Notre Dame Law Review

Volume 59 | Issue 3 Article 5

1-1-1984

Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality

Thomas M. Kelly

NOTES

Where Offenders Pay For Their Crimes: Victim Restitution and Its Constitutionality

In 1982 Congress enacted the Victim and Witness Protection Act ("VWPA" or "the Act").[1] Certain sections of the Act provided that convicted offenders pay restitution to their victims.[2] In *United States v. Welden*,[3] however, the United States District Court for the Northern District of Alabama held that these provisions were unconstitutional.

The VWPA represents a congressional effort "to enhance and protect the necessary role of crime victims and witnesses in the [federal] criminal justice process."[4] It does this by: requiring that "victim impact statements" accompany presentence reports;[5] strengthening the protections afforded victims and witnesses of federal crimes;[6] ordering the United States Attorney General to promulgate guidelines for the Department of Justice concerning the assistance and protection of witnesses and victims;[7] ordering the United States Attorney General to outline legislation aimed at depriving federal felons of profit from the sale of "their story";[8] and, directing federal courts to order federal offenders to pay restitution to their victims or to state on the record why such an order was not issued.[9]

In *United States v. Welden*, the district court held the restitution provisions of the Act unconstitutional as violations of the convicted person's seventh amendment right to a jury trial of the restitution issue.[10] Further, the court held the Act violative of the due process and equal protection clauses of the fifth and fourteenth

1 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 51 U.S.L.W. 139 [hereinafter cited as VWPA].

2 *Id.* § 5 (codified at 18 U.S.C. §§ 3579-3580 (1982)).

3 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7444 (11th Cir. Aug. 8, 1983).

4 VWPA, *supra* note 1, § 2(b)(1).

5 *Id.* § 3 (amending FED. R. CRIM. P. 32(c)).

6 *Id.* § 4 (codified at 18 U.S.C. §§ 1512-1515 (1982)).

7 *Id.* § 6, 48 Fed. Reg. 33,774 (1983).

8 *Id.* § 7; *see also* note 117 *infra*.

9 *Id.* § 5 (codified at 18 U.S.C. §§ 3579-3580 (1982)).

10 568 F. Supp. at 534.

amendments.[11]

Part I of this note presents an historical overview of restitution and a discussion of current restitution programs. Part II outlines and discusses the VWPA. Finally, Parts III and IV focus on *Welden*, critically analyzing the decision and concluding that the restitution provisions of the Act should have survived the *Welden* court's constitutional test.

I. Restitution — An Overview

> "History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim."[12]

The principal reaction to "crime" in primitive society was retaliation by the victim against the offender. As the collective order grew, the concept of "blood-feud" replaced private revenge. Those with familial or tribal ties ("blood ties") to the victim sought revenge against the group whose member perpetrated the crime. The harsh and destructive blood-feud eventually gave way to a process known as composition, with the offending group paying the victim pursuant to an agreement produced by negotiations between the two groups.[13] The advent of economic stability has been credited with spanning the transition from blood-feud to composition.[14] The system of composition, said to have begun in the Middle Ages primarily in Germanic areas, marked the beginning of restitution in a proper sense,[15] that is, as being closely related to the concept of punishment.[16] Later refined to the point where every injury was deemed worth a codified amount of money, composition reduced the chances of the "perpetual vendetta," often a consequence of the blood-feud.[17] Offenders unable to pay the ordered composition were branded outlaws and banished from their community.[18]

This early system of restitution largely disappeared when the state became the administrator of the criminal law. In feudal times,

---

11 *Id.* at 535.

12 S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 12 (2d ed. 1970).

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

14 *Id.*

15 S. SCHAFER, *supra* note 12, at 3.

16 *Id.* at 5.

17 *Id.*

18 *Id.* at 6. Schafer characterizes these laws of ancient communities as "not a law of crimes but a law of torts." *Id.* at 5.

as the king or lord began to exercise more control, offenders not only paid restitution to victims but also paid a sum to the king or lord as a commission for effecting the reconciliation.[19] The concept of compensation or restitution eventually became separate from the criminal law and was embodied in the law of torts.[20]

The dual criminal-civil system did and does not adequately serve the crime victim.[21] The victim may have neither the time nor the money to expend for tort actions against offenders. Furthermore, criminals may not have the resources to pay civil judgments.[22] A restitution system does, however, offer victims at least some hope of reparation should the offender be caught and convicted. The overriding justification for a restitution system may be what one writer called an intuitive sense of its rationality.[23] In other words, it just makes sense that offenders should pay or work after they are convicted in order to pay for the damage they caused. If the offender is truly unable to pay, the victim could be compensated with public funds, accumulated by the collection of fines.[24]

Through the years many scholars and jurists have called for restitution provisions, but these calls have been largely unheeded.[25] Sir Thomas More,[26] Jeremy Bentham,[27] and others[28] proposed various

19 Jacob, *supra* note 13, at 46-47.

20 *Id.* at 47.

21 *Id.* at 47-48; *see* Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 U.C.L.A. L. REV. 52 (1982).

22 Jacob, *supra* note 13, at 48.

23 Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 214 (1978); *see also* Geis, *Restitution by Criminal Offenders: A Summary and Overview*, in RESTITUTION IN CRIMINAL JUSTICE 147 (J. Hudson & B. Galaway eds. 1977) ("The advantages of restitution seem so obvious that commentators find it barely believable at times that programs have not long since been set into motion.").

24 Geis, *supra* note 23, at 147 (quoting a 1974 report of the Law Reform Commission of Canada).

25 Jacob, *supra* note 13, at 48.

26 *Id.* (citing T. MORE, UTOPIA 23-24 (J.C. Collins ed. 1904), in which More urged that offenders pay their victims, earning the funds by public works).

27 *Id.* (citing J. HUDSON & B. GALAWAY, CONSIDERING THE VICTIM: SELECTED READINGS IN RESTITUTION AND VICTIM COMPENSATION 3-4 (1975), in which Bentham is said to have proposed mandatory restitution by convicted offenders and publicly funded compensation for victims whose offenders went unapprehended).

28 *Id.* at 48-50 (citing J. HUDSON & B. GALAWAY, *supra* note 27, at xx, in which Frenchman Bonneville de Marsengy is said to have asserted society's duty to crime victims as part of a social contract. Like Bentham, de Marsengy believed that if offenders were not available to provide restitution, society must.). In the late 1800's penologists of the world argued over proposals to order prisoners to pay earnings to their victims; to condition sentence suspensions on restitution; or to employ publicly funded compensation programs to benefit those victims unable to garner payments from offenders through the criminal justice system. In 1927, Enrico Fermi noted the demoralizing position in which the system placed victims forced to seek

restitution and compensation systems to benefit crime victims and to fulfill what they believed was society's obligation to those victims.

In more recent years, Englishwoman Margery Fry spoke out for victims' rights.[29] At first Fry urged reform of the criminal justice system through a system of restitution aimed not only at aiding victims but at rehabilitating offenders.[30] In fact, Fry originally espoused restitution primarily for its rehabilitative benefits. Later, she became disenchanted with the rehabilitative aspects of restitution and began to advocate a state-funded compensation scheme. Fry believed such a scheme was justified because society owed something to its citizens when they suffered as victims of crime.[31]

Margery Fry has been credited with launching a movement in the 1950's that led initially to the enactment of victim compensation laws in New Zealand and Great Britain,[32] and eventually in the United States, Australia, and Canada.[33] These compensation plans are generally civil in nature[34] and quite unlike the punitive restitution sentences imposed under the criminal justice system. In modern parlance, "restitution" is typically viewed as an offender-oriented sanction: the offender pays the crime victim under the supervision of the criminal justice system. Conversely, "compensation" is a state-administered, and state-funded program: the state pays the victims for losses suffered at the hands of criminals.[35]

---

restitution in the civil courts. Fermi recommended the state impose a strict obligation upon offenders to pay victims damages especially since society had the greater interest in prosecuting criminals. Jacob, *supra* note 13, at 49-50.

29 Jacob, *supra* note 13, at 51 (citing M. FRY, ARMS OF THE LAW (1951)). Fry conceded that restitution would not undo the wrong but it would serve to educate the offender and provide a first step toward reformation for the offender. She called restitution the ideal solution. H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 10 (1974) (quoting M. FRY, ARMS OF THE LAW (1951)).

30 Jacob, *supra* note 13, at 51 (citing Fry, *Justice for Victims*, The Observer (London), July 7, 1957).

31 Jacob, *supra* note 13, at 51. Writing from her British perspective, Fry advocated state-funded compensation to supplement national insurance benefits and possible restitution from the offender. With her changed attitude regarding restitution's viability, Fry noted that a compensation program would also serve to appease victims psychologically, quelling 'the natural sense of outrage.' H. EDELHERTZ & G. GEIS, *supra* note 29, at 10.

32 H. EDELHERTZ & G. GEIS, *supra* note 29, at 11-12.

33 Jacob, *supra* note 13, at 52 (Fry's writings led to the adoption of victim-compensation programs in New Zealand, Great Britain, the United States, Australia and Canada.). For a list and discussion of compensation programs enacted in the United States, see Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485 (1980).

34 *See* text accompanying note 24 *supra*.

35 Colson & Benson, *Restitution as an Alternative to Imprisonment*, 1980 DET. C.L. REV. 523, 526 n.9; *see also* A. CAMPBELL, LAW OF SENTENCING § 10, at 49 (1978) (Employed interchangeably with the term "reparation," restitution is court-ordered compensation to an of-

In addition to these compensation laws,[36] some states have enacted restitution statutes which give state courts a restitution sentencing option.[37] The state of Washington, for example, permits Washington's courts to order, *in lieu of* an otherwise prescribed fine, that restitution be paid by persons who "through commission of crime" have gained money or caused a victim to lose money or property.[38] A Washington criminal court may order restitution of up to double the gain or loss.[39] Several other states have enacted restitution statutes which allow courts to order restitution in addition to or in lieu of otherwise prescribed sentences.[40]

Some state statutes allow the defendant to be heard only if he questions the imposition, amount or distribution of restitution.[41] Others mandate hearings.[42] Most of these laws leave the resolution

---

fender's victim for the damage caused by the offender's unlawful conduct.); Harland, *supra* note 23, at 204 ("Victim compensation" refers to state-funded programs whereas "restitution" indicates money or services provided by offenders as directed by the criminal justice system.); Hudson & Galaway, *Introduction*, in RESTITUTION IN CRIMINAL JUSTICE 1 (J. Hudson and B. Galaway eds. 1977) (Restitution involves offender reparation as part of the sanction imposed and supervised by criminal justice officials.); Nader & Combs-Schilling, *Restitution in Cross-Cultural Perspective*, in RESTITUTION IN CRIMINAL JUSTICE 27, 27-28 (J. Hudson & B. Galaway eds. 1977) (The accepted usage of the terms in America remains: compensation refers to money or services paid by the state or by the offender to the state; restitution refers to money or services paid by the offender to the victim.).

36 *See* Hoelzel, *supra* note 33; *see also* Brown, *Wisconsin's Victim Compensation Program*, 63 JUDICATURE 497 (1980) (Under the Wisconsin plan, victims may receive awards of up to $10,000 for medical expenses or lost wages and up to $2,000 for burial expenses from a state fund administered by the Crime Victims Compensation Bureau.); Konig, *Compensation for Victims of Crime—The Texas Approach*, 34 SW. L.J. 689 (1980) (Texas' Crime Victims Compensation Act mandates compensation for victims of violent crime only for pecuniary loss incurred as a result of physical injuries.); Note, *The 1981 Oklahoma Crime Victim Compensation Act*, 17 TULSA L.J. 260 (1981) (Oklahoma law provides that victims be compensated from a fund financed through assessments imposed on offenders in addition to court costs and fines.).

37 *See, e.g.*, ALA. CODE §§ 15-18-65 to -78 (1982 & Supp. 1983); ARIZ. REV. STAT. ANN. § 13-603.C (Supp. 1983-1984); FLA. STAT. ANN. § 775.089 (West Supp. 1983); HAWAII REV. STAT. § 706-605(1)(e) (Supp. 1982); ILL. ANN. STAT. ch. 38, § 1005-5-6 (Smith-Hurd 1982); KY. REV. STAT. ANN. § 431.200 (Baldwin 1983); ME. REV. STAT. ANN. tit. 17-A, §§ 1321-1330 (1983 & Supp. 1983-1984); MISS. CODE ANN. §§ 99-37-1 to -23 (Supp. 1983); MO. ANN. STAT. §§ 546.630, .640 (Vernon 1953); N.J. STAT. ANN. § 2C:43-3 (West 1982); OHIO REV. CODE ANN. § 2929.11 (Page Supp. 1982); OR. REV. STAT. §§ 137.103, .106, .109 (1981); PA. STAT. ANN. tit. 18, § 1106 (Purdon 1983); UTAH CODE ANN. § 76-3-201 (Supp. 1983); WASH. REV. CODE ANN. § 9A.20.030 (Supp. 1983-1984).

38 WASH. REV. CODE ANN. § 9A.20.030(1) (Supp. 1983-1984).

39 *Id.*

40 *See* note 37 *supra* (all listed statutes except Washington's).

41 *See, e.g.*, OR. REV. STAT. § 137.106(3) (1981); UTAH CODE ANN. § 76-3-201(3)(c) (Supp. 1983).

42 *See, e.g.*, ALA. CODE § 15-18-67 (1982); ILL. ANN. STAT. ch. 38, § 1005-5-6(a) (Smith-Hurd 1982).

of restitution issues to the discretion of the criminal court sentencing judge,[43] but both Kentucky[44] and Missouri[45] require that juries be impaneled to ascertain the restitution amount if the defendant disputes the issue. Some state statutes provide criteria which the judge must consider when assessing the evidence before the court on the restitution issue. For example, Alabama law mandates consideration of the victim's and the defendant's financial resources, the defendant's ability to pay, the anticipated rehabilitative effect of the manner or method of payment, the burden or hardship imposed upon the victim as a result of the defendant's criminal acts, and the mental, physical and financial condition of the victim.[46]

To enforce the restitution order, some state statutes permit the courts to employ their contempt power,[47] revoke probation, parole,

---

43 Some states do not provide any dispute resolution procedure. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-603.C (Supp. 1983-1984) (The statute states that a "court shall require . . . restitution . . . in such an amount and manner as the court may order."); FLA. STAT. ANN. § 775.089(1) and (3) (West Supp. 1983) (Without detailing any dispute resolution procedure, the law provides that a court *may* consider restitution in addition to other punishment. *After* its imposition, a defendant may petition the court for "remission" or modification if defendant can show undue hardship.); HAWAII REV. STAT. § 706-605(1)(e) (Supp. 1982) (A court may sentence convicted persons to make restitution in an amount the person can afford to pay.); ME. REV. STAT. ANN. tit. 17-A, §§ 1152 2-A., 1323 1., 1323 2. (1983 & Supp. 1983-1984) (Every natural person convicted of a crime may be required to make restitution. The court shall make inquiries of the prosecutor, police officer, or victim with respect to the victim's loss. The court must state in open court or in writing reasons for not imposing restitution.); N.J. STAT. ANN. § 2C:43-3 (West 1982) (Courts may sentence convicted persons to pay fines or make restitution or both, but restitution may be in an amount no greater than the victim's loss. The statute contains no imposition procedure guide.); OHIO REV. STAT. § 2929.11(A),(E) (Page Supp. 1982) (Those guilty of felonies may be required to make restitution as fixed by the court. If the victim is more than 65 years old or totally disabled, the court shall consider this fact in favor of imposing restitution.); PA. STAT. ANN. tit. 18, § 1106(a) (Purdon 1983) (Any offender convicted of a crime resulting in personal injury or property loss or damage may be sentenced to make restitution in addition to other punishment.).

44 KY. REV. STAT. ANN. § 431.200 (Baldwin 1983) (Restitution shall be ordered whenever *property damage* results from a misdemeanor or felony. If defendant does not agree to the restitution amount a jury shall be impaneled to try the facts and ascertain the amount of property damage or loss.).

45 MO. ANN. STAT. § 546.640 (Vernon 1953) (Felon must restore property or make reparations. If the defendant does not agree with amount determined, a jury shall be impaneled to try the facts and ascertain the value and amount of the property or assess the damages.).

46 ALA. CODE § 15-18-68 (1982).

47 *See, e.g.*, FLA. STAT. ANN. § 775.089(5) (West Supp. 1983) (While a Florida court may enforce an order with its contempt power, if the court finds the convict has made a good faith effort to comply, the court may increase the time for payment, reduce the amount due, or grant remission.); MISS. CODE ANN. §§ 99-37-5, -7, -9 (Supp. 1983) ("Contempt" means intentional refusal or no good faith effort to comply. Upon motion by the court or the District Attorney, the convict must show cause as to why he should not be found in contempt of court. The court may order the person committed until payment is made. Section 99-37-9 limits the amount of contempt jail-time; no greater than one day for each $25.00 due under a restitu-

or prison sentence suspension,[48] or allow victims to bring a civil action to enforce restitution orders.[49] Some state statutes fail to specify any enforcement procedures.[50]

Since 1925, the Federal Probation Act[51] has permitted federal courts to issue restitution orders as a condition of probation. Courts have held that this power is not a use of the criminal process to enforce a debt. These courts have reasoned that when a court revokes probation upon an offender's failure to pay restitution, the imprisonment is punishment for the original crime and not for the failure to honor the restitution debt.[52] Under the Probation Act, the sentencing court must first assess the offender's financial capacity.[53] In addition, the court may not order payment of an amount greater than "actual damages or loss caused by the offenses for which conviction was had."[54] In 1983[55] and 1984,[56] Congress also considered legisla-

---

tion order; no greater than 30 days if misdemeanor conviction; no greater than one year otherwise.); PA. STAT. ANN. tit 18, § 1106(f) (Purdon 1983) (The probation section, which receives the restitution payments and passes them on to the victim[s] under § 1106(e), must notify the state district court within 20 days of a convict's failure to make restitution payments. If the convict fails to pay within 20 days hence, he is cited for contempt of the district court, and the contempt case is forwarded to the court of common pleas for a hearing.).

48 *See, e.g.*, ALA. CODE § 15-18-72 (1982) (Probation or parole may be revoked if restitution serves as a condition.); ILL. ANN. STAT. ch. 38, § 1005-5-6(d) (Smith-Hurd 1982) (Where conditions of payment are not satisfied, the court can allow a greater time for payment, up to 2 years more than the original order allowed. If the offender violates the payment conditions during the additional period, the court may revoke the sentence or enlarge the conditions.).

49 *See, e.g.*, FLA. STAT. ANN. § 775.089(6) (West Supp. 1983) (Upon default by the offender, the defaulted payments may be collected "by any means authorized by law for enforcement of a judgment."); MISS CODE ANN. § 99-37-13 (Supp. 1983) (Default may be collected "by any means authorized by law.").

50 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-603.C (Supp. 1983-1984); HAWAII REV. STAT. § 706-605(1)(e) (Supp. 1982).

51 18 U.S.C. § 3651 (1982).

52 A. CAMPBELL, *supra* note 35, § 23, at 89.

53 *Id.*

54 *Id.* at 90 (citing 18 U.S.C.S. § 3651 (Law. Co-op. 1974)).

55 *See, e.g.*, H.R. 3498, 98th Cong., 1st Sess., 129 CONG. REC. H4895 (daily ed. Oct. 28, 1983) (This proposed legislation, which was reported to the House Committee on the Judiciary, would make state compensation programs eligible for federal grants of up to fifty percent of the cost of compensating victims and up to one hundred percent of the cost of compensating victims of crimes subject to exclusive federal jurisdiction.); *see also* S. 1941, 98th Cong., 1st Sess., 129 CONG. REC. S13767 (daily ed. Oct. 6, 1983) (Reported to the Senate Judiciary Committee, like the House version, S. 1941 would establish a Crime Victim's Assistance Fund which would receive fines collected from federal offenders. The funds would be distributed to state compensation programs—up to fifty percent of the awards granted to victims by the qualifying state programs with up to one hundred percent of the awards granted by states for victims of federal offenses.).

Under both H.R. 3498 and S. 1941, only approved state compensation programs could receive the federal supplementing funds. Approved programs, under the proposed legislation,

tion aimed at supplementing approved state compensation programs with federal funds.

Other nations have employed restitution in various forms. In his book, *Compensation and Restitution to Victims of Crime*, Stephen Schaefer offers a comparative summary in which he classifies into five categories the systems used to provide restitution or compensation to crime victims.[57] The five categories include: (1) civil damages awarded only in civil proceedings;[58] (2) civil restitution (non-punitive) awarded in criminal proceedings;[59] (3) civil restitution (punitive) awarded in criminal proceedings;[60] (4) civil compensation

---

would include those state compensation programs that: offered compensation for medical expenses; promoted "victim cooperation with reasonable requests of law enforcement officials"; diminished compensation to victims guilty of "contributory misconduct"; subrogated the state to claims a compensation recipient may acquire against the offender; did not discriminate against non-residents of the state; provided compensation to victims of exclusive federal-jurisdiction crimes.).

56 *See, e.g.*, S. 2423, 98th Cong., 2d Sess., 129 CONG. REC. S2633 (daily ed. Mar. 13, 1984) (This Act would establish a Crime Victims' Assistance Fund to assist: (1) states with eligible victim compensation programs; (2) non-profit or public agencies who assist victims of crime; and (3) federal law enforcement agencies and federal crime victims through state programs. The Crime Victims' Assistance Fund would receive all criminal fines collected from convicted federal defendants and all proceeds of contracts entered into by federal defendants for the purpose of selling literary or other rights to their "crime story." *See* note 117 *infra*.

Under S. 2423, "approved" state programs would include those that provide: the same financial benefits to non-resident crime victims; the same financial benefits to victims of federal crimes committed in the state as are provided state crime victims; and, compensation for mental health counselling required by eligible individuals as a result of their victimization.

57 S. SCHAFER, *supra* note 12, at 102.

58 *Id.* at 103. In the first type of restitution or compensation system, the civil and criminal wrongs are adjudicated in separate proceedings. In Schafer's 1970 account, he lists India, Pakistan, New Zealand, and the federal system in the United States as the only systems utilizing this "purely civil solution" to resolve the restitution question. As Schaefer writes, federal law "does not provide for civil parties in criminal proceedings." *Id.* at 62.

59 *Id.* at 103. In the second type of system, the victim's claims for restitution may be heard by the criminal court during the criminal proceedings. The criminal trial takes priority, and the court views the restitution issue as a tangential civil one. The civil claim need not be brought into the criminal proceeding by the victim, and the court may in some cases refuse to hear this civil restitution claim. Judicial economy appears to be the overriding justification for this system, which is in use in the Dominican Republic, England, France, Germany, Holland, Hungary, Israel, Norway, and Sweden. Schafer labels this method the "most usual treatment" of the restitution question.

60 *Id.* at 104. Schafer divides his third system of restitution, in which the criminal court judge orders punitive restitution, into three sub-systems. Under the laws in the first subsystem, the offender must pay money to indemnify the victim only in addition to otherwise prescribed punishment. Germany, Sweden, Mexico, and some of the United States have passed laws of this type. *See, e.g.*, PA. STAT. ANN. tit. 18, § 1106(a) (Purdon 1983); OR. REV. STAT. § 137.106(1) (1981). Section 5 of the VWPA allows federal courts to order restitution "in addition to or in lieu of any other penalty authorized by law." 18 U.S.C. § 3579(a)(1) (1982).

The second sub-category of laws include those that allow courts to order offenders to pay

"awarded in criminal proceedings and backed by the resources of the state";[61] and, (5) compensation "awarded through a special procedure."[62]

No historical overview of restitution would be complete without a discussion of the purposes behind the theory of restitution. Alan T. Harland, an associate professor at the Department of Criminal Justice at Temple University, writes that this question has an impact beyond the academic.[63] For example, courts have justified the use of restitution as a condition of probation without statutory authority because of restitution's utility as a rehabilitative tool. And, courts have justified using a lower level of appellate scrutiny for restitution awards, "a creative alternative to incarceration," than they would have applied to a "punitive" sentence.[64]

Burt Galaway, a member of the University of Minnesota faculty and author of numerous articles on restitution and victim compensation, listed five possible purposes for restitution:[65] (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

---

double or triple the amount necessary to merely indemnify a victim. Some states have enacted laws of this type. S. SCHAFER, *supra* note 12, at 105; *see, e.g.*, WASH. REV. CODE ANN. § 9A.20.030(1) (Supp. 1983-1984) (Court may order, in lieu of a fine, restitution of up to double the victim's loss from the crime's commission.); UTAH CODE ANN. § 76-3-201(3)(a) (Supp. 1983) (In addition to any other sentence, the court may order restitution of up to double the amount of "pecuniary damages.").

The third sub-category of laws (again seen in some American states) include those enactments which allow restitution agreements in lieu of criminal proceedings and punishments. S. SCHAEFER, *supra* note 12, at 105.

61 S. SCHAFER, *supra* note 12, at 105-06. Schafer's fourth system, employed in Cuba, is one in which the law provides for compensation awards in criminal proceedings, but the state pays the victim from a fund. The awards are determined in criminal court, but the victim's receipt of the award does not depend upon the offender's solvency. The state "reimburses" itself by bringing an action against the offender for the compensation amount and depositing receipts into the fund. Schafer says this uniform system, "enshrined in the constitutional law of the country," implies the notion that whenever a citizen suffers as a victim of crime, the state failed in its duty toward its citizens by not preventing the crime. *Id.* at 106.

62 *Id.* at 106. The fifth type of system includes those laws under which restitution is procured in a separate proceeding, not involving a civil or criminal tribunal. The state compensates victims. Sweden and many of the American states employ this system.

Of the 27 state compensation systems listed and discussed in Hoelzel's article, *supra* note 33, at 486, only four programs, those in Illinois, Massachusetts, Ohio, and Tennessee, are administered by courts. The balance are administered by newly established administrative agencies, the state Workman's Compensation Division, Industrial Accident Board, and the like.

63 Harland, *supra* note 21, at 126.

64 *Id.*

65 Galaway, *Toward the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 77, 82-83 (J. Hudson & B. Galaway eds. 1977).

for offenders; and, (5) reduced demand upon the criminal justice system. As Galaway suggests, arguments can be made for all these "purposes" and it would seem that one can tailor individual programs to justify one or some of them.[66]

Offenders are, however, rarely apprehended and convicted and those that are may not possess sufficient assets to adequately compensate victims. A relatively small percentage of victims would benefit from a pure restitution program which relied upon payments from convicted offenders to their victims.[67] Despite the incomplete coverage afforded victims under a restitution program, the United States Congress believed it should be part of a government attempt to indemnify victims of crime, and in 1982, Congress enacted legislation which served to expand the power of federal judges to grant victims restitution.

II. The Victim and Witness Protection Act of 1982

On April 22, 1982, Senators Heinz and Laxalt introduced the VWPA.[68] The Act's declared purpose "is to strengthen existing legal protections for victims and witnesses of Federal crimes and require the United States Attorney General to develop additional legislative proposals and guidelines toward this end."[69]

Senator Heinz asserted that most victims of crime are victimized twice, once by the criminal and once by the criminal justice system.[70] Arguing that victims must be given "at least the rights now afforded routinely to the accused," he called it inexcusable that victims rou-

66 *Id.* at 83.

67 *Id.* at 82 ("If the primary social objective is protecting the welfare of crime victims, then other programs—such as public victim compensation—are likely to become more effective than offender restitution."); *see also* 128 CONG. REC. H 8202 (daily ed. Sept. 30, 1982) (In his statement explaining the VWPA, Rep. Rodino warned against "false hopes . . . that restitution is a panacea for the financial ills of crime victims." Rodino pointed out that restitution is only possible when the wrongdoer is caught, convicted, and "possesses the resources to make it." Restitution "cannot reasonably be expected to benefit the majority of crime victims." Rodino called upon Congress to enact legislation aimed at assisting states—more than 30 of which have set up victim compensation programs—in their compensation efforts. See notes 55-56 *supra* for a brief description of proposed legislation; Harland, *supra* note 21, at 59 (Harland cites one commentator's complete dismissal of restitution "because few defendants have sufficient financial resources."); D. CARROW, CRIME VICTIM COMPENSATION 10 (report to the U.S. Dept. of Justice 1980) (The fact that restitution only assists victims when offenders are apprehended and convicted, serves as restitution's "most limiting" barrier.).

68 VWPA, *supra* note 1; *see also* S. REP. NO. 532, 97th Cong., 1st Sess. 10, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 2515, 2516 [hereinafter cited as SENATE REPORT].

69 SENATE REPORT, *supra* note 68, at 9.

70 128 CONG. REC. S13063 (daily ed. Oct. 1, 1982) ("This bill takes a long step forward in preventing that second crime.").

tinely reported to court only to find the court date changed, that the system forced victims to share courtroom waiting areas with their accused offenders, that offenders could spend and enjoy money gained from crime when victims received no restitution, and that prosecutors and parole boards considered sentencing and release dates without considering the victim and his or her circumstances.[71]

Consistent with its purpose, the Act has three fundamental objectives: to improve and protect the role of victims in the federal criminal justice system; to assist witnesses and victims without infringing on the constitutional rights of accused offenders; and to provide a model for action by state and local officials.[72] These objectives are apparent from the substantive provisions of the VWPA and from the legislative history behind them.

A. *Section 3: Victim Impact Statement*

Section 3, the first substantive provision of the VWPA,[73] amends the Federal Rules of Criminal Procedure.[74] Effective for all presentence reports ordered on or after March 1, 1983,[75] the new Rule 32(c)(2) requires that presentence reports contain a statement of the circumstances of the offense, the circumstances affecting the defendant's behavior, information regarding the "financial, social, psychological and physical harm" done to any victim as well as any other information which could aid the court in sentencing, "including the restitution needs of any victim."[76]

The Judiciary Committee wrote in the Senate Report that the victim impact statement serves as a first step toward insuring the victim's side is heard and considered.[77] Further, they urged that additional techniques already available, such as victim allocution at sentencing and prosecution-victim consultation concerning plea bargaining, be employed to the same end.[78] The Committee also stated that the victim impact statement should be used whenever an institu-

71 128 CONG. REC. S11434 (daily ed. Sept. 14, 1982). Senator Laxalt considered the role of the victim in the criminal justice system and asserted that we must take better care of victims if we want an effective system. Laxalt said the system that depends upon the victim to "sign complaints, identify the accused and to testify for the prosecution," has forgotten and neglected them. *Id.* at S11435.

72 *Id.* at S11437.

73 VWPA § 3.

74 *Id.*; *see also* FED. R. CRIM. P. 32(c)(2).

75 VWPA § 9(b)(1).

76 *Id.* § 3.

77 SENATE REPORT, *supra* note 68, at 13.

78 *Id.*

tion is victimized and human victims can be found (perhaps the tellers of a robbed bank). The Committee noted that the term "victim" includes indirect victims, such as a homicide victim's family members.[79] Finally, the Committee cautioned that "need" as used in the phrase "restitution needs of any victim" should not be construed to mean that only "needy" victims may receive restitution.[80]

B. *Section 4: Protection of Victims and Witnesses From Intimidation*

The first two provisions of section 4 create new offenses under Title 18 of the United States Code. Section 1512[81] of the Code outlaws the intimidation or harassment of witnesses, victims, or informants *before* the federal witness or victim testifies or the informant informs. Section 1513[82] prohibits retaliation against federal witnesses, victims, or informants *after* those persons have testified or informed. A third provision of section 4 enables United States district courts to issue, upon the application of a government attorney, temporary restraining orders or protective orders to prevent the harassment or intimidation of witnesses or victims.[83]

C. *Section 5: Restitution*

Section 5 of the VWPA,[84] the major focus of this note, deals with restitution and the procedure for ordering it. In a statement before the House of Representatives, Representative Rodino, the chairman of the House Judiciary Committee, asserted that a purpose of the federal criminal justice system ought to be making "the victim financially whole."[85] But Rodino recognized that restitution cannot reasonably be expected to benefit the majority of crime victims. Offenders must first be caught and convicted, and even then, the offender may not possess the assets to make restitution. To remedy the inadequate coverage afforded by restitution, Rodino suggested that Congress act to assist states in providing victim compensation programs.[86]

---

79 *Id.*

80 *Id.* ("[T]he committee does not intend to limit restitution to the financially needy.").

81 18 U.S.C. § 1512 (1982).

82 *Id.* § 1513.

83 *Id.* § 1514.

84 VWPA § 5.

85 128 CONG. REC. H8201 (daily ed. Sept. 30, 1982) ("The person who should be responsible for doing this is the wrongdoer, the person who caused the loss.").

86 *Id.* at H8202. Although the VWPA addresses criminal *restitution*, Senator Heinz called a federal policy on victim *compensation* "a great need" and marked it as one of the three important areas not addressed in the Act. The other two "great needs" identified by Heinz:

Senator Laxalt noted that under pre-Act law, courts were allowed to order restitution but rarely did.[87] Due in part to judges' inability to order restitution in conjunction with a prison sentence, Congress sought in section 5 of the Act to "remedy this injustice" by adding sections 3579 and 3580 to Title 18. The goal: to make restitution the expected norm and not an afterthought.[88] Pre-Act federal law did and does allow a restitution order as condition to a probation term.[89] Congress, however, wanted to go further. In its report, the Senate cited the integral role restitution once played in criminal justice systems of "virtually every culture and every time" and lamented its current infrequent and indifferent use.[90]

Section 3579 allows federal courts to order persons convicted of any Title 18 offense, or aircraft piracy under Title 49, to make restitution to "any victim of the offense."[91] Should the court refuse to order restitution or order only "partial" restitution, the court must state its reasons on the record.[92] Requiring the court to explain its failure to order total restitution is yet another example of Congress' desire to make restitution the expected norm.[93] Under section 3579 the restitution may be made in money or, if the victim or his estate consents, in services, and the restitution may be made to another person or organization designated by the victim or victim's estate.[94] Ad-

---

(1) relocation of witnesses to prevent harassment and intimidation after the decision is made to testify; and (2) legal redress for persons injured when "a negligent government official," for example, releases a dangerous person from federal prison. 128 CONG. REC. S13062-63 (daily ed. Oct. 1, 1982). See notes 55-56 *supra* for a discussion of proposed federal legislation concerning victim compensation.

87 128 CONG. REC. S13064 (daily ed. Oct. 1, 1982) (Sen. Laxalt probably refers here to the Federal Probation Act provision (18 U.S.C. § 3651 (1982)) allowing federal courts to order restitution as a condition of probation.). In general, absent statutory authority, criminal courts do not have the authority to order restitution. Harland, *supra* note 21, at 57-58.

88 128 CONG. REC. S13063 (daily ed. Oct. 1, 1982).

89 18 U.S.C. § 3651 (1982) ("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.").

90 SENATE REPORT, *supra* note 68, at 30. Some would dispute this assertion that restitution has played a role in *every* time. *See* notes 20-31 and accompanying text.

91 18 U.S.C. § 3579(a)(1) (1982). One Senate version of the Act limited restitution to Title 18 offenses. The version enacted added certain Title 49 offenses to aid people victimized by airline hijacking. 128 CONG. REC. S13063 (daily ed. Oct. 1, 1982). The Act fails however to define "victim." One commentator, recognizing that § 3579(a)(1) speaks of the "victim of the offense," described as problematic those situations involving victims of "offenses" for which the defendants are not charged or convicted. Merritt, *Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982*, 20 CRIM. L. BULL 44, 46 (1984).

92 18 U.S.C. § 3579(a)(2) (1982).

93 128 CONG. REC. S13063 (daily ed. Oct. 1, 1982).

94 18 U.S.C. § 3579(b) (1982).

ditionally, the restitution order must be as fair as possible to the victim without unduly complicating or prolonging the sentencing process.[95] Representative McCollum called this a "logical limitation on awarding restitution" which would preclude, for example, orders with respect to speculative lost future wages.[96]

Calling the difficult cases concerning precise amounts owed unusual, the Committee said courts are authorized by the Act to reach expeditious and reasonable restitution determinations.[97] The section 3579 restitution order could be used to return property or compensate victims for damaged property.[98] If the victim suffered bodily injury, the court could order the defendant to pay for physical, psychiatric, or psychological care or treatment and reimburse the victim for lost income.[99] The court may also order the defendant to pay necessary funeral and related services.[100]

A court, however, may not order restitution to a victim who has already received compensation, but may "in the interests of justice" order that restitution be paid to the compensator.[101] The compensators who may receive restitution payments, could include friends, family, or other persons or organizations as well as insurance companies and state victim compensation programs.[102] To insure that victims do not receive double damages, restitution payments may be set-off against damages won by the victim in federal or state civil proceedings.[103] Further, the court may order that defendants make installment payments or payment within a specified period. In any case, payment must be made immediately or no later than the end of any probation period, five years after imprisonment ends (if the court does not order probation), or five years after sentencing.[104]

If the defendant is placed on probation or parole under Title 18, any restitution order automatically becomes a condition of the pro-

95 *Id.* § 3579(d). This provision, directing restitution orders which are both fair to the victim and "will not unduly complicate or prolong the sentencing process" has been "credited" with causing some of the difficulty with the Act. *See* notes 147-48 *infra* and accompanying text.

96 128 CONG. REC. H8207 (daily ed. Sept. 30, 1982) (McCollum noted that such awards could be obtained in civil actions.).

97 SENATE REPORT, *supra* note 68, at 31.

98 18 U.S.C. § 3579(b)(1) (1982).

99 *Id.* § 3579(b)(2).

100 *Id.* § 3579(b)(3).

101 *Id.* § 3579(e)(1).

102 SENATE REPORT, *supra* note 68, at 32-33.

103 18 U.S.C. § 3579(e)(2) (1982).

104 *Id.* § 3579(f) (If the court does not otherwise provide, the restitution is due immediately.).

bation or parole.[105] If the defendant fails to comply with the restitution order, the court may use that failure as grounds for revocation of the probation and a parole board may do likewise concerning parole.[106] Either the victim or the United States Government may enforce a restitution order, in the same manner as a judgment in a civil action is enforced.[107] Thus, according to the Senate Report, the Federal Rules of Civil Procedure apply in enforcement proceedings. Arrest, attachment, garnishment, replevin, and sequestration are available means to convince a recalcitrant defendant to comply with a restitution order.[108]

The second of section 5's two restitution provisions adds section 3580,[109] the procedures provision. Section 3580 begins with a list of factors which the court may consider when pondering the restitution amount. These include: the victim's loss, the defendant's resources, the defendant's dependents, "and such other factors the court deems appropriate."[110] The court can order the probation service to include in its pre-sentence report, or in a separate report, information concerning these factors.[111] Additionally, both the defendant and the government must have access to any report dealing with the factors.[112]

Under section 3580, disputes concerning the amount or type of restitution are to be resolved by the court; findings are to be based on a preponderance of the evidence. The government has the burden of proving the amount of the victim's loss, and the defendant bears the burden of showing his financial resources and the needs of his dependents. The burden concerning other matters shall be on the party "designated by the court as justice requires."[113]

Finally, section 3580 directs that the defendant's conviction in-

105 *Id.* § 3579(g). As indicated in Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 507 n.5 (1984), the Act did not specifically repeal the restitution probation-condition of the Probation Act, 18 U.S.C. § 3651 (1982). Nevertheless, since any restitution ordered under the new § 3579 would be an *automatic* condition of any probation granted, § 3579 would appear to "subsum[e] the former authority," § 3651. But § 3651 permits the restitution condition *whenever* federal courts order probation. Thus, § 3651 still applies whenever conviction results from a non-Title 18 or aircraft piracy charge (those offenses covered by § 3579).

106 18 U.S.C. § 3579(g) (1982).

107 *Id.* § 3579(h).

108 SENATE REPORT, *supra* note 68, at 33.

109 18 U.S.C. § 3580 (1982).

110 *Id.* § 3580(a).

111 *Id.* § 3580(b).

112 *Id.* § 3580(c).

113 *Id.* § 3580(d).

volving an act giving rise to restitution will serve "to estop the defendant from denying the essential allegations of that offense in any subsequent federal or state civil proceeding brought . . . by the victim."[114] Congress intended that the defendant's conviction would relieve the victim of the need to establish a defendant's liability in a civil suit.[115]

Sections 6 and 7 of the VWPA make up the balance of the substantive provisions of the Act. Section 6 directs the Attorney General to prepare guidelines for the fair treatment of crime victims and witnesses in the federal criminal justice system.[116] Section 7 directs the Attorney General to study and prepare a report regarding laws which might prevent federal felons from profiting by the sale of their story.[117]

III. *United States v. Welden*

The restitution provisions of section 5 of the VWPA met their first test in *United States v. Welden*.[118] In *Welden*, the Federal District Court for the Northern District of Alabama found the provisions

114 *Id.* § 3580(e) (This section contains a caveat: The estoppel effect of the federal conviction "giving rise to the restitution order" is allowed "to the extent consistent with state law.").

115 SENATE REPORT, *supra* note 68, at 32.

116 VWPA § 6. In § 6 of the VWPA, Congress directed that the Attorney General prepare guidelines "consistent with the purposes" of the Act "to provide crime victims with services and information to minimize the effects of the crime itself and provide realistic expectations regarding victim's relationship to the criminal justice process." SENATE REPORT, *supra* note 68, at 40. These guidelines were published in the Federal Register on July 25, 1983. 48 FED. REG. 33,774 (1983). The guidelines were included in the *Welden* court's opinion. 568 F. Supp. at 520-25.

117 VWPA § 7. The Victims of Crime Assistance Act of 1984, S. 2423, 98th Cong., 2d Sess., 129 CONG. REC. S2633 (daily ed. Mar. 13, 1984), would amend Title 18 of the United States Code by adding Rule 32.2 to the Federal Rules of Criminal Procedure. The new rule would allow federal courts to collect money which would otherwise be paid to the defendant pursuant to contracts entered into "for the purpose of having his crime depicted in a movie, book, newspaper, magazine, radio, or television production, or live entertainment of any kind, or for the purpose of expressing his thoughts, opinions or emotions regarding such crime." Money so collected would be deposited in the Crime Victim Assistance Fund for disbursement in accordance with the provision of the balance of the Victims of Crime Assistance Act. *See* note 56 *supra*.

Some states have enacted statutes, sometimes called "Son of Sam" legislation after the infamous "Son of Sam" case and the subsequently-enacted New York law prohibiting financial gain by felons from the tale of their "story." Heinz, *The Victim and Witness Protection Act of 1982*, 29 PRAC. LAW. 13, 16-17 (1983). For a discussion of the New York statute, see Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979); *see also* Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109 (1981).

118 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7444 (11th Cir. Aug. 8, 1983).

void, declaring them unconstitutional. Asserting that Congress failed to comprehend the full impact of the VWPA's victim restitution provisions,[119] Federal District Judge Acker of the Northern District of Alabama concluded in *Welden* that both sections 3579 and 3580 were unconstitutional, declaring them "null, void and of no force and effect."[120] In *Welden*, three co-defendants were indicted under the federal kidnapping statute (18 U.S.C. § 1201(a)(1)). One victim was killed, another sexually abused and stabbed and a third suffered damage to his automobile. The jury convicted all three defendants: Carlton Welden, Eugene Satterfield, and Perry Allison.[121] At the July 15 sentencing hearing each defendant moved the court to declare sections 3579 and 3580 unconstitutional.[122] Since the Title 18 crime of kidnapping was committed after January 1, 1983, the effective date of sections 3579 and 3580, the Act's restitution provisions applied.[123] The court thus felt compelled to address their constitutionality.[124] Judge Acker considered himself the first to be called upon to assess the constitutionality of the new VWPA.[125]

---

119 *Id.* at 530.

120 *Id.* at 536.

121 *Id.* at 517.

122 *Id.*

123 VWPA § 9(b)(2) ("The amendments made by Section 5 of this Act shall apply with respect to offenses occurring on or after January 1, 1983.").

124 568 F. Supp. at 517-18.

125 *Id.* at 535-36. The Tenth Circuit is presently considering an appeal in United States v. Richard, No. 83-C.R. 114 (D. Colo. 1983), in which the defendant Richard was convicted in federal court of armed robbery and ordered to pay $5000 in restitution within five years from the end of his prison term. Brief for Appellee at 11, United States v. Richard, *appeal docketed*, No. 83-1903 (10th Cir. Jan. 30, 1984) [hereinafter cited as Brief for Appellee (*Richard*)]. Pursuant to the restitution provisions of the VWPA the district court heard evidence regarding restitution at the sentencing hearing. Without dispute, the defendant agreed to pay $328.62 for bank-employee salaries for non-productive work time after the robbery. *Id.* at 6. The defendant, however, did dispute the victim bank's claimed total robbery loss of $13,326. *Id.* at 4, 11. The defendant, employing a disguise, robbed the bank, escaped to a nearby men's room and stashed his disguise and more than $100,000 in cash in a wall compartment in the men's room. *Id.* at 9. Police later recovered the money from the men's room. A subsequent bank audit revealed a loss of approximately $13,000 after accounting for the money recovered from the men's room. *Id.* at 10. The defendant, claiming he stashed all the stolen money in the men's room, faulted the bank's audit. The court found "by a preponderance of the evidence" the loss to be $13,326 but, in considering defendant's financial condition and twelve-year prison term only ordered partial restitution of $5,000. *Id.* at 11.

In *Richard*, the defense not only appealed the restitution order but also attacked the constitutionality of the restitution provisions of the Act, §§ 3579-3580; Brief for Appellant at 13, United States v. Richard, *appeal docketed*, No. 83-1903 (10th Cir. Jan. 30, 1984) [hereinafter cited as Brief for Appellant (*Richard*)]. Since the defense failed to raise the constitutionality of the Act at trial or during sentencing proceedings, the government asserted that the defendant cannot make such claims for the first time on appeal. Brief for Appellee (*Richard*) at 12. The defense claimed the court should consider the constitutional issues anyway, "to prevent mani-

At the sentencing hearing the probation service submitted to the court a victim impact statement as required by the Act's amendment of the Federal Rules.[126] The court refused to accept as accurate the report that victim Pauline Calloway, the sexually abused and beaten young woman should be awarded only $599 in medical expenses.[127] Further, the court lamented the probation service's failure to consider as victims either Calloway's allegedly murdered boyfriend, his estate, or Mr. Devin Little, the man whose car the defendants damaged.[128] Judge Acker wrote that it would be unconscionable to award Calloway $599 and Hill's estate not "one dime."[129]

In assessing the financial condition of the defendants, the probation service reported that Welden's net worth was $23,200 while both Allison and Satterfield had minus net worths.[130] Judge Acker found

---

fest injustice." Brief for Appellant (*Richard*) at 13. Basing his claim on the notion that § 3579(h) of the Act makes a restitution order a civil judgment, the defendant claimed that the Act violated his fifth amendment due process and equal protection rights. The defense faulted the summary manner in which courts may order restitution—the civil judgment. Thus, according to Richard, the Act has deprived him of due process since it fails to provide the process normally attendant to a *civil proceeding*. *Id.* at 14. The defense did not claim the Act violated the seventh amendment jury trial right since Richard did not request a jury trial on the restitution issue. *Id.* at 15.

The defense in *Richard* also urged the Tenth Circuit to reverse the restitution order on the grounds that, under § 3579(d), the district court should have refused to impose an order since it would "unduly complicate or prolong the sentencing process." *Id.* at 11. Richard argued that, due to the complexities, a restitution determination would, if properly considered, result in a mini-trial for damages, and thus the court should have sentenced Richard without ordering restitution. *Id.* at 12-13. A properly considered restitution order, according to Richard, could only "unduly complicate or prolong the sentencing process." *Id.* at 13. The government countered, asserting that Richard was given more substantial rights at the actual sentencing hearing than normally accrue at sentencing. "An additional trial would produce nothing more." Brief for Appellee (*Richard*) at 24.

126 568 F. Supp. at 525.

127 *Id.* Referring to Miss Calloway's "state of hysteria" upon escape and her visible shaking on the witness stand, Judge Acker "strongly suspect[ed]" she would need counseling for a long time, implying that the $599 restitution limit would not cover the cost. Judge Acker also wrote that any income lost by Miss Calloway was not indicated at the hearing.

128 *Id.* The court wrote that, "in response to the court's question, [the probation officer] . . . did not consider Mr. Hill a 'victim.' " The third "victim," Mr. Little, suffered property damage in that the upholstery of his automobile was blood-stained and cut out by the FBI for evidence.

129 *Id.* at 536. The court also wrote that those persons who paid Hill's funeral expenses should receive restitution. *Id.* Of course, § 3579(b)(3) authorizes such a payment. *See* note 100 *supra* and accompanying text. The court also wrote that it "might struggle to find a way not to pay Mr. Little for his damaged upholstery." 568 F. Supp. at 536. But, one could question whether Little was a § 3579 "victim" since none of the defendants were charged or convicted with damaging Little's car. *See* Merritt, *supra* note 91, at 46.

130 568 F. Supp. at 525-26.

the figures difficult to accept,[131] and he also expressed misgivings about the hearsay testimony concerning defendants' assets and liabilities.[132] The court reported that, at the sentencing hearing, all the defendants disputed the accuracy of the Victim Impact Statement and victim Calloway's $599 medical bill.[133] The defendants also offered different views on how any restitution award might be apportioned among them.[134]

Judge Acker proceeded to pose "questions" concerning sections 3579 and 3580.[135] In the court's words, these were only *some* of the many questions which "flood to the mind" and are too numerous to ask much less answer. Judge Acker posed forty-one of those questions to help answer the ultimate question, namely, whether or not the restitution provisions were constitutional.[136] Turning to the merits of the case, the court considered the Act's restitution provisions in light of the fifth, sixth, seventh, eighth, and fourteenth amendments to the Constitution,[137] and concluded that sections 3579 and 3580 failed to comply with the seventh,[138] fifth, and fourteenth amend-

131 *Id.* at 526. The judge specifically mentioned the apparent contradiction evidenced by defendant Satterfield's statement concerning his statutory right-to-redeem certain property worth $12,000, coupled with the pre-sentence report indication that Satterfield possessed *no assets*. Also, expressing an apparent concern regarding the innocent parties associated with defendants, Judge Acker said the pre-sentence reports failed to indicate whether or not defendants' property was jointly owned.

132 *Id.*

133 *Id.*

134 *Id.* at 526-27 (Should the restitution-paying offenders pay according to their respective degrees of guilt or by their respective ability to pay?).

135 *Id.* at 527-30.

136 *Id.* The forty-one questions posed concerned: (1) due process; (2) equal protection; (3) choice of law; (4) appeals problems; (5) other questions of statutory interpretation.

Before turning to the constitutionality of the statutes, Judge Acker examined the legislative history of the Act concluding that it was not only sparse but difficult to reconstruct. Judge Acker added that the Act appeared to be a hasty response to a national concern (the Act was first introduced during "Crime Victims Week") for witnesses and victims. Judge Acker found no legislative debate over the restitution provisions. He asserted that "[t]he good lawyers in both houses apparently did not do what the court is being forced to do." *Id.* at 530. Judge Acker concluded that during the congressional deliberations on the Act "constitutional considerations took a back seat." *Id.* at 532.

137 *Id.* at 532-35.

138 *Id.* at 534.

The *Welden* court considered the seventh amendment right to a jury "[i]n suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. Noting that § 3579(h) turns the restitution order into a civil judgment, Judge Acker concluded that the restitution hearing must be a suit at common law. 568 F. Supp. at 534. Since the value in controversy in *Welden* exceeded the twenty-dollar limit, the court held the right to a jury trial applicable. The court then asserted that since §§ 3579-3580 clearly and flatly deny a jury trial, they fail the seventh amendment test. *Id.*

ments,[139] while they passed muster under the sixth[140] and eighth amendments.[141]

139 *Id.* at 535. The *Welden* court then considered the restitution provisions in light of the "brother and sister" due process and equal protection provisions of the fifth and fourteenth amendments, again finding the Act unconstitutional. *Id.* at 534-35. The government unsuccessfully argued that, since the broad sentencing power granted by the Probation Act had been declared constitutional in terms of the fifth amendment, then it followed that the restitution provisions in the VWPA would also pass the test. But, Judge Acker felt Congress granted too much discretion to the courts and the Justice Department, creating a "potential Frankenstein" which did not provide due process. *Id.* at 534. The court distinguished between restitution as a condition to probation under the Probation Act and restitution under § 3579. See note 195 *infra* for Harland's discussion of this distinction. The court called the § 3579 restitution order "a civil judgment against a person on the hearsay testimony of a witness without any discovery and without cross-examination." *Id.* at 535.

Stating that due process required fairness and reasonableness, Judge Acker declared that the Act set *no* ascertainable standards. Courts were unleashed without being provided rules of evidence, rules of discovery, burdens of proof, requirements of notice, requirements of standing, and the like. As an example, the court referred to the government's brief and the assertion that the rules of evidence did not apply at the sentencing hearing. Judge Acker agreed with this interpretation, deploring the result that the issue of restitution amount could be decided upon hearsay evidence. 568 F. Supp. at 534-35. Judge Acker lamented Congress' failure to contemplate either defendants' due process rights to counsel at the sentencing hearing or the right to review pre-sentence reports, prepare for trial, or present witnesses. *Id.* at 534.

Turning to the question of equal protection Judge Acker concluded that disparate results under §§ 3579-3580 are so probable that "it is impossible" to look forward to equal protection compliance. *Id.* at 535. The *Welden* court looked and did not find the potential for "enough equality of application" to satisfy the equal protection requirements. But if the restitution provisions of the Act merely provide a federal court with another sentencing option, different courts can apply the Act and reach different results, without running afoul of equal protection. *See* notes 199-202 *infra* and accompanying text.

140 The *Welden* court next turned to the defendants' sixth amendment argument and pointed out that the sixth amendment provides that persons are entitled to trial by an impartial jury. *Id.* at 534; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury."). But the court noted that this sixth amendment right has never been applied "beyond the adjudication of guilt." 568 F. Supp. at 534. The *Welden* court held that the sixth amendment did not apply to the issues in dispute.

141 The eighth amendment forbids both excessive fines and cruel and unusual punishment. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Judge Acker reasoned that any restitution order under §§ 3579-3580 would constitute "fines" under the eighth amendment but that whether or not they were excessive had to be determined on a case-by-case basis. 568 F. Supp. at 532.

By "indulging the presumption of constitutionality," Judge Acker found, although reluctantly, that "the Act pass[ed] muster" under the eighth amendment because the restitution order and its enforcement would not amount to cruel and unusual punishment. *Id.* at 533. The court's concern here centered on the notion that the Act could be construed to allow imprisonment for debt. The general rule in the United States is that a person may not be imprisoned for debt. 16 C.J.S. *Constitutional Law* § 204(1) (1956). While there is no federal constitutional edict banning it, many state constitutions do ban imprisonment for debt. Some state statutes, and a federal statute also prohibit imprisonment for debt. *Id.* The perti-

nent federal statute prohibits any court of the United States from imprisoning any person for debt if the state in which it sits bans such a penalty. 28 U.S.C. § 2007 (1982).

Section 3579 allows restitution orders "in addition to *or* in lieu of any other penalty authorized by law," including imprisonment. 18 U.S.C. § 3579(a)(1) (1982) (emphasis added). Further, the Act allows courts to require compliance with a restitution order within specified periods, *id.* § 3579(f)(1), and allows authorities to revoke probation or parole if defendants fail to comply. *Id.* 3579(g). Judge Acker was concerned that court-ordered restitution, without an accompanying prison term, might later have the effect of putting the defendant in jail for failure to comply with the order. 568 F. Supp. at 532 ("The Act certainly encourages and allows trial courts to keep defendants in jail, or to put defendants in jail, if they fail to pay restitution.").

Despite its doubts, the *Welden* court found §§ 3579-3580 constitutional under the eighth amendment. *Id.* at 533. The court referred to the treatment received by the Probation Act in the courts. *Id.* at 532-33. In responding to a government argument, the court referred to 18 U.S.C. § 3561, enacted in 1925, which allows federal courts to order defendants to make restitution to "aggrieved parties" as a condition to probation. The Supreme Court has never considered the constitutionality of § 3651 under the eighth amendment. *Id.* at 532.

The Supreme Court has considered a Georgia statute in a case in which the state acted to revoke probation when the offender failed to pay a fine and restitution. *Id.* In Bearden v. Georgia, 103 S. Ct. 2064 (1983), without mentioning the eighth amendment, the court ruled that a state court could not automatically revoke probation without first determining that the probationer had not made a *bona fide* effort to pay restitution.

In *Bearden*, the defendant pled guilty to charges of burglary and theft but, pursuant to Georgia law, Georgia First Offender Act, GA. CODE ANN. § 27-2727 to -2730 (current version at §§ 42-8-60 to -65 (1981)) the court deferred proceedings and sentenced Bearden to four years probation. As a condition to the probation, the court ordered Bearden to pay a total of $750 in fines and restitution within four months. Bearden failed to pay and without considering the reasons for the inability to pay, the Georgia court revoked probation, convicted Bearden, and ordered imprisonment for the balance of the probation period. 103 S. Ct. at 2067.

The Supreme Court found that the fourteenth amendment "fundamental fairness" doctrine prohibited Georgia from depriving Bearden of his "conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 2073. Bearden had borrowed and paid $200 of the $550 he owed but claimed he could not find a job and was unable to pay the balance. *Id.* at 2067. The Supreme Court ruled that in keeping with Williams v. Illinois, 399 U.S. 235 (1970), and Tate v. Short, 440 U.S. 397 (1971), the Georgia court should have considered whether Bearden made a *bona fide* effort to pay. Further, the court held that alternatives to imprisonment must be considered before imposing a prison sentence. *Id.* at 2073-74.

Judge Acker in *Welden*, 568 F. Supp. at 533, conceded that Congress may have adequately "anticipated" *Bearden* in that the Act requires courts and the Parole Commission to "consider the defendant's employment status, earning ability, financial resources, the willfullness of the defendant's failure to pay, and any other special circumstances," 18 U.S.C. § 3579(g), when considering parole or probation revocation. While insisting that nowhere does the Act specify that the court must consider a parolee's or probationer's "*bona fide effort*," as required by the fourteenth amendment under *Bearden*, Judge Acker conceded that *perhaps* "this concept is implicit in the statutory language" requiring the court to consider the defendant's financial situation and the willfulness of his failure to pay. 568 F. Supp. at 533. If the terms of § 3579(g) do not require a consideration of "bona fide effort" it would seem that any court, considering probation revocation for non-payment of restitution under § 3579, could so interpret the Act in light of *Bearden* and the fourteenth amendment.

The court reluctantly concluded that the Act's restitution provisions could "possibl[y]"

IV. *Welden*: A Critical Analysis

The *Welden* court, citing little authority,[142] held that the restitution provisions of the VWPA were constitutionally infirm, ruling that those provisions were void as of July 20, 1983.[143] The *Welden* court's sweeping declaration and its bases are, however, suspect; the government has appealed the decision.

The *Welden* court found that the convicted offender has a right, under the seventh amendment, to a jury trial of the issues concerning any restitution order under sections 3579 and 3580.[144] The *Welden* court determined, without citing any authority, that the sentencing hearing, at which the court considers restitution, amounts to a "suit at common law." The court, focusing on section 3579(h),[145] which allows enforcement of restitution orders "in the same manner as a judgment in a civil action," concluded that the Act "turns a restitution order into a *civil judgment*." Therefore, according to *Welden*, the proceeding which produces the civil judgment/restitution order must be a "suit at common law." Thus, since the sentence being produced becomes a civil judgment, the offender has a right to a jury trial.[146]

Having determined that the offender has a right to a jury trial, the court asserted that section 3579 clearly and flatly denies that right.[147] The court was apparently referring to section 3579(d) which directs that the imposition of the restitution order "will not unduly complicate or prolong the sentencing process."[148] Presumably, the

---

be construed as allowed under the eighth amendment "by indulging the presumption of constitutionality." 568 F. Supp. at 533.

142 While the *Welden* court was the first court to consider the constitutionality of the Act, as Judge Acker notes, courts have considered the Probation Act of 1925 and its restitution provisions. 568 F. Supp. at 534. Nevertheless, Judge Acker was unable to cite any case where a court has voided a restitution-authorizing statute, or an analogous one, for the reasons enumerated by Judge Acker or, for that matter, for any reason. *Id.* at 534-36.

143 *Id.* at 536.

144 *Id.* at 534. The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

145 568 F. Supp. at 534; *see* 18 U.S.C. 3579(h) (1982) ("An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.").

146 568 F. Supp. at 534 (emphasis added).

147 *Id.*

148 *Id.* Judge Acker, in his opinion, failed to specify how § 3579 "clearly and flatly" denies a jury trial. This denial may be inferred from the text of 18 U.S.C. § 3579(d) (1982) ("The court shall impose an order of restitution to the extent that such an order is as fair as possible to the victim and the imposition of such an order will not unduly complicate or prolong the sentencing process.").

Welden court concluded that a jury trial of the restitution order would "unduly complicate or prolong the sentencing process."

The *Welden* court erred in four respects in concluding that the restitution provisions of the VWPA fails to comply with the seventh amendment. The *Welden* court failed to: (1) consider a recognized method of statutory interpretation; (2) realize that restitution is a part of the sentencing process and not a civil judgment; (3) recognize that restitution is an equitable remedy, thus not necessitating a jury trial; and (4) consider salvaging the Act by severing the section it found objectionable.

First, then, the *Welden* court interpreted the Act differently than the accepted interpretation of 18 U.S.C. 3565, a statute similarly worded. In its appellate brief, the government pointed to 18 U.S.C. 3565[149] which allows collection of "fines and penalties" imposed in all criminal cases "by execution against the property of the defendant in like manner as judgments in civil cases." The government asserts that section 3565 does not make every "fine and penalty" imposed in all criminal cases civil judgments merely because they can be enforced in a like manner. It follows that the VWPA's similar provision, section 3579(h), should be similarly interpreted.[150]

Second, under the Act restitution merely becomes one of a federal judge's sentencing options. Thus, the judge has the unilateral discretion, without a jury, to decide whether to impose restitution.

149 Brief for Appellee at 57, United States v. Welden, No. 83-7444 (11th Cir. Aug. 8, 1983)[hereinafter cited as Appellee's Brief (*Welden*)]. 18 U.S.C. § 3565 (1982) provides that "[i]n all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, such . . . fine or penalty . . . may be enforced by execution against the property of the defendant in like manner as judgments in civil cases."

150 The government cited Hill v. Wampler, 298 U.S. 460, 463 (1936), in which the Supreme Court in dicta simply restated the provisions of 18 U.S.C. § 569 (the predecessor of 18 U.S.C. § 3565) ("[A] fine imposed by a court of the United States in a criminal prosecution may be enforced by execution against property in like manner as in civil cases."). Appellee's Brief (*Welden*), *supra* note 149, at 57. Further, the government cited FED. R. CIV. P. 69 which directs that the "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise." *Id.* Thus, fines and penalties imposed in *all* federal criminal cases can be enforced like civil judgments, by employing Rule 69 and other applicable provisions.

A review of case law governing the use of § 3565 fails to reveal any case in which a defendant claimed that this enforcement provision turned a sentencing hearing into a "suit at common law." As the government noted in its brief, Appellee's Brief (*Welden*), *supra* note 149, at 57 n.30, even without the Act's § 3579(h) (providing that restitution orders may be enforced as if they were civil judgments), § 3565 arguably would have governed the enforcement of the restitution order under § 3579. That is, a § 3579 order could have been construed a "penalty" enforceable "by execution against property of the defendant in like manner as judgments in civil cases." § 3565 has, however, never been employed to enforce restitution orders issued under the Probation Act.

The *Welden* court, however, decided that restitution under the Act is not a *sentence* but a *civil judgment*.[151] Congress probably did not intend that juries determine the restitution amount, whether or not restitution should be ordered, or to whom. Rather, Congress intended that the restitution be a part of an offender's *sentence*.[152] The Constitution does not mandate jury sentencing, even in capital cases.[153] It is clear that if a restitution order under the Act amounts to a sentencing option, the judge in his discretion can determine the restitution amount and issue the order without impaneling a jury. A jury need not be impaneled to determine any sentence.[154]

Third, the jury trial right has not traditionally been associated with equitable remedies such as restitution. As mentioned above,[155] states which have granted their criminal courts the discretion to order restitution have not, in general, required the impaneling of juries to resolve disputed issues. Most state systems (like the federal system under the VWPA) leave sentencing to the judge's discretion while providing certain criteria for him to consider.[156] Additionally, at least two state statutes (Florida's[157] and Mississippi's[158]) permit the enforcement of restitution orders by "any means authorized by law" for enforcement of a judgment. Neither Florida's statute nor Mississippi's has been successfully challenged on the ground that they violate a person's right to a jury, a right granted by both state's

151 568 F. Supp. at 534.

152 This issue, whether the restitution order amounts to a sentence, or part thereof, or, when issued under the Act amounts to a civil judgment, appears to be the key issue in *Welden*.

153 A. CAMPBELL, *supra* note 35, § 70, at 227 n.28 (1978). Campbell writes that most jurisdictions require jury sentencing in *capital* cases. Nevertheless, even in those capital cases, the constitution does not mandate jury sentencing. *Id.* Campbell cites and quotes Profitt v. Florida, 428 U.S. 242, 252 (1976) (" '[j]ury sentencing in a capital case can perform an important societal function, . . . but it has never been suggested that jury sentencing is constitutionally required.' ").

154 Appellee's Brief (*Welden*), *supra* note 149, at 58. Among other cases, the government cited Williams v. New York, 337 U.S. 241, 246-47 (1949) (distinguished between the strict evidentiary rules associated with the trial process and the wide discretion authorized sentencing judges who are largely free to garner and consider a wide range of information) and Morgan v. Wainwright, 676 F.2d 476, 480-81 (11th Cir. 1982). Citing cases from the former Fifth Circuit, as well as the Eighth, Seventh, and Second Circuits, the *Morgan* court indicated that a criminal defendant has no constitutional right to a jury-determined sentence. Further, in practice, juries generally do not participate in sentencing.

155 *See* notes 43-45 *supra* and accompanying text; *see also* Appellee's Brief (*Welden*), *supra* note 149, at 58.

156 *Id.*

157 *See* note 49 *supra*.

158 *Id.*

constitutions.[159]

As far as the right to a jury trial in the federal system is concerned, the Supreme Court in 1830, in *Parsons v. Bedford*,[160] stated that the seventh amendment may embrace all suits which are not in equity and admiralty jurisdiction. As the Court pointed out, the amendment applies to cases in which *legal* rights are to be ascertained and determined.[161] A serious question exists whether, under the Act, a judge ascertains and determines legal rights. Judge Acker evidently believed that legal rights are established at the sentencing hearing because the victim can enforce any restitution order as if it were a civil judgment. He wrote: "It is certainly not a proceeding in equity."[162]

In distinguishing between law and equity, one must first examine the nature of the remedy.[163] In his discussion of the jury trial right, Professor Moore mentioned the early inadequacy of the common law remedies of account and debt whereupon equity stepped in to compel the payment of money or *restitution*.[164] According to Moore, restitution in equity is the disgorgement of ill-gotten gains or the restoration of the status quo.[165] In discussing the restitution provisions of the VWPA, Representative Rodino stated that a purpose of the criminal justice system ought to be making the victim financially whole.[166] The restitution provisions of the Act are part of Congress' effort to disgorge offenders of ill-gotten gains and restore, to the extent possible, the victim's status quo.[167] And, as Moore states, "[w]hen restitution is . . . authorized by [a] valid statute there is no right to a jury."[168]

---

159 FLA. CONST. art. 1, § 22 ("The right of trial by jury shall be secure to all and remain inviolate."); MISS. CONST. art. 3, § 31 ("The right of trial by jury shall remain inviolate.").

The federal statute allowing Federal courts to condition probation on the payment of ordered restitution, 18 U.S.C. § 3651 (1982), does not contain a provision that the restitution order be treated as a civil judgment. Enforcement of restitution under § 3561 includes court-revocation or modification of probation or the revocation of the suspension of a prison sentence.

160 28 U.S. (3 Pet.) 432, 445-46 (1830).

161 *Id.*

162 568 F. Supp. at 534.

163 Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503, 512 (1973). .

164 5 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 38.24[2], at 38-194 (2d ed. 1982). Thereafter, the *common-law* courts also developed a form of restitution called "general assumpsit." *Id.* at 38-195.

165 *Id.*

166 128 CONG. REC. H8201 (daily ed. Sept. 30, 1982).

167 *Id.*

168 5 J. MOORE, *supra* note 164, at 38-196.

Moreover, the Supreme Court in *Curtis v. Loether*[169] considered the seventh amendment jury trial right under the Civil Rights Act. For purpose of analysis, however, *Curtis* serves to illustrate the distinction between equitable actions and legal actions in light of the jury trial right. The Court held that in actions for *damages*, a legal action under Title VIII of the Civil Rights Act to redress fair housing law violations, either party may demand a jury.[170] But, in contrast to the Title VIII action for damages, in Title VII equitable actions for backpay, or *restitution*, a jury trial is not required under the seventh amendment. The Supreme Court in *Curtis* cited several federal circuit court cases in which the courts considered the jury trial right under Title VII in actions for backpay, "an equitable remedy [and] a form of restitution."[171] In those decisions, the circuit courts held that for these "form[s] of restitution" a jury trial is not required. Also, these courts noted that a judge had discretion under Title VII when determining whether or not to award the restitution.[172] The circuit courts considered this factor as further support for the proposition that the seventh amendment did not apply in the "backpay" actions under Title VII.

Like Title VII actions for backpay, the VWPA gives the court the discretion to order restitution to crime victims. Unlike Title VIII, under which, according to the Supreme Court in *Curtis*, juries are required, the Act does not give private plaintiffs (or the government) the right to redress their grievances in terms of seeking and setting damages. The VWPA merely gives victims and the United States the ability to enforce restitution orders *as if* they were civil judgments.[173] The jury trial right does not attend to the equitable

169 415 U.S. 189 (1974).

170 *Id.* at 197.

171 *Id.* at 196-97. The *Curtis* court cited, e.g., Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).

172 415 U.S. at 197.

173 18 U.S.C. § 3579(h) (1982).

The *Welden* court also referred to what it termed the *res judicata* effect of the restitution order. 568 F. Supp. at 535. Here, the judge referred to § 3580(e) ("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.").

As the government's brief noted, Appellee's Brief (*Welden*), *supra* note 149, at 56 n.29, the *Welden* court seemed to conclude that the sentencing hearing must be a civil proceeding because the defendant cannot in any subsequent civil proceeding "relitigate the facts of the underlying conviction." *Id.* But even without § 3580(e), the facts in the underlying criminal conviction could not be relitigated. *Id.* The restitution order itself may or may not have

remedy of restitution, or any equitable remedy. Whether one treats the restitution order, for purposes of enforcement, *as if* it were a civil judgment, seems immaterial to the jury trial issue. Whether a civil judgment or a sentence option, the restitution order remains equitable in nature and the jury trial right does not apply.

It would seem, then, that the *Welden* court erred in holding the restitution provisions of the Act unconstitutional under the seventh amendment. The sentencing judge has the unilateral discretion to decide to impose restitution as one of several sentencing options. Further, the equitable remedy of restitution has not traditionally been associated with the right to a jury. While it is true a restitution order under the Act may be enforced "*as if* it were a civil judgment," it does not follow that it therefore *is* a civil judgment. Even if it were, it remains an equitable remedy to which the jury trial right has not traditionally been applied. Further, under 18 U.S.C. § 3565 any fine or penalty imposed in all criminal cases may be collected "in like manner as judgments in civil cases." The sentencing hearings which have imposed fines and penalties in all criminal cases since section 3565's enactment have not been deemed civil cases and neither, then, should a restitution sentencing hearing under section 3579.

Finally, even if section 3579(h) does, in effect, transform the sentencing hearing into a civil proceeding (at which a jury trial right attends) it would seem that under general judicial principles and in keeping with the presumption of constitutionality, the *Welden* court could have considered ruling that section 3579(h) alone was unconstitutional. The court could then have severed section 3579(h) and let the balance of the restitution provisions, sections 3579 and 3580, stand.[174] Judge Acker believed that section 3579(h) turned the sentencing hearing into a seventh amendment "suit at common law." If section 3579(h) were extricated, the court probably would not have found the jury trial right applicable, since the restitution order would then have been just another part of the sentence, not a civil judgment. As merely a sentencing option, the restitution and the issues associated with its determination can be decided without a jury.

The *Welden* court also found that sections 3579 and 3580 vio-

collateral estoppel effect. The Act does not address this issue. *Id.* "[I]t is difficult to see how the presence of a collateral estoppel provision as to the facts underlying a conviction alters the nature of the *criminal sanction* in any way." *Id.* (emphasis added).

174 568 F. Supp. at 533. "Indulging" this presumption of constitutionality, the *Welden* court did find the Act constitutional under the eighth amendment. *Id.* For a discussion of the duty to avoid constitutional decisions, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 93-95 (2d ed. 1983).

lated the due process and equal protection requirements of the fifth and fourteenth amendments.[175] The court acknowledged a United States court of appeals decision, *United States v. Baker*, in which the Seventh Circuit upheld the constitutionality of the Probation Act and the broad discretion granted the sentencing judge under that law's provisions.[176] The *Baker* court, considering the Probation Act and the judge's discretion thereunder to order restitution as a probation condition, concluded that section 3651 of the Probation Act was not unconstitutionally vague under the fifth amendment.[177] Nevertheless, the *Welden* Court concluded that Congress granted a judge acting under sections 3579 and 3580 of the VWPA "*too much* discretion" and "created a potential Frankenstein."[178]

Still, sentencing judges can and do act with discretion.[179] But what kind and how much discretion is constitutional? In *Welden* the court attacked the VWPA for unleashing courts without providing standards such as "rules of evidence, rules of discovery, burdens of proof, requirements of notice, requirements of standing and the like."[180] As an example, Judge Acker lamented the fact that the res-

175 568 F. Supp. at 535; *see also* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). While the fourteenth amendment and its equal protection clause on its face only applies to the states, the due process clause of the fifth amendment has been construed to apply the equal protection guarantee to the federal government. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 174, at 422-23.

176 568 F. Supp. at 534.

177 *Id.*

178 *Id.* (emphasis added).

179 *See* note 139 *supra* and accompanying text.

180 568 F. Supp. at 534. Judge Acker cited Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956), for the proposition that, to satisfy both the "due process" and "equal protection" requirements "a statute must not subject an individual to arbitrary or uneven exercises of power." In *Sexton* the Sixth Circuit considered an action to enjoin a state court judge's actions regarding matters in probate. In dicta, the Sixth Circuit wrote that due process is "secured by laws operating on all alike, and not subjecting the individual to the arbitrary or uneven exercises of the powers of government unrestrained by the established principles of private right and distributive justice." *Id.* at 224. Further, the *Sexton* court wrote that "equal protection" implies that "all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination." *Id.* These principles certainly are valid ones, but the *Welden* court failed to cite any case where a court applied these principles to a sentencing statute analogous to §§ 3579-3580.

Next, Judge Acker stated the familiar due process test of "fairness and reasonableness," citing a 1968 decision of the court for the Southern District of West Virginia. *Id.* at 534. In the case, Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968), *aff'd*, 399 F.2d 638 (1968), *cert. denied*, 394 U.S. 905 (1969), the district court dismissed the complaint of a group of suspended college students. The students claimed the college administration denied them due process in suspending them after several violent demonstrations. Like the *Sexton* court, the

titution sentencing-issue can be decided on hearsay evidence.[181]

Campbell, in his treatise *Law of Sentencing*, states that "[d]ue process does not require a judge to draw sentencing information through the narrow net of courtroom evidence rules."[182] He writes that, generally, judges are allowed "virtually unlimited discretion" as to kind and source of information when considering sentencing. Judges can look to presentence reports, police reports, and even observations of the offender when determining what sentence ought to be imposed.[183] Judicial discretion at the sentencing stage is indeed very broad.

Nevertheless, there are some limits to this discretion. As the government indicated in its appellate brief, the *Welden* court, acting under the Act, as well as all federal courts ordering criminal sentences, must follow the Federal Rules of Criminal Procedure.[184] Rule 32(c)(2), as amended by the VWPA, lists the information which the Probation Service must include in the presentence report,[185] unless the defendant waives that report.[186] The defendant has a right to make a statement under Rule 32(a)(1)[187] to the sentencing judge who must, under Rule 32(c)(3), disclose the pre-sentence report to the defendant.[188]

Baker court denied the claim, holding that the defendant college acted properly. *Id.* at 237. Again, the *Welden* court failed to cite authority in other than general terms.

181 568 F. Supp. at 534-35.

182 A. CAMPBELL, *supra* note 35, § 85, at 275.

183 *Id.* at 276. Campbell does note that sentences have been remanded where based on unsubstantiated hearsay. *Id.* § 88, at 284. No provision of the Act, however, requires the unquestioned acceptance of such hearsay or the total reliance thereon.

184 Appellee's Brief (*Welden*), *supra* note 149, at 59; *see also* Brief for Appellee (*Richard*), *supra* note 125, at 19-21 (Existing law regarding sentencing applies to restitution sentencing under the Act. In general this existing law provides that: (1) the formal rules of evidence do not apply to sentencing proceedings; (2) the sentencing judge is granted nearly unlimited access and use of information regarding the defendant's background; (3) within limits, sentencing judges impose sentences within their own discretion; (4) defendants cannot demand discovery of government evidence at sentencing hearings; (5) no jury right attends the sentencing process; and, (6) the defendant may not demand an evidentiary hearing at sentencing.).

185 FED. R. CRIM. P. 32(c)(2); *see also* notes 73-78 *supra* and accompanying text.

186 *Id.* at 32(c)(1) ("The probation service . . . shall make a presentence investigation and report . . . unless . . . the defendant waives a presentence investigation and report.").

187 *Id.* at 32(a) (Before imposing sentence the court must afford the defense attorney, the defendant, and the government attorney an opportunity to speak on the punishment issue.).

188 *Id.* at 32(c)(3) (Upon request the defendant or his counsel must be permitted to read the pre-sentence report. However, certain information—diagnostic opinion which might disrupt rehabilitation, information obtained from a confidential source, or information which, if disclosed, might result in harm to anyone—may be excluded from the report copy granted the defendant.).

The Act itself provides a procedures section, section 3580, which lists the criteria a sentencing court must consider,[189] mandates disclosure to the defendant of all reports which contain information relating to these criteria,[190] and provides the court with standards for resolving the restitution issue.[191] As the government brief in the *Welden* appeal points out,[192] the Act is more specific in delineating sentencing procedures than the 1925 Probation Act, which has been held constitutional under the fifth amendment.[193]

The *Welden* court drew a distinction between ordering restitution as a condition of probation pursuant to the Probation Act and basing a civil judgment on hearsay "without any discovery and without cross-examination."[194] Again, the infirmity inherent in sections 3579 and 3580 is, according to *Welden*, section 3579(h), which allows enforcement of the restitution order "as if it were a civil judgment."[195] As previously discussed, this conclusion, that section 3579(h) turns the restitution order into a civil judgment, is questionable at best.[196] Again, even if it were true, the court could have considered declaring only 3579(h) void, leaving the balance of sections 3579 and 3580 intact.[197]

In sum, due process standards of trial differ from those standards applicable at sentencing.[198] Judge Acker seems to apply the same

189 18 U.S.C. 3580(a); *see* note 110 *supra* and accompanying text.

190 18 U.S.C. 3580(c); *see* note 112 *supra* and accompanying text.

191 18 U.S.C. 3580(d); *see* note 113 *supra* and accompanying text.

192 Appellee's Brief (*Welden*), *supra* note 149, at 61 (Sections 3579-3580 provide restitution sentencing procedures and limits. For example, § 3579(b)(1) mandates return or replacement of lost property, or payment of its value. Section 3579(b)(2) lists the costs, relating to bodily injury, which are subject to restitution. Section 3579(b)(3) indicates that courts may require offenders pay funeral costs. In § 3580(a)(1) Congress listed factors to be considered when assessing the restitution amount—victim loss, defendant's financial resources, defendant's needs. "In other words, the statute leaves little room for discretion.").

193 United States v. Baker, 429 F.2d 1344 (7th Cir. 1970), *cited in Welden*, 568 F. Supp. at 534.

194 568 F. Supp. at 535.

195 *Id.* Harland, in his article, *supra* note 21, at 72, wrote of the importance of the distinction between restitution as a condition of probation and restitution as a sentence. First, the law treats differently those in default; offenders who receive restitution as a probation-condition may receive a prison sentence while those who receive restitution sentences may be held in contempt of court. Second, according to Harland, courts have held restitution sentences void without statutory authority while probation-condition restitution has been upheld even without such authority.

196 *See* notes 149-54 *supra* and accompanying text.

197 *See* note 174 *supra* and accompanying text.

198 A. CAMPBELL, *supra* note 35, § 41, at 150-51 (quoting Solesbee v. Balkcom, 339 U.S. 9 (1950) (" 'necessary and inherent' differences between due process standards at trial and at sentencing"), *reh'g denied*, 339 U.S. 926 (1950); *see also* Harland, *supra* note 21, at 99 (Given the

standards because of his premise that the sentencing hearing amounts to a proceeding which produces a civil judgment. When the erroneous premise falls, the restitution order becomes just another sentencing option. As such, the great body of law applied to sentencing proceedings serves to adequately guide the courts under the Constitution.

Addressing the "equal protection" issue, Judge Acker expressed a concern that it is impossible to look forward to enough equality of application for the Act to comply with equal protection.[199] The court fails to cite one case in support of this notion. Campbell writes that courts have uniformly held that courts do not violate equal protection principles by imposing different sanctions on offenders convicted of the same offences.[200] The general rule is: courts need act only within statutory parameters.[201] Again, the Act provides those parameters in section 3580 in more detail than the other federal restitution provision embodied in the Probation Act.[202]

V. Conclusion

In passing the VWPA Congress believed in the time-honored, thoroughly logical notion that offenders should pay their victims, indemnifying them for their losses. In *Welden* the court concluded that Congress failed in its effort to draft a constitutional statute. The court reasoned that since under the enforcement provision of the VWPA a restitution order could be enforced as a civil judgment it *was* a civil judgment. And, therefore, the proceeding which produced the restitution order (otherwise known as the sentencing hearing) must be a "suit at common law." The court concluded that the substantive and procedural rights guaranteed in a federal civil suit—procedure, discovery, cross-examination, etc.—were due any offender who, at "sentencing," may be ordered to pay restitution under the Act. Since the Act forbids any restitution determination which might unduly complicate or prolong sentencing, the *Welden* court de-

---

same facts, a restitution-sentencing proceeding need not comply with the same due process standards required of a civil proceeding. A "summary procedural pattern" suffices in the criminal sentencing setting while the civil proceeding must include a "plenary trial" with "formal evidence.").

199 568 F. Supp. at 535.

200 A. CAMPBELL, *supra* note 35, § 45, at 163-64.

201 *Id.* at 164.

202 *See* notes 109-13 *supra* and accompanying text; *see also* Appellee's Brief (*Welden*) *supra* note 149, at 63 (The Probation Act, 18 U.S.C. § 3561, lends itself to "less evenhanded" application since it, in contrast to § 3580, fails to specify the factors a court need consider or how much restitution a court should order given bodily injury or property damage.).

termined that the Act, in effect, unconsitutionally forbids these substantive and procedural rights.

The restitution provisions, however, should survive. Pre-Act federal law allowed enforcement of penalties "in like manner as judgments in civil cases." Neither restitution orders under the 1925 Probation Act, nor other penalties issued under federal criminal law have ever been treated as the *Welden* court treated sections 3579 and 3580. A sentence does not *become* a civil judgment merely because a statute provides that, for enforcement purposes, a sentence may be treated *as if* it were a civil judgment. Thus, the Constitution does not require the procedural and substantive safeguards the *Welden* court held essential to the restitution hearing. Further, even if the restitution order becomes a civil judgment, the order's equitable nature precludes the applicability of a seventh amendment right to jury trial.

The restitution order serves as a sentencing option. Acting within the parameters of the VWPA, the sentencing judge applies the established body of law governing sentencing. As such, restitution does and should properly become part of any sentence the judge in his discretion can order.

Congress enacted the VWPA in an effort to at least begin addressing the needs of victims and witnesses who become entangled in the federal criminal justice system. The restitution provisions, a part of the admittedly imperfect effort to compensate victims for their losses, must be given a fair chance to effect this noble end. Crime victims deserve at least this much.

Thomas M. Kelly