement the changes for several years.³⁷ Accordingly, during the first three years of the MVRA's enactment, the federal criminal debt increased by "only" \$1.75 billion per year, growing from roughly \$6 billion at the beginning of 1996³⁸ to approximately \$13 billion by the end of fiscal year 1999.³⁹ In subsequent years, however, as courts began to apply the MVRA more strictly, the amount of unpaid criminal debt grew at a much more rapid pace. From the beginning of fiscal year 2000 to the end of fiscal year 2002, the federal criminal debt increased to \$25 billion, a rate of \$4 billion per year.⁴⁰ The rate of increase has continued to go up since 2002, with uncollected criminal sanctions rising to over \$50 billion at the end of fiscal year 2007.⁴¹ In comparison, during the roughly fourteen years that the VWPA constituted the federal restitution framework, uncollected criminal debt increased by only about \$6 billion over

33. As of the end of fiscal year 2007, the total federal criminal debt was \$50,456,613,913.31. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007, tbl.8C (2007) [hereinafter ANNUAL STATISTICAL REPORT].

34. As of the end of fiscal year 2007, the total federal criminal debt owed to third parties (also referred to as nonfederal restitution) was \$39,829,032,720.46, or approximately 79 percent of all outstanding criminal sanctions. *See id.* at tbl.8B. The total criminal debt owed to the United States, which consists of restitution owed to the government (also referred to as federal restitution) and fines, was \$10,627,581,192.85, or approximately 21 percent of all outstanding criminal sanctions. *See id.* at tbl.8A.

35. *Supra* note 34.

36. *See* GAO, CRIMINAL DEBT 2001, *supra* note 10, at 70 ("[The] dramatic increase in the balance of reported uncollected criminal debt is primarily attributable to the Mandatory Victims Restitution Act of 1996 (MVRA).").

37. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-99-95, FEDERAL COURTS: DIFFERENCES EXIST IN ORDERING FINES AND RESTITUTION 4-5 (1999).

38. *Criminal Restitution Improvement Act Hearing*, *supra* note 32, at 1 (statement of Rep. Coble).

39. U.S. GEN. ACCOUNTING OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 8 (2004) [hereinafter GAO, CRIMINAL DEBT 2004].

40. *Id.* at 7.

41. *See supra* note 33.

the entire period.⁴² In other words, while the federal criminal debt increased by only around \$430 million per year under the VWPA, it is currently growing at a rate of around \$5 billion per year under the MVRA.⁴³

While it is clear that substantially more restitution goes unpaid under the MVRA, it is also possible that victims are receiving more restitution under the Act. Unfortunately, reliable statistics on restitution collection under the VWPA are unavailable. The collection of criminal debt under the VWPA, a duty carried out by various government agencies, suffered from significant fragmentation of policy and administration.⁴⁴ This division caused serious deficiencies in record keeping, and created a situation in which “the government . . . lack[ed] complete and reliable data on the total amount of criminal debt that federal offenders have paid.”⁴⁵ Indeed, in many of the largest criminal debt collection cases, there was “no mechanism by which those collections [were] reported to any governmental agency.”⁴⁶ Nevertheless, the available statistics demonstrate a definitive increase in net restitution collection since the enactment of the MVRA, with restitution collection rising from a reported \$327 million in 1995⁴⁷ to \$1.77 billion in 2007.⁴⁸

Though restitution collection has increased under the MVRA, it is unclear that the provisions of the Act are responsible for those gains. Indeed, criminal debt collection was already rapidly increasing before the MVRA was enacted, rising more than six fold between 1987 and 1995.⁴⁹ Other forces, such as improved recordkeeping, enhanced debt-collection procedures, and the dramatic increase in white collar crime have all likely played significant roles in the increase in net debt collection and are unrelated to the MVRA’s restitution provisions.⁵⁰ Even if the MVRA has led to increased compensation

42. See GAO, CRIMINAL DEBT 2001, *supra* note 10, at 20–22.

43. The disparity in amounts of uncollected criminal sanctions under the VWPA and the MVRA has broader implications than merely an increase in the federal criminal debt. Unpaid restitution represents money owed to victims and outstanding debts against offenders, which bear on both victim satisfaction and offender rehabilitation. See *infra* Parts II, III.

44. U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-94-178, RESTITUTION, FINES, AND FORFEITURE: ISSUES FOR FURTHER REVIEW AND OVERSIGHT 10–13 (1994).

45. *Id.* at 12.

46. *Id.* at 12–13.

47. The Executive Office for U.S. Attorneys reported collecting \$327,027,028 in criminal debt in 1995. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 1995 tbl.12C (1995).

48. The Executive Office for U.S. Attorneys reported collecting \$1,772,410,788.18 in criminal debt in 2007. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007 tbl.8C (2007).

49. Criminal debt collection rose from \$48,269,080 in 1987 to \$327,027,028 in 2005, an increase of over 675 percent. See EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 1995 tbl.12C (1995); EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 1987 tbl.5 (1987).

50. The scale of white-collar financial fraud, which is responsible for approximately two-thirds of the overall outstanding criminal debt, has grown markedly since the enactment of the

for victims of crime, the Department of Justice has acknowledged that any such increase is only marginal: “the Mandatory Victims Restitution Act (MVRA) has resulted in a large surge in criminal debt, but it has not resulted in any appreciable increase in compensation to the victims of crime, in most cases, because of the defendants’ inability to pay.”⁵¹

While net criminal debt collection has grown under the MVRA, collection rates—the percentage of restitution awards that are paid by offenders—have fallen. Despite an under-recording of debt collection during the VWPA, reported collection rates reached as high as 13.3 percent.⁵² Actual collections under the VWPA may have been substantially higher, as studies of other restitution programs that considered offenders’ financial circumstances prior to ordering restitution found “collection rates ranging from 34% to 54%.”⁵³ In contrast, the current rate of criminal debt collection under the MVRA is just 3.5 percent.⁵⁴

That collection rates for restitution judgments imposed under the MVRA are so low is not surprising. While several factors contribute to such low rates, the Department of Justice has acknowledged that “[b]y far, the greatest impediment to collecting full restitution is the lack of relationship between the amount ordered and its corresponding collectibility.”⁵⁵ This relational deficiency is directly attributable to the MVRA’s mandate that judges order restitution in the full amount of victims’ losses without considering offenders’ ability to pay.⁵⁶ In

MVRA. GAO, CRIMINAL DEBT 2004, *supra* note 39, at 8. In 1990, it was estimated that economic crime cost the United States approximately \$100 billion. THE NATIONAL FRAUD CENTER, INC., THE GROWING GLOBAL THREAT OF ECONOMIC AND CYBER CRIME 6 (Dec. 2000). By 2001, that estimate had grown to over \$500 billion. *Id.*

51. Letter from Clarence A. Lee, Assoc. Dir., Admin. Office of the U.S. Courts, to Gary T. Engel, Dir. of Fin. Mgmt. and Assurance, U.S. Gen. Accounting Office (June 6, 2001), in GAO, CRIMINAL DEBT 2001, *supra* note 10, app. IV, at 105.

52. In 1992, \$304,853,699 of the \$2,286,911,617 in outstanding criminal debt was collected, for a collection rate of approximately 13.3 percent. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 1995 tbl.12C (1995); EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 1992 tbl.12 (1992).

53. CYNTHIA A. KEMPINEN, PA. COMM’N ON SENTENCING, PAYMENT OF RESTITUTION AND RECIDIVISM 1 (2002) (citing BARBARA SMITH ET AL., AMERICAN BAR ASSOCIATION, IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION (1989); Arthur J. Lurigio & Robert C. Davis, *Does a Threatening Letter Increase Compliance with Restitution Orders?: A Field Experiment*, 36 CRIME & DELINQUENCY 537 (1990); ROBYN L. COHEN, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE VIOLATION IN STATE PRISON, 1991 (1995).

54. In 2007, the most recent year for which federal criminal debt collection statistics are available, \$1,772,410,788.18 of the \$50,456,613,913.31 in outstanding criminal debt was collected, for a collection rate of approximately 3.5 percent. ANNUAL STATISTICAL REPORT, *supra* note 33, at tbl.8C.

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

56. See 18 U.S.C. § 3664(f)(1)(A) (2006).

most instances, the result of this provision is that “collection of the total restitution assessed may be unrealistic from the outset.”⁵⁷

The reason for such a strong connection between collection rates and setting the amount of restitution in accordance with an offender’s ability to pay is that an overwhelming majority of offenders do not have the financial resources to pay substantial restitution orders. Over 85 percent of federal criminal defendants are indigent at the time of their arrest,⁵⁸ and nearly half of offenders made less than \$600 during the month prior to their offense.⁵⁹ Moreover, the government often seizes the assets an offender may accumulate from his or her illegal activity prior to conviction, making these assets unavailable for the satisfaction of restitution judgments.⁶⁰ Exacerbating the problem is the fact that the economic situation of most inmates does not improve upon release.⁶¹ The average inmate has little in the way of education or marketable job skills, and job opportunities tend to be limited in the communities to which prisoners return.⁶² Moreover, a criminal conviction frequently acts as a major impediment to employment.⁶³ As a result, the foremost reason for the nonpayment of criminal economic sanctions is the offender’s inability to pay them.⁶⁴ Offenders’ limited economic resources present such a barrier to payment that judges have likened the collection of restitution to “get[ting] blood out of a stone.”⁶⁵

While offender indigence would impede collection under virtually any system of restitution, certain factors specific to the MVRA’s restitution framework may contribute to the current “embarrassingly low levels” of criminal debt collection.⁶⁶ Intuitively, mandatory and full restitution orders—even when not based on an offender’s ability to pay—should lead to greater victim compensation than a system in which restitution orders are adjusted to reflect

57. GAO, CRIMINAL DEBT 2004, *supra* note 39, at 5.

58. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 105.

59. DORIS J. JAMES, U.S. DEP’T OF JUSTICE, PROFILE OF JAIL INMATES 9 (2002).

60. Though seized assets are technically available for payment of restitution judgments, they are more typically used “to make owners (e.g., a mortgager) whole and to fund law enforcement activities,” thus reducing the amount available to fulfill restitution obligations. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 33.

61. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, REPAYING DEBTS 1 (2007).

62. *Id.*

63. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003) (“The finding that ex-offenders are only one-half to one-third as likely as nonoffenders to be considered by employers suggests that a criminal record indeed presents a major barrier to employment.”).

64. R. BARRY RUBACK ET AL., PA. COMM’N ON CRIME & DELINQUENCY, EVALUATION OF BEST PRACTICES IN RESTITUTION AND VICTIM COMPENSATION ORDERS AND PAYMENTS 111 (2006) (study of offenders and victims finding that inability to pay was the primary reason for offender nonpayment of economic sanctions).

65. R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution*, FED. PROBATION, June 2004, at 21, 25.

66. 152 CONG. REC. S6457 (daily ed. June 23, 2006) (statement of Sen. Dorgan).

the offender's financial circumstances. As compared to the VWPA restitution scheme, the MVRA should have no effect on victim compensation in those cases in which the judge accurately assesses the offender's maximum ability to pay, but would lead to increased compensation in instances in which a judge under-assesses the offender's financial capacity⁶⁷ or in which the offender's economic circumstances improve after sentencing. Consequently, the legislators who enacted the MVRA assumed that mandatory restitution would increase net victim compensation.⁶⁸ However, anecdotal and empirical evidence indicates that mandatory restitution may actually lead to decreased compensation. Consider, for example, the following statement by criminal defense attorney James Felman to the House Judiciary Committee:

Among the costs of ordering a defendant to pay what everyone recognizes he or she cannot is that there is little incentive for the defendant to try. A defendant ordered to pay an amount he or she can never hope to satisfy regardless of how many years he or she tries to do so has no incentive to earn anything more than the bare minimum necessary for survival

In contrast, by tailoring restitution orders based on what defendants can realistically hope to pay, they are given an incentive to do so. They have hope that if they do more than the minimum—If they rehabilitate themselves as fully as possible—they can one day satisfy their obligations and try to improve their overall lot in life. Thus, mandatory restitution orders imposed without regard to ability to pay may lead to victims ultimately receiving less restitution and not more.⁶⁹

Felman's hypothesis that mandatory restitution may decrease victim compensation has not been empirically tested, but his underlying presumption that the psychological underpinnings of a restitution award affect compliance

67. Under the VWPA, judges relied primarily on probation officers' assessment of offenders' financial means to determine the restitution amount. However, probation officers occasionally do not take adequate steps to verify offender assets, so it is likely that judges did periodically misassess offenders' financial means. See GAO, CRIMINAL DEBT 2001, *supra* note 10, at 14–15 (finding that in a random sample of cases involving restitution, approximately 30% of probation officers had not adequately verified offender assets).

68. See H.R. REP. NO. 104-16, at 4–5 (1995).

69. *Criminal Restitution Improvement Act Hearing*, *supra* note 32, at 28–29 (testimony of James Felman, Partner, Kynes, Markman & Felman). Though Felman's testimony appears largely directed toward the effect of mandatory restitution on indigent offenders, excess restitution judgments may also reduce the repayment incentive of more affluent offenders. The case of Jay Jones illustrates this effect. Jones, a corporate executive at a large financial services company, was ordered to pay nearly \$1.1 billion dollars in restitution after pleading guilty to a financial fraud conspiracy in 2003. However, after being released from his three-and-a-half year stint in prison, Jones—recognizing that the full repayment of his restitution order was “ridiculously unattainable”—ceased making payments altogether. “Honestly, from my stand-point,” Jones said in an interview after being released from prison, “if it would have been \$400,000 or \$500,000, it would have scared me more than \$1 billion.” Ross Todd, *Three Cents on the Dollar*, AM. LAW., Nov. 2007, at 68.

rates has merit. Offenders “care about both the outcomes they receive (distributive fairness) and the process by which those outcomes were reached (procedural fairness).”⁷⁰ At least one restitution researcher surmises that the nonpayment of economic sanctions is thus more likely to occur when “offenders believe that economic sanctions are unfair because the amounts are too high or the procedures used to determine the amounts are unfair.”⁷¹ Furthermore, research indicates that offenders are less likely to volunteer compensation “if [they are] led to believe that even [their] best efforts at compensation will be inadequate.”⁷² When applied to the MVRA, these findings suggest that at least some offenders whose restitution judgments far exceed their financial means are less likely to pay restitution as a result of perceived distributive or procedural inequity, or because they do not believe they will be able to fully satisfy the restitution order.

From the information available regarding restitution collection, it is unclear whether the MVRA has led to a net increase in total victim compensation. If mandatory restitution has increased recompense, the government has acknowledged that the increase is insubstantial.⁷³ Given the lack of an appreciable increase in compensation and the fact that over 96 percent of net restitution goes uncollected, the MVRA has fallen short of its aim of “ensur[ing] that criminals pay full restitution to their victims for all damages caused as a result of the crime.”⁷⁴ Instead, the MVRA has served to reinforce that which members of the criminal justice system have long understood: “to subject a defendant to a judgment which he cannot pay and has no reasonable prospect of paying . . . is of little use to the victim of crime”⁷⁵

II

THE MVRA AND VICTIM SATISFACTION

Inherent in any victims’ rights legislation and pervasive in the legislative history of the MVRA is the desire to enhance victim satisfaction with the criminal justice system. Specifically, the legislators who enacted the MVRA sought to “provide the victim with some small sense of satisfaction that the system addresses their needs.”⁷⁶ Without citing any authority, Congress concluded that victims of crime would be happier if full restitution of the victim’s loss were ordered, even if there were no realistic possibility of the

70. RUBACK, *supra* note 64, at 93.

71. *Id.* at 94.

72. Stewart Macauley & Elaine Walster, *Legal Structures and Restoring Equity*, J. Soc. ISSUES 173, 178 (1971).

73. *See supra* note 51 and accompanying text.

74. H.R. REP. NO. 104-16, at 4 (1995).

75. *People v. Kay*, 111 Cal. Rptr. 894, 896 (Ct. App. 1973).

76. 141 CONG. REC. H1302, H1303 (daily ed. Feb. 7, 1995) (statement of Rep. Price).

judgment being fulfilled.⁷⁷ While this arguably makes intuitive sense, the available research reveals that such a scheme actually reduces victim satisfaction.

In 1992, four years prior to the enactment of the MVRA, Robert Davis, Barbara Smith, and Susan Hillenbrand—three of the nation's leading researchers on restitution—published an extensive study on victim satisfaction with restitution orders. The study surveyed 198 victims of crime who had been awarded restitution to determine the greatest correlates between restitution orders and victim satisfaction.⁷⁸ The study's findings directly contradict the assumptions on which Congress based the MVRA: the factor that was most highly correlated with victim satisfaction was the percentage of the restitution award paid by the offender, regardless of the size of the award.⁷⁹ This factor correlated with victim satisfaction to a greater extent than whether restitution had been ordered in full (i.e., covered the entirety of the victim's losses).⁸⁰ Additionally, the study found that neither the total dollar amount awarded nor the payment time (the amount of time it takes the offender to pay and the amount of time he is given to pay) influenced victim satisfaction.⁸¹ Accordingly, victims in cases in which the dollar amount of restitution was small and the offenders were given more time to pay were just as satisfied as those who received larger restitution awards to be paid over a shorter period of time.⁸²

One potential explanation for the study's findings is that when restitution orders are imposed, victims are given false hope that they will be compensated.⁸³ When those expectations of compensation subsequently go unfulfilled, the result "may compound victims' pain and anger, and may increase the negative feelings that accompany the victimization and the criminal justice experience."⁸⁴ Supporting this notion is the fact that probation officers and

77. In response to discussions that offender indigence would limit the amount of restitution that was realistically collectible, the Senate Judiciary Committee stressed "the benefits that even nominal restitution payments have for the victim of crime." S. REP. NO. 104-179, at 18 (1995).

78. Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 750-51 (1992).

79. *Id.* at 753-54.

80. The percentage of the award paid by the offender had a 0.58 correlation with victim satisfaction, while whether the amount awarded covered the victim's losses had a 0.43 correlation. *Id.* at 754.

81. *Id.* at 753.

82. *Id.*

83. RUBACK, *supra* note 64, at 123.

84. Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9 JUST. Q. 393, 410 (1992). *See also* Carol Shapiro, *Is Restitution Legislation the Chameleon of the Victims' Movement?*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 73, 76 (Burt Galaway & Joe Hudson eds., 1990) ("It is quite possible that enabling legislation and victims' bills of rights that stress financial compensation and restitution by offenders may exacerbate victims' sense of powerlessness within the criminal justice system. Restitution orders may raise victim expectations and even prolong their initial anger and distress.") (internal citations omitted); Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 573 (1984) ("When a victim realizes that compensation is not

prosecutors report having to help victims who are granted a restitution order to see it as a “symbolic victory,” so that victims are not significantly let down when they do not ultimately receive restitution from the offender.⁸⁵

Applying the study’s findings to the MVRA reveals that the Act has likely resulted in decreased victim satisfaction with federally imposed restitution. The MVRA was enacted under the assumption that, with regard to victim satisfaction, the imposition of full restitution is more important than compliance rates. The study, however, demonstrates that the opposite is true: it is more important to victims that offenders comply with restitution orders than that judges order restitution in the full amount of their loss.⁸⁶ In other words, victim satisfaction is best achieved when collection rates are high, even when increasing compliance comes at the expense of reducing the amount of the restitution judgment. To that end, the VWPA netted far superior results, with collection rates that were likely substantially higher than the MVRA’s current rate of 3.5 percent. By creating a restitution scheme that emphasizes the size of the restitution order over compliance rates, Congress passed a victims’ rights bill that has reduced victim satisfaction.⁸⁷

While victim satisfaction would be best achieved under a scheme that imposed restitution for the full amount of the victim’s loss and ensured that offenders complied with the judgments in their entirety, the achievement of these two goals is often mutually exclusive.⁸⁸ The tension between these two objectives was known prior to the enactment of the MVRA, and their mutual exclusivity has been reinforced in the years following its passage. While the MVRA provision requiring full restitution without consideration of the defendant’s financial circumstances⁸⁹ has accomplished the first goal (federal judges frequently order restitution in the full amount of the victim’s loss), it has also caused the demise of the second goal—very few victims receive restitution payments that approach the full amount of the restitution judgment.⁹⁰

forthcoming, he may feel frustrated and victimized by the system designed for his benefit.”).

85. RUBACK, *supra* note 64, at 123.

86. Though the reason why victims value compliance over full restitution orders is unclear, one possible explanation is that restitution that is ordered but not paid has the effect of creating a “righ[t] without [a] remed[y],” which clinical psychologists have found to cause “feelings of helplessness, lack of control, and further victimization.” Davis et al., *supra* note 78, at 749. Therefore, the importance of compliance to victims likely lies at least partially in its ability to provide a more complete “remedy” (payment) to the “right” (the amount of restitution ordered).

87. Prior to the MVRA’s passage, commentators hypothesized that such a situation might occur: “it is possible that if the increased emphasis of courts and legislatures on victim’s rights results in larger restitution orders, compliance rates—and accordingly victim satisfaction—will decrease.” Smith & Hillenbrand, *supra* note 4, at 249–50.

88. *Id.* at 249 (“[T]hese two goals are often mutually exclusive because high compliance rates [with restitution orders] generally occur when the offender’s means have been a factor in fashioning economic sanctions.” (citation omitted)).

89. 18 U.S.C. § 3664(f)(1)(A) (2006).

90. *See supra* text accompanying footnotes 44–75 (discussing the MVRA’s effect on collection rates).

Unfortunately for victims, this has the effect of satisfying their secondary goals instead of their primary ones.

The fallacious assumptions regarding victim satisfaction that underlie the MVRA cannot be attributed solely to congressional failure. Those who testified on behalf of victims during congressional hearings on the bill—David Beatty, Director of Public Policy for the National Victim Center, and John Stein, Deputy Director of the National Organization for Victim Assistance—failed to apprise Congress of the pertinent scholarly analysis. Inexplicably, these high-ranking members of two of the nation's foremost victims' rights organizations perpetuated Congress's inaccurate supposition that mandatory restitution would improve victim satisfaction. Citing only anecdotal evidence, Beatty testified to Congress that “[f]or [victims], a restitution payment, no matter how small, even if the payment is a dollar, represents some measure of personal accountability. . . . So for all these victims, the fact that a restitution payment is made at all is more important than the amount of that payment.”⁹¹ Though Beatty is correct that “the amount of . . . payment” is generally of secondary concern to victims, he failed to address that victims' primary concern is the amount of payment *relative to the size of the restitution award*.⁹² By misinforming the legislature about the nature of victim satisfaction with restitution, Beatty and Stein likely played a significant role in Congress's conclusion that nominal offender payments—even when part of large restitution awards—would increase victim satisfaction.⁹³

Though Congress was left largely ignorant of the likely effect of the MVRA on victim satisfaction with restitution orders, it was advised that the Act might “breed[] contempt for the justice system.”⁹⁴ The Judicial Conference cautioned Congress that the “imposition of restitution without consideration of ability to pay would make many such orders unenforceable,” which, in turn, would “erode respect for the justice system on the part of victims. . . . [and their] friends, relatives and other members of the public.”⁹⁵ Though Congress left this concern unaddressed, ample scholarship reveals that mandatory restitution undermines public confidence in the criminal justice system.⁹⁶ In

91. *MVRA Hearing*, *supra* note 20, at 28 (statement of David Beatty, Director of Public Policy, National Victim Center). Beatty's statement that victims' foremost concern is the payment of restitution—even when only a nominal amount—could also be construed to support a restitution framework which ensures that victims receive at least nominal restitution from the offender without necessarily imposing full restitution. Congress never considered the merits of such a system, however, perhaps in part because Beatty expressed full support for the provisions of the MVRA.

92. Davis et al., *supra* note 78, at 753–54.

93. See S. REP. NO. 104-179, at 12 (1995).

94. *MVRA Hearing*, *supra* note 20, at 27 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States).

95. *Id.* at 26–27.

96. Despite the testimony of the Judicial Conference and scholarly research tending to demonstrate a causal link between noncompliance with criminal sanctions and diminished respect

addition to the Judicial Conference, several commentators have suggested that high levels of noncompliance with criminal economic sanctions such as restitution reduce respect for and confidence in the legal system.⁹⁷ Specifically, scholars have found that where “financial obligations are set too high for the disadvantaged and not enforced, the credibility of the courts comes into question and respect for the law declines.”⁹⁸ Accordingly, the frequent imposition of restitution judgments on indigent defendants under the MVRA may be reducing public confidence in the justice system.

In sum, legislation intended to increase victim satisfaction has likely had the opposite effect. The failures of both Congress and victims’ rights advocates to consider pertinent scholarly research on victim satisfaction with restitution orders led Congress to make inaccurate assumptions regarding victims’ priorities. Those suppositions helped shape the MVRA, creating an act that has likely reduced victim satisfaction with restitution as well as public confidence in the legal system.

III

THE EFFECT OF MANDATORY RESTITUTION ON OFFENDER REHABILITATION

Historically, restitution has been considered an offender-based remedy.⁹⁹ For instance, to the extent that restitution was used as a part of the criminal justice system in the late nineteenth and early twentieth centuries, it was imposed primarily to promote the responsibility and rehabilitation of offenders, not to compensate victims.¹⁰⁰ In the years prior to the inception of the victims’ rights movement, a survey of restitution programs in the United States indicated that over half of such programs primarily focused on offender rehabilitation, while just over one-fifth principally concentrated on victim compensation.¹⁰¹ The predominant focus on offender rehabilitation reflected the consensus among commentators that while restitution appears to have the primary “aim of compensation, close examination reveals that its principal value is not its ability to make victims whole, but rather its utility as a

for the criminal justice system, a comprehensive review of the legislative history reveals that Congress did not respond to this concern.

97. See e.g., Lurigio & Davis, *supra* note 53, at 540.

98. Gerald R. Wheeler et al., *Economic Sanctions in Criminal Justice: Dilemma for Human Service?*, 14 JUST. SYS. J. 63, 74 (1990).

99. “[I]n its historic connotation, restitution was designed to benefit the offender rather than the victim.” Burt Galaway, *Toward the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE, 77, 82 (Joe Hudson & Burt Galaway eds., 1977) [hereinafter RESTITUTION IN CRIMINAL JUSTICE]. See also RUTH ANN STRICKLAND, RESTORATIVE JUSTICE 49 (2004) (“Historically, restitution was designed to rehabilitate and benefit offenders, not victims.”).

100. Susan Hillenbrand, *Restitution and Victim Rights in the 1980s*, in VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 188, 189–90 (Arthur J. Lurigio et al., eds., 1990).

101. Joe Hudson & Burt Galloway, *Introduction to Restitution in Criminal Justice*, *supra* note 99, at 7.

corrective device.”¹⁰² Accordingly, Congress’s victim-based rationale for the MVRA’s enactment signified a departure from the historical understanding of restitution held by legal scholars.¹⁰³

The reason most restitution programs have historically considered victim compensation an “ancillary goal” is that restitution is not a practical means of victim compensation.¹⁰⁴ In addition to the problem of offender indigence—which reduces convicted offenders’ ability to pay restitution—the rate at which crimes are committed is much higher than the rate at which offenders are apprehended or convicted, reducing the proportion of offenders who are available to reimburse victims.¹⁰⁵ As a result of the limited economic resources of offenders and low conviction rates, “[o]n a purely practical, cost-benefit basis, restitution programs probably would find it hard to justify their existence if the intended ‘benefit’ were solely for victims.”¹⁰⁶

Courts have also historically considered restitution an offender-focused remedy. During the years in which the VWPA set the federal restitution framework, the “[c]ourts clearly rel[ied] on an offender-based rationale to justify restitution in the criminal justice system.”¹⁰⁷ While the primary motivation for the passage of the restitution portion of the VWPA was to benefit victims, courts were reluctant to adopt this rationale for imposing restitution.¹⁰⁸ Even the Supreme Court has acknowledged offender rehabilitation as restitution’s primary purpose:

Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant. . . .

102. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 (1984).

103. Though the MVRA represents a conceptual shift in the rationale for restitution, its victim-based focus is indicative of a trend in modern crime legislation. According to one scholar, the crime victim has been the “lawmaking rationality” for virtually all federal crime legislation since the late 1960s. SIMON, *supra* note 27, at 75–76. Focusing on the victim and emphasizing the threat of crime enables Congress “to take dramatic political steps” and provides “a constantly renewed rationale for legislative action.” *Id.* at 75, 77. Accordingly, legislators have come to “define[] the crime victim as an idealized political subject,” and have created a federal crime legislation model marked by two main principles: “(1) the system is the problem; (2) the victim is the key.” *Id.* at 101, 110. The legislative history of the MVRA reveals that the Act mirrors this paradigm: the VWPA and overly lenient judges are cited as the problem with restitution, and victims’ interests are employed as the impetus for the Act. *See* 141 CONG. REC. H1302, H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Hyde); S. REP. NO. 104-179, at 12–13 (1995).

104. Hillenbrand, *supra* note 100, at 195. For additional discussion on why restitution is not a practical means of victim compensation, see *infra* Part IV.

105. Hillenbrand, *supra* note 100, at 195.

106. *Id.*

107. *See* Smith & Hillenbrand, *supra* note 4, at 249.

108. *Id.*

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.¹⁰⁹

The Court's reliance on the State's "penal and rehabilitative interests" as a justification for restitution is well founded. Commentators have long hypothesized the positive effect of restitution on rehabilitation,¹¹⁰ and empirical data have recently lent support to that hypothesis. In one study of Pennsylvania offenders, researchers found that offenders who paid *higher percentages* of their restitution judgments were less likely to commit new offenses.¹¹¹ A similar study conducted across several states found that juveniles who were assigned to restitution programs were less likely to recidivate than their counterparts who did not take part in restitution programs.¹¹² Though other studies have found no correlation between restitution and the commission of subsequent offenses,¹¹³ the general consensus among restitution scholars is that restitution can be a "beneficial corrective device."¹¹⁴

The presumed connection between restitution and rehabilitation has even led several states to mandate that judges consider the effects that restitution will have on an offender's rehabilitation before ordering restitution.¹¹⁵ For instance, Mississippi's current restitution statute requires that "[i]n determining whether to order restitution which may be complete, partial or nominal, the court shall take into account . . . [t]he rehabilitative effect on the defendant of the payment of restitution and the method of payment."¹¹⁶

Despite restitution's historic place as an offender-based remedy and the emphasis by commentators, the courts, and state legislatures on the correlation between restitution and rehabilitation, Congress scarcely considered the MVRA's rehabilitative effect prior to enactment. Though some legislators partially predicated their support for the MVRA on the notion that restitution

109. Kelly v. Robinson, 479 U.S. 36, 52–53 (1986). In addition to the Supreme Court, many other federal and state courts have discussed offender rehabilitation as the central focus of restitution. See e.g., State v. Harris, 70 N.J. 586, 592–93 (1976).

110. For a brief summary of some such hypotheses, see Bruce Jacob, *The Concept of Restitution: An Historical Overview*, in RESTITUTION IN CRIMINAL JUSTICE, *supra* note 99, at 45, 51–55.

111. KEMPINEN, *supra* note 53, at 3–4.

112. Paul Marcotte, *Restitution Pays: Recidivism Likely to Dip: Study*, A.B.A. J., May 1, 1986, at 21.

113. Thomas I. Miller, *Consequences of Restitution*, 5 LAW & HUM. BEHAV. 1 (1981).

114. *Victim Restitution in the Criminal Process*, *supra* note 102, at 938.

115. Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 122–23 (1982).

116. MISS. CODE ANN. § 99-37-3(2) (2007).

promotes offender rehabilitation,¹¹⁷ others seemingly viewed restitution as a means of retribution.¹¹⁸ What Congress failed to discuss, however, was the effect that *mandatory* restitution would have on offender rehabilitation.¹¹⁹ This failure has proven costly, as the MVRA's restitution framework has likely impeded offender rehabilitation.

Even if one assumes that restitution can promote offender rehabilitation, any such positive effect is lost when the restitution order exceeds the offender's financial means.¹²⁰ One commentator has observed that when "the amount of restitution . . . [is] beyond the financial capability of a defendant, it is apparent that restitution becomes an obstacle to the defendant's rehabilitation rather than a means for accomplishing rehabilitation."¹²¹ Since the MVRA does not permit courts to consider defendants' economic circumstances before ordering the amount of restitution, restitution judgments frequently exceed offenders' ability to pay. For rehabilitative purposes, however, it is critical to exercise "as much precision as possible in setting the amount of restitution in accordance with the offender's ability to pay," as restitution judgments that do not comport with defendants' financial circumstances create "an almost impossible condition for probation, undermining any meaningful rehabilitative effect."¹²² Though the MVRA permits judges to consider defendants' economic circumstances when fashioning the payment schedule, restitution orders become an obstacle to rehabilitation when either the payment schedule or the total restitution amount exceed the offender's ability to pay.¹²³

Courts have frequently justified the decision not to impose restitution on the grounds that restitution in excess of a defendant's ability to pay would impede rehabilitation. The California Court of Appeal, for instance, in deciding not to impose restitution on an indigent offender, stated that

to subject a defendant to a judgment which he cannot pay and has no reasonable prospect of paying . . . is of little use to the victim of the

117. See, e.g., *MVRA Hearing*, *supra* note 20, at 2 (statement of Sen. Hatch) (discussing the importance of considering "the generally beneficial effect of requiring the criminal to pay for the crime"); S. REP. NO. 104-179, at 18 (1995) (citing the "potential penological [sic] benefits of requiring the offender to be accountable for the harm caused to the victim").

118. See, e.g., *MVRA Hearing*, *supra* note 20, at 4 (statement of Sen. Biden) ("Restitution also sends a tough message to criminals: you must take responsibility for your actions and you will pay for the pain you have caused."). See also *id.* at 7 (letter from Andrew Fois, Assistant Attorney General, to Sen. Hatch, dated Oct. 11 1995) ("Likewise, the [MVRA] maximizes the punitive effect of restitution on the offender.").

119. Though Congress was warned by the Judicial Conference that mandatory restitution "will result in a likely increase in the recidivism rate," that concern was not subsequently addressed by Congress. *Id.* at 24 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States).

120. See William M. Aker, Jr., *Making Sense of Victim Restitution: A Critical Perspective*, 6 FED. SENT'G. REP. 234 (1994).

121. *Id.* at 235. For a similar analysis, see Harland, *supra* note 115, at 91.

122. Harland, *supra* note 115, at 91-92 (citation omitted).

123. Aker, *supra* note 120, at 235.

crime, and is apt to be either frustrating to a repentant probationer or perversely satisfying to a rebellious one. . . . [Imposing restitution in the instant case does not] seem suitable for preventing repetition of the offenses.¹²⁴

Similarly, the Supreme Court of Maine has acknowledged that when a defendant is indigent and is unlikely to significantly improve his financial situation, the requirement of “restitution serves neither the penological purpose of assisting in the rehabilitation of the offender nor the social objective of making the victim adequately whole.”¹²⁵

Offender rehabilitation, of course, affects more than just the offender. When offender rehabilitation is impeded, offenders are more likely to recidivate and thereby impose financial and social costs on the general public.¹²⁶ Financially, recidivism necessitates hiring more police officers and increases court costs.¹²⁷ Additionally, for those offenders whose new offense results in a prison sentence, the cost of incarcerating a federal inmate is more than \$24,000 per year.¹²⁸ From a social perspective, crimes committed by recidivists create new victims.¹²⁹ Ironically, by negatively impacting offender rehabilitation, the victims’ rights-based MVRA may actually cause a net increase in the number of victims of crime.

While the public dialogue regarding a potential linkage between mandatory restitution and recidivism has been largely anecdotal, there is sufficient information to create a strong inference that restitution in excess of an offender’s ability to pay increases the likelihood that the offender will recidivate. To better understand the connection between mandatory restitution and recidivism, it is helpful to divide the information into two categories: one in which restitution is the direct cause of recidivism and another in which restitution is the indirect cause of recidivism.

Failure to pay restitution can directly cause an offender’s return to prison. Though the Supreme Court ruled in *Bearden v. Georgia* that using economic sanctions to create a debtor’s prison in which offenders are imprisoned for inability to pay is unconstitutional,¹³⁰ federal law still permits the court to revoke an offender’s probation or supervised release “[u]pon a finding that the defendant is in default on a payment of a fine or restitution.”¹³¹ While Congress

124. *People v. Kay*, 111 Cal. Rptr. 894, 896 (1973).

125. *State v. Blanchard*, 409 A.2d 229, 239 (Me. 1979). *See also* *State v. Garner*, 566 P.2d 1055, 1057 (Ariz. 1977) (“An order requiring payment of reparations should be within the means of the convicted person. . . . If reparations were beyond the probationer’s means, they could not have a salutary rehabilitative, as well as punitive, effect.”).

126. *See* MGMT. & TRAINING CORP. INST., DATA SPOTLIGHT: RECIDIVISM 3 (2003).

127. *Id.*

128. The average cost of incarceration for federal inmates in fiscal year 2007 was \$24,922. Annual Determination of Average Cost of Incarceration, 73 Fed. Reg. 33853 (June 13, 2008).

129. MGMT. & TRAINING CORP. INST., *supra* note 126, at 3.

130. *Bearden v. Georgia*, 461 U.S. 660 (1983).

131. 18 U.S.C. § 3613A (2006).

did amend the statute following the *Bearden* decision to provide that “[i]n no event shall a defendant be incarcerated . . . solely on the basis of inability to make payments because the defendant is indigent,”¹³² judges can still incarcerate offenders upon a finding that he or she “willfully” failed to pay an economic sanction.¹³³ Moreover, the Senate Judiciary Committee has seemingly supported the re-incarceration of indigent defendants by “encourag[ing] the courts to consider the failure of a defendant to meet a nominal payment schedule to be per se willful for the purpose of imposing sanctions.”¹³⁴

As a result of this statutory scheme, offenders frequently have their probation revoked for failure to pay economic sanctions. In 1991, five years prior to the MVRA’s enactment, 11.5 percent of probation violators reported having a revocation hearing for failure to pay economic sanctions.¹³⁵ Though no similar study has been conducted since the MVRA came into effect, the number of probationers who fail to pay their economic sanctions has increased drastically since the passage of the Act. A plausible inference from this data is that the number of offenders who have their probation revoked for failure to pay has also increased.

Inability to pay restitution can also directly cause recidivism when offenders engage in illicit activity expressly to satisfy their restitution judgments. This is most likely to occur when indigent offenders are confronted with large restitution orders and “[p]ressures brought to bear could be so great that offenders could conceivably be motivated to commit further crimes to avoid penalties for their failure to meet restitution bargains”¹³⁶ Thus, prior to the institution of mandatory restitution, some judges were reluctant to order restitution because of their concern that the offender would commit a new offense to comply with the restitution judgment.¹³⁷ Though the prevalence of this type of restitution-based recidivism is unclear, the notion is not unfounded. One federal judge, for instance, encountered “a defendant who engineered a massive mail fraud scheme in order to pay a restitution order and thereby avoid a revocation of probation proceeding.”¹³⁸

Mandatory restitution may also serve as the indirect cause of recidivism as well. Restitution, particularly when ordered in excess of an offender’s ability to pay, can result in significant financial hardship for the offender.¹³⁹ Many

132. *Id.* § 3614(c).

133. *Id.* § 3614(b)(1). Additionally, “[p]robation officers may also request that the court revoke supervision (i.e., send an offender to prison) if the offender is willfully refusing to make payments.” GAO, CRIMINAL DEBT 2001, *supra* note 10, at 29.

134. S. REP. NO. 104-179, at 22 (1995).

135. COHEN, *supra* note 53, at 3.

136. Herbert Edelhertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE, *supra* note 99, at 63, 64.

137. Slavin & Sorin, *supra* note 84, at 571.

138. *Id.* at 571 n.390.

139. See RUBACK, *supra* note 64, at 92, 106–08.

offenders live below the poverty line, and even nominal restitution payments can compose a significant percentage of the offender's income. Restitution judgments thus thrust indigent offenders even further into poverty, decreasing the likelihood that they will "lead crime-free lives."¹⁴⁰ Moreover, poverty and resource deprivation—both of which are associated with the imposition of mandatory restitution—are inextricably linked to violent crime and property offenses.¹⁴¹

For indigent offenders, the additional financial burdens that result from economic sanctions "make it even more difficult for them to try and lead crime-free lives."¹⁴² In a survey of federal probationers, a third of respondents indicated that their economic sanction "resulted in significant financial hardship," while more than a tenth reported that the "sanction resulted in a severe deprivation."¹⁴³

In a separate study, researchers found that difficulty in paying economic sanctions positively correlated to offenders' beliefs that paying sanctions interfered with their ability to complete probation and parole successfully and to provide for their families.¹⁴⁴ These economic hardships, which are most salient when restitution is ordered without regard to the offender's ability to pay, can "encourage a person to return to the behavior and illegal activities that resulted in the person's incarceration in the first place."¹⁴⁵

In sum, the imposition of mandatory restitution can serve as an impediment to offender rehabilitation. While restitution orders may have a salutary rehabilitative effect when based on an offender's ability to pay, restitution in excess of an offender's financial means eliminates any such positive effect. Mandatory restitution also results in significant economic hardship for many offenders, forming a barrier to their successful reentry into their communities. The obstacle of mandatory restitution and its corresponding economic hardship can directly and indirectly cause recidivism. Directly, the nonpayment of economic sanctions can result in the revocation of the offender's probation and re-incarceration. Also, indigent offenders who are un-

140. *Id.* at 123.

141. See Ching-Chi Hsieh & M.D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182 (1993). See also CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 87 (1978) (arguing that poverty is a major cause of crime); Ralph C. Allen, *Socioeconomic Conditions and Property Crime, A Comprehensive Review and Test of the Professional Literature*, 55 AM. J. ECON. & SOC. 293, 294 (1996) ("Central to most theories of crime . . . is the idea that poverty or inequality is criminogenic.").

142. RUBACK, *supra* note 64, at 123.

143. *Id.* at 92 (citing G.F. Allen & H. Treger, *Fines and Restitution Orders: Probationers' Perceptions*, FED. PROBATION, June 1994 at 34).

144. *Id.* at 107.

145. MCLEAN & THOMPSON, *supra* note 61, at 22 (recommending a cap be put on the percentage of an offender's income that could be paid towards restitution to avoid such a situation).

able to pay restitution may commit new offenses to obtain the resources needed to comply with the judgment. Indirectly, the financial hardship imposed by restitution judgments makes it more difficult for offenders to lead crime-free lives.

IV

THE VIABILITY OF THE MVRA AS A MEANS TO COMPENSATE VICTIMS

Having now established that mandatory restitution does not facilitate offender rehabilitation, the MVRA must find its justification in the benefit it confers on victims. I have already discussed that where restitution programs solely intend to benefit victims, they generally do not survive a practical cost-benefit analysis.¹⁴⁶ The reason that such programs often do not withstand economic scrutiny is that when “the sole aim is to reimburse victims, the cost of staffing and running programs relative to the funds collected might suggest that public monies would better be provided directly to crime victims through crime victim compensation programs.”¹⁴⁷ Accordingly, the purpose of this Part is to analyze the practicality of mandatory restitution as a means to compensate victims.

The imposition of every restitution judgment comes with significant cost. Each restitution order imposed by the courts increases administrative expenditures by approximately \$400 to \$500.¹⁴⁸ Additionally, according to the Congressional Budget Office, when “litigation and enforcement costs of the United States Attorneys” are factored in, the total cost of imposing a single restitution order is approximately \$2,000.¹⁴⁹ These costs grow even higher when offenders do not pay restitution judgments, as it takes approximately fifty-five hours of the public’s time—paid for by taxpayers—when officials attempt to enforce unpaid restitution.¹⁵⁰

Using the \$2,000 figure as a benchmark, any restitution judgment would have to result in offender payments exceeding that amount to withstand a cost-benefit analysis. Given that the current federal collection rate of restitution is approximately 3.5 percent, however, the majority of restitution orders do not survive such scrutiny. Over 65 percent of all federal criminal debt cases involve amounts less than \$5,000.¹⁵¹ Using current collection rates, the average expected offender payment on a \$5,000 restitution order is approximately \$175.¹⁵² Accordingly, for many restitution judgments, the government is

146. See *supra* text accompanying notes 99–106.

147. Hillenbrand, *supra* note 100, at 195–96.

148. H.R. REP. NO. 104-16, at 6 (1995).

149. S. REP. NO. 104-179, at 26 (1995).

150. Linda Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN’S J. LEGAL COMMENT. 107, 128–30 (1992).

151. Based on a sample of 25,412 criminal debt cases at four federal judicial districts in 1999. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 81 tbl.7.

152. To reach the \$175 figure, I applied the 3.5 percent collection rate for fiscal year 2007 to a judgment of \$5,000. However, it is important to note that the 3.5 percent figure represents the

spending considerably more than the offender can be expected to pay or the victim can be expected to receive. Indeed, for the strata of judgments smaller than \$5,000, the average economic sanction was just \$532, meaning that in many cases the government's expenditures are guaranteed to exceed the amount paid by the offender.¹⁵³

Though unexpectedly low collection rates have contributed to this poor expense-to-revenue ratio, Congress was cautioned that the imposition of restitution judgments on indigent offenders would create such a situation. During a legislative hearing on the MVRA, Judge Maryanne Barry, in her role as representative of the Judicial Conference, informed Congress that "[t]he costs associated with [the MVRA] are, in far too many cases, simply unjustified."¹⁵⁴ Citing the administrative costs involved in determining victims' losses, prosecuting and defending restitution, fashioning payment schedules, collecting restitution, and holding nonpayment violation hearings, Judge Barry concluded that "[i]t is simply a matter of bad policy to force the criminal justice system to make these expenditures where there is only a remote possibility restitution will ever be collected."¹⁵⁵

Despite Judge Barry's first-hand knowledge of the workings and expenses of the criminal justice system, several members of Congress were overtly "skeptical" of her representation of the costs of the MVRA.¹⁵⁶ Some legislators implied that Barry was exaggerating the costs and accused the Judicial Conference of "cry[ing] wolf."¹⁵⁷ Other members of Congress simply did not view the administrative expenditures Barry discussed, such as the cost of holding a hearing to determine the proper amount of restitution, as "real cost[s]."¹⁵⁸ Finally, some members seemed to understand the expenses, but

collection rate for all outstanding restitution orders and may not be representative of the average collection rate for a \$5,000 restitution award.

Unfortunately, more specific data on collection rates is not available. Though nearly two-thirds of all economic sanctions are for amounts less than \$5,000, government-sponsored collection rate studies "did not review cases under \$5,000 because they were deemed to be immaterial" relative to the total outstanding criminal debt. *Id.* at 81. Other publicly available information on criminal debt collection under the MVRA does not permit the calculation of collection rates for awards of varying sizes. Over the past year, I attempted to obtain the data necessary to make such calculations through a Freedom of Information Act request to the Executive Office for United States Attorneys, but I was ultimately unsuccessful in acquiring the necessary information.

153. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 81 tbl.7.

154. *MVRA Hearing*, *supra* note 20, at 24 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States).

155. *Id.*

156. *Id.* at 19 (statement of Sen. Grassley) ("I suppose I am, like Senator Biden, somewhat skeptical about the analysis of the Judicial Conference.").

157. *Id.* (statement of Sen. Grassley).

158. In response to Judge Barry's claim that the MVRA would increase administrative costs by necessitating "a hearing, if not a trial, on damages" for restitution, Senator Biden responded "That is not a real cost." *Id.* at 15 (statement of Sen. Biden). Though the basis for Senator Biden's statement is unclear, it seems to reflect his view that increased burdens on the

found them outweighed by the “needs of the victim and the generally beneficial effect of requiring the criminal to pay for the crime.”¹⁵⁹ Unfortunately, however, as this Comment has demonstrated, mandatory restitution serves neither victims’ needs nor offenders’ rehabilitation effectively, leaving little justification for the MVRA from a cost-benefit perspective.

V

POLICY SUGGESTIONS

The failure of the MVRA to further victims’ interests or promote offender rehabilitation mandates a change in federal restitution policy. This Part therefore makes recommendations for the future direction of restitution legislation. Specifically, Part V.A discusses what actions should be presently taken to rectify the current state of federal restitution. It focuses on pragmatic and politically feasible changes to federal restitution and recommends a return to a discretionary framework, improved assessment of offender assets, and heightened collection efforts. Part V.B examines possible directions for the future of restitution research and policy, focusing on the potential of restorative justice.

A. Returning to a Discretionary Restitution Framework

During the decade in which the MVRA has provided the federal restitution framework, it has become apparent that the MVRA is inferior to the system it replaced. For both victim satisfaction and offender rehabilitation, this Comment has established the value of discretionary restitution¹⁶⁰—heightened victim satisfaction and potentially enhanced offender rehabilitation—while also demonstrating the detriments of mandatory restitution—reduced victim satisfaction and increased rates of recidivism. The respective impact of mandatory and discretionary restitution on victim compensation is less clear, though I contend that even if mandatory restitution increases net offender payments, the additional revenue is likely substantially offset by the heightened administrative costs associated with such a scheme. Regardless of the comparative effects of the competing frameworks on victim compensation, the superiority of discretionary restitution with respect to victim satisfaction and offender rehabilitation mandates a return to a VWPA-type federal restitution scheme.

While returning to a discretionary framework is the first step in rectifying the federal restitution system, it is not a panacea. Several of the impediments that plague mandatory restitution would also be present under a discretionary scheme. Specifically, present problems relating to collection efforts,

courts are generally not substantive costs. *See id.* at 18 (“I do take issue with [Judge Barry’s] characterization of how much difficulty this will add to the court’s undertaking.”).

159. *Id.* at 2 (statement of Sen. Hatch).

160. For the purpose of this Section, the term “discretionary restitution” will be used to refer to a framework under which courts consider offenders’ ability to pay prior to deciding whether to order restitution and determining the amount of restitution.

overworked collection staff, and inaccurate presentence reports would also hamper the effectiveness of a discretionary system. Accordingly, in addition to reinstating the VWPA's restitution framework, other reforms are necessary to maximize the effectiveness of such a scheme.

1. Heighten Collection Efforts for Offenders with the Financial Resources to Pay Restitution

Heightened collection efforts should be directed towards offenders who have the financial capacity to pay restitution.¹⁶¹ Though an overwhelming number of offenders are indigent, some possess the financial means to compensate victims. Currently, however, restitution orders are not being adequately enforced against affluent offenders. For example, a study conducted by the Government Accountability Office revealed that a sample of five white-collar criminals who owed millions of dollars in restitution continued to lead lavish lifestyles: one owned property worth over a million dollars, another lived in a home worth several million dollars, and two took overseas trips while on supervised release.¹⁶² Despite this wealth, the studied offenders had only paid "a relatively small amount" of their court-ordered restitution judgments.¹⁶³

A primary impediment to collecting restitution from affluent offenders is the lack of federal collection staff.¹⁶⁴ Though Congress greatly increased the number of federal restitution judgments by enacting the MVRA, it did not provide a corresponding increase in funding for Financial Litigation Units (FLUs), the divisions responsible for the collection of criminal debt.¹⁶⁵ As a result, while "the FLUs have seen a dramatic increase in their criminal caseload as a result of the passage of the MVRA in 1996," staffing levels have remained relatively unchanged.¹⁶⁶ The strained resources of our nation's criminal debt collection agency mean that even in restitution cases involving substantial dollar amounts, FLUs frequently perform little or no offender asset discovery, which gives offenders "time to hide or liquidate assets that could have been available to pay toward the debt."¹⁶⁷ Simply put, the "lack of resources has

161. This recommendation—implementing a discretionary restitution framework and improving collection enforcement—was suggested by the Judicial Conference to Congress during a legislative hearing on the MVRA. *See MVRA Hearing, supra* note 20, at 19 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States).

162. GAO, CRIMINAL DEBT 2005, *supra* note 55, at 11–12.

163. *Id.* at 8.

164. *Id.* at 52.

165. Letter from Mary Beth Buchanan, Dir. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. and Assurance, U.S. Gov. Accountability Office (Jan. 13, 2005), *in* GAO, CRIMINAL DEBT 2005, *supra* note 55, at 22 n.3.

166. Letter from Mark T. Calloway, Dir. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. & Assurance, Gen. Accounting Office (June 5, 2001), *in* GAO, CRIMINAL DEBT 2001, *supra* note 10, at 90.

167. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 14. Though FLUs are required to

severely impacted the FLUs' ability to collect criminal debt."¹⁶⁸

Though a return to a discretionary restitution framework would ameliorate the workload of the FLUs, it would likely be insufficient in itself to solve this collection impediment. Moving to a discretionary scheme would decrease the number of restitution orders—reducing the caseload of the FLUs and freeing up human capital¹⁶⁹—but it would not eliminate the resource and staff constraints that existed even under the discretionary federal restitution framework of VWPA.¹⁷⁰ Thus, additional funding, which could be provided through the administrative costs saved by returning to a discretionary framework, would likely also be necessary.

2. Improve Pre-Restitution Assessment of Offender Assets

Another necessary reform is improving the assessment of offenders' assets *prior* to ordering restitution. While of lesser importance in a mandatory scheme, an accurate evaluation of the offender's financial means before the imposition of restitution in a discretionary framework is of paramount importance, as such evaluation influences both the amount of the restitution order and the payment schedule. Currently, pre-sentence evaluations of offender assets are frequently inaccurate. A study released in 2001 revealed that probation officers—who are responsible for the pre-restitution financial investigation—did not take adequate steps to verify offender assets in approximately 30 percent of cases, including some in which no financial information whatsoever had been obtained.¹⁷¹ Like the FLUs, the failures of the probation department are primarily due to funding shortages, as budget constraints have limited probation staffing to an estimated 77 percent of the number required to supervise offenders adequately.¹⁷²

“‘promptly and vigorously’ perform asset discovery work,” a GAO study found that in 48 percent of a sample of cases involving restitution judgments greater than or equal to \$14 million, there was “little or no evidence of asset discovery work.” *Id.*

168. Letter from Mark T. Calloway, Dir. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. & Assurance, Gen. Accounting Office (June 5, 2001), in GAO, CRIMINAL DEBT 2001, *supra* note 10, at 90. See also Shapiro, *supra* note 84, at 75 (“Moreover, compliance with restitution orders is relatively high when restitution becomes a focus of a probation officer's work with an offender.”).

169. Following the enactment of the MVRA, the number of pending debts handled by FLUs increased by approximately 45 percent and “outstanding debts per staff increased by over 160 percent.” GAO, CRIMINAL DEBT 2001, *supra* note 10, at 14. A return to a VWPA-framework should reverse this trend.

170. See U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-90-62, OVERVIEW OF CIVIL AND CRIMINAL DEBT COLLECTION EFFORTS 20 (1990).

171. GAO, CRIMINAL DEBT 2001, *supra* note 10, at 14–15 (finding that in “40 of the 125 random cases reviewed, probation officers had not taken adequate steps to verify an offender's assets during the pre-sentence investigation” (citation omitted)).

172. *MVRA Hearing*, *supra* note 20, at 14 (statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States).

Since imposing restitution in accordance with the offender's ability to pay affects victim satisfaction, restitution collection, and offender rehabilitation, the current state of pre-sentencing financial assessment requires improvement to maximize the salutary effects of returning to a VWPA restitution framework. The most straightforward way to achieve this aim would be to increase federal funding of probation departments and eliminate the staffing constraints that have led to inadequate asset discovery. However, given the potential economic and political infeasibility of significantly increasing overall funding for offender supervision, Congress should also consider alternative means of improving pre-restitution financial assessment. One such alternative would be to provide the funding necessary for additional probation officers whose sole job would be to verify offenders' assets. Supplementing the current probation staff with officers who specialize in asset verification could be effected at minimal cost and would help judges make more accurate assessments of offenders' financial circumstances before ordering restitution.

Imposing a discretionary restitution framework, combined with improving collection procedures and the identification of offender assets, would significantly improve the federal restitution system. A discretionary scheme would increase victim satisfaction with restitution orders and would eliminate the rehabilitation impediments created by mandatory restitution. Moreover, within a discretionary scheme, improving collection procedures and identification of offender assets would enhance victim compensation and further increase victim satisfaction. Finally, more accurate pre-sentence evaluations of offenders' financial circumstances would reduce the likelihood that judges under-assess offender assets and thus would alleviate congressional concerns that courts impose insufficient economic sanctions in a discretionary framework.

B. Restorative Justice

While returning to a discretionary system would improve the federal restitution scheme, the limitations inherent in the traditional criminal justice system would inevitably constrain its effectiveness. Even under a discretionary system of restitution, the primary focus of the criminal justice proceeding is on "what is done to or with offenders," not on helping the victim.¹⁷³ Under the traditional criminal justice paradigm, "victims are rarely consulted about their needs or how they believe the case should be resolved"¹⁷⁴ and are largely excluded from the process of criminal adjudication.¹⁷⁵ For victims of crime,

173. Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 337 (2008) (citation omitted).

174. STRICKLAND, *supra* note 99, at 38.

175. Though victims' rights legislation has enhanced the standing of victims in the criminal justice system, their participatory rights remain limited. *See id.* at 37–38. *See also* Susan Howley & Carol Dorris, *Legal Rights for Crime Victims in the Criminal Justice System*, in VICTIMS OF CRIME, *supra* note 1, at 299, 311 ("Victims report an inability to get information about cases, suffering through repeated case continuances, being denied an opportunity to be heard at

this can incite or exacerbate feelings of isolation and powerlessness.¹⁷⁶ These and other limitations of our retributive justice system have spurred a recent interest in restorative justice,¹⁷⁷ a means of addressing crime and restitution outside of the traditional criminal justice framework and of giving victims rights not present in our current system.¹⁷⁸ This Section thus provides an overview of restorative justice and discusses the ways it could be incorporated into the criminal justice system to further victims' interests as well as promote offender rehabilitation.

Broadly defined, restorative justice “describes a series of processes designed to repair the harm that a criminal offense inflicts on victims, offenders, and communities.”¹⁷⁹ Instead of relying on traditional retributive justifications for state intervention and punishment, restorative justice is predicated on restoring losses resulting from crime and bringing about peace among those affected by the harm.¹⁸⁰ These aims are accomplished by “requir[ing] the parties with a stake in a particular crime—the victims, offenders, and communities—to work together to repair the harm of crime and prevent future harm.”¹⁸¹ Thus, in contrast to our prevailing system of criminal justice, in which the harm inflicted by the offender is balanced by imposing retribution, restorative justice balances this harm by “offering support to the victim and requiring the offender to make amends.”¹⁸² Ultimately, the goal of such practices “is the restoration into safe communities of victims and offenders who have resolved their conflicts.”¹⁸³

The most common type of restorative justice program today is Victim-Offender Mediation (VOM).¹⁸⁴ This process entails “interested victims [meeting] with their offenders in a safe setting with the guidance of trained

sentencing, failing to receive an order of restitution, being unable to collect restitution, and so on.”).

176. STRICKLAND, *supra* note 99, at 38.

177. *Id.* at 2–3.

178. *Id.* at 38–39.

179. *Id.* at 1.

180. Burt Galaway & Joe Hudson, *Introduction: Towards Restorative Justice*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION, *supra* note 84, at 1–2.

181. STRICKLAND, *supra* note 99, at 1.

182. Martin Wright, *Victim-Offender Mediation as a Step Towards a Restorative System of Justice*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 525 (Heinz Messmer & Hans-Uwe Otto eds., 1992) [hereinafter RESTORATIVE JUSTICE ON TRIAL].

183. Antony Duff, *Restoration and Retribution*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 43, 44 (Andrew Von Hirsch et al. eds., 2003).

184. Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1372 (2001). See also STRICKLAND, *supra* note 99, at 139. Victim-offender mediation is also commonly referred to as “victim-offender conferencing,” “victim-offender reconciliation,” and “victim-offender dialogue.” M.S. UMBREIT ET AL., CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE DIALOGUE: EVIDENCE-BASED PRACTICE 1 (2006).

mediators.”¹⁸⁵ In a typical VOM session, “[t]he victim and offender meet with each other, on a voluntary basis and in the presence of a trained mediator, to work toward ‘empowering victims in their search for closure and healing; impress upon the offender the human impact of their behavior; and promote restitution to the victim.’”¹⁸⁶ In this process, victims and offenders—not the courts—work together to determine a mutually acceptable resolution, which generally focuses on a restitution agreement.¹⁸⁷

Though restorative justice and VOM are “relatively new movement[s] in the fields of victimology and criminology,”¹⁸⁸ initial research suggests they are more effective than traditional punishment and restitution schemes in promoting the interests of victims and the rehabilitation of offenders. For victims, restorative justice has been shown to enhance satisfaction with the criminal justice system.¹⁸⁹ Compared to victims whose cases are processed through traditional proceedings, victims who participate in VOM tend to be more satisfied with both the process and the outcome of their case.¹⁹⁰ Moreover, restorative justice practices generally enhance victim compensation, as restitution agreements resulting from restorative justice programs have substantially higher compliance and collection rates than court-ordered restitution.¹⁹¹ In addition to furthering victims’ interests, restorative justice also promotes offenders’ rehabilitation. Studies of restorative justice programs have consistently shown reduced recidivism rates, with some large-scale studies finding reoffense rates as much as one-third lower for cases resolved through VOM than for those adjudicated in court.¹⁹² Reaffirming the beneficial effects of restorative justice, a recent meta-analysis of restorative justice studies from the past twenty-five years confirmed that, compared to nonrestorative approaches to criminal behavior, restorative programs “resulted in higher victim satisfaction,” “tended to have substantially higher [restitution] compliance rates,” and “yielded reductions in recidivism.”¹⁹³

185. STRICKLAND, *supra* note 99, at 9.

186. Lucas, *supra* note 184, at 1375 (citation omitted).

187. Manaugh, *supra* note 5, at 356.

188. STRICKLAND, *supra* note 99, at 1.

189. UMBREIT ET AL., *supra* note 184, at 4. See also Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 136 (2005); STRICKLAND, *supra* note 99, at 48.

190. Mark S. Umbreit, *Mediation Victim-Offender Conflict: from Single-Site to Multi-Site Analysis in the U.S.*, in RESTORATIVE JUSTICE ON TRIAL, *supra* note 182, at 431, 432–36.

191. *Id.* at 439. See also Latimer et al., *supra* note 189, at 137. However, one notable study found no difference in collection rates between VOM and comparison groups. UMBREIT & COATES, *supra* note 84, at 7.

192. STRICKLAND, *supra* note 99, at 26–28. See also UMBREIT ET AL., *supra* note 184, at 9–10.

193. Latimer et al., *supra* note 189, at 135–37.

Restorative justice programs are successful largely because they provide a “broader range of approaches to justice than the criminal justice system typically offers.”¹⁹⁴ In contrast to the traditional criminal justice system, in which victims are primarily passive participants,¹⁹⁵ victims are central and active participants in restorative justice programs.¹⁹⁶ Such participation is crucial to both victim satisfaction and victims’ concept of fairness.¹⁹⁷ Moreover, participation in restorative justice programs has been shown to “significantly reduce victims’ anger, anxiety, fear of re-victimisation by the same offender, and fear of crime in general.”¹⁹⁸ In short, restorative justice provides victims with opportunities and rights not present in our current criminal justice system, enabling them to “express emotion [and] obtain psychological closure [and] a release from the power that the crime event holds for them.”¹⁹⁹ This vocalization of emotion may also contribute to offender rehabilitation; indeed, recent scholarship asserts that “hearing the victim’s story might trigger the emotions of empathy and compassion in the offender” and subsequently reduce the likelihood of another offense.²⁰⁰

Though restorative justice has many potential advantages over traditional practices, it also has limitations. First, the reach of VOM is limited by victims’ willingness to participate in mediation. Victim participation is voluntary in virtually all VOM programs,²⁰¹ and studies have shown that only between 50

194. Lucas, *supra* note 184, at 1378–79 (citation omitted).

195. Erez & Roberts, *supra* note 1, at 293 (“Court procedures rarely provide victims with an occasion to contract a coherent and meaningful narrative.”).

196. STRICKLAND, *supra* note 99, at 38–39.

197. Mark S. Umbreit, *The Meaning of Fairness to Burglary Victims*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION, *supra* note 84, at 49–51. See also Erez & Roberts, *supra* note 1, at 293. Erez and Roberts state,

Research has demonstrated that the right to participate in proceedings, including the right to be heard at various points in the criminal justice process, is important to many crime victims. Most victims are interested in participating in the justice process, and they want an opportunity to tell, in their own words, the way that the crime has affected them.

Id.

198. Leena Kurki, *Evaluating Restorative Justice Practices*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 183, at 293, 295.

199. John R. Gehr, *The Function of Forgiveness in the Criminal Justice System*, in RESTORATIVE JUSTICE ON TRIAL, *supra* note 182, at 541, 546 (citation omitted).

200. Robinson & Shapland, *supra* note 73, at 344. Others argue that restorative justice’s potential to reduce recidivism lies not in offenders empathizing with victims, but rather in being given a forum to discharge feelings of shame, guilt, and remorse. *Id.* at 349–50. In either event, studies of victim-offender mediation reveal the process “may be helpful in reducing offender justifications that tend to alienate them from victims and, thus, may lead to greater acceptance of responsibility and the development of peaceful relations.” Galaway & Hudson, *supra* note 180, at 2.

201. MARK S. UMBREIT ET AL., OFFICE FOR VICTIMS OF CRIME, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 8 (2000). Offender participation is not always voluntary, however, with some VOM programs requiring the offender to participate when the victim is interested in taking part. *Id.*

percent²⁰² and 75 percent²⁰³ of victims are willing to participate in mediation when given the opportunity. A second objection to restorative justice is that it does not work for dangerous offenders.²⁰⁴ Though advocates argue that restorative justice programs have been successfully applied to such offenders, most also concede that there are some “[u]nsuitable offenders [who] should not meet with their victims.”²⁰⁵ Finally, while the available scholarship on restorative justice is promising, “there are definite limits upon the scope, quality, and results of existing research.”²⁰⁶ In particular, additional research is needed to better determine the “long-term effects [of restorative justice] on offenders [and] communities.”²⁰⁷

Despite the limitations of restorative justice and the need for further investigation, the research suggesting its advantages over current restitution and criminal justice practices is too strong to ignore. By addressing the emotional damage caused to victims of crime in addition to the monetary harm, the potential for restorative justice transcends that of traditional court-ordered restitution programs. If Congress is sincere in its expressed desire to improve victim satisfaction, victim compensation, and offender rehabilitation, future restitution policy should explore the potential of integrating restorative justice practices.²⁰⁸

CONCLUSION

In the decade since the MVRA’s passage, the Act has failed to achieve its stated purposes for enactment: low collection rates have impeded the goal of enhancing victim compensation, and unfulfilled restitution judgments have decreased victim satisfaction. Additionally, the burden of mandatory restitution has hindered offender rehabilitation, which likely increases recidivism rates and results in new victims of crime. Finally, high administrative costs coupled with the prevalence of offender indigence mean that in a majority of cases, the government is likely spending more to impose the provisions of the MVRA than the victim will receive in restitution from the offender.

202. John Gehm, *Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation*, in *CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION*, *supra* note 84, at 177, 179.

203. Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1998 *W. CRIMINOLOGY R.* 1 (1998).

204. STRICKLAND, *supra* note 99, at 32.

205. D.W. Van Ness & K.H. Strong, *Practical Objections to Restorative Justice*, in *RESTORING JUSTICE* 155, 186 (2d ed. 2002). For a general discussion of the application of restorative justice to dangerous offenders, see *id.* at 186–90 and STRICKLAND, *supra* note 99, at 32–34.

206. Kurki, *supra* note 198, at 293.

207. *Id.*

208. Unfortunately, the short-term prospects for gaining congressional support for restorative justice are dubious, as commentators have noted that “[t]he popularity of punitive measures with elected officials and the desire to be ‘tough on crime’ may impose barriers to programs that appear to be softer on crime, no matter how effective they are.” STRICKLAND, *supra* note 99, at 141–42.

The MVRA's failings demand an immediate return to a discretionary restitution scheme. Congress's goals in enacting the MVRA were laudable, but its years in operation have demonstrated that mandatory restitution is an ineffectual means for achieving those aims. By returning to a discretionary restitution framework, better assessing offenders' financial means, and heightening collection efforts, Congress could greatly improve the restitution framework. Additionally, future restitution research and policy should focus on methods for further promoting victims' interests and enhancing offender rehabilitation, such as restorative justice programs.