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The Newly Adopted Criminal Restitution Statutes of South Carolina: Analysis and Recommendations for Change

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Gaines: The Newly Adopted Criminal Restitution Statutes of South Carolina

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*Kenneth Winchester Gaines**

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I. INTRODUCTION

Across the country, state legislatures have enacted criminal statutes with crime victims in mind. The federal government led the way with the Victim and Witness Protection Act (VWPA).¹ Before the promulgation of these laws, many victims believed, and sometimes rightly so, that they had been victimized and abused not only by the criminal defendants but by the criminal justice system as well. Victims had no avenue through which to voice their concerns in criminal matters that would forever affect their lives.

In most instances, victim protection laws have been reactive—responding to the ever-increasing voices of a disgruntled public that believed it had no input in the administration of justice. Criminal defendants were thought to have all of the rights and protections under the law, and for many years they did.

Now a majority of the state legislatures have adopted some form of victim's rights laws, using the VWPA as their model. One important component of most of these laws is restitution to the victim by the perpetrator.²

1. 18 U.S.C. §§ 3663-3664 (1988).

2. See ALA. CODE §§ 15-18-65 to 15-18-78 (1977); ALASKA STAT. §§ 12.55.025(f), 12.55.051 (1990); ARIZ. REV. STAT. ANN. §§ 13-804 to -814 (1989 & Supp. 1994); ARK. CODE ANN. §§ 16-90-301 to 310 (Michie 1987 & Supp. 1993); CAL. PENAL CODE §§ 155.5 (West 1988), 1203.1-1203.11 (West 1982 & Supp. 1994); COLO. REV. STAT. §§ 17-2-103(9)(a), 16-11-101.5, 17-24-119, 18-6.5-106 (1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53a-30(a) (4) (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, §§ 4101, 4104 (1987); FLA. STAT. ANN. §§ 944.485, 945.091(6), 945.31, 946.002, 947.181, 948.032, 775.089(12) (a) (West 1985 & Supp. 1994); GA. CODE ANN. § 17-14-5 (1990); HAW. REV. STAT. § 706-644 to -645 (1994); ILL. ANN. STAT. ch. 38, para. 1005-5-6, 1003-3-9(g) (Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 35-50-5-3, 35-38-2-3(j) (Burns 1994 & Supp. 1994); IOWA CODE ANN. § 910.1-910.15 (West 1994); KAN. STAT. ANN. § 19-4809 (Supp. 1993); KY. REV. STAT. ANN. § 431.200 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 46:1844(J) (West Supp. 1994); ME. REV. STAT. ANN. tit. 17-A, §§ 1321-1330, tit. 30-A, § 1605 (West. 1983 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 276, §§ 92A (West 1972 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 780.66-.768 (West Supp. 1994); MISS. CODE ANN. §§ 99-37-1 to -25 (Supp. 1993); MO. ANN. STAT. §§ 211.083, 211.181(3) (6), 211.185, 559.100 (Vernon Supp. 1994); NEB. REV. STAT. §§ 29-2280 to -2289 (1989); NEV. REV. STAT. ANN. §§ 176.189 (Michie Supp. 1993); N.H. REV.

The South Carolina General Assembly recently enacted its own criminal restitution statute, which became effective on June 14, 1993.³ As with the enactment of similar state and federal laws, the promulgation of the South Carolina statute came at the unyielding behest of certain victim advocacy groups and individuals.⁴ The legislative intent behind the enactment of this bill was summarized as follows:

Under current law, defendants are not being forced to comply with orders to pay fines and with restitution orders (parole is not being revoked upon failure to pay restitution) and victims have no recourse. This bill was introduced to create a way for property to be attached if a defendant fails to pay ordered fines or restitution.⁵

Although the application of the criminal restitution statutes has yet to be addressed by the South Carolina Supreme Court, cases have been decided on the federal level as well as on various state levels that provide guidance as to how these new laws will affect the adjudication of criminal justice in this state. What follows in this Article is an analysis of state and federal laws and cases to determine what they can tell us about the adequacy of our newly enacted victim restitution statutes.⁶

Part One focuses on the history of and problems encountered by federal and state restitution statutes. It is divided into five sections. Section One addresses the background and purpose of the criminal restitution statutes on the federal and state levels. Section Two outlines the constitutional challenges

STAT. ANN. §§ 651:2, 651:22, 651:62-67 (1986 & Supp. 1993); N.J. STAT. ANN. §§ 2C:46-1 to -5, 30:4-91.4, 30:4-92, 30:8-26 (West 1982 & Supp. 1994); N.M. STAT. ANN. § 31-20-6 (Michie 1994); N.Y. CRIM. PROC. LAW §§ 420.10-.30 (McKinney 1994); N.C. GEN. STAT. § 15A-1343 (1988 & Supp. 1994); N.D. CENT. CODE §§ 12.1-32-07, 12.1-32-08, 12.48.1-03, 32-03-09.2 (1976 & Supp. 1993); OHIO REV. CODE ANN. § 2951.02(B) (9) (Anderson 1993 & Supp. 1993); OKLA. STAT. ANN. tit. 22, §§ 991a, 991a-3, 991a-10, 991b (West 1986 & Supp. 1994); S.C. CODE ANN. §§ 17-22-322 to -326, 17-25-125, 24-3-40, 16-3-1270, 24-21-480, 24-23-220 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 23A-27-25.1 to -27-25.6, 23A-28-1 to -28-13 (1988 & Supp. 1994); TENN. CODE ANN. §§ 7-3-401 to -3-405, 41-6-101 to 6-207 (1990 & Supp. 1994); TEX. CRIM. PROC. CODE ANN. § 42.12 (West 1979 & Supp. 1985); UTAH CODE ANN. §§ 76-3-201, 76-3-201.1, 77-18-6, 77-27-11 (1990 & Supp. 1994); VT. STAT. ANN. tit. 28, § 252 (1986); VA. CODE ANN. § 19.2-305 to -305.2 (Michie 1990 & Supp. 1994); WASH. REV. CODE ANN. §§ 9.94A.145, 13.40.200 (West 1993 & Supp. 1994); W. VA. CODE § 62-12-9 (1992 & Supp. 1994); WYO. STAT. §§ 7-9-101 to 9-115, 7-13-421, 7-13-502, 7-16-205 (1987 & Supp. 1994).

3. Act of June 14, 1993, 1993 S.C. Acts 140 (codified at S.C. CODE ANN. §§ 17-25-322 to -326 (Law. Co-op. Supp. 1993)).

4. SOUTH CAROLINA HOUSE JUDICIARY COMM., STAFF SUMMARY REPORT TO THE GEN. ASSEMBLY OF 1993, at 2 (1993) [hereinafter JUDICIARY COMM. REPORT].

5. *Id.*

6. S.C. CODE ANN. §§ 17-25-322 to -326 (Law Co-op. Supp. 1993).

the statutes have faced. Section Three provides guidance on collateral estoppel and res judicata considerations on any subsequent civil action. Section Four discusses what constitutes the “offense of conviction,” and Section Five outlines the scope of state and federal restitution under the revised VWPA.

Part Two of this article delves into the South Carolina restitution statute: its history, shortcomings, and recommendations for its improvement. The statute is compared with the VWPA as well as various other state statutes to determine what the shortcomings in these statutes can tell us about the South Carolina statute.

The Conclusion encompasses this writer’s suggestions for improvements to the South Carolina statute. It offers the author’s views regarding the changes that need to be made to the statutes to avoid the problems encountered by the VWPA and other state criminal restitution statute.

PART ONE

I. BACKGROUND AND PURPOSE OF CRIMINAL RESTITUTION STATUTES

When the federal government enacted the VWPA in October 1982, its avowed purpose was “to strengthen existing legal protections for victims and witnesses of Federal crimes”⁷ The Act’s precursor was the declaration of “Crime Victims’ Week” in April 1982.⁸

Under the VWPA, the restitution provisions were originally codified at 18 U.S.C. sections 3579 and 3880.⁹ These sections underwent necessary revisions as they were tested in the federal court system. Under the original provisions, however, many cases were decided that set the pathway for state legislatures and courts to follow. A closer analysis of the early version of the VWPA clarifies what legal and constitutional challenges South Carolina’s restitution statute may have to endure.

There were several major provisions of the VWPA: 1) the requirement that the sentencing judge receive a victim impact statement; 2) the requirement of restitution for crimes involving property loss or personal injury; 3) the establishment of civil liability of the federal government for bodily injury caused by dangerous persons who have escaped or are released from federal custody when the government is found to be grossly negligent; 4) requiring the Attorney General to promulgate guidelines for the fair treatment of victims of

7. S. REP. NO. 532, 97th Cong., 2d Sess. 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2515.

8. *See* 1982 U.S.C.C.A.N. at 2516. In declaring Crime Victim’s Week, President Reagan commented that the “plight of innocent citizens, victims of lawlessness, deserves immediate national attention.” *Id.*

9. The VWPA, renumbered and amended on November 1, 1986, is codified at 18 U.S.C. §§ 3663-3664 (1988).

federal crimes; and 5) the requirement that the Attorney General recommend legislation to prevent a felon from profiting from his crime's notoriety before the victim is compensated.¹⁰

Section 3663 outlines the general provisions of the VWPA. Subsection 3663(a)(1) makes restitution discretionary.¹¹ Under the former provisions, if a court declined to order restitution, it was required to state its reasons for that decision.¹²

As is the case with many laws, the problems with the VWPA did not surface until the statute was in court.¹³ The VWPA does not clearly define who is a crime "victim" for the purpose of awarding restitution. To promote the rehabilitative goals of restitution, and also for equitable considerations, courts have held that organizations and businesses, as well as individuals, may be victims.¹⁴ The Federal Savings and Loan Insurance Corporation (FSLIC) was deemed a victim when it acquired the claims of a defunct savings and loan that had been defrauded.¹⁵ Courts also have ruled that the Internal Revenue Service,¹⁶ an insurance company,¹⁷ a county,¹⁸ the Department of La-

10. S. REP. NO. 532, *supra* note 7, at 9-10, *reprinted in* 1982 U.S.C.C.A.N. at 2515.

11. Section 3663(a) (1) provides, in relevant part: "The court, when sentencing a defendant convicted of an offense under this title . . . , may order, in addition to or . . . in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3663(a) (1) (1988).

12. Formerly, 18 U.S.C. § 3663(a)(2) stated: "If the court does not order restitution, or orders only partial restitution . . . the court shall state on the record the reasons therefor." 18 U.S.C. § 3663(a)(2) (repealed 1986).

13. One commentator observed,

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

Laura Munster Sever, Note, *The Victim and Witness Protection Act of 1982: Who Are the Victims of Which Offenses?*, 20 VAL. U. L. REV. 109, 110 (1985) (emphasis added).

14. The rationale behind this policy, as explained by two commentators, is that "[d]efendants should not be relieved of their obligation to make restitution simply because of the victims's identity. In addition, it is inequitable not to compensate corporate or organizational victims who suffer losses that ultimately are borne by the consumer or shareholder." The VWPA therefore should be construed or amended to reflect this policy. Lorraine Slavin & David J. Sorin, Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 524 (1984).

15. *United States v. Smith*, 944 F.2d 618, 621-22 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992).

16. *United States v. Helmsley*, 941 F.2d 71, 101-02 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992).

17. *United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988); *United States v. Durham*,

bor,¹⁹ the Farmer's Home Administration,²⁰ an Indian health care service,²¹ and Medicare²² were victims entitled to restitution.

The idea of extending the definition of victim to include nonindividuals is critical to the rehabilitative and penal goals of restitution. Although the restitution statutes were passed in response to requests by individuals for compensation to redress losses they had incurred as victims of crime, the goals of restitution are the same for business and governmental entities that have been injured by crime. This definition of victim also makes clear that a crime perpetrated against a business is no less a crime than one perpetrated against a human being; society's interests in penalizing the offender and compensating the victim still are being met.

Many states have adopted their own versions of the VWPA²³ just as the drafters of the VWPA intended.²⁴ For example, the Alabama legislature enacted criminal restitution legislation.²⁵ Section 15-18-65 of the Alabama Code explains the legislative purpose of the statute²⁶ while section 15-18-67 sets forth the general restitution provisions.²⁷ The statute does not specify which courts have jurisdiction under the statute.

755 F.2d 511, 513-14 (6th Cir. 1985).

18. *United States v. Ruffen*, 780 F.2d 1493 (9th Cir.), *cert. denied*, 479 U.S. 963 (1986).

19. *United States v. Fountain*, 768 F.2d 790, 892 (7th Cir.), *opinion amended and reh'g denied*, 777 F.2d 345 (1985), *and cert. denied*, 475 U.S. 1124 (1986) (holding that the Department of Labor is a "person" entitled to compensation under third-party payment provision of VWPA).

20. *United States v. Kirkland*, 853 F.2d 1243, 1246 (5th Cir. 1988).

21. *United States v. Sunrhodes*, 831 F.2d 1537, 1545-46 (10th Cir. 1987).

22. *United States v. Livingston*, 770 F. Supp. 440 (N.D. Ill. 1991), *aff'd*, 983 F.2d 1073 (7th Cir. 1992).

23. *See supra* note 2.

24. *See* S. REP. NO. 532, *supra* note 7, at 10, *reprinted in* 1982 U.S.C.C.A.N. at 2516. The Senate report commented, "The bill has been drafted with the knowledge that the majority of serious violent crimes fall within the jurisdiction of the State and local law enforcement agencies. An important purpose of S.2420, therefore, is to provide a model statute for State and local governments." *Id.*

25. ALA. CODE §§ 15-18-65 to 78 (1982 and Supp. 1993). The Alabama statute served as a model for South Carolina's restitution statutes.

26. Section 15-18-65 provides, "The legislature hereby finds, declares and determines that it is essential to be fair and impartial in the administration of justice, that all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof." ALA. CODE § 15-18-65 (1982).

27. Section 15-18-67 states, in pertinent part, "When a defendant is convicted of a criminal activity or conduct which has resulted in pecuniary damages or loss to a victim, the court shall hold a hearing to determine the amount or type of restitution due the victim or victims of such defendant's criminal acts." ALA. CODE § 15-18-67 (1975).

The Alabama Court of Criminal Appeals addressed this ambiguity in *Burt v. City of Montgomery*.²⁸ The Montgomery municipal court ordered the defendant, convicted of third-degree assault, to pay restitution to both of his victims. The defendant appealed, claiming that the municipal court had no jurisdiction to order him to pay restitution. In considering the defendant's contention, the appellate court looked to the legislative intent to ascertain whether, absent guidance on the issue, restitution should be imposed in all criminal courts.²⁹ The court ultimately rejected the defendant's argument and held that the statute does not limit the authority to order restitution to any particular court.³⁰

In an effort to quell the anger of victims of crime, Congress and many state legislatures drafted restitution statutes in relative haste. The resulting statutes often seemed carelessly thought out and were poorly written. Many challenges have been raised against the federal and state restitution statutes, especially constitutional challenges.

II. CONSTITUTIONAL CHALLENGES

A. Sixth and Seventh Amendments

There have been several constitutional challenges to restitution statutes as elements of civil and criminal law are commingled to afford relief to victims of crime. Sixth and Seventh Amendment challenges have plagued the courts' decisions under the restitution statutes.³¹ As one commentator stated, "[T]he critical issue in determining the right to a jury trial is whether VWPA restitution orders are criminal or civil in nature. If they are criminal, the Sixth Amendment governs the right to jury trial; if they are civil, the Seventh Amendment controls."³²

28. 598 So. 2d 5 (Ala. Crim. App. 1991), *cert. denied* (1992).

29. *Id.* at 8-9. The court stated, "In the area of statutory construction, the duty of a court is to ascertain the legislative intent from the language used in the enactment. When the statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement." *Id.* (quoting *Parker v. Hilliard*, 567 So. 2d 1343, 1346 (Ala. 1990)).

30. *Id.* at 8.

31. The Sixth Amendment to the United States Constitution provides the criminal defendant with the right to a speedy and public jury trial. It also affords the defendant the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Seventh Amendment affords the defendant the right to a trial by jury. U.S. CONST. amend. VII.

32. Bonnie A. Von Roeder, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 673 (1984).

At their restitution hearings, many criminal defendants asserted their Seventh Amendment right to trial by jury to get another jury trial. However, a majority of courts have rejected this defense.³³

In 1984 the constitutionality of the VWPA was attacked in *United States v. Satterfield*.³⁴ The defendant was convicted of kidnapping a woman from her home and forcing her to accompany him and his co-defendants from Georgia to Alabama.³⁵ The district court refused to require the defendant to pay \$599 in restitution to cover the victim's medical expenses, holding that the VWPA violated the defendant's Seventh Amendment right to a jury trial. The government cross-appealed from the district court's decision.³⁶

The Eleventh Circuit, ruling in favor of the government, rejected the district court's position that collateral estoppel and civil enforcement provisions of the VWPA made restitution a civil rather than criminal penalty.³⁷ Rather, the court stated that whether a penalty should be characterized as civil or criminal is a question of legislative intent.³⁸ Upon a review of the legislative history of the VWPA, the *Satterfield* court concluded that Congress intended restitution to be a criminal penalty.³⁹

In *United States v. Brown*⁴⁰ the Second Circuit held that the Seventh Amendment was not a bar to ordering restitution, reasoning that restitution was a permissible form of criminal punishment and noting that it was in place at the time the Seventh Amendment was adopted.⁴¹ The defendant in *Brown*, convicted of engaging in a scheme to defraud the public by holding himself out as an attorney, appealed the restitution award on the ground that it violated his right to a jury trial.⁴² The court rejected the defendant's contention, finding that restitution is different from a civil judgment because it is assessed only

33. *Id.* at 691.

34. 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985).

35. *Id.* at 831.

36. *Id.* at 833.

37. *Id.* at 837-38.

38. *Id.* at 836 (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)).

39. *Satterfield*, 743 F.2d at 837. The court found, "In drafting the restitution provisions of the VWPA, Congress made clear in both the language of the statute and its accompanying legislative history that victim restitution would be imposed as a criminal, rather than civil, penalty." *Id.* at 836. The court explained, "The legislative history of the VWPA reenforces our conclusion that Congress intended to make restitution an element of the criminal sentencing process and not an independent action civil in nature. The history is replete with references to restitution as part of the criminal sentence." *Id.* at 837.

40. 744 F.2d 905 (2d Cir.), *cert. denied*, 469 U.S. 1089 (1984).

41. *Id.* at 910. "[W]e note that judicially ordered restitution comports with the common law practice at the time the Seventh Amendment was adopted. Common law judges awarded restitution in larceny cases, thereby sparing victims the need to pursue civil remedies." *Id.* (citation omitted).

42. *Id.* at 908.

after the defendant has been found guilty.⁴³ After an adjudication of guilt, there is no constitutional requirement that a jury determine any aspect of the defendant's sentence.⁴⁴ Further, the court reasoned that, so long as restitution remains a permissible form of punishment, it is not subject to the civil requirement of a jury trial simply because it also achieves the same purpose as a civil judgment.⁴⁵

The Sixth Circuit reached the same conclusion in *United States v. Durham*⁴⁶ but for different reasons. In *Durham* the court held that the defendant had no standing to assert his Seventh Amendment right to a jury trial because he did not dispute the accuracy of any facts concerning the restitution amount.⁴⁷

As another ground for rejecting the Seventh Amendment defense, courts have held that restitution under the VWPA is an equitable remedy not requiring a jury determination.⁴⁸ Speaking on this issue, the Seventh Circuit stated,

Restitution is frequently an equitable remedy, meaning, of course, that there is no right of jury trial. The Supreme Court has suggested that restitution of back pay under Title VII of the Civil Rights Act of 1964 is an equitable remedy not requiring a jury. The same, it seems to us, is true of restitution under the Victim and Witness Protection Act of 1982.⁴⁹

During the same year that *Brown* was decided in Second Circuit, the Tenth Circuit Court of Appeals addressed the same issue in *United States v.*

43. *Id.* at 909.

44. *Brown*, 744 F.2d at 908.

45. *Id.* at 909. The court observed that many of the goals of restitution are penal:

Restitution undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines Restoring the victim's property also serves the legitimate penal purpose of vindicating society's interest in peaceful retribution. Finally, restitution can be a useful step toward rehabilitation These penal purposes have long been promoted through the imposition of fines payable to the Treasury; their achievement is not lessened because the immediate beneficiary of a restitution order is the crime victim.

Id. at 909 (citation omitted).

46. 755 F.2d 511 (6th Cir. 1985).

47. *Id.* at 514. "The purpose of the procedural devices *Durham* seeks—jury trial, discovery, and cross-examination—is to enhance the accuracy of factual determinations. Where the claimant does not dispute the accuracy of any factual finding, invocation of jury trial and due process guarantees is not proper." *Id.*

48. *United States v. Fountain*, 768 F.2d 790, 801 (7th Cir.), *opinion amended and reh'g denied*, 777 F.2d 345 (1985) and *cert. denied*, 475 U.S. 1124 (1986).

49. *Id.* (citations omitted).

Watchman.⁵⁰ The defendant, who pleaded guilty to assault with intent to murder, contended that he was entitled to a jury trial on the amount of restitution to be awarded under the VWPA. The court, citing *Brown*, held that restitution is a permissible penalty that can be imposed on a defendant as a part of sentencing.⁵¹ The court explained, "The restitution procedure does not infringe on Seventh Amendment rights. The basic concept of restitution . . . was in place when the Seventh Amendment was adopted."⁵²

The Fourth Circuit, however, in *United States v. Dudley*⁵³ came to a different ruling. It held that the restitution provision of the VWPA was civil, allowing the victim of the crime to recover the restitution award from the defendant's estate.⁵⁴ The defendant, convicted of conspiracy to use and unlawful use of food stamps, was ordered to reimburse the Agriculture Department the value of the stolen stamps. However, during the pendency of his appeal, the defendant died.⁵⁵

The defendant's attorney argued that, like all criminal penalties, the duty to pay ends at the death of the defendant.⁵⁶ The Circuit Court, however, concluded that restitution differed from the other forms of punishment given to the defendant as it was primarily compensatory.⁵⁷ The defendant's attorney attacked the constitutionality of the VWPA, as it provided for a civil penalty without affording the defendant the Seventh Amendment right to a jury trial.⁵⁸ The Fourth Circuit considered this issue moot, since the attorney failed to object to the correctness of the restitution amount. Therefore, no issue of fact existed to be tried by a jury.⁵⁹

The *Dudley* ruling has been criticized. Commentators look to the rule of abatement *ab initio*, reasoning that the death of a criminal defendant pending appeal abates all proceedings from the beginning of the prosecution. As such, all convictions are void from their inception; therefore, no criminal conviction existed in *Dudley* upon which to base the restitution award.⁶⁰

In 1986, the Alabama Court of Criminal Appeals considered the issue of a defendant's right to trial by jury at the restitution hearing. In *Rice v.*

50. 749 F.2d 616 (10th Cir. 1984).

51. *Id.* at 617.

52. *Id.*

53. 739 F.2d 175 (4th Cir. 1984).

54. *Id.* at 178.

55. *Id.* at 176.

56. *Id.*

57. *Id.* at 177.

58. *Dudley*, 739 F.2d at 178.

59. *Id.* at 179.

60. Barbara J. Taylor, Note, *Abatement of Restitution Orders Under the Victim and Witness Protection Act*, 42 WASH. & LEE L. R. 557, 570 (1985).

Alabama,⁶¹ the defendant, convicted of first-degree robbery, challenged the Alabama criminal restitution statute as unconstitutional. The defendant maintained that the language of the Alabama restitution statute made restitution a civil judgment;⁶² therefore, he argued, the Seventh Amendment afforded him the right to a trial by jury on the amount of restitution.⁶³ The court disagreed. Looking to the federal courts for guidance since Alabama courts had not addressed the issue, the court observed, "Under 18 U.S.C. § 3579(h) [replaced by 18 U.S.C. § 3663 (1988)], an order of restitution may be enforced in the same manner as a judgment in a civil action."⁶⁴ According to the court, however, this alone did not make restitution a civil penalty.⁶⁵

In determining whether the enforcement provision of the restitution statute made it civil and thus entitled the defendant to a jury trial under the Seventh Amendment, the *Rice* court looked to the legislative intent of the statute.⁶⁶ The court followed the reasoning of the Eleventh Circuit in *United States v. Satterfield*,⁶⁷ which concluded that the VWPA "intended to make restitution an element of the criminal sentencing process and not an independent action civil in nature."⁶⁸ The *Satterfield* court also noted that the VWPA permits the imposition of restitution only after a determination of certain factors, such as the financial ability of the defendant to pay. The court reasoned that the statute's consideration of the defendant's financial condition comports with the rehabilitative purpose of ordering restitution and noted that this factor generally is not considered in determining the amount of damages in a civil trial.⁶⁹ The *Rice* court, observing that Alabama's statute contained provisions similar to those found in the VWPA, followed *Satterfield* in holding that restitution is a criminal penalty⁷⁰ and, consequently, that a jury trial is not

61. 491 So. 2d 1049 (Ala. Crim. App. 1986).

62. *Id.* at 1052. Section 15-18-78 of the Alabama statute provides that "[a] restitution order in a criminal case shall be a final judgment and have all the force and effect of a final judgment in a civil action under the laws of the state of Alabama." ALA. CODE § 15-18-78 (Supp. 1994).

63. *Rice*, 491 So. 2d at 1052.

64. *Id.*

65. *Id.*

66. *Id.* at 1052-53.

67. 743 F.2d 827 (11th Cir. 1984).

68. *Id.* at 837.

69. *Id.* at 836-37.

70. *Rice*, 491 So. 2d at 1052. The court found

Subsection 3579(a)(1) allows the court to prove restitution "in addition to or in lieu of any other penalty authorized by law" as a part of the "sentencing" of the defendant

Consistent with this characterization of restitution as part of a criminal sentence are subsection 3580(a) and (b), which incorporate the restitution order into the traditional sentencing role of the court. Under subsection 3580(a), the court can order restitution only after it considers the financial resources of the defendant, his

required to determine the amount of restitution as the constitutional guarantee applies only to civil damages cases and not to a penalty such as restitution imposed by a court in a criminal proceeding.⁷¹

Criminal defendants also have challenged restitution awards under the Sixth Amendment right to counsel. In *Hill v. Bradford*⁷² the Supreme Court of Alabama held that the defendant had a right to counsel at the restitution hearing in the absence of any waiver of his rights.⁷³

Thus, although a Sixth Amendment right to have counsel present at the restitution hearing exists,⁷⁴ under these federal and state statutes there is no comparable Seventh Amendment right to have a jury determination of the amount of restitution to be awarded.⁷⁵ Because restitution is a part of the sentencing phase of the criminal trial, it should be accorded the same status as fines and other penalties that are imposed without the presence of a jury. This conclusion also comports with the fact that restitution's major purpose is penal.

B. Fifth Amendment

Criminal restitution awards have been challenged as violating the Fifth Amendment.⁷⁶ In *United States v. Satterfield* the defendants questioned the adequacy of procedural safeguards at the sentencing phase. The defendants also challenged the admissibility of hearsay evidence at sentencing.⁷⁷ The district court ruled in the defendants' favor, holding that the defendants' right to a fair hearing had been denied at the sentencing phase and that the imposition of restitution had been arbitrary.⁷⁸ On appeal, the court recognized that the VWPA provided few standards for determining the restitution owed to the victim or the ability of the defendant to pay. The court concluded, however,

earning ability and the financial needs of his dependents. These considerations, which help tailor restitution to the individuality of the defendant, are vital to the rehabilitation goals of sentencing, but generally are not relevant in determining the amount of damages awarded in a civil case.

Id. (quoting *Satterfield*, 743 F.2d at 836-37 (footnotes omitted)) (citation omitted).

71. *Id.* at 1052.

72. 565 So. 2d 208 (Ala. 1990).

73. *Id.* at 210 (citing *Williams v. Alabama*, 506 So. 2d 368 (Ala. Crim. App. 1986), *cert. denied*, 506 So. 2d 372 (Ala. 1987)).

74. *Id.* at 210.

75. *See, e.g., United States v. Satterfield*, 743 F.2d 827, 837 (11th Cir. 1984).

76. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

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

78. *Id.*

that the VWPA, together with the dictates of Rule 32 [of the Federal Rules of Criminal Procedure], contains sufficient safeguards to ensure that a sentencing judge . . . will award restitution based on accurate facts and premises. . . . Rule 32(a)(1)(C) creates additional procedural protection by assuring the defendant the opportunity "to make a statement in his own behalf and to present any information in mitigation of punishment."⁷⁹

These procedural safeguards adequately protect against infringement of the defendant's due process rights. The defendant may present evidence to counter the government's assertion as to the appropriate amount of restitution. Additionally, the requirement that a judge examine the finances of the defendant and consider several other factors before determining the amount of restitution provides sufficient protection of the defendant's Fifth Amendment rights.

A criminal defendant's due process rights also require that the court consider alternative forms of punishment before revoking the defendant's parole for inability to pay restitution. The Third Circuit so held in *United States v. Palma*,⁸⁰ stating that "before the probation or parole of a defendant who has in good faith attempted to comply with a restitution order may be revoked, the court or the Parole Commission must consider whether alternative punishment measures are available."⁸¹

C. Eighth Amendment

Eighth Amendment challenges to restitution statutes have failed to withstand the scrutiny of the courts. In *United States v. Ciambrone*⁸² the defendant, convicted of racketeering and conspiracy, challenged the VWPA's restitution provision as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment by permitting incarceration for the failure to pay a debt.⁸³ The court, however, held that the statute does not violate the Eighth Amendment because under the statute the determination of whether a defendant's probation should be revoked must be predicated upon the availability of alternative forms of punishment as well as a consideration of statutory factors relating to the defendant's ability to pay.⁸⁴

79. *Id.* at 840 (quoting FED. R. CRIM. P. 32(a)(1)(c) (amended 1993)).

80. 760 F.2d 475 (3d Cir. 1985).

81. *Id.* at 479.

82. 602 F. Supp. 563 (S.D.N.Y. 1984).

83. *Id.* at 568. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

84. *Ciambrone*, 602 F. Supp. at 569.

In 1987, the Alabama Court of Criminal Appeals confronted an Eighth Amendment challenge to the state's restitution statute in *Wiggins v. Alabama*.⁸⁵ In *Wiggins*, the defendant was convicted of first-degree theft in the embezzlement of funds from her employer.⁸⁶ She appealed the amount of restitution the court ordered her to pay. Relying upon the Eighth Amendment, the defendant argued that forcing her to pay almost \$90,000 to her employer (the city of Andalusia, Alabama) amounted to an excessive fine and cruel and unusual punishment as she had limited resources and her employer was financially well off.⁸⁷ Unpersuaded by the defendant's argument, the court held that the fine was not excessive and the punishment not cruel and unusual; instead, the court placed priority on the goal of fully compensating the victim.⁸⁸

The federal VWPA provides that a court should consider several factors before ordering restitution, including the loss to the victim and the finances and earning ability of the defendant.⁸⁹ A court also will review the defendant's finances before revoking the defendant's probation or parole for a failure to pay restitution.⁹⁰

D. Fourteenth Amendment

What occurs when a defendant cannot afford to pay restitution? The United States Supreme Court addressed this issue in *Bearden v. Georgia*.⁹¹

In *Bearden* the defendant pleaded guilty to burglary and theft and was ordered to pay a \$500 fine and \$250 in restitution as a condition to his probation. The defendant paid the first installment of \$200 but was unable to pay the rest. As a result, the trial court revoked his probation and sentenced him to serve the remainder of his probationary period in prison.⁹²

On appeal before the Supreme Court, the defendant argued that he was financially unable to pay the fine and restitution. The Court held that the

85. 513 So. 2d 73 (Ala. Crim. App. 1987).

86. *Id.* at 74.

87. *Id.* at 79.

88. *Id.* Concerning the restitution statute, the court stated, "It is clear to us . . . that it is the intent of the legislature that victims be fully compensated through restitution." *Id.* (quoting *Ex parte Clare*, 456 So. 2d 357, 358 (Ala. 1984)).

89. See 18 U.S.C. § 3664(a) (Supp. V 1993). More specifically, § 3664(a) provides that a court, in determining the amount of restitution, should consider "the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." *Id.*

90. 18 U.S.C. § 3663(g) (Supp. V 1993).

91. 461 U.S. 660 (1983).

92. *Id.* at 662-63.

defendant could not be imprisoned solely because he was unable to pay the restitution amount.⁹³ If the refusal to pay were willful, however, the defendant's probation could be revoked.⁹⁴

The Court further held that the fundamental fairness strictures of the Fourteenth Amendment required that the defendant not be punished for his inability to pay.⁹⁵ The state may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and make restitution if he has demonstrated a sufficient bona fide effort to do so.⁹⁶

However, if a defendant is indigent but has the future earning ability to make the restitution payments, the restitution amount will be upheld. In *United States v. Brown*⁹⁷ the court held that an obligation to pay restitution may be imposed on a defendant who is indigent at the time of sentencing but subsequently acquires a means of discharging his debts.⁹⁸ Courts have recognized that judges would be severely restricted in imposing restitution awards if they did not have the authority to discount present indigence when determining if restitution should be awarded.⁹⁹ Nevertheless, restitution can be avoided when the defendant and the state agree that the defendant does not have the present or future ability to pay.¹⁰⁰

A criminal defendant need not be accorded the same degree of due process at the sentencing phase of the proceeding that he or she is entitled to at the trial.¹⁰¹ The defendant's Fourteenth Amendment due process rights are sufficiently safeguarded when he or she is assured the right to receive

93. *Id.* at 667-68.

94. *Id.* at 668.

95. *Id.* at 672. The Court explained,

Only if alternative measures [of punishment] are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden, 461 U.S. at 672-673.

96. *Id.* at 669-73.

97. 744 F.2d 905 (2d Cir.), *cert. denied*, 469 U.S. 1089 (1984).

98. *Id.* at 911.

99. *See, e.g.*, *United States v. Rice*, 954 F.2d 40, 44 (2d Cir. 1992) (quoting *United States v. Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986)).

100. *See United States v. McIlvain*, 967 F.2d 1479, 1481 (10th Cir. 1992).

101. *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). The court explained, Because the sentencing procedure is not a trial, courts have limited this [due process] right in order to prevent the sentencing hearing from becoming a full-scale evidentiary hearing. The degree of protection required is only that which is necessary to ensure that the district court is sufficiently informed to enable it to exercise its sentencing discretion in an enlightened manner.

Id. at 840 (citations omitted).

notice of the hearing and the opportunity to present evidence.¹⁰² In *United States v. Satterfield*¹⁰³ the defendants argued that the due process requirements of fairness and a nonarbitrary exercise of power were infringed because they did not receive during sentencing the same procedural protections afforded them at trial.¹⁰⁴ The court, however, held that the defendants' due process rights were adequately protected at the sentencing phase.¹⁰⁵ Noting that due process requires only that the defendant have notice and a right to be heard, the court stated that the defendants' only protectable interest was their right not to be sentenced on the basis of invalid premises or inaccurate information.¹⁰⁶

The California Court of Appeals in *California v. Goulart*¹⁰⁷ explored the fundamental fairness of ordering restitution as a condition of probation. The defendant pleaded guilty to one of nine counts of interfering with an electrical line. The other counts against him were dropped.¹⁰⁸ The sentencing court ordered restitution for instances of tampering besides the count to which the defendant pleaded.¹⁰⁹ The court of appeals held that the restitution order did not violate the defendant's Fourteenth Amendment rights because the defendant had not shown that the evidence considered by the judge was unreliable.¹¹⁰

E. The Supremacy Clause and Bankrupt Defendants

Criminal defendants increasingly have used bankruptcy laws in an attempt to discharge state court restitution orders. Although the automatic stay provision of the bankruptcy code generally stays all actions brought against a debtor in bankruptcy,¹¹¹ an exception to the stay provision allows criminal proceedings against the debtor to continue.¹¹² The bankruptcy court may stay a state criminal proceeding, however, when the court deems it necessary to carry out the intent of the drafters of the Bankruptcy Code.¹¹³

102. *United States v. Rochester*, 898 F.2d 971, 981 (5th Cir. 1990).

103. 743 F.2d 827 (11th Cir. 1984).

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

105. *Id.* at 841.

106. *Id.* at 840.

107. 273 Cal. Rptr. 477 (Cal. Ct. App. 1990).

108. *Id.* at 479.

109. *Id.* at 480.

110. *Id.* at 482-83.

111. See 11 U.S.C. § 362(a) (1988).

112. See 11 U.S.C. § 362(b)(1) (1988). See also Michelangelo Scafidi, Comment, *Circumventing State Court Orders of Criminal Restitution: A Bankruptcy Loophole*, 19 J. MARSHALL L. REV. 449, 453-54 (1986).

113. Scafidi, *supra* note 112 at 454; see also 11 U.S.C.A. § 105(a) (1988) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.")

Under the authority of the Supremacy Clause the bankruptcy court may even void a state restitution law if it conflicts with or obstructs the purpose of the bankruptcy law. This scenario occurred in *Perez v. Campbell*,¹¹⁴ in which the defendant, the at-fault driver in an automobile accident, was sued by the other individuals involved in the accident.¹¹⁵ Judgment was rendered against the defendant under a statute that specifically prohibited the avoidance of this type of debt through bankruptcy.¹¹⁶ The defendant thereafter filed for bankruptcy, and the Supreme Court held the state statute invalid because the Supremacy Clause proscribes such a conflict between the state statute and the federal Bankruptcy Code.¹¹⁷

The United States Supreme Court also has indicated that state court criminal proceedings might be enjoined in certain circumstances. In *Younger v. Harris*¹¹⁸ the Court stated that a federal court may enjoin a state criminal court proceeding when the prosecution is acting in bad faith.¹¹⁹ Many bankruptcy courts have followed this reasoning, typically enjoining restitution awards in cases involving checks returned for insufficient funds.¹²⁰ The courts usually base their decisions on the belief that the victim's main interest is collecting a debt and not punishing the criminal defendant.¹²¹

Other courts have said, however, that restitution is not a debt and therefore is not dischargeable under the bankruptcy laws. In making this determination, the courts look to the definitions of "debt," "claim," and "creditor."¹²² In *In re Johnson*,¹²³ for example, the court stated that restitution was not a debt and that the victim was not a creditor for bankruptcy purposes.¹²⁴

In an effort to resolve this split between the courts on the issue of the dischargeability of restitution under bankruptcy, the United States Supreme Court recently ruled in *Pennsylvania Department of Public Welfare v. Davenport*¹²⁵ that state criminal restitution obligations are "debts" under 11 U.S.C. § 101(11) and are dischargeable under Chapter 13 of the Bankruptcy Code.¹²⁶

114. 402 U.S. 637 (1971).

115. *Id.* at 638.

116. *Id.*

117. *Id.* at 652.

118. 401 U.S. 37 (1971).

119. *Id.* at 54.

120. Scafidi, *supra* note 112, at 456-57.

121. *Id.* at 457.

122. *Id.* at 462.

123. 32 B.R. 614 (Bankr. D. Colo. 1983) (mem.).

124. *Id.* at 615-17.

125. 495 U.S. 552 (1990).

126. *Id.* at 564.

Chapter 13 provides for a restructuring of the debtor's obligations while he or she attempts to pay them off. It therefore has a rehabilitative effect on the debtor, not unlike the criminal restitution statutes.¹²⁷ In an effort to make the payment of debts more attractive to the debtor than the liquidation of his or her assets, Chapter 13 allows the discharge of more debts than does Chapter 7.¹²⁸ In response to the ruling in *Davenport* Congress specifically amended the discharge section¹²⁹ to exclude from its provisions a debt for restitution included in a sentence on the debtor's conviction of a crime.¹³⁰

Bankrupt debtors also have tried to discharge criminal restitution debts under Chapter 7.¹³¹ In *Kelly v. Robinson*¹³² the United States Supreme Court held that restitution obligations under Chapter 7 fall within the scope of section 523(a)(7),¹³³ which provides that a debt may not be discharged "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."¹³⁴ Exceptions to discharge under Section 523(a)(7) do not apply to successful Chapter 13 plans.¹³⁵

On October 7, 1994, Congress adopted legislation that amended the Bankruptcy Code to bar debtors from discharging criminal fines under Chapter 13.¹³⁶ Congress passed the legislation in an effort to further strengthen creditors' rights. As a result of these amendments, criminal restitution and fines, once included as dischargeable debts under Chapter 13 plans, can no longer be discharged in bankruptcy. It would seem only just that restitution owed to victims of crime would not be considered a debt for bankruptcy purposes. Since criminal restitution is primarily penal, a criminal defendant should not be permitted to discharge a part of his sentence in bankruptcy court.

127. Carol Malz-Meaders, Case Note, *Pennsylvania Department of Public Welfare v. Davenport: Are Criminal Restitution Obligations Dischargeable Under Chapter 13?*, 37 LOY. L. REV. 155, 156-58 (1991).

128. *Id.* at 159.

129. 11 U.S.C. § 1328(a)(3).

130. *See* *People v. Warnes*, 12 Cal. Rptr. 2d 893 (1992).

131. *See* Malz-Meaders, *supra* note 127, at 160-63.

132. 479 U.S. 36 (1986).

133. *Id.* at 52.

134. 11 U.S.C. § 523(a)(7) (1988).

135. Malz-Meaders, *supra* note 127, at 165.

136. The Bankruptcy Reform Act of 1994, 1994 H.R. 5116; 103 H.R. 5116.

III. COLLATERAL ESTOPPEL AND RES JUDICATA CONSIDERATIONS IN SUBSEQUENT CIVIL ACTIONS

The doctrine of collateral estoppel traditionally has had three essential elements: "(1) the parties and issues must be identical; (2) the particular matter must be fully litigated and determined; and (3) the litigation must result in a final decision of a court of competent jurisdiction."¹³⁷ However, federal courts have abandoned the mutuality of parties requirement, allowing the use of criminal convictions in later civil suits to estop litigation of issues decided in the criminal case.¹³⁸

The VWPA sought to clarify what effect a finding of guilt in a criminal action would have on a later civil proceeding. The legislative intent was that the underlying facts of an adjudicated crime would be treated as res judicata in a subsequent civil proceeding¹³⁹ so that a criminal conviction would obviate the victim's need to establish liability in a subsequent civil suit for damages.¹⁴⁰ This policy is codified at 18 U.S.C. § 3664(e).¹⁴¹ The VWPA's requirement that a conviction be obtained before collateral estoppel can be invoked again raises the issue of what constitutes a conviction for restitution purposes. One commentator has stated, "[T]he issue that arises is a matter of statutory interpretation, and it must be determined whether a judgment entered in a criminal case pursuant to a plea of nolo contendere constitutes a 'conviction' within the meaning of the statute."¹⁴² A majority of courts addressing the issue have ruled that a nolo plea generally constitutes a conviction in other settings.¹⁴³

137. Thomas D. Sawaya, *Use of Criminal Convictions in Civil Proceedings-Statutory Collateral Estoppel Under Florida and Federal Law*, FLA. B.J., Nov. 1988, at 17, 18, (citing *Tomlinson v. Lefkowitz*, 334 F.2d 262 (5th Cir. 1964); *Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958); *Gordon v. Gordon*, 59 So. 2d 40 (Fla. 1952)).

138. *See, e.g.*, *United States v. Glantz*, 837 F.2d 23 (1st Cir. 1988); *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987).

139. S. REP. NO. 532, *supra* note 7, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 2537.

140. *Id.* at 2638.

141. Section 3664(e) provides:

A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

18 U.S.C. § 3664(e) (1988).

142. Sawaya, *supra* note 137, at 19.

143. *Id.* at 19 (citing *Sokoloff v. Saxbe*, 501 F.2d 571 (2d Cir. 1974)). The *Sokoloff* court stated, "Where . . . a statute (or judicial rule) attaches legal consequences to the fact of a conviction, the majority of courts have held that there is no valid distinction between a conviction upon a plea of nolo contendere and a conviction after a guilty plea or trial." *Sokoloff*, 501 F.2d at 574.

Res judicata treatment at the subsequent civil trial is accorded only those elements of an offense proven at the criminal trial.¹⁴⁴ The court in *United States v. Brown*,¹⁴⁵ when analyzing what was then section 3580(e) (now section 3664(e)) of the VWPA, rejected the defendant's assertion that the res judicata provision unconstitutionally blurred the distinction between a criminal sentence and a civil judgment.¹⁴⁶ The court in *United States v. Satterfield*¹⁴⁷ also followed this approach, holding that acts that support a restitution order but that are not a part of the essential allegations underlying the defendant's conviction must be litigated at the civil proceeding.¹⁴⁸

But what happens if the order of the criminal and civil proceedings are reversed, and the civil suit is dismissed before the criminal suit goes to trial? In such an instance, a federal court still could impose restitution as a form of punishment in the criminal proceeding. The issue of whether ordering restitution would further the penal goals of the restitution statute would not have been litigated in the civil proceeding.¹⁴⁹

Alabama has codified the doctrine of collateral estoppel into its restitution statute.¹⁵⁰ Florida followed suit in 1984 with the enactment of Florida Statutes section 775.089(8).¹⁵¹ The language of the Florida statute is almost identical to that of section 3663(a)(2) of the VWPA.¹⁵² The Florida statute additionally provides for an offset in the amount of civil recovery based upon the amount recovered by the victim through restitution from the criminal action.¹⁵³

The doctrine of collateral estoppel should be imposed at a civil hearing subsequent to a criminal trial. Such a policy decreases the amount of court

144. *United States v. Brown*, 744 F.2d 905 (2d Cir.), *cert. denied*, 469 U.S. 1089 (1984).

145. *Id.*

146. *Id.* at 910.

147. 743 F.2d 827 (11th Cir. 1984).

148. *Id.* at 838. The court explained,

The facts underlying a criminal offense that gives rise to a restitution order will be given collateral estoppel effect only if they were fully and fairly litigated at the criminal trial, or stipulated through a guilty plea. The collateral estoppel provision of the VWPA does not contravene congressional intent, convert the restitution aspect of the sentencing hearing into a civil proceeding, or deny the defendant his right to a jury trial under the seventh amendment.

Id. (citations omitted).

149. *See United States v. Hairston*, 888 F.2d 1349, 1355 (11th Cir. 1989).

150. Section 15-18-75 of the Alabama Code provides, "If conviction in a criminal trial necessarily decides the issue of a defendant's liability for pecuniary damages for a victim, that issue is conclusively determined as to the defendant, if it is involved in a subsequent civil action." ALA. CODE § 15-18-75 (1982).

151. FLA. STAT. ANN. § 775.089(8) (West 1992 & Supp. 1994).

152. Sawaya, *supra* note 137, at 17.

153. FLA. STAT. ANN. § 775.089(8) (West 1992 & Supp. 1994).

time necessary to litigate the civil action by affording judicial notice of certain facts litigated at the criminal level. Moreover, it saves the victim added legal expenses.

IV. CRIMINAL RESTITUTION: WHAT CONSTITUTES THE OFFENSE OF CONVICTION

A. *The VWPA*

1. *The Circuits Split*

Numerous courts have addressed how restitution is determined. Questions have arisen, however, concerning whether restitution is limited to those offenses for which the defendant pleaded guilty or was convicted. The federal circuit courts interpreted the VWPA's provision allowing restitution for "the offense of conviction" in several different ways. Several of the circuits had allowed restitution for acts beyond the offenses for which the defendant was convicted or to which the defendant pleaded guilty so long as the acts were somehow "related" to those offenses. Others limited restitution to the act underlying the conviction. The split ultimately was resolved by the United States Supreme Court in *Hughey v. United States*.¹⁵⁴

Before *Hughey* settled the issue, the Second Circuit held that a defendant would be liable to a victim for losses beyond the specified charge for which the defendant was convicted so long as the victim suffered losses from the defendant's "related" course of conduct.¹⁵⁵ The Tenth Circuit allowed restitution for other criminal acts of the defendant that had a "significant connection" to the act of conviction.¹⁵⁶ The Fifth Circuit followed suit, allowing restitution for losses beyond the amount involved in the offense of conviction when there was a significant connection between that offense and other offenses for which the defendant was not convicted.¹⁵⁷

In *United States v. Walker*¹⁵⁸ the Eighth Circuit adopted a similar approach, stating that the VWPA should be construed broadly to allow restitution for acts beyond those that underlie the offense of conviction.¹⁵⁹ The defendants in *Walker* were convicted of tax evasion and conspiring to defraud the federal government by the improper diversion of income from

154. 495 U.S. 411 (1990).

155. *United States v. Berrios*, 869 F.2d 25, 29 (2d Cir. 1989).

156. *United States v. Duncan*, 870 F.2d 1532, 1536 (10th Cir.), *cert. denied*, 493 U.S. 906 (1989).

157. *United States v. Hughey*, 877 F.2d 1256, 1264 (5th Cir. 1989), *rev'd*, 495 U.S. 411 (1990).

158. 896 F.2d 295 (8th Cir. 1990).

159. *Id.* at 306.

their family-owned corporation.¹⁶⁰ The district court ordered the defendants to make restitution to the company's employees, who lost their jobs when the company filed for bankruptcy.¹⁶¹ The Eighth Circuit agreed that restitution could be ordered if there was a significant connection between the crime of conviction and the other acts.¹⁶² However, the court found an insufficient link between the defendants' criminal acts and the company's bankruptcy that led to the employees' loss of their jobs.¹⁶³

The Ninth Circuit in *United States v. Pomazi*¹⁶⁴ held that in cases involving a continuing scheme to defraud, "it is within the power of the court to require restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea."¹⁶⁵

Courts have also awarded restitution for dismissed or even uncharged crimes, so long as they were committed with the same state of mind as the crime for which the defendant was convicted.¹⁶⁶ In *California v. Goulart* the court, noting that one of the purposes of restitution is rehabilitation of the defendant, stated that the trial court was not limited "to imposing restitution for losses resulting from crimes of which the defendant was convicted."¹⁶⁷ The court continued, "A court may also consider crimes which were charged but dismissed; uncharged crimes, the existence of which is readily apparent from the facts elicited at trial; or even charges of which the defendant was acquitted, if justice requires they be considered."¹⁶⁸ The *Goulart* court found that in ordering restitution it was within the trial judge's discretion to consider thefts for which the defendant had not been charged.¹⁶⁹

Courts have allowed restitution awards for amounts greater than alleged in the indictment, so long as the defendant agrees to the amount. In *United*

160. *Id.* at 296.

161. *Id.* at 305.

162. *Id.* at 306.

163. *Walker*, 896 F.2d at 306. The court observed,

In this case the record shows an insufficient factual nexus between the conspiracy committed by the Walkers and C-66's bankruptcy, the closing of the business, and loss of employee's salaries Simply put, there is no showing that the employees of C-66 lost their jobs as a result of actions taken by the Walkers surrounding the commission of their offense.

Id.

164. 851 F.2d 244 (9th Cir. 1988).

165. *Id.* at 249 (quoting *United States v. Davies*, 683 F.2d 1052, 1055 (7th Cir. 1982)).

166. *See, e.g., California v. Goulart*, 273 Cal. Rptr. 477, 480 (Cal. Ct. App. 1990) (quoting *California v. Richards*, 131 Cal. Rptr. 537, 542 (1976)).

167. *Id.*

168. *Id.* (citations omitted).

169. *Id.* at 481.

*States v. Kirkland*¹⁷⁰ the Fifth Circuit held that a defendant who enters a plea agreement requiring him to pay an amount of restitution greater than that alleged in the indictment cannot later challenge the amount as excessive.¹⁷¹ The court observed that “[t]he [other] courts that have considered the issue agree that the amount of restitution may be established by a plea agreement.”¹⁷² Moreover, the court indicated that a restitution hearing is not necessary if the defendant does not dispute the amount of restitution awarded.¹⁷³

The Ninth Circuit agreed with this proposition in *United States v. Whitney*.¹⁷⁴ The *Whitney* court there stated that a plea agreement that specifically determines the amount of restitution will be enforced when the defendant has freely and voluntarily agreed to it and the agreement has been examined in open court.¹⁷⁵

Other circuits have held that restitution should be limited to the offense for which the defendant was charged. For example, the Eleventh Circuit in *United States v. Barnette*¹⁷⁶ held that the VWPA allows restitution only for actual losses that flow from the offense of conviction.¹⁷⁷

2. Hughey v. United States

From its inception, the VWPA was interpreted differently by appellate courts throughout the country, causing a split of decisions among the circuits as discussed above. No firm decision existed on whether a defendant could be required to pay restitution for acts other than those underlying the offense of conviction until the United States Supreme Court conclusively decided the issue in May 1990 in *Hughey v. United States*.¹⁷⁸

In *Hughey* the defendant pleaded guilty to using one unauthorized credit card but did not admit to any of the other charges against him.¹⁷⁹ The government petitioned the district court to require the defendant to pay restitution for unauthorized credit card losses in excess of the losses for which he was convicted.¹⁸⁰ The Supreme Court, reversing the decision of the Fifth Circuit, held that restitution under the VWPA is authorized only for the losses

170. 853 F.2d 1243 (5th Cir. 1988).

171. *Id.* at 1251.

172. *Id.* at 1249 (citing *United States v. Gruette*, 678 F.2d 600, 604 (5th Cir. 1982)).

173. *Id.* at 1248 n.6.

174. 838 F.2d 404 (9th Cir. 1988) (order amending prior opinion).

175. *Id.* at 404.

176. 800 F.2d 1558 (11th Cir. 1986) (per curiam), *cert. denied*, 480 U.S. 935 (1987).

177. *Id.* at 1571.

178. 495 U.S. 411 (1990).

179. *Id.* at 413-14.

180. *Id.* at 414.

caused by the conduct underlying the offense of conviction and not for losses resulting from other acts.¹⁸¹ The court reasoned

Given that the ordinary meaning of “restitution” is restoring someone to a position he occupied before a particular event, the repeated focus in § 3579 [of the VWPA] on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.¹⁸²

The Court failed to recognize expressly the ambiguity of the phrase “offense of conviction” as set forth in the VWPA. However, the Court found that even if the statute were ambiguous, in light of the longstanding principles favoring leniency toward criminal defendants in the application of ambiguous laws the defendant should be required to pay restitution only for the acts for which he was convicted.¹⁸³ Despite the attempt to create a uniform approach, the federal circuits interpreted *Hughey* differently when attempting to define what constitutes the offense of conviction.

3. VWPA Revisions After *Hughey v. United States*

a. General Provisions

The passing of years found the VWPA being applied in increasingly more diverse cases and causes of action. This expansion resulted not only from a more liberal statutory interpretation but from legislative amendment. In an effort to address the limitations of the VWPA demonstrated by *Hughey* and other challenges to its legality, Congress made numerous revisions to the statute.¹⁸⁴

One of the more recent amendments to the VWPA, effective November 29, 1990, was enacted as a part of the Crime Control Act of 1990.¹⁸⁵ This amendment broadened in many respects the jurisdiction and scope of cases

181. *Id.* at 416.

182. *Id.* (citation omitted).

183. *Hughey*, 495 U.S. at 422.

184. Pub. L. 99-646, §§ 8(b), 20(a), 77(a), 78(a), 79(a), Nov. 10, 1986, 100 Stat. 3593, 3596, 3618, 3619; Pub. L. 100-182, § 13, Dec. 7, 1987, 101 Stat. 1268; Pub.L. 100-185, § 12, Dec. 11, 1987, 101 Stat. 1285; Pub. L. 100-690, Title VII, § 7042, Nov. 18, 1988, 102 Stat. 4399; Pub.L. 101-647, Title XXV, § 2509, Title XXXV, § 3595, Nov. 29, 1990, 104 Stat. 4863, 4931.

185. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

covered under the VWPA. The restitution provisions are renumbered and codified at 18 U.S.C. §§ 3663 and 3664.¹⁸⁶

An amendment to section 3663(a)(1) makes clear that the statute applies to all courts with criminal jurisdiction,¹⁸⁷ resolving the type of ambiguity considered in *Burt v. City of Montgomery*.¹⁸⁸

Because of the revision to the VWPA that expands the phrase “victim of an offense” to include those involved in schemes and conspiracies,¹⁸⁹ the circuits give different interpretations to whether the entire “scheme or conspiracy” constitutes the “offense of conviction.” Section 3663(a)(2) expands the scope of cases in which a restitution order may be issued and the types of victims to whom restitution may be awarded, absent a showing to the contrary.¹⁹⁰ The new provision is a profound change from section 3579(2), its precursor.¹⁹¹

Under section 3663(a)(3) restitution is authorized for offenses beyond those for which the defendant is convicted so long as there is a plea agreement to that effect.¹⁹²

b. Circuits Remain Split

i. Plea Agreements

In spite of the revisions to the VWPA, the federal circuits have reached different conclusions on whether a criminal defendant, even with his consent, may be ordered to pay restitution in excess of the amount attributable to the offense of conviction. The amendments to the VWPA, enacted in large part to limit the holding in *Hughey*, were tested in *United States v. Rice*.¹⁹³ The defendant in *Rice*, having pleaded guilty to making false statements to a federally insured bank, agreed to make restitution for losses to the victims that exceeded the counts to which he pleaded guilty.¹⁹⁴

186. 18 U.S.C. §§ 3663, 3664 (Supp. V 1993).

187. 18 U.S.C. § 3663(a)(1) currently provides, “The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or, *in the case of a misdemeanor*, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.” 18 U.S.C. § 3663(a)(1) (Supp. V 1993) (emphasis added).

188. See 598 So. 2d 5, 8 (Ala. Ct. Crim. App. 1991) *cert. denied* (1992) (holding that municipal court has jurisdiction under state criminal restitution statute).

189. Crime Control Act of 1990, Pub. L. No. 101-647, § 2509(2), 104 Stat. 4789 (codified at 18 U.S.C. § 3663(a)(2) (Supp. V 1993)).

190. 18 U.S.C. § 3663(a)(2) (Supp. V 1993).

191. 18 U.S.C. § 3579 (Supp. III 1985), *amended by* 18 U.S.C. § 3663 (Supp. V 1993).

192. 18 U.S.C. § 3663(a)(3) (Supp. V 1993). The section reads: “The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.” *Id.*

193. 954 F.2d 40 (2d Cir. 1992).

194. *Id.* at 41.

The Supreme Court issued its opinion in *Hughey* after the defendant pleaded guilty but before he was sentenced. At his sentencing hearing, however, the defendant did not raise any objections to his restitution payment based on *Hughey*. Although the sentencing court initially left the restitution amount to be decided by the parties, the court later scheduled a restitution hearing because the parties failed to reach an agreement.¹⁹⁵

By the time of the restitution hearing, 18 U.S.C. § 3663(a)(3) had been in effect for six months.¹⁹⁶ At the restitution hearing the defendant for the first time raised a *Hughey* defense, arguing that restitution should be limited to the offenses for which he had pleaded guilty.¹⁹⁷ The court disagreed and noted that section 3663(a)(3) was in effect when the defendant was ordered to pay restitution; therefore, the amount of restitution would be the amount ordered by the district court pursuant to the plea agreement.¹⁹⁸

The court in *United States v. Winkler*¹⁹⁹ followed this line of reasoning when it upheld the amount of restitution provided for in a plea agreement. The plea agreement in *Winkler* allowed the sentencing court to determine the amount of restitution based on the amount of the civil judgments against the defendant and the defendant's financial circumstances.²⁰⁰ The court distinguished its case from *Hughey* on two grounds. First, *Hughey* did not involve this type of plea agreement. Second, *Hughey* was decided before section 3663(a)(3) was adopted and held that "the sentencing court could not properly rely on 18 U.S.C. § 3579, the predecessor to the pre-amendment version of § 3663, to authorize such a restitution order."²⁰¹

The government has attempted to use the revisions in the VWPA to obtain restitution from a defendant based upon his or her plea agreement. In *United States v. Cockerham*,²⁰² however, the Fifth Circuit Court of Appeals rejected this reasoning in its interpretation of *Hughey*. In *Cockerham* the criminal defendant entered a plea agreement with the government that the government argued could be used to provide an alternative basis for calculating restitution.²⁰³ The court disagreed with the government's contention, stating that

195. *Id.* at 42.

196. *Id.* at 44.

197. *Id.* at 42.

198. *Rice*, 954 F.2d at 44.

199. 817 F. Supp. 1530 (D. Kan. 1993) (mem. and order).

200. *Id.* at 1536.

201. *Id.*

202. 919 F.2d 286 (5th Cir. 1990). The court noted, "According to *Hughey*, restitution based on a loss resulting from acts for which Cockerham was not convicted is inappropriate." *Id.* at 288.

203. *Id.* at 288 n.2.

it would “decline to depart from the Supreme Court’s clear mandate in *Hughey*.”²⁰⁴

In *United States v. Young*²⁰⁵ the defendant, a bank manager, approved certain loans in return for payments from the loan recipients. He pleaded guilty to “two counts of accepting and receiving a commission or gift in connection with approval of a loan by a bank officer.”²⁰⁶ In return for the guilty plea, the government stipulated that the defendant would not be charged with any subsequent crimes committed while he was at the bank. The plea agreement also provided for restitution that was not limited to the counts to which he pleaded guilty. The defendant appealed his sentence, which included a \$1.5 million dollar restitution payment to the bank.²⁰⁷

The court sided with the defendant in finding the restitution amount to be inappropriate. The court ruled that even if the defendant in return for a dismissal of other offenses consented to restitution for losses other than those stemming from the acts upon which the conviction was based, the restitution amount could not be upheld.²⁰⁸

The *Young* opinion is consistent with *Hughey* in that it limits the scope of a restitution award to those offenses for which the defendant is convicted even in the presence of a plea agreement that provides for additional compensation.²⁰⁹

Other circuits have followed the spirit of *Hughey*, restricting restitution to losses from the acts to which the defendant has pleaded guilty or significantly connected acts.²¹⁰

A minority of the courts, however, giving a narrow interpretation to *Hughey*, have accepted plea agreements that provide restitution for acts other than those for which the defendant was convicted.²¹¹ Some courts have

204. *Id.*

205. 953 F.2d 1288 (11th Cir. 1992).

206. *Id.* at 1289.

207. *Id.*

208. *Id.* at 1290.

209. The *Young* court explained,

The relevant version of the VAWA, in turn, limits restitution to only those crimes for which the defendant has been convicted. . . . Parties to a plea agreement cannot increase the statutory powers of the sentencing judge to authorize restitution simply by stipulating to restitution beyond that allowed under the relevant version of the [Victim Witness Protection] Act.

Id. (citations omitted).

210. See *United States v. Fuentes*, 991 F.2d 700 (11th Cir. 1993) (per curiam); *United States v. Cobbs*, 967 F.2d 1555 (11th Cir. 1992) (per curiam); *United States v. Braslawsky*, 951 F.2d 149 (7th Cir. 1991).

211. See, e.g., *United States v. Marsh*, 932 F.2d 710 (8th Cir. 1991); *United States v. Domincio*, 765 F. Supp. 1259 (E.D. Va. 1991) (mem. and order).

looked for guidance in the Federal Probation Act,²¹² which includes a restitution provision similar to that of the VWPA. In *United States v. Soderling*²¹³ the Ninth Circuit Court of Appeals, analyzing the rulings under the Federal Probation Act (FPA) and the VWPA, held that decisions under the VWPA should follow those of the FPA because the language of the statutes was almost identical.²¹⁴ Under the FPA (now repealed), a negotiated plea agreement could order restitution beyond losses from the crimes for which the defendant pleaded guilty.²¹⁵

The Fourth Circuit has ruled on this issue, stating that in cases involving a plea agreement the court can consider the entire scheme for restitution purposes, instead of just the acts to which the defendant pleaded guilty. In *United States v. Mullins*²¹⁶ the defendant sought to pay restitution only for the one act of wire fraud to which he pleaded guilty. The court held that the defendant was liable for additional amounts of restitution, however, based on the terms of the defendant's plea agreement.²¹⁷

Revisions to the VWPA were needed, especially in the area of plea agreements. The former practice of limiting the restitution amount to the count of conviction, even in the presence of a plea agreement that increases the restitution amount, would seem to be a hindrance to the resolution of criminal cases. Many more cases can be resolved by way of plea agreements if the defendant has more of a bargaining tool with the restitution amount. However, courts should be cautious not to use restitution as a substitute for incarceration. A wealthy defendant should not be permitted to plead himself out of serving time in prison simply by paying increased restitution in return for a dismissal of charges.

212. 18 U.S.C. § 3651, *repealed by*, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

213. 970 F.2d 529 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2446 (1993).

214. *Id.* at 532-33.

215. *Id.* at 532.

216. 971 F.2d 1138 (4th Cir. 1992).

217. *Id.* at 1146 n.7. The court explained,
[Defendant] has contended that the specific conduct that is the basis of his offense of conviction is only the wire fraud. . . .

. . . .
That argument is resolved by our conclusion that, based on the plea agreement and the information, we must view the offense of conviction as . . . the entire scheme to defraud Therefore, the amount of restitution may be based on the losses suffered . . . from the scheme to defraud

Id.

ii. "Scheme or Conspiracy"

In *United States v. Bane*²¹⁸ the court, recognizing that the federal circuits had reached differing results in applying *Hughey* to offenses involving a criminal scheme,²¹⁹ followed the Fourth Circuit in holding that when the offense of conviction involves a scheme to defraud the entire scheme should be considered "conduct" under *Hughey*.²²⁰

In *United States v. Stouffer*²²¹ the Fifth Circuit Court of Appeals also narrowed *Hughey* by holding that the defendants' convictions of wire and mail fraud made them liable for restitution for all activities within their scheme to defraud.²²² The court noted that to convict the defendants of mail and wire fraud the government had to prove a scheme to defraud.²²³ Because a fraudulent scheme is a necessary element of these offenses, the court concluded that acts involved in the scheme were "conduct underlying the offense of conviction" for *Hughey* purposes.²²⁴ The court explained, "[T]he indictment described in detail the duration of Stouffer and Atchley's scheme and the methods used—we find that the district court's inclusion of all losses caused by the scheme to defraud satisfied *Hughey*'s requirement that sentencing courts focus upon only the *specific* conduct underlying the offense of conviction."²²⁵

In an attempt to compensate more victims and narrow *Hughey*, Congress amended the VWPA to include as victims those persons harmed by defendants involved in a scheme or conspiracy.²²⁶ The Seventh Circuit Court of Appeals applied this change in the VWPA in *United States v. Brothers*²²⁷ when it upheld an order for the defendant, convicted of mail fraud, to pay restitution for the losses caused by the entire fraudulent scheme and not merely for the

218. 817 F. Supp. 32 (N.D.W. Va. 1993) (order).

219. *Id.* at 33-34.

220. *Id.* at 34. The court stated,

In the instant matter, defendant plead guilty to mail fraud, an essential element of which involves a scheme to defraud. Restitution imposed for the loss of all victims in this matter is appropriate because the conduct which is the basis of conviction, and to which defendant plead guilty, involves a scheme to defraud.

Id. (citation omitted).

221. 986 F.2d 916 (5th Cir. 1993).

222. *Id.* at 928-29.

223. *Id.* at 928.

224. *Id.*

225. *Id.* at 929.

226. See *supra* notes 189-91 and accompanying text. Section 3663(a)(2) provides, "For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663(a)(2) (Supp. V 1993).

227. 955 F.2d 493 (7th Cir.), *cert. denied*, 113 S.Ct. 142 (1992).

losses caused by the specific acts of fraud proven by the government at trial.²²⁸

In *United States v. All Star Industries*²²⁹ the Fifth Circuit took the conspiracy theme a step further. A corporate defendant was ordered to pay restitution under the Federal Probation Act²³⁰ for acts that occurred more than five years before the issuance of an indictment against it, despite a five-year statute of limitations on the offenses.²³¹ The court held that the corporation, which had been convicted of participating in a single and continuing conspiracy that began more than five years before the indictment was returned but did not end until it was within the statute of limitations period, could be ordered to pay restitution for all losses stemming from the conspiracy.²³²

It seems more appropriate and equitable to allow restitution only for conduct underlying the offense of conviction, i.e., for the acts to which the defendant has pleaded or is found guilty. This principle also would hold true in cases involving a scheme or conspiracy; for restitution purposes, the court should look only to the acts to which the defendant has pleaded or is found guilty. The victim can seek restitution in a civil proceeding for those acts for which the defendant was not deemed guilty at the criminal trial. This requirement promotes the criminal nature of the restitution award and advances the notion that restitution is a part of the criminal process, in that restitution is awarded only for those acts for which the defendant is convicted or pleads guilty.

4. *Retroactivity of Hughey*

In *United States v. Guardino*²³³ the court applied *Hughey* retroactively to the defendant's obligation to pay restitution for offenses beyond those for which he was convicted.²³⁴ The defendant was indicted on nineteen counts of obtaining money fraudulently through his capacity as a professional psychic. The defendant pleaded guilty to some counts; however, other counts were dismissed.²³⁵ The defendant's sentencing occurred after the *Hughey* decision but before the amendments regarding victims of schemes and conspiracies.²³⁶

228. *Id.* at 497.

229. 962 F.2d 465 (5th Cir.), *cert. denied sub nom.*, 113 S. Ct. 377 (1992).

230. 18 U.S.C. § 3651, *repealed by* Pub. L. No. 98-473, 98 Stat. 1987 (1984).

231. *All Star Industries*, 962 F.2d at 476.

232. *Id.* at 477.

233. 972 F.2d 682 (6th Cir. 1992).

234. *Id.* at 687-88 n.7.

235. *Id.* at 684.

236. *Id.* at 687.

The court held that the VWPA (prior to the 1990 amendment) permitted restitution only for those acts for which the defendant was convicted.²³⁷

In *United States v. Woods*,²³⁸ however, the Third Circuit Court of Appeals declined to apply *Hughey* retroactively.²³⁹ The defendant sought to invoke *Hughey*'s limited restitution interpretation while trying to recoup restitution he paid pursuant to the Federal Probation Act before *Hughey* took effect.²⁴⁰ The defendant relied upon Rule 35(a) of the Federal Rules of Criminal Procedure, which authorized courts to change illegal sentences at any time.²⁴¹ The court found that the rule did not directly address the retroactivity issue.²⁴² In deciding not to give retroactive application to *Hughey*, the court looked to the relief sought by the defendant. Had the defendant been seeking his freedom or had the laws under which he was convicted been found illegal, the court probably would have followed the United States Supreme Court's decision in *Davis v. United States*²⁴³ and applied *Hughey* retroactively.²⁴⁴ However, because the defendant was seeking only the return of his money, the court found that the defendant's interest was not strong enough to warrant a retroactive application of the new law.²⁴⁵

The idea of amending a restitution order through a retroactive application of *Hughey* seems extreme. Retroactivity should be applied sparingly, as it is such a drastic measure and may cause uncertainty and confusion. Recoupment of restitution does not seem to be a sufficiently important interest to invoke a

237. *Id.* at 688. Quoting from a Seventh Circuit opinion, the court stated, Even if [defendant] had entered into an agreement to pay a specific sum in restitution beyond the damages from the crime of conviction, the district court lacked the authority to issue a restitution order in that amount. Section 3663 and *Hughey* clearly limit the amount of restitution which can be ordered.

Guardino, 972 F.2d at 688 (alteration in original) (quoting *United States v. Braslawsky*, 951 F.2d 149 (7th Cir. 1992)).

238. 986 F.2d 669 (3d Cir.), *cert. denied*, 114 S. Ct. 90 (1993).

239. *Id.* at 682.

240. *Id.* at 673-74.

241. *Id.* at 674; *see* FED. R. CRIM. P. 35(a) (*amended by* Pub. L. No. 98-473, Title II, § 215(b), 98 Stat. 2015 (1984)).

242. *Woods*, 986 F.2d at 675.

243. 417 U.S. 333 (1974). The test employed in *Davis* was "whether the claimed error of law was a 'fundamental defect which inherently results in a complete miscarriage of justice,' and whether '(i)t . . . present(s) exceptional circumstances where the need for the remedy afforded' by the writ of habeas corpus is apparent." *Id.* at 346 (citation omitted).

244. *Woods*, 986 F.2d at 680-81.

245. *Id.*

We are more willing to expend scarce judicial resources—which, of course, is what retroactivity entails—on those defendants that come before us because of an ongoing or potential loss of liberty, than on those who, like *Woods*, seek the retroactive application of a new decision in order to recoup lost money.

Id. at 682.

retroactive treatment of *Hughey's* holding.²⁴⁶ Because safeguards were in place at the time of sentencing to make certain the defendant would be able to pay the restitution, upholding the restitution amount would not seem to create any considerable injustice to the defendant.

B. State Court Interpretations

State courts typically have interpreted the scope of their own state restitution statutes to provide that restitution is available only for the act of conviction and not for unrelated acts for which the defendant was charged but not convicted.

In 1986 a California court of appeals held that the scope of restitution was limited solely to the offense for which the defendant was convicted and to acts "committed with the same state of mind as the offense of which he was convicted."²⁴⁷ In *California v. Lafantasie*²⁴⁸ the defendant pleaded guilty to unlawfully leaving the scene of an injury accident; however, he was never charged with being criminally responsible for the accident.²⁴⁹ The trial court ordered the defendant to pay restitution to the victim whom he struck.²⁵⁰ The appellate court vacated the restitution order, reasoning that the conduct for which the defendant was found guilty, leaving the scene of an accident, bore no relationship to paying the victim for injuries received.²⁵¹

The facts in *Lafantasie* clearly show the lack of a nexus between the offense of conviction and the other acts for which the defendant was not charged. Even a broad interpretation of the restitution statute could not sustain a restitution order for the other acts because the other acts did not relate to the crime for which the defendant was convicted, nor would a restitution order based on those counts have served any rehabilitative goal.²⁵²

246. *See id.* at 680-81.

247. 224 Cal. Rptr. 13, 15 (Cal. Ct. App. 1986).

248. *Id.*

249. *Id.* at 15.

250. *Id.* at 14.

251. *Id.* at 16-17. In holding that restitution was improper in this context, the court stated, "Requiring restitution for the act of driving at the time of the incident requires restitution for an act which (1) has no relationship to the crime of which Lafantasie was convicted, leaving the scene of an injury accident, (2) relates to conduct, driving, which is not itself criminal and (3) requires conduct which is not reasonably related to future criminality."

Lafantasie, 224 Cal. Rptr. at 16 (citing *California v. Lent*, Cal. Rptr. 905, 908 (1975) (en banc)).

252. *Id.* at 15. The court added that "[w]hile California law does not limit restitution to the actual losses caused by the crime proved ' . . . courts must tread lightly in this area lest they be reduced to "mere collection agencies" [citations], and restitution must in each case be narrowly tailored to serve a purpose described in section 1203.1.'" *Id.* (quoting *California v. Richards*, 131 Cal. Rptr. 537, 540 (1976) (en banc)).

The Alabama Court of Criminal Appeals in 1988 employed the same rationale in *Brothers v. Alabama*²⁵³ when it held that a defendant who pleaded guilty to burglary and theft of property but had an arson charge against him dismissed could not be forced to make restitution for damages caused by the arson.²⁵⁴ The *Brothers* court observed that the criminal activity for which the defendant was convicted (theft) bore no relationship to that for which restitution was being sought (arson).²⁵⁵ Although the defendant was charged with arson, he was not convicted of that offense.²⁵⁶

V. SCOPE OF RESTITUTION AWARD UNDER REVISED VWPA

A. *Compensable Expenses*

The expansion of the VWPA's scope did not mean that the list of compensable expenses would be extended. For example, in *United States v. Husky*²⁵⁷ the Eleventh Circuit Court of Appeals refused to extend the scope of the VWPA to include restitution for the mental anguish and suffering of the victim.²⁵⁸

The Ninth Circuit in *United States v. Keith*²⁵⁹ also stated that the list of compensable injuries provided in section 3663(b)(2) was exclusive. The court noted, "Unlike an award of damages in a civil action, a restitution order under the Act may compensate only for the kinds of harms enumerated in subsection 3579(b) [currently 18 U.S.C. Section 3663(b)] . . . and does not bar a subsequent civil action for damages based upon the same incident."²⁶⁰

Some courts have held that the VWPA does not authorize the inclusion of consequential damages such as attorney's fees and expenses as a part of a restitution order.²⁶¹ Other courts have ordered the payment of consequential damages, such as litigation costs and funeral expenses. In 1992, the Court of

253. 531 So. 2d 317 (Ala. Crim. App. 1988).

254. *Id.* at 318-19.

255. *Id.* at 319.

256. *Id.* at 318. The court noted that "[t]he appellant did not admit committing arson, nor was he convicted of committing arson The burning of the victim's house was not an indirect result of the theft or burglary" *Id.* at 319.

257. 924 F.2d 223 (11th Cir.), *cert. denied*, 112 S. Ct. 111 (1991).

258. *Id.* at 226-27. The court concluded that the list of compensable injuries provided in 18 U.S.C. § 3663(b)(2) is exclusive; thus, it determined that a court may not order restitution for injuries outside the statutory list, such as mental anguish and suffering. *Husky*, 924 F.2d at 226-27.

259. 754 F.2d 1388 (9th Cir.), *cert. denied*, 474 U.S. 829 (1985).

260. *Id.* at 1391.

261. See *United States v. Diamond*, 969 F.2d 961, 968 (10th Cir. 1992); *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990) ("[L]egal fees generated in prosecuting a claim are not recoverable under the VWPA.").

Criminal Appeals of Alabama in *Butler v. Alabama*²⁶² addressed the scope of damages available under the state restitution statute. The court used the “reasonable person” standard of foreseeability of damages in determining the appropriate amount of restitution. Applying this standard, the court determined that the criminal defendant was liable for costs of litigation involving the deceased victim’s will and for costs relating to the administration of the victim’s estate including funeral expenses.²⁶³

All expenses that occur as a natural and direct consequence of the defendant’s acts should be compensable. Therefore, restitution orders should include all actual expenses that can be traced back to the defendant’s criminal conduct. The list of compensable losses under the VWPA should be expanded to include any actual expenses incurred by the victim that were a direct and foreseeable result of the defendant’s criminal behavior. Punitive damages, however, still should be left solely to the civil courts.

B. Factual Findings in Absence of Plea Agreement

When the government and the defendant enter a plea agreement that sets the amount of restitution, a hearing on the amount of restitution ordered is not necessary.²⁶⁴ In the absence of a plea agreement, however, courts have reached different conclusions on whether factual findings must be made when setting the restitution amount.

The Ninth Circuit has stated that the restitution award must “have a sound basis in fact” and that the victim should be allowed to participate in the fact finding so that the court can make an accurate determination of the victim’s

262. 608 So. 2d 773 (Ala. Crim. App. 1992).

263. *Id.* at 775-76. In this case, a nurse prompted her charge to change her will and to leave her property to the nurse. A week later, the nurse murdered her victim. *Id.* at 774. The court stated,

The criminal act, i.e., the murder of the victim, under the circumstances of this case, was the proximate cause of the expenses, damages, or economic loss of the victims who were, in this case, the heirs of the victim. The restitution was to cover each heir’s actual expenses and share of the economic loss that resulted from the murder. We believe that a reasonable person could have foreseen or anticipated that the expenses embodied in the restitution order might occur as a natural consequence of the actions of the appellant, i.e., persuading the victim to change her will so as to leave all her property to the appellant and murdering her in order to obtain the property under the will. Under the circumstances existing here, it was reasonably foreseeable that there would be litigation over the will with resulting costs and that costs would be incurred in the administration of the victim’s estate, including funeral expenses.

Id. at 775-76.

264. *See* United States v. Kirkland, 853 F.2d 1243, 1249 n.10 (5th Cir. 1988); *see also* United States v. Whitney, 838 F.2d 404, 404 (9th Cir. 1988) (order) (stating that a plea agreement fixes the responsibility for the loss with “reasonable certainty”).

losses.²⁶⁵ Conversely, in *United States v. Hairston*²⁶⁶ the Eleventh Circuit held that no findings of fact need be made before ordering restitution.²⁶⁷

It seems more consistent with the goal of fully compensating the victim to make findings of fact when computing the restitution award. The basic goal of restitution generally is to put the aggrieved party back in the same position he or she would have been in had the specific event not occurred. To rely on vague factors in determining the restitution amount seems to be detrimental not only to the defendant as the amount may be set too high but also to the victim as he or she may not be fully compensated.

C. Limitation of Restitution Period

In *United States v. Diamond*²⁶⁸ the court considered how long the period extends during which restitution can be ordered. The defendant pleaded guilty to two counts of filing false reports with intent to defraud a federal agency, the Small Business Association. He was sentenced to probation and ordered to pay restitution to the SBA.²⁶⁹ However, the court, relying on the fact that restitution is a part of the sentencing process, held that the requirement to pay restitution could not extend beyond the period of probation given to the defendant.²⁷⁰

The holding in *Diamond* appears to be the majority position. Because restitution is considered a part of the defendant's sentence, payment of restitution should not be enforced beyond the time the defendant is serving his or her sentence, either through incarceration or probation.

265. *United States v. Weir*, 861 F.2d 542, 546 (9th Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

266. 888 F.2d 1349 (11th Cir. 1989).

267. *Id.* at 1352. The court stated,

We agree with the courts that have declined to adopt a rigid rule requiring district courts to make findings of fact whenever they impose an order of restitution under the VWP. The plain language of §§ 3579(a) and 3580(d) required only that the district court "consider" the listed factors and resolve disputes by a preponderance of the evidence. There was no requirement that specific findings be made on each factor.

Id.

268. 969 F.2d 961 (10th Cir. 1992).

269. *Id.* at 963.

270. *Id.* at 969. The court observed, "Although a court may require a defendant to make restitution under the VWP 'within a specified period or in specified installments,' 18 U.S.C. § 3663(f)(1) (1988), the duration of such period or the last such installment 'shall not be later than—(A) the end of the period of probation, if probation is ordered.'" *Id.* (citing 18 U.S.C. § 3663(f)(2)(A) (1988)).

D. Collateral Source Doctrine

In *Varner v. Alabama*²⁷¹ the defendant was convicted of murder.²⁷² Although the defendant pointed out that the victim's funeral expenses might have been paid by insurance, the court nevertheless held that the defendant was liable for those expenses. The court recognized that "[u]nder the collateral source doctrine, damages recovered by a party are not diminished because the injured party has been compensated for the loss by insurance or other such payment."²⁷³ As such, a victim does not have to prove that he or she actually paid the expenses upon which the restitution amount is based. Rather, the victim need only prove that he or she was liable for their payment.²⁷⁴

In *Butler v. Alabama*²⁷⁵ the Alabama Court of Criminal Appeals held that the defendant could not offset the restitution award by any money paid to the victims by third parties that overlapped the expenses for which the defendant was liable.²⁷⁶

In cases involving multiple defendants, and absent any statutory directive on the issue, courts have fashioned various methods to determine how restitution should be made. Courts may apportion restitution based on the relative culpability of each defendant,²⁷⁷ divide the restitution amount equally by the number of defendants,²⁷⁸ hold each defendant jointly and severally liable to the victim,²⁷⁹ or require each defendant to make full restitution to the victim.²⁸⁰

Not enough cases have been decided on this issue to determine a clear and fast rule. Priority should be placed on requiring the criminal defendant to pay the victim for the losses and damages the defendant caused without allowing the victim to obtain a windfall by receiving full payment from each defendant. Joint and several liability seems to be the best option, as each defendant remains liable to the victim until the victim receives full compensation.

271. 497 So. 2d 1135 (Ala. Crim. App. 1986).

272. *Id.* at 1136.

273. *Id.* at 1139 (citing *Mitchell v. Moore*, 406 So. 2d 347, 351 (Ala. 1981)).

274. *Id.* at 1139 (citing *Roland v. Krazy Glue, Inc.*, 342 So. 2d 383, 385 (Ala. Civ. App. 1977)).

275. 608 So. 2d 773 (Ala. Crim. App. 1992).

276. *Id.* at 776.

277. See *Slavin & Sorin*, *supra* note 14, at 527.

278. *Id.* at 528 (citing *State ex rel D.G.W.*, 361 A.2d 513, 523-24 (N.J. 1976)). The authors state that this view is an exception to the general rule. *Id.*

279. *Id.* (citing *People v. Goss*, 167 Cal. Rptr. 224, 234 (Cal. Ct. App. 1980).

280. *Id.*

E. Ex Post Facto Considerations

Some courts have interpreted 18 U.S.C. § 3663(a)(2) to allow victims to recover for criminal acts committed even before the enactment of the legislation so long as one criminal act within the same “scheme or conspiracy” occurred after the effective date.²⁸¹

Courts have ruled that if a defendant is tried after the effective date of section 3663 for a crime committed before the effective dates and then is ordered to pay restitution pursuant to that section, there is no violation of the constitutional prohibition on ex post facto laws.²⁸² In *United States v. Arnold*²⁸³ the Fifth Circuit ruled that no ex post facto violation occurred when restitution was ordered under section 3663(a)(3),²⁸⁴ which became effective after the commission of the crime but before the defendant’s guilty plea.²⁸⁵

Ex post facto issues also were presented by a challenge to a restitution award brought by the defendant in *United States v. Wallen*.²⁸⁶ The *Wallen* court held that the defendant, who had been convicted of racketeering, could be ordered as a part of his sentence to pay restitution for all losses resulting from his continuing offense, even for those losses suffered before the effective date of the VWPA.²⁸⁷

However, in *United States v. Streebing*²⁸⁸ the Sixth Circuit held that 18 U.S.C. § 3663(a)(2) could not be applied retroactively as it would violate the constitutional prohibition against ex post facto laws.²⁸⁹ Although the statute was in effect at the time of the defendant’s conviction and sentencing, the statute was not in effect at the time the crimes were committed for which increased restitution was sought.²⁹⁰

Circuits are split over the effect of ex post facto considerations in cases in which the VWPA amendment expanding the list of compensable injuries became effective after the commission of the defendant’s crime but before the defendant was convicted or pleaded guilty.²⁹¹ Caution should be exercised

281. *United States v. Bortnovsky*, 879 F.2d 30, 42 (2d Cir. 1989).

282. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

283. 947 F.2d 1236 (5th Cir. 1991) (per curiam).

284. 18 U.S.C. § 3663(a)(3) (Supp. V 1993) (permitting sentencing judge to order restitution to extent provided in plea agreement).

285. *Arnold*, 947 F.2d at 1238 n.2.

286. 953 F.2d 3 (1st Cir. 1991) (per curiam).

287. *Id.* at 4-5.

288. 987 F.2d 368 (6th Cir.), *cert. denied*, 113 S. Ct. 2933 (1993).

289. *Id.* at 376.

290. *Id.*

291. *See Wallen*, 953 F.2d at 5 (discussing split among circuits on ex post facto considerations).

when retroactively applying a law that criminalizes actions that were not illegal when the acts were committed.

PART TWO

I. BACKGROUND AND PURPOSE OF THE SOUTH CAROLINA CRIMINAL RESTITUTION STATUTE

On June 10, 1993, the South Carolina General Assembly passed a piece of legislation²⁹² that was long overdue. The law provides the victims of criminal acts an avenue to *enforce* the recovery of restitution from their offenders. The general provisions of the legislation are located in section 17-25-322(A) of the South Carolina Code.²⁹³ This section provides that a hearing must be held to determine the appropriate restitution amount for pecuniary damages the crime victim has suffered, unless the defendant in open court agrees to the restitution amount.²⁹⁴

But just how far-reaching are South Carolina's restitution provisions? Are they only applicable to felonies tried in circuit court or is any court with criminal jurisdiction required to abide by their dictates? The statutes are unclear on this issue.

The language of section 17-25-322(A) is almost identical to that of the comparable Alabama criminal restitution section.²⁹⁵ As in the Alabama statute, there is no expression concerning which courts have jurisdiction to order restitution. Because the South Carolina statute does not limit to any particular court the authority to impose restitution, any court that handles criminal proceedings is subject to this section and must conduct a restitution hearing as a matter of course.²⁹⁶

Sections 17-25-322, -323, and -326 do not differentiate as to the type of criminal defendants that fall within their jurisdiction.²⁹⁷ All of the sections except Section 17-25-325 contain only general references to the type of crime and court addressed.

292. 1993 S.C. Acts 140, §§ 1-4 (codified at S.C. CODE ANN. §§ 17-25-322 to -326 (Law. Co-op. Supp. 1993)).

293. S.C. CODE ANN. § 17-25-322(A) (Law. Co-op. Supp. 1993).

294. *Id.*

295. ALA. CODE § 15-18-67 (1982).

296. S.C. CODE ANN. § 17-25-322(A) (Law. Co-op. Supp. 1993).

297. Section 17-25-322(A) provides in general terms, "When a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant's criminal acts." *Id.*

Section 17-25-325 raises the question of whether restitution applies only to felonies, as it refers only to the court of general sessions in describing how a victim may enforce a restitution order.²⁹⁸ At best, section 17-25-325 confers specific powers to the court of general sessions not conferred by any other section. At worst, it confuses the question of which courts are covered by the restitution statutes. This ambiguity could be used by criminal defendants, as it was by the defendant in *Burt v. City of Montgomery*,²⁹⁹ to argue that the restitution statutes apply only to felonies under the jurisdiction of the general sessions court.

The South Carolina Supreme Court has yet to decide a case involving the new restitution statutes. However, the court decided cases before the enactment of the enforcement statutes that challenged the constitutionality of restitution awards.

II. FOURTEENTH AMENDMENT CONSIDERATIONS

The main import of the restitution statutes is to make the victim whole. However, the criminal defendant's ability to pay also is considered in determining the appropriate amount of restitution and the appropriate punishment for a failure to pay.³⁰⁰

The language of the South Carolina statute is comparable to that found in the federal VWPA and the Alabama state statute insofar as each statute provides that a number of factors must be considered in ordering restitution.³⁰¹ Specifically, the South Carolina statute provides for the consideration of the defendant's financial status before the presiding judge imposes restitution.³⁰²

298. Section 17-25-325 states in relevant part:

The sentence and judgment of the *court of general sessions* in a criminal case against an individual may be enforced in the same manner by execution against the property of the defendant as is provided by law for enforcing the judgments of the courts of common pleas in civil actions.

Id.

299. 598 So. 2d 5 (Ala. Crim. App. 1991); *see supra* notes 28-30 and accompanying text.

300. S.C. CODE ANN. § 17-25-322(B) (Law. Co-op. Supp. 1993).

301. *See id.*; 18 U.S.C. § 3664(a) (Supp. V 1993); ALA. CODE § 15-18-68 (1982).

302. S.C. CODE ANN. § 17-25-322(B) (Law. Co-op. Supp. 1993). Section 17-25-322(B) provides, in part,

In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration the following:

- (1) The financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;
- (2) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (3) The anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment; . . .

Full compensation seems to be contemplated by the South Carolina statute.³⁰³ The trial court retains jurisdiction over the matter until restitution is paid in full.³⁰⁴ If a probation or parole defendant is found in default on the restitution award, judgment will be entered in favor of the State or victim for any unpaid balance or fines.³⁰⁵

The South Carolina restitution statute addresses the issue of indigent defendants in section 17-25-322(B).³⁰⁶ The Code section requires the judge to consider the ability of the defendant to pay before issuing a restitution order.³⁰⁷ This section of the South Carolina Code is similar in wording to section 3664 of the VWPA and reads identically to the corresponding Alabama Code section upon which it was modeled.³⁰⁸ Additionally, the South Carolina Code provides for a hearing to show cause when the defendant is in default.³⁰⁹ Revocation of a defendant's probation is not automatic; indigence is one factor that the South Carolina courts may consider before deciding whether a criminal defendant's probation should be revoked.³¹⁰

303. For instance, section 17-25-322(A) provides, "[T]he court shall order the defendant make restitution or otherwise compensate the victim for *any pecuniary damages*." S.C. CODE ANN. § 17-25-322(A) (Law. Co-op. Supp. 1993) (emphasis added).

304. *Id.*

305. *Id.* § 17-25-323(B).

306. S.C. CODE ANN. § 17-25-322(B) (Law. Co-op. Supp. 1993).

307. S.C. CODE ANN. § 17-25-322(B)(1)-(3) (Law Co-op. Supp. 1993). This section provides that:

In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration the following:

- (1) The financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;
- (2) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (3) The anticipated rehabilitative effect on the defendant regarding the manner or the method of payment; . . .

308. ALA. CODE § 15-18-68 (1982).

309. Section 17-25-323(B) provides, in pertinent part:

When a defendant has been placed on probation . . . and ordered to make restitution, and the defendant is in default in the payment of them or of any installment . . . , the court, before the defendant completes his period of probation or parole, on motion of the victim or the victim's legal representative, the solicitor, or a probation and parole agent, or upon its own motion, *must hold a hearing to require the defendant to show cause why his default should not be treated as a civil judgment and a judgment lien attached.*

S.C. CODE ANN. § 17-25-323(B) (Law. Co-op. Supp. 1993) (emphasis added).

310. *See id.*; cf. 18 U.S.C. § 3663(g) (Supp. V 1993) ("In determining whether to revoke probation . . . the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.").

In 1986 the South Carolina Supreme Court decided *Barlet v. State*,³¹¹ a criminal case dealing with the failure of the defendant to make restitution. The defendant pleaded guilty to one count of grand larceny and was sentenced to probation and ordered to pay fees and restitution to the victim. His probation was revoked for failure to make the required payments.³¹² The supreme court reversed the decision to revoke the defendant's probation, holding that probation could not be revoked solely for a failure to pay restitution absent a showing that the defendant failed to make a bona fide effort.³¹³

Several years after *Barlet*, the supreme court decided *Nichols v. State*.³¹⁴ In *Nichols* the state successfully sought to revoke the defendant's probation for his nonpayment of the ordered restitution.³¹⁵

On appeal, the supreme court again held that probation could not be revoked for a failure to pay restitution without a showing that the defendant did not make a bona fide effort to pay. Because such a showing had not been made at the revocation hearing, the court determined that the defendant's due process rights had been violated.³¹⁶

Even though *Barlet* and *Nichols* were decided before the enactment of the South Carolina restitution statutes, they followed the principles established by courts in other states with criminal restitution statutes similar to South Carolina's VWPA. The holdings of these two cases thus follow the dictates of South Carolina's newly adopted restitution statutes.

III. COLLATERAL ESTOPPEL

Another case decided before the adoption of the new restitution statutes was *Fanning v. Hicks*.³¹⁷ *Fanning* involved a civil cause of action brought by a burglary victim against a criminal defendant. The defendant appealed the judgment of actual and punitive damages on the theory that the criminal restitution award acted as an accord and satisfaction. Although the defendant was ordered to pay restitution to the victim in the criminal proceeding, the *Fanning* court held that the defendant was liable to the victim for civil damages, as well, because the restitution ordered in the criminal proceeding was not agreed to by the victim.³¹⁸

311. 288 S.C. 481, 343 S.E.2d 620 (1986).

312. *Id.* at 481-82, 343 S.E.2d at 621.

313. *Id.* at 483, 343 S.E.2d at 622.

314. 308 S.C. 334, 417 S.E.2d 860 (1992).

315. *Id.* at 336, 417 S.E.2d at 861.

316. *Id.* at 337, 417 S.E.2d at 862. The *Nichols* court also held that the defendant was denied effective assistance of counsel at the probation revocation hearing, as his attorney failed to make a showing of the defendant's inability to pay restitution. *Id.*

317. 284 S.C. 456, 327 S.E.2d 342 (1985).

318. *Id.* at 458, 327 S.E.2d at 343. In so holding, the court stated,

Although *Fanning* was a civil suit and decided under the laws of accord and satisfaction, it did address the issue of restitution at criminal proceedings. Because the case was decided before the enactment of the new restitution statutes, the victim in *Fanning* had no voice in the amount of the restitution award.

Collateral estoppel issues, although not addressed by the court, are present in *Fanning*. The court awarded restitution to the victim in the criminal proceeding. Under the doctrine of collateral estoppel, that restitution amount should have been offset from any recovery in the civil proceeding. Had *Fanning* been decided under the collateral estoppel provisions of the VWPA or corresponding state provisions, Hicks would have been entitled to an offset of the amount Fanning recovered in criminal restitution.

IV. RECOMMENDATIONS FOR IMPROVEMENT

The legislature has provided a framework within which victims can enforce the recovery of criminal restitution. However, as is evident from the analysis of the newly adopted criminal restitution statute in this state, many revisions are necessary to avoid the pitfalls of the VWPA and other state statutes. This state's legislature wanted to ensure a way for the victims of criminal acts to receive compensation from their offenders³¹⁹ by enacting into law the restitution statute. Unfortunately, the legislature fell into the same drafting quagmire that afflicted the federal and various state governments. The legislative intent is clear; however, the law has been and will be challenged on many fronts unless some necessary amendments to the statutes are made.

The South Carolina criminal restitution statute contains no definitions section. Therefore, problems likely will present themselves when courts attempt to determine the precise meaning of such terms as "victim," "criminal acts," or "restitution" amount. The state legislature should adopt a complete and concise definitional section to the restitution statute so that there will be no doubt as to what persons, criminal acts, or courts come within the purview of the statute. Restitution should be awarded for any losses that can be directly attributable to the actions of the defendant and for which there is a reasonable foreseeability or likelihood. The aim of restitution should be to put the victim in the financial position he would have been in but for the crimes of the defendant. Although no punitive damages should be awarded, the list

The record is void of any evidence that Fanning agreed with Hicks to settle their dispute for \$3,850. Restitution was ordered by the court as a special condition to probation. Respondent was not even present during the taking of the plea. Without an agreement between the parties, there can be no accord and satisfaction.

Id.

³¹⁹ JUDICIARY COMM. REPORT, *supra* note 4.

of compensable expenses should be expanded further than that of the VWPA to be in line with the holding of the Alabama court in *Butler v. Alabama*.³²⁰

Whether restitution is a criminal or a civil penalty needs to be explained. This can be implemented through the definitional section. The inclusion of this provision would clear up the ambiguity of the enforcement provisions of the statutes, equating it to the enforcement of civil judgments.

Amendments also should be made to provide collateral estoppel and res judicata treatment for the acts underlying the offenses on which conviction is predicated.³²¹ Such a revision would be helpful to the victim in any subsequent civil proceeding, as he or she would not have to prove the defendant's guilt again. It also would be equitable to the defendant, as any civil award would be offset by the amount the defendant paid the victim in criminal restitution. It would cut down on court time and expense, as well.

Finally, the legislature should specify the courts to which the restitution statutes apply. On this issue, the legislature should follow the lead of the VWPA and amend the statute to include all criminal courts.

Plea agreements and their effects on the restitution amount also need to be addressed. The legislature should follow the VWPA's lead and allow for restitution beyond the count of conviction so long as the defendant agrees.³²² The victim would be likely to be awarded an even greater restitution amount.

Finally, the statutes need to be amended to address recovery by the victim of the restitution amount from a third party or from multiple defendants. Since one of the goals of restitution is to rehabilitate the defendant, a priority should be placed on the defendant's repaying the victim, even if there has been payment to the victim by a third party. When multiple defendants are involved, they should be held jointly and severally liable to the victim until the full restitution amount is paid.

CONCLUSION

The main thrust of this Article is that most of the problems encountered on the federal and various state levels concerning criminal restitution statutes can be avoided in South Carolina. The current South Carolina statute needs certain changes, discussed earlier, that should be instituted as soon as possible, to avoid costly litigation of issues that could be resolved simply through better drafting. The South Carolina General Assembly, by adopting the criminal restitution statute, began addressing the needs of the victims of crimes. This subject is especially important now when the increase in criminal activity has brought the issue of the rights of crime victims to the forefront. However,

320. 608 So. 2d 773 (Ala. Crim. App. 1992).

321. See 18 U.S.C. § 3664(e) (1988).

322. 18 U.S.C. § 3663(a)(3) (Supp. 1990).

better drafting of the criminal restitution statute is necessary to ensure that crime victims in this state are not engulfed in a morass of poorly written laws when they seek restitution for their losses.