Fordham Law Review

Volume 58 | Issue 1 Article 3

1989

The Victim and Witness Protection Act of 1982: Retroactive Application for Continuing Crimes

Douglas J. Kepple

NOTES

THE VICTIM AND WITNESS PROTECTION ACT OF 1982: RETROACTIVE APPLICATION FOR CONTINUING CRIMES

INTRODUCTION

In response to the needs of victims of federal crimes, the 97th Congress enacted the Victim and Witness Protection Act of 1982 ("VWPA").[1] The VWPA authorizes a federal court to award restitution as part of a defendant's sentence[2] but, by its terms, applies only to offenses occurring on or after January 1, 1983, the effective date of the statute.[3]

Federal courts are divided over whether the statute permits restitution for losses sustained by victims of continuing crimes when such losses occurred before the effective date. The Third, Fourth and Fifth Circuits look to the language of the effective date and allow restitution only for losses occurring on or after January 1, 1983.[4] Under this approach, victims may still recover pre-effective date losses in subsequent civil proceedings.[5] The Second, Sixth, Ninth and Eleventh Circuits, however, grant restitution for losses occurring before and after the effective date of the VWPA when the offense is a continuing crime or scheme to defraud.[6]

---

1. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in scattered sections of 18 U.S.C. and Fed. R. Crim. P. 32(c)(2)).

2. *See* 18 U.S.C. § 3663(a) (Supp. V 1987) (originally codified at 18 U.S.C. § 3579(a)(1)). "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." *Id.*

3. *See* 18 U.S.C. § 1512 note (a)(2) (1982 & Supp. V 1987).

4. *See, e.g.*, United States v. Corn, 836 F.2d 889, 896 (5th Cir. 1988) ("When the defendant's offense is a unitary conspiracy or scheme to defraud, the government must identify which losses resulted from acts committed before and which from acts committed after the effective date for the purposes of restitution . . . ."); United States v. Oldaker, 823 F.2d 778, 781 (4th Cir. 1987) ("Although conspiracy is commonly viewed as an ongoing offense, the losses suffered by Oldaker's victims after January 1, 1983, are the only ones compensable under the Act."); United States v. Martin, 788 F.2d 184, 189 (3d Cir. 1986) ("[W]hile a scheme to defraud . . . may properly be viewed as one unitary offense, the losses which resulted therefrom must be separately identified as those which occurred before and those which occurred after January 1, 1983 . . . .").

5. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 940 n.71 (1984); *cf.* 18 U.S.C. § 3663(e) (Supp. V 1987) (originally codified at 18 U.S.C. § 3579(e)(2)) ("Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages . . . .").

6. *See, e.g.*, United States v. Bortnovsky, 879 F.2d 30, 42 (2d Cir. 1989) ("[A]ny loss sustained as a result of one of the predicate acts underlying the RICO offenses seems to us to fall within the scope of the Act."); United States v. Angelica, 859 F.2d 1390, 1393 (9th Cir. 1988) ("Because the fraudulent scheme continued beyond January 1, 1983, we hold that all of the victims' losses are subject to a judgment of restitution under the VWPA."); United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987) ("The district court correctly held that [defendant] pled guilty to the offense of mail fraud involving a

These circuits focus on the unified nature of continuing offenses and regard such criminal acts as having been committed after the effective date of the VWPA.[7]

This Note discusses whether the VWPA should provide restitution for losses occurring before the effective date of the statute if those losses were sustained as a result of a continuing crime. Part I examines the legislative history of the VWPA and the policies served by restitutionary remedies. Part II discusses the nature of continuing crimes and the problems in applying the effective date of the VWPA to such crimes. Part II argues that where continuing crimes are concerned, going beyond the effective date of the VWPA is essential in order to fulfill the purpose of the statute. Part III addresses the *ex post facto* clause and the constitutionality of demanding restitution for losses incurred before the VWPA's effective date. This Note concludes that the VWPA should permit restitution for pre-effective date losses when such losses are suffered as part of a continuing crime.

I. LEGISLATIVE HISTORY AND THE POLICY OF RESTITUTION

A. *Legislative History*

Addressing the judiciary's mistreatment of crime victims,[8] President Reagan said in 1982 that, "The plight of innocent citizens victimized by lawlessness deserves immediate national attention."[9] The President urged "all . . . involved in the criminal justice system to devote special attention to the needs of victims of crime, and to redouble their efforts to make our system responsive to those needs."[10]

Sharing the President's views, the Special Senate Subcommittee on Ag-

scheme which continued in operation after January 1, 1983, and therefore, was subject to the restitution provisions of the Act."); United States v. Barnette, 800 F.2d 1558, 1571 (11th Cir. 1986) ("[T]he conspirators continued to defend and promote their fraudulent scheme after January 1, 1983 .... Therefore, the restitution order imposed . . . is authorized.") (citation omitted), *cert. denied*, 480 U.S. 935 (1987).

7. *See Bortnovsky*, 879 F.2d at 42; *Angelica*, 859 F.2d at 1393; *Further*, 823 F.2d at 968; *Barnette*, 800 F.2d at 1571.

8. For discussion of the judiciary's mistreatment of crime victims, see R. Elias, Victims of the System: Crime Victims and Compensation in American Politics and Criminal Justice (1983). *See generally* Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss. L.J. 515, 518-20 (1982) ("alienation of the victim"); Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislature*, 70 A.B.A. J. 25 (1984) (whether nation's system of justice has failed in meeting the needs of victims); Metz, *The Illusion of Victim Rights*, Stud. Law., Mar. 1989, at 17 ("[t]he problem is not whether you're rich or poor, . . . but essentially: Is there any system there for anybody?"); *Victims of Crime: Giving Them Their Day in Court*, Judges' J., Spring 1984 (special issue discussing rights and needs of victims); Blackmore, *Paying the Price of Crime*, Police Mag., July 1979, at 54 (inefficiency of judiciary and lack of response to witness needs).

9. Proclamation No. 4929, 47 Fed. Reg. 16,313 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News A47.

10. *Id.* The President further declared the week beginning April 19, 1982 as "Crime Victims' Week." *See id.*

ing and the Senate Judiciary Subcommittee on Criminal Law[11] conducted hearings on victims' rights.[12] These hearings indicated that victims were the "forgotten persons"[13] in the criminal justice system and that their needs were being ignored.[14]

Soon after these hearings, and in response to the national outcry concerning victims' rights,[15] separate bills were introduced in the Senate and House which eventually became the VWPA.[16] The VWPA passed both houses with exceptional speed[17] and support, and created a panoply of devices that increase protection of both victims and witnesses. The VWPA has three major provisions. First, the VWPA amends the Federal Rules of Criminal Procedure to require that a pre-sentencing report assessing the financial, social, psychological and medical impact of the crime upon the victim be filed with the trial judge.[18] Second, Section 1512 of Title 18 broadens the definition of witness to include victims and expands witness protection to cases other than organized crime offenses.[19] Section 1512 also provides criminal penalties for intimidation of victims and witnesses[20] and lowers the threshold requirements for com-

11. *See* S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2536 [hereinafter *Senate Report on Criminal Law*].

12. *See* Hearings Before the Special Committee on Aging, 97th Cong., 2d Sess. S141-43 (1982) (testimony of witnesses appearing before the Committee on the Effects of Crime on the Elderly); Hearings Before the Senate Judiciary Committee Concerning the Omnibus Victims Protection Act, 97th Cong., 2d Sess. S521-81 (1982) (testimony about mistreatment of crime victims by judicial system).

13. *See Senate Report on Criminal Law, supra* note 11, at 2516.

14. *See id.*

15. *See supra* note 8 and accompanying text.

16. Senator Thurmond of South Carolina began the process on September 17, 1981, with the introduction of the Criminal Code Reform Act of 1981. *See* S. 1630, 97th Cong., 1st Sess., 127 Cong. Rec. 20,925 (1981). On April 22, 1982, this bill was combined with the Omnibus Victims Protection Act. *See* S. 2420, 97th Cong., 2d Sess., 128 Cong. Rec. 7423 (1982).

For the House, two bills were introduced by Representative Rodino of New Jersey: The Victims of Crime Compensation Act of 1982, H.R. 6447, 97th Cong., 2d Sess., 128 Cong. Rec. 11,051 (1982), and The Victim and Witness Protection and Assistance Act of 1982, H.R. 6448, 97th Cong., 2d Sess., 128 Cong. Rec. 11,051 (1982).

17. The Senate Judiciary Committee reported on its version of the Bill, S. 2420, on August 19, 1982. *See* S. Rep. No. 532, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515. The Senate considered and passed S. 2420 twenty six days later, on September 14, 1982. *See* 128 Cong. Rec. 23,391 (1982). On September 30, 1982, the House passed H.R. 7191, its version of the Bill, and passed the Senate Bill, S.2420, with amendments. *See* 128 Cong. Rec. 26,348-63 (1982). On October 1, 1982, the Senate passed the House version, with amendments of its own. *See* 128 Cong. Rec. 26,809 (1982). The House then approved the final version from the Senate on October 1, 1982. *See* 128 Cong. Rec. 27,386 (1982). President Reagan signed the Act into law on October 12, 1982, less than two months after it left committee in the Senate.

18. *See* Fed. R. Crim. P. 32(c)(2). The "Victim Impact Statement" is prepared by the Probation Department; *see also Senate Report on Criminal Law, supra* note 11, at 2517-20 (testimony of probation department that a victim impact statement be prepared).

19. *See* 18 U.S.C. § 1512(a) (1982 & Supp. V 1987).

20. *See id.*

mission of an intimidation offense.[21] Third, Section 3663 of Title 18 authorizes restitution for crime victims,[22] but does so only when its imposition will not unduly complicate or prolong the sentencing process.[23]

Congress intended the restitution provision, Section 3663, to "ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime . . . ."[24] The Senate report accompanying the Act called the "insensitivity and lack of concern for the victim and witness . . . a tragic failing in our criminal justice system"[25] and asserted that federal courts were following the trend of state courts by "reducing restitution from being an inevitable if not exclusive sanction to being an occasional afterthought."[26] Consequently, by enacting Section 3663, the Senate ensured that "the wrongdoer [would be] required to the degree possible to restore the victim to his or her prior state of well-being."[27]

By providing restitution as part of a defendant's sentence, the VWPA fills what the Ninth Circuit felt was a sentencing gap in the Uniform Probation Act,[28] the predecessor of the VWPA. The Uniform Probation

---

21. *See* 18 U.S.C. § 1512(a),(b) (1982 & Supp. V 1987).

22. *See* 18 U.S.C. § 3663 (Supp. V 1987) (originally codified at 18 U.S.C. § 3579).

23. *See* 18 U.S.C. § 3663(d) (Supp. V 1987).

24. 18 U.S.C. § 1512 note (b)(2) (1982 & Supp. V 1987). The Act, according to Senator Heinz, was "a constructive federal approach designed to rebalance the scales of justice in favor of the valid interest of the victim." *See* 128 Cong. Rec. 26,809 (1982).

Senator Heinz commented that "it is, unfortunately, not too strong a statement to make that most crime victims are victimized twice—the second time by the insensitivity of a criminal justice system which fails to acknowledge that people, too, are victims. This bill takes a long step forward in preventing that second crime." *See* 128 Cong. Rec. 26,810 (1982); *see also* 128 Cong. Rec. 27,392 (1982) (statement by Representative Fish) ("It is time for this Congress to show the compassion to victims of Federal crime that they deserve and have a right to expect").

25. *Senate Report on Criminal Law*, *supra* note 11, at 2516.

26. *Id.* at 2536. The Senate sought to implement "new methods of constructive, victim-oriented sentencing practices [that] can insure . . . that the prosecutorial, judicial and probation authorities know, and are encouraged to respond to, the victim's monetary damages." *Id.* at 2537.

27. *Id.* at 2536. Senator Laxalt stated that "[i]t is the intent of Congress that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim. The purpose of this bill is to attempt to make the victim whole once again." 128 Cong. Rec. 26,811 (1982).

28. *See* United States v. Signori, 844 F.2d 635, 640 (9th Cir. 1988). The Uniform Probation Act provided, in pertinent part, that the court,

> [u]pon entering a judgment of conviction of any offense not punishable by death or life imprisonment, . . . may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> . . . .
>
> While on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

18 U.S.C. § 3651 (*repealed* Nov. 1, 1987).

In addition to filling the sentencing gap, Congress expanded the term "offense" under

Act awarded restitution only as a condition of probation.[29] The VWPA, in contrast, allows restitution in conjunction with imprisonment or fine.[30]

B. *Policy of Restitution*

The two primary goals of restitution are to prevent unjust enrichment[31] and to promote rehabilitation.[32] Traditional notions of justice provide that a defendant who profits from wrongdoing "in equity and good conscience . . . should not be permitted to retain that by which [he] has been enriched."[33] Furthermore, by forcing the defendant to disgorge his ill-gotten gains, restitution fosters societal confidence in the fairness of the legal system.[34] Restitution also forces a defendant to assume financial responsibility for his unlawful actions[35] and impresses upon the

---

Section 3663 of the VWPA. The Uniform Probation Act provided that a defendant "[m]ay be required to make restitution . . . to aggrieved parties for . . . loss caused by the offense for which conviction was had . . . ." 18 U.S.C. § 3651 (1986) (*repealed* Nov. 1, 1987). The VWPA does not contain this limiting language and provides that a court may order "the defendant make restitution to any victim of such offense". 18 U.S.C. § 3663(a) (Supp. V 1987). This liberalization of "offense" is some indication of intent by Congress to expand the reaches of Section 3663 beyond those for which a conviction was had. *See* Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507, 509-17 (1984).

29. *See* 18 U.S.C. § 3651 (*repealed* Nov. 1, 1987).

30. *See* 18 U.S.C. § 3663(b)(1)(A),(B) (Supp. V 1987). The federal courts were authorized "for the first time, to order payment of restitution independently of a sentence of probation." S. Rep. No. 532, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2536.

31. *See* Restatement of the Law of Restitution § 1 (1937).

32. *See* B. Galaway, Toward the Rational Development of Restitution Programming, Restitution in Criminal Justice 77 (1977). Professor Galaway postulates five purposes for restitution: (1) redress for victims; (2) rehabilitation for offenders; (3) reduction of the need for vengeance by the victim; (4) less severe and more humane sanctions for offenders; and, (5) reduced demand upon the criminal justice system. *See id.* at 82-83. "[R]estitution is an appropriate and effective criminal sanction that promotes the criminal law's goals of rehabilitation, deterrence and retribution. Moreover, only within the criminal justice system can restitution foster these aims." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 941 (1984); *see* S. Rep. No. 532, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2538 (VWPA allows alternative forms of restitution so that restitution can "satisfy the victim and provide maximum rehabilitative incentives to the offender").

33. Federal Sugar Refining Co. v. United States Sugar Equalization Bd., Inc., 268 F. 575, 582 (S.D.N.Y. 1920). One commentator argues that the deterrent value of restitution would be greater if supervised restitution were imposed in an amount which would penalize the criminal. *See* K. Menninger, The Crime of Punishment 68 (1968).

34. *See* Lamborn, *Remedies for the Victims of Crime*, 43 S. Cal. L. Rev. 22 (1970); McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 Urban Law. 346, 349-50 (1976). If victims are given prompt and full restitution, they have an immediate sense that justice has been done. *See* Lamborn, *supra*, at 27. The criminal justice system, by forcing the convicted defendant to make the victim whole, restores trust and confidence to our judicial system. *See id.*

35. *See* Durst v. United States, 434 U.S. 542, 554 (1978); B. Galaway, *supra* note 32, at 83; Note, *supra* note 32, at 939.

Restitution's rehabilitative effectiveness "stems from its direct relation to the amount of damage suffered by the victim: by ordering restitution, a court forces the defendant to

criminal that he has injured a human being.[36] "Through restitution, an offender can express guilt in a socially acceptable manner and can increase his self-respect by gaining a sense of accomplishment."[37]

II. CONTINUING CRIMES UNDER THE ACT

A. *Continuing Crimes*

Continuing crimes occur over a period of time,[38] often have more than one objective,[39] and are perpetrated by acts in furtherance of a general scheme.[40] Continuing crimes, which include schemes to defraud and conspiracies,[41] are unique because they are unitary in nature; several distinct acts, legal or illegal, are components of a single offense.[42] The VWPA expressly authorizes the sentencing court to order a defendant to "make restitution to any victim of the *offense*." [43] It is the unitary nature of continuing crimes which permits a court to impose restitution on pre-effective date losses. As the Supreme Court said: "As the offense has not been terminated or accomplished [the perpetrator of a continuing crime] is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence."[44] An examination of two specific continuing crimes, conspiracy and mail fraud, illustrates the unique nature of all continuing crimes.

---

acknowledge . . . the harm he has caused." Note, *supra* note 32, at 938; *see* Comment, *Compensation for Victims of Crime—The Texas Approach*, 34 Sw. L.J. 689, 690 (1980).

36. When the criminal is forced to compensate the victim, this enforces the idea that his incarceration is not a punishment by and for the state, but is a result of his injuring the victim. *See* Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. Rich. L. Rev. 71, 80 (1970).

37. Note, *supra* note 32, at 938. Restitution provides the offender an opportunity for a cathartic recognition of his wrongdoing and a symbolic expiation of guilt. *See* Eglash, *Creative Restitution: A Broader Meaning for an Old Term*, 48 J. Crim. L. & Criminology 619, 622 (1958); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 Minn. L. Rev. 243, 249-50 (1965); *see also* 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino) ("One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life.") (citing Huggett v. State, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (Wis. 1978).

38. *See infra* notes 54-56.

39. *See* United States v. Walker, 653 F.2d 1343, 1350 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982). *See, e.g.*, United States v. Inryco, Inc., 642 F.2d 290, 295 (9th Cir. 1981) (conspiracy to violate Sherman Act included subsidiary objective of recovering a subcontract award), *cert. dismissed*, 454 U.S. 1167 (1982).

40. *See infra* note 53.

41. *See* W. LaFave & J. Israel, Criminal Procedure 699 (1985).

42. *See* Phillips v. United States, 679 F.2d 192, 196 (9th Cir. 1982).

43. 18 U.S.C. § 3579(a)(1) (1982) (emphasis added).

44. Hyde v. United States, 225 U.S. 347, 369 (1912) ("The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous.").

1. Conspiracies

A conspiracy has been defined as "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means."[45] Conspiracy is an offense distinct from the object of the conspiracy.[46] Under the no-merger rule, conspiracy is prosecuted as a crime separate from any substantive offenses committed in the course of the conspiracy.[47] Federal statutes provide criminal liability for each member of the conspiracy[48] in actions brought within a five-year statute of limitations.[49] The statute of limitations begins to run immediately after the completion of the last overt act in furtherance of

45. R. Perkins & R. Boyce, Criminal Law 681 (1982) (citing Pettibone v. United States, 148 U.S. 197, 203 (1893)); *see* Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938) ("two or more persons combining with the intent and purpose of committing a public offense by doing an unlawful act or doing a lawful act in an unlawful manner").

Several elements make up a common law conspiracy. These elements are often changed by statutory definition. First, there must be an agreement. *See* Krulewitch v. United States, 336 U.S. 440, 447-48 (1949) (Jackson, J., concurring). The agreement, however, need not be formalized. *See* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 182 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). Second, either the ends or the means must be illegal. *See* R. Perkins & R. Boyce, *supra*, at 684. It is not the agreement which is illegal, but the result of the agreement. *See* United States v. Kissel, 218 U.S. 601, 608 (1910). Third, while at common law a mere agreement between parties was enough to constitute a conspiracy, *see* R. Perkins & R. Boyce, *supra*, at 684, statutes now commonly require an overt act in furtherance of the conspiracy. *See* 18 U.S.C. § 371 (1982). Acts sufficient to satisfy this third element include, for example, taking a position to observe the activities of the intended victim of a kidnapping planned for the future, *see* People v. Stevens, 78 Cal. App. 395, 396, 248 P. 696, 697 (Cal. Dist. Ct. App. 1926), or purchasing the necessary stamps to be used in a conspiracy to commit murder by mail. *See* People v. Corica, 55 Cal. App. 2d 130, 134, 130 P.2d 164, 167 (Cal. Dist. Ct. App. 1942). One court held that a meeting to discuss plans was not an overt act in addition to the agreement because it was a part of the agreement itself. *See* People v. Hines, 168 Misc. 453, 457, 6 N.Y.S.2d 2, 5 (N.Y. Sup. Ct. 1938).

46. *See* Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938); *see also* United States v. Kissel, 218 U.S. 601, 603-04 (1910).

47. *See Troutman*, 100 F.2d at 632. This doctrine is known as the "No Merger Rule." *See* Johl v. United States, 370 F.2d 174, 177 (9th Cir. 1966). The "Pinkerton Rule", articulated by the Supreme Court in Pinkerton v. United States, 328 U.S. 640 (1946), further broadened the net of conspiracy by concluding that, when a conspiracy and a substantive offense are charged, a conspirator can be held guilty of the substantive offense even though he did no more than join the conspiracy. *See id.* at 647.

48. The general federal conspiracy statute provides:

> If two or more persons conspire either to commit any [Title 18] offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (1982).

Conspiracy is one of the most commonly charged offenses in federal prosecutions. *See* Selz, *Conspiracy Law in Theory and in Practice: Federal Conspiracy Prosecutions in Chicago*, 5 Am. J. Crim. L. 35, 48-49 (1977).

49. *See* 18 U.S.C. § 3282 (1982).

the conspiracy.[50]

Conspiracies begin when an agreement has been formed and one or more overt acts have been performed in furtherance of the unlawful design[51] and continue as long as the conspirators act to further the ends of the agreement.[52] If the conspirators agree to further their primary purpose by taking additional steps, such as dividing profits,[53] the conspiracy will continue until those additional acts are accomplished or abandoned.[54] Conspiracies end when their goals are accomplished or the conspiracy has been abandoned.[55]

2. Mail Fraud

Mail fraud, like conspiracy, is a continuing crime.[56] The federal mail fraud statute provides that anyone who devises a scheme to defraud and uses the mails in furtherance of that scheme can be held criminally liable.[57] The essential elements of mail fraud are the act of having devised

50. *See* W. LaFave & J. Israel, *supra* note 41, at 699.

51. *See* Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938).

52. *See* United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *see also* United States v. Kissel, 218 U.S. 601, 607 (1910) ("mere continuance of the result of a crime does not continue the crime").

53. *See* United States v. Walker, 653 F.2d 1343, 1350 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); Atkins v. United States, 307 F.2d 937, 940 (9th Cir. 1962); Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954) (per curiam); *see also* United States v. CFW Construction Co., Inc., 583 F. Supp. 197, 206 (D.S.C.) (where agreement includes a payoff, conspiracy continues until payoff received), *aff'd*, 749 F.2d 33 (4th Cir. 1984).

54. *See* United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); United States v. Allegretti, 340 F.2d 254, 256 (7th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965); McDonald v. United States, 89 F.2d 128, 133 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937).

Conspiracies, however, are not continued by express or implied agreements among their members to keep the conspiracy secret. *See* Grunewald v. United States, 353 U.S. 391, 399-400 (1957) (quoting Krulewitch v. United States, 336 U.S. 440, 443-44 (1949)); Fiswick v. United States, 329 U.S. 211, 217 (1946). If conspiracies were continued by implied agreements to keep them secret, the statute of limitations on a conspiracy would effectively be tolled. All conspiracies include an implied agreement to remain silent. *See Grunewald*, 353 U.S. at 404-06.

55. *See* United States v. Kissel, 218 U.S. 601, 608 (1910).

56. *See* United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987); *see also* United States v. Cohen, 516 F.2d 1358, 1364 (8th Cir. 1975) ("proof of mail fraud scheme involving two or more persons is analogous to the nature of proof in a conspiracy").

57. The mail fraud statute provides:

> Whoever, having devised . . . any scheme or artifice to defraud, [and] . . . for the purpose of executing such scheme . . . places in any post office . . . any matter or thing . . . to be sent or delivered by the Postal Service, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

The federal mail fraud statute has been applied to a broad range of offenses. *See, e.g.*, United States v. Lovett, 811 F.2d 979 (7th Cir. 1987) (bribery); United States v. Washita Construction Co., 789 F.2d 809 (10th Cir. 1986) (bid rigging); United States v. Girdner, 754 F.2d 877 (10th Cir. 1985) (election fraud).

The Supreme Court, in *McNally v. United States*, 483 U.S. 350 (1987), greatly restricted the applicability of the federal mail fraud statute by holding that it could not be used to prosecute those who fraudulently deprive others of "intangible rights" such as the

or intended to devise a scheme to defraud,[58] and the act of placing or causing mail to be placed in an authorized depository with the intent to carry out an essential step in the execution of the scheme to defraud.[59]

A mailing must be sufficiently related to the scheme to defraud to constitute mail fraud.[60] For example, letters used to lure victims into the scheme are closely related to the scheme and are covered by the statute.[61] A mailing which is not sufficiently related to the scheme, such as mailing stolen credit card receipts,[62] or which occurs after the scheme has reached fruition,[63] does not fall within the purview of the mail fraud statute.

Although each use of the mails may constitute a separate instance of mail fraud,[64] when the mailings are part of a larger mail fraud scheme, all of them must be prosecuted as one unified scheme to defraud.[65] Consequently, each mailing is simply a count within the indictment.[66]

B. *The VWPA and Continuing Crimes*

A strict interpretation of the VWPA, adopted by the Fifth, Fourth and Third Circuits, precludes restitution for losses from a continuing crime

---

right to an honest government. *See id.* at 366-67 (Stevens, J., dissenting). The Court so held even though mail fraud was often the "sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." Note, McNally v. United States *and its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 Mercer L. Rev. 697, 697 (1988) (quoting Rakoff, *The Federal Mail Fraud Statute I*, 18 Duq. L. Rev. 771, 772 (1980)).

58. *See* 18 U.S.C. § 1341 (1982).

59. *See id.*

60. *See* United States v. Ashdown, 509 F.2d 793, 799 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975).

61. *See* United States v. Maze, 414 U.S. 395, 403 (1974). "Lulling letters" include not only those which entice the victim into the scheme, but also those which lull a victim into a false sense of security or postpone the victims' ultimate complaint. *See Ashdown*, 509 F.2d at 799-800.

62. *See Maze*, 414 U.S. at 402. The defendant was engaged in a stolen credit card scheme. When a merchant mails receipts from stolen credit cards to the collecting bank, he is not perpetuating the scheme.

63. *See* Kann v. United States, 323 U.S. 88, 94 (1944). The scheme, purchasing goods or services with fraudulent checks, reached fruition when the defendant received the goods or services. The bank's use of the mails in the ordinary course of business to effectuate collection of the check was not in furtherance of the scheme.

64. *See* Sanders v. United States, 415 F.2d 621, 626 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).

65. *See* United States v. Woods, 775 F.2d 82, 88 (3d Cir. 1985).

> The offense [of mail fraud] is a scheme to defraud, and each count is simply an act in furtherance of the unitary scheme; therefore, establishing that a single count caused a specific loss would be difficult. It is the overall scheme that is central to all the counts and gives rise to the victims' financial loss.

Id.

66. *See* United States v. Ledesma, 632 F.2d 670, 679 (7th Cir.), *cert. denied*, 449 U.S. 998 (1980); United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978); Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 845 (1967).

which occurred prior to January 1, 1983.[67] This interpretation, however, creates procedural difficulties. In the case of continuing crimes, it may be very difficult to distinguish between losses taking place before and after the effective date.[68] This confusion can have the effect of complicating and prolonging the sentencing process.[69] If substantial, the complication might bar the granting of restitution.[70] In addition, this strict interpretation ignores the VWPA's mandate to provide compensation to victims of *offenses*[71] and furthers neither the purpose of the VWPA nor the policy of restitution.[72] Rather than follow this literal approach, courts should construe the effective date of the VWPA to permit pre-effective date restitution.

1. Statute of Limitations Analysis

A statute of limitations has the procedural effect of barring prosecution for an offense if the action is not brought within a requisite time period.[73] Limiting exposure to criminal prosecution relieves individuals of the burden of defending themselves against charges when the relevant facts have been obscured by the passage of time.[74] All statutes of limitations provide that the period of limitations begins to run when every element in the statutory definition of an offense has been committed.[75] For continuing crimes, the statute of limitations begins to run when the course of conduct or defendant's complicity terminates.[76]

A statute of limitations also has an evidentiary effect when applied to continuing crimes.[77] Despite the time-bar to prosecution, acts occurring outside the statute of limitations may be introduced into evidence when

67. *See supra* note 4, 5 and accompanying text.

68. *See* United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987).

69. Two circuit courts have found that the severance of a mail fraud or conspiracy into pre- and post-effective date loss is at best impractical and would certainly complicate the sentencing process. *See* United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987); United States v. Woods, 775 F.2d 82, 88 (3d Cir. 1985). For example, in *Purther*, a mail fraud case, the court stated that "[i]t would be virtually impossible to determine precisely when each victim of a scheme . . . actually suffered his or her loss. This is especially so where . . . the perpetrator makes some payments of 'interest' or 'return on investment' . . . ." *Purther*, 823 F.2d at 968.

70. *See* 18 U.S.C. § 3663(d) (Supp. V 1987).

71. The term "offense" has caused some interpretational problems. One commentator discussed the problems courts were having in applying both a broad and narrow interpretation of offense. *See* Project, *supra* note 28, at 509-17.

72. *See supra* notes 24-37 and accompanying text.

73. *See* Toussie v. United States, 397 U.S. 112, 114 (1970).

74. *See id.* at 114.

75. *See* W. LaFave & J. Israel, *supra* note 41, § 18.5(a), at 699.

76. *See* Hyde v. United States, 225 U.S. 347, 368-69 (1912) (defendant convicted of conspiracy); United States v. A-A-A Electrical Co., 788 F.2d 242, 245 (4th Cir. 1986) (defendant convicted of conspiracy in restraint of trade); United States v. Girard, 744 F.2d 1170, 1172 (5th Cir. 1984) (dismissal of indictment for bid rigging based on expiration of statute of limitations).

77. *See* United States v. Brasco, 516 F.2d 816, 818 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975).

they are part of a continuing crime.[78]

Criminal acts occurring within the statute of limitations are subject to prosecution under the no-merger rule. In contrast, evidence of criminal acts occurring outside the statute of limitations can be admitted only as evidence of the continuing nature of a continuing crime, but cannot be introduced to support substantive prosecution of the criminal act.[79] Thus, crimes which cannot be the focus of an indictment can nevertheless be used as evidence to demonstrate the nature of the scheme and the intent required to prove a continuing crime.[80] Courts admit proof of events occurring outside the statute of limitations because "[i]t would be a bizarre result indeed if a [continuing] crime properly prosecuted within the limitations period could not be proven because an essential element . . . could only be established by proof of incidents occurring outside the period."[81]

The effective date provision of the VWPA is arguably similar in operation to a statute of limitations.[82] Both create cut-off dates, points at which prior events cannot be made the basis for the pertinent govern-

78. *See* United States v. Seuss, 474 F.2d 385, 391 (1st Cir.) ("pre-statute of limitations evidence [is] admissible 'to show the nature of the scheme and the intent', but only 'if it is connected up with the scheme existing when the overt acts were performed' ") (quoting defendant's admission regarding pre-statute of limitations evidence) (citation omitted), *cert. denied*, 412 U.S. 928 (1973).

In Troutman v. United States, 100 F.2d 628 (10th Cir. 1938), the court stated that "evidence tending to prove relevant acts or conduct which occurred before the date on which it is charged the scheme was devised, or more than three years before the return of the indictment, may be admitted if within the period of limitations the mails were used in furtherance of such scheme." *Id.* at 633; *see* United States v. Perholtz, 842 F.2d 343, 365 (D.C. Cir.) (because mailings that clearly furthered scheme to defraud occurred within five years of indictment, mail fraud prosecution is not time barred as agreement to pay bribes falling within time-barred period), *cert. denied*, 109 S. Ct. 65 (1988); United States v. Castellano, 610 F. Supp. 1359, 1384 (S.D.N.Y. 1985) (racketeering act falling outside of limitation period may be used as element of RICO prosecution, provided at least one other act occurred within period); United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971) ("proof running back of the statute is admissible to show the scheme and intent if it is connected up with the scheme existing when use of the mails occurred"); Weatherby v. United States, 150 F.2d 465, 467 (10th Cir. 1945) (if any use of the mails was within period, the prosecution was timely); Little v. United States, 73 F.2d 861, 867 (10th Cir. 1934) (no defense that scheme was formed prior to the limitations period); Fournier v. United States, 58 F.2d 3, 6 (7th Cir.) (date of mailing rather than date of agreement is germane to statute of limitations), *cert. denied*, 286 U.S. 565 (1932); Munch v. United States, 24 F.2d 518, 519 (5th Cir. 1928) (usage of mails, not scheme to defraud, triggers the statute of limitations); United States v. Epperson, 552 F. Supp. 359, 361 (S.D. Ill. 1982) (while only nine of fourteen acts comprising mail fraud were committed within statute of limitations, court admitted remaining five acts as evidence of mail fraud scheme).

However, it must be proven that one overt act was performed during this period and that the overt act was performed in furtherance of the conspiracy. *See* Grunewald v. United States, 353 U.S. 391, 396-97 (1957).

79. *See supra* note 47 and accompanying text.

80. *See* United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971).

81. United States v. Ashdown, 509 F.2d 793, 798 (5th. Cir.), *cert. denied*, 423 U.S. 829 (1975).

82. *See* Attorney General's Memorandum, Implementation of the Restitution Provi-

ment action. Neither, however, should bar courts from recognizing the unique nature of continuing crimes and treating them as unitary crimes.[83] A rigid adherence to effective date requirements would subvert the primary purpose of the underlying statute. Courts should be able to interpret the effective date of the VWPA to provide complete restitution to victims of continuing crimes. Similarly, in the statute of limitations context, the government may ignore the statute of limitations for evidentiary purposes despite the fundamental policies behind the statute of limitations.[84]

Given the legislative history of the VWPA and the policy underlying all restitution, going beyond the effective date of the VWPA is no more objectionable than "breaching" the statute of limitations for evidentiary purposes.[85] In the statute of limitations context, evidence is permitted to

---

sions of the Victim and Witness Protection Act of 1982 (1983) (on file at *Fordham Law Review*). The Attorney General stated:

> [T]he United States Attorney's offices should take the position that it is the intent of the legislation to aid victims; therefore, the Act should apply to crimes that were committed, or continued, past the effective date of the legislation provisions. An analogy may be drawn to the statute of limitations; a continuing offense that occurs in part before the statute runs may be included in the offense charged.

Id. at 21.

83. Any restitution to the victim must comply with the defendant's due process rights. *See* Project, *supra* note 28, at 544-67. In order to provide pre-effective date restitution for continuing crimes, therefore, it may be useful for the trial court to use a special interrogatory charge to the jury to determine which acts were included in the conviction for the continuing crime. *See* United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984). Such special interrogative will ensure that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the *preponderance* of the evidence." 18 U.S.C. § 3664 (Supp. V 1987) (originally codified at 18 U.S.C. § 3580(d)) (emphasis added).

One could argue that if restitution cannot be imposed for acts no longer subject to prosecution as substantive offenses because they occurred outside the statute of limitation, that restitution for those acts should also be prohibited. The connection between restitution and prosecution, however, is not so clean. For example, courts have given restitution for acts not leading to convictions when those acts are counts in a plea- bargained indictment. *See, e.g.*, United States v. Davies, 683 F.2d 1052, 1055 (7th Cir. 1982) ("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"); United States v. Roberts, 619 F.2d 1, 2 (7th Cir. 1979) (when amount of actual damages caused by defendant and sufficient identification of the victim to allow reparation are established, the requirements of Section 3651 are satisfied). *But see* United States v. Buechler, 557 F.2d 1002, 1008 (3d Cir. 1977) ("Because that amount exceeds the 'loss caused by the offense for which conviction was had,' the restitution order exceeded the authority conferred by Section 3651 and is, to that extent, illegal."); Karrell v. United States, 181 F.2d 981, 987 (9th Cir.) ("the trial court erred in ordering restitution as to losses sustained by any [victim] other than one directly concerned in the six counts upon which appellant stands convicted"), *cert. denied*, 340 U.S. 891 (1950); United States v. Follette, 32 F. Supp. 953, 955 (E.D. Pa. 1940) (judge may order restitution only "for actual damages or loss caused by the offense for which conviction was had").

84. *See* Attorney General's Memorandum, *supra* note 82; *supra* notes 77-81 and accompanying text.

85. *See* Attorney General's Memorandum, *supra* note 82.

prove such essential elements as intent even though that evidence may offend the policies behind the statute of limitations.[86] In contrast, going beyond the effective date of the VWPA clearly furthers the policy behind the VWPA.[87] Going beyond the effective date of the VWPA provides complete restitution, and thereby fulfills the purposes of the VWPA.[88] "Incomplete compensation does not remedy fully the wrong committed,"[89] therefore, permitting the perpetrator of a continuing crime to avoid making restitution for pre-effective date losses is "intolerable from a societal perspective."[90]

III. CONSTITUTIONAL CONSIDERATIONS: *EX POST FACTO* ANALYSIS

The United States Constitution forbids the federal and state governments from enacting any *ex post facto* law or bill of attainder.[91] *Ex post facto* laws retroactively criminalize past innocent acts,[92] retroactively increase the punishment for crimes,[93] or retroactively alter the rules of evidence to permit courts to receive less or different testimony than the law required at the time of the offense.[94] The Supreme Court recognizes that the *ex post facto* prohibition furthers two important purposes. First, it ensures "that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[95] Second, the prohibition also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[96]

In *United States v. Corn*, the Fifth Circuit refused to grant restitution for losses incurred prior to the effective date of the VWPA, reasoning that doing so would increase the punishment applicable to crimes and violate the *ex post facto* clause.[97] This court, however, erred in its application of *ex post facto* principles to continuing crimes. When criminal conduct continues after the enactment or amendment of a statute which increases the penalty imposed on such conduct, the statute may be applied to the part of the continuing crime occurring before its enactment

86. *See* United States v. Ashdown, 509 F.2d 793, 798 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975).

87. *See supra* notes 31-37 and accompanying text.

88. *See supra* notes 25-28 and accompanying text.

89. Partial restitution, although it does not fully address pecuniary harm, may still have some rehabilitative effects. *See* Epstein, *Crime and Tort: Old Wine in Old Bottles*, in Assessing the Criminal: Restitution, Retribution, and the Legal Process 231, 257 (1977).

90. United States v. McLaughlin, 512 F. Supp. 907, 912 (D. Md. 1981). The court stated that such incomplete restitution would not foster a defendant's acceptance of responsibility for his unlawful actions. *See id.*

91. *See* U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1.

92. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). *Calder* envisioned the government enacting a law that would criminalize an act that was previously innocent, then applying the law to acts occurring before the law was passed. *See id.*

93. *See id.*

94. *See id.*

95. Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

96. *Id.* at 29.

97. *See* United States v. Corn, 836 F.2d 889, 895-96 (5th Cir. 1988).

without violating the *ex post facto* prohibition.[98] By engaging in criminal conduct after the effective date of a statute, the defendant voluntarily subjects himself to the increased penalty. Simply because the increased penalty relates to the conduct occurring prior to the effective date does not create an *ex post facto* violation. Courts universally cite the unitary nature of continuing crimes and conclude that a statute imposing a greater penalty for a continuing crime, where the crime is still being carried on after the date when the statute becomes effective, does not violate the *ex post facto* provision.[99]

CONCLUSION

Given the policies that underlie restitution, the legislative intent of the VWPA and the unitary nature of continuing crimes, pre-effective date losses suffered as a result of ongoing crimes should be subject to restitution under the VWPA. It was Congress' intent to help the "forgotten persons"[100] of the criminal justice system; granting pre-effective date restitution would further this goal.

Douglas J. Kepple

98. *See, e.g.*, United States v. Johnson, 537 F.2d 1170, 1175 (4th Cir. 1976); United States v. Ferrara, 458 F.2d 868, 874 (2d. Cir.), *cert. denied*, 408 U.S. 931 (1972); Huff v. United States, 192 F.2d 911, 915 (5th Cir. 1951), *cert. denied*, 342 U.S. 946 (1952); United States v. Shackelford, 180 F. Supp. 857, 859 (S.D.N.Y. 1957); United States v. Ogull, 149 F. Supp. 272, 274 (S.D.N.Y. 1957); *cf.* Christianson v. United States, 226 F.2d 646, 652-53 (8th. Cir. 1955) (rule forbidding use of evidence of acts or admissions of one conspirator, occurring before the conspiracy was formed or after termination, against another conspirator is not violated by admitting evidence establishing an existing conspiracy to violate a law not yet in effect), *cert. denied*, 350 U.S. 994 (1956).

99. *See Johnson*, 537 F.2d at 1175; *Ferrara*, 458 F.2d at 874; *Huff*, 192 F.2d at 915; *Shackelford*, 180 F. Supp. at 859; *Ogull*, 149 F. Supp. at 274.

100. *See Senate Report on Criminal Law*, *supra* note 11, at 2516.