STATEMENT
OF

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BEFORE
THE

UNITED STATES SENTENCING COMMISSION

ON

PROTECTING CRIME VICTIMS' RIGHTS IN THE SENTENCING PROCESS

ON

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WASHINGTON, D.C.

Mr. Chairman and Distinguished Members of the Commission,

I am pleased to be here today to continue a discussion with the Sentencing Commission about how best to protect crime victims' rights in the sentencing process. The Commission's recently proposed amendments include a proposed policy statement concerning crime victims' rights. The proposal is long-overdue, and the Commission is to be commended for paying attention to the important subject of treating crime victims fairly.

I am here today to make four points about the Commission's proposed victims' amendment. In Part I of my testimony, I explain how the Commission's proposal, while well-intentioned, appears to have virtually no substantive effect. The provision simply reminds judges that they should follow federal statutes on crime victims' rights. Part I urges the Commission to consider doing more than admonishing judges to comply with existing law. In particular, the Commission should amend its policy statements to more thoroughly integrate crime victims into the sentencing process. I provide specific suggestions for how this might best be accomplished.

Part II of my testimony turns to another important part of sentencing – restitution – and urges the Commission to recommend to Congress that judges be given greater power to craft restitution awards. Current federal law authorizes judges to order restitution only for certain narrow categories of losses, such as to compensate victims for damage to their property or to reimburse them for medical expenses. The need to fit restitution awards into these narrow categories has led to considerable litigation about whether particular restitution awards made by district court judges were authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that judges should have broad authority to order defendants to pay restitution. Congress has mandated that restitution's purpose is to restore victims to where they would have been had no crime been committed. Unfortunately, the current restitution statutes do not permit trial judges to achieve that goal. In my testimony, I discuss specific examples of appellate court cases that have overturned quite appropriate district court restitution orders on the grounds that they were not statutorily-authorized. I urge the Sentencing Commission to recommend to Congress to extend these statutes and give judges appropriate power to craft proper restitution awards.

Part III of my testimony urges the Commission to recommend to Congress that it pass legislation giving judges greater power to prevent profiteering by criminals. The current federal law on the subject is apparently unconstitutional, yet neither the Justice Department nor the Congress has taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes merely because no one had taken the time to draft appropriate, constitutional legislation. Corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering as a condition of supervised release. In addition, it is possible to draft a constitutional statute that forbids profiteering by criminals. I offer some specific legislative suggestions along these lines.

Finally, in Part IV, I suggest that a crime victims' representative might make a useful *ex*

officio addition to the Commission.

Although I am a federal district court judge in the District of Utah, I appear today as a law professor from the S.J. Quinney College of Law at the University of Utah interested in the subject of crime victims' rights.[1] Nothing in these remarks is intended to comment on any pending cases and makes no positive commitment on legal issues that may arises in cases that come before me in my court. I appreciate the excellent assistance of Stewart M. Young in preparing this testimony.

I. THE COMMISSION SHOULD INTEGRATE CRIME VICTIMS INTO THE SENTENCING PROCESS.

A. The Current System Gives Victims A Limited Role in the Sentencing Process.

The outlines of the current sentencing system are well-known to the Commission. Here it is worth briefly highlighting the limited role for victims provided for by the Guidelines and Rules of Criminal Procedure. Under the current system, a "victim impact statement" is typically included in the pre-sentence report prepared by the probation office. This victim impact statement is often written by the victim and explains the effect of the crime. Later, at the sentencing hearing, victims are allowed to speak or "allocute." As Rule 32 of the Federal Rules of Criminal Procedure currently provides, "before imposing sentence" the court "must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence."[2] Yet while this rule gives many victims the right to allocute, courts typically seem to treat this right of allocution as a mere general exhortation about the effects of the crime rather than for providing specific information that goes into the Guidelines calculation.

Handling victim allocution in this way often means that victims' information will have little or no effect on the sentence imposed. The most important determinant of most sentences is the applicable guideline. To be sure, the Supreme Court recently held in the well-known *Booker* decision that the federal sentencing guideline scheme is "advisory."[3] But most district judges

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[1] *See, e.g.*, DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE (Carolina Academic Press 2d ed. 2005); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835.

[2] FED. R. CRIM. P. 32(i)(4)(B).

[3] *United States v. Booker*, 543 U.S. 200, 234 (2005) (remedial majority opinion by Justice Breyer).

continue to give the Guidelines "heavy weight"[4] and statistics collected by the Sentencing Commission show the most sentences continue to fall within the Guideline recommendations.[5]

B. The Crime Victims' Rights Act Commands that Victims Be Given an Expanded Role in the Sentencing Process, Including Access to Pre-Sentence Reports.

A limited role for victims has now become inconsistent with the role envisioned by Congress. In October 2004, Congress passed the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act."[6] Congress intended through this legislation to make crime victims real participants in the criminal justice process. To that end, the Act guarantees crime victims a series of rights, such as the right to be present and heard at appropriate points in the criminal justice process and the right to be treated fairly.[7]

Specifically, the Crime Victims' Rights Act guarantees crime victims the right "to be reasonably heard" and "to be treated with fairness" throughout the criminal justice process, including at sentencing hearings.[8] This congressional command is not an invitation for business as usual. Instead, Congress expected "*meaningful participation* of crime victims in the justice system . . . ."[9] In federal sentencings, crime victims cannot be such participants unless they are allowed an appropriate role in the process of determining the applicable sentencing guideline. In the great majority of cases, the Guidelines are *the* major factor driving a defendant's sentence. The Commission should allow victims an opportunity to be involved in that guidelines determination. The Commission should draft procedures (either alone or in cooperation with Judicial Conference's Criminal Rules Advisory Committee) that allow victims to review relevant

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[4] *See, e.g., United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005); *United States v. Wanning*, 354 F. Supp. 2d 1056 (D. Neb. 2005). *But cf. United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (suggesting lesser weight appropriate for the Guidelines).

[5] U.S. SENTENCING COMMISSION, U.S. SENTENCING COMMISSION SPECIAL POST-*BOOKER* CODING PROJECT (data extraction as of February 1, 2006) (Feb. 14, 2006). *See generally* Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, __ U. HOUSTON L. REV. ___ (forthcoming 2006) ("[I]t seems reasonable to predict that the guidelines will remain the predominant factor in determining individual sentences for years to come.").

[6] Pub. L. No. 108-405, § 102(a), 118 Stat. 226 (Oct. 30, 2004).

[7] *See generally* Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005).

[8] 18 U.S.C. § 3771(a)(4) & (8).

[9] 150 CONG. REC. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

parts of the pre-sentence report, including the all-important Guidelines calculation; to raise objections to any improper calculation; and to be heard on that calculation. Anything less will leave victims on the outside looking in at the process, rather than participating in the process as Congress – and justice – require.

One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. Among its comprehensive list of rights, the Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . ."[10] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[11] The right is not narrowly circumscribed to just impact information, however. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The CVRA appears to legally entitle victims to be heard on disputed Guidelines issues and, as a consequence, to review parts of the pre-sentence report relevant to those issues. As Senator Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.[12]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).[13] For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated:

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[10] 18 U.S.C. § 3771(a)(4).

[11] *See generally* DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE ch. 10 (2d ed. 2006) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

[12] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chap. 10 (discussing three types of victim impact information).

[13] *See supra* note 6.

> The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.[14]

Again, it is hard to see how victims can meaningfully provide "any information" and their "opinion" about a sentence without being told what everyone else in the courtroom knows – the Guidelines calculations that likely will drive the sentence.

Victims may often possess information quite relevant to the district court's assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to "victim-related adjustments."[15] This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnaping provision, for example, looks to such things as the degree of injury suffered by the victim.[16] The fraud provision looks to loss to the victim.[17]

To be sure, in many cases a prosecutor may bring some of these relevant facts to the court's attention. Indeed, under the new Act prosecutors are required to "use their best efforts" to insure that victims' rights are protected.[18] But the Act clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the Act begins: "A *crime victim* has the following rights . . . ."[19] Moreover, the Act specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.[20] This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.[21] As Senator Kyl explained about the right-to-be-heard

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[14] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[15] U.S.S.G. § 3A.1.1 *et seq.*

[16] U.S.S.G. § 2A4.1(b)(2).

[17] U.S.S.G. § 2B1.1(b).

[18] 18 U.S.C. § 3771(c).

[19] 18 U.S.C. § 3771(a).

[20] 18 U.S.C. § 3771(d).

[21] *See generally* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (explaining victim participation model of criminal

provision:

> This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings*.[22]

An independent basis for the victim reviewing pre-sentence reports is the victim's broad right under the CVRA to be "treated with fairness."[23] This right seems to comfortably encompass a right of access to relevant parts of the pre-sentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, *fairness includes the notion of due process*. . . . This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process.*[24]

Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that "[i]t is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner*.'" [25] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process. . . ."[26]

A victim's right to be heard regarding sentencing issues is important for another reason:

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justice).

[22] 150 CONG. REC. S10910-11 (Oct. 9, 2004) (remarks of Sen. Kyl) (emphasis added).

[23] 18 U.S.C. § 3771(a)(8).

[24] 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

[25] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[26] 150 CONG. REC. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.[27] While reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[28] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,[29] it is unclear how those provisions are integrated with the Guidelines procedural provisions.

For all these reasons, the Crime Victims' Rights Act should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters. It is therefore incumbent on the judiciary to take specific steps to integrate victims into the sentencing process.

C. The Commission's Proposed Victims' Provision is Inadequate.

It would not be difficult for the Judiciary to fold victims into sentencing process. All that would be needed are a few straightforward changes in the Federal Rules of Criminal Procedure and the *Federal Sentencing Guidelines Manual*. Elsewhere I have offered suggested changes to the federal rules.[30] Here I will focus on the changes needed in the *Manual*. As the Commission is aware from my previous testimony,[31] I believe that specific changes are need to the *Manual*. The Commission has apparently agreed that some change is appropriate, as it has recommended a new policy statement on crime victims' rights. Before turning to my own recommendations, it may therefore be worth briefly noting why the Commission's changes are, to my mind, inadequate.

The Commission has proposed a new policy statement that would instruct judges to adhere to federal law on crime victims' rights:

§ 6A1.5 Crime Victims' Rights (Policy Statement) (proposed)

In any case involving the sentencing of a defendant for an offense against a crime

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[27] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *accord* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[28] 18 U.S.C. § 3771(a)(6).

[29] 18 U.S.C. § 3664.

[30] *See* Cassell, *supra* note 1 (detailing proposed changes to the Federal Rules of Criminal Procedure).

[31] *See* Testimony of Paul G. Cassell Before the Sentencing Commission on the Effect of *United States v. Booker* on the Federal Sentencing Guidelines (Feb. 15, 2005).

> victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

This provision appears to do nothing more than instruct judges to follow the law. Such an instruction is unhelpful. Of course federal judges will follow the law – on crime victims' rights no less than on other subjects. This point is reinforced by the fact that ordinarily a court will not award an injunction that does nothing more than require a party of follow the law. As the Supreme Court has explained, "Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law."[32] Thus, courts have been skeptical of requests to order compliance with the law.[33] The Commission, too, should be skeptical of a policy statement that appears to do nothing other than restate existing law.

D. The Commission Should Make Specific Changes to the Guidelines to Protect Victims' Rights.

Rather than a purely symbolic injunction to follow the law, what trial judges need is specific guidance from the Commission on how to appropriately integrate crime victims into the sentencing process. It is here that the Commission, as the judiciary's expert agency on the subject, could be particularly helpful. In particular, the Commission should change the policy statements in the Guidelines to explain how crime victims are to participate in the Guidelines process. Currently those provisions allow only "the parties" (i.e., the prosecution and the defense) to dispute sentencing factors contained in the pre-sentence report. For example, section 6A1.3 provides: "When any factor important to the sentencing determination is reasonably in dispute, *the parties* shall be given an adequate opportunity to present information to the court regarding that factor."[34] In the wake of the CVRA, district judges can no longer follow that approach. The Commission should give guidance on what approach district judges should follow. I believe that the Sentencing Commission should make four changes to the Guidelines:[35]

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[32] *Waite v. Macy*, 246 U.S. 606, 608-09 (1918) (citing *First Nat'l Bank v. Abright*, 208 U.S. 548 (1908)).

[33] *Lauer Farms v. Waushara Country Bd. of Adjustment*, 986 F. Supp. 544, 554 (E.D. Wisc. 1997) ("Indeed, such an injunction would do little more than direct the defendant to follow the law in the future.").

[34] U.S.S.G. § 6A1.3(a) (emphasis added).

[35] In my earlier testimony to the Commission, I recommended changes similar to those proposed here. This testimony reflects my current thinking and research on these issues. *See generally* Cassell, *supra* note 1.

1. *Probation Officers Required to Investigated Victims Issues*

The Commission should change section 6A1.1 to insure that the probation officers include victim information in their pre-sentence reports as follows:

§ 6A1.1. Pre-sentence Report (Policy Statement)

(a) The probation officer must conduct a pre-sentence investigation and submit a report to the court before it imposes sentence unless —
  (1) 18 U.S.C. § 3593 (c) or another statute requires otherwise; or
  (2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the pre-sentence report.

(c) If a pre-sentence report is prepared, the probation officer must determine whether any victim wishes to provide information for the pre-sentence report.

The proposed change would require the probation office to affirmatively seek out the victim. It seems unlikely that a probation officer could properly prepare a thorough pre-sentence report without obtaining the victim's views. Indeed, the rules already require the probation officer to include victim information in the report.[36] Because there is no way to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate whether the victim has useful information. Of course, nothing in the proposed change would require the probation officer to include irrelevant or argumentative information in the report.

2. *Disclosure of Pre-sentence Report to the Victim*

The Commission should change section 6A1.2 to insure that victims have reasonable access to pertinent parts of the pre-sentence report as follows:

§ 6A1.2. Disclosure of Pre-sentence Report; Issues in Dispute (Policy Statement)

(a) The probation officer must give the pre-sentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the pre-sentence report to the victim.

Rule 32(e)(2), Fed. R. Crim. P.

(b) Within 14 days after receiving the pre-sentence report, the parties or the

[36] *See* FED. R. CRIM. P. 32(b)(2)(B).

victim, must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. An objecting party or victim must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties and any involved victim to discuss the objections. The probation officer may then investigate further and revise the pre-sentence report accordingly. Rule 32(f), Fed. R. Crim. P.

(c) At least 7 days before sentencing, the probation officer must submit to the court, ~~and to~~ the parties, and any involved victim, the pre-sentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comment on them. Rule 32(g), Fed. R. Crim. P.

Crime victims should have access to the substance of the pre-sentence report. The pre-sentence report is the central document at sentencing. Indeed, the main event at many sentencing hearings is resolving challenges to the report. Without access to the substance of that report, crime victims cannot effectively participate in the sentencing process. They will truly remain outsiders to a process, in spite of Congress' command that they be brought in.

I made this argument before the Commission in February 2005. In response, the Practitioners' Advisory Group disputed my proposal. In a letter to the Commission,[37] they argued that "nothing in the CVRA or its legislative history states that crime victims should be permitted to review portions of the pre-sentence report, dispute guidelines calculations, raise grounds for departures, or as such rights would seem to imply, appeal a sentence on factual or legal grounds."[38] The Group also cited the legislative history of a proposed constitutional amendment protecting victim's rights, which in its view limited a victim's right to be heard to mere "allocution" at sentencing – that is, merely providing victim impact information.

The Practitioners' Group's arguments are flawed for several reasons. First, the Group too narrowly views the CVRA's relevant legislative history. As explained above, Congress intended for victims to have broad rights in the sentencing process, including rights to be reasonably heard in a meaningful manner. It is not reasonable to deprive victims of the critical information in the pre-sentence report. Second, the Group misdescribes the relevant history of the constitutional amendment – known as the Victims' Rights Amendment. It is true that the Amendment contained a right to be "reasonably heard," just as the CVRA does. The Group does not recognize, however, that the legislative history of the Amendment suggests that Congress was taking an expanding view of the victim's right to be heard at sentencing, including a view

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[37] Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo Hinojosa (Feb. 28, 2005) (available at http://sentencing.typepad.com).

[38] *Id.* at 2.

that would embrace victim opinion evidence, as discussed in the note below.[39]

Most important, the Practitioners' Advisory Group's letter fails to consider the impact of the victim's right to fairness on the issues. Presumably the Group (which is comprised primarily of defense attorneys) would be outraged if sentencings occurred without notice to defendants about relevant parts of the pre-sentence report – and properly so. It would be unfair to force defense counsel to argue sentencing issues without basic information about what is being considered at the sentencing hearing. These same due process principles dictate that victims should receive this information as well.

The Practitioners' Advisory Group also seemingly raises a concern that can be immediately dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues would imply a right to appeal a sentence. It would not. The CVRA contains its own specific appellate provisions, which permit victim appeals only for denials of their rights.[40] It

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[39] The Group cites the Senate Judiciary Committee Report on the Victims' Rights Amendment, which in 2000 referenced a Tenth Circuit decision restricting the right of victims to present opinion evidence:

> At the same time, the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlimited today. Congress and the States remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that a victims' views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. *Cf. Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991) (concluding that victim opinion on death penalty not admissible). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.

S. REP. NO. 106-254 at 12 (2000). In 2003, however, the same passage in the Senate Judiciary Committee Report was changed to remove the citation to that case and instead cite the nation's leading exponent of expansive rights for victims:

> Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell Law Review 282 (2003). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.

S. REP. NO. 108-191 at 37 (2003).

[40] 18 U.S.C. § 3771(d)(5).

specifically allows a right to seek "to re-open . . . a sentence" only for violations of a victim's "right to be heard."[41] Moreover, while victims have due process protections, due process does not guarantee a right to an appeal.[42] Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense.[43] For all these reasons, victims have the right to review relevant parts of the pre-sentence report and be heard on Guidelines issues in the trial court, but not the right to appeal Guidelines issues to the appellate courts.

Because victims have a right of access to the pre-sentence report, the question then arises of how to provide that access. Nothing in current law precludes releasing pre-sentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. The federal courts that have considered the issue generally have held that circulation is allowed to third parties upon a proper showing of particularized need approved by the court.[44] Some courts' local rules also allow additional distribution with approval of the court.[45] Victims always have a particularized need for access to the Guidelines calculations and related parts of the pre-sentence report, as without such access they are unable to effectively make their sentencing recommendation.

In view of that legal landscape, the ways in which the Guidelines could handle disclosure of the pre-sentence reports to victims are:

(1) *Complete Disclosure.*

The Guidelines could direct full disclosure of the pre-sentence report to the victim. While there are apparently no statutory barriers to this approach, legitimate policy objections might be raised. Portions of the report may contain sensitive private information about the defendant (results of psychiatric examinations, prior history of drug use, childhood sexual abuse, and the like). The report may also reveal confidential law enforcement information that should not be widely circulated. Victims may not always need access to these limited parts of the report. While a number of states give victims unfettered right to access the pre-sentence

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[41] 18 U.S.C. § 3771(d)(5)(A).

[42] *See McKane v. Durston*, 153 U.S. 684 (1894).

[43] 18 U.S.C. § 3742.

[44] *See, e.g.*, *United States v.* Corbitt, 879 F.2d 224, 238 (7th Cir. 1989) (compelling, particularized need standard); *United States v. Schlette*, 842 F.2d 1574, 1576 (9th Cir. 1988) (interests of justice standard); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1173 (2d Cir. 1983) (compelling need standard).

[45] *See, e.g.*, D. Utah Crim. Local R. 32-1(c) (pre-sentence reports not released without order of the court).

report,[46] in the federal system a more limited approach is arguably appropriate. I will proceed on that assumption, although there is a certain simplicity and appeal to a flat rule simply giving the pre-sentence report to the victim.

(2) *Selective Disclosure.*

The Guidelines could direct that the probation office redact any pre-sentence report to remove confidential information and then provide the redacted report to the victim. This approach, too, is problematic; it would require considerable work by busy probation officers to prepare two separate documents – first a regular report, then a redacted report – presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential.

(3) *Disclosure Through Prosecutors.*

The simplest solution to the competing concerns is to disclose the report to victims through an intermediary, specifically the prosecutor. The prosecutor would serve as the filter for confidential information and could assist the victim by highlighting critical parts of the report. One might raise the concern that this approach would burden prosecutors, who are no less busy than probation officers. But the CVRA already gives victims the right to "confer" with prosecutors[47] – and presumably they will be conferring regarding the important topic of sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The CVRA also authorizes increased funding of $22 million for the Victim/Witness Assistance Programs in U.S. Attorney's Offices, so presumably they will be able to expand their victim services.[48]

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[46] ALA. CODE § 15-23-73 (1975) ("victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws"); ALASKA STAT. § 12.22.023 (giving victim right to look at portions of sentencing report); ARIZ. CONST. art. 2 § 2.1 (giving victim right to review pre-sentence report when available to the defendant); ARIZ. REV. STAT. § 13-4425 (giving victim right to review pre-sentence report "except those parts excised by the court or made confidential by law"); COL. REV. STAT. § 24-72-304(5) (giving prosecutor discretion to allow victim or victim's family to see pre-sentence report); FLA. STAT. § 960.001 (giving victim right to review pre-sentence report); IDAHO STAT. § 19-5306 (giving victim right to review pre-sentence report); IND. CODE § 35-40-5-6(b) (giving victim right to read and "respond to" material contained in the pre-sentence report); LA. CONST. art. 1 § 25 (giving victim "right to review and comment upon the pre-sentence report"); MONT. STAT. § 46-18-113 (giving prosecutor right to disclose contents of pre-sentence report to victim); OR. REV. STAT. §137.077 (pre-sentence report must be made available to victim).

[47] 18 U.S.C. § 3771(a)(5).

[48] *See* Pub. L. No. 108-405, 118 Stat. 2260, 2264 (2004).

Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, disclosure of the report should be required only upon request by a victim.

Some of the aspects of preparing and disclosing pre-sentence reports may be covered in Rule 32 of the Federal Rules of Criminal Procedure. As will be discussed shortly, the Commission should coordinate with the Committee on Criminal Rules to insure that any changes in the Criminal Rules are consistent with the provisions of the *Manual*.

3. *Changes to Involve Victims in the Resolution of Disputed Guidelines Factors*

The Commission should amend section 6A1.3 as follows to insure that crime victims have the opportunity to be involved in the resolution of disputed Guidelines factors:

§ 6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties and any involved victim shall be given adequate opportunity to present information to the court regarding that factor. . . .

[No further changes are recommended to this section.]

In addition, the Commission should amend section 6A1.4 as follows to recognize the possibility of a departure based on information contained in a victim impact statement:

§ 6A1.4. Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the pre-sentence report or in a party's or victim's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

For the reasons explained earlier, the victim's right to be "reasonably heard" at the sentencing hearing encompasses the right to be heard on guidelines issues. The changes in the *Manual* noted above would simply incorporate the victim in the process of determining the appropriate guideline.

Changing the rule in this fashion would also clarify the appropriate sequencing at sentencing hearings. Rule 32(i) already allows the victim to submit "any information" about the sentencing.[49] Yet if the experience in my court is any guide, the victim's allocution frequently occurs only after the court has decided all the issues surrounding the pre-sentence report. If the

[49] FED. R. CRIM. P. 32(i).

victim's right to provide information to the court is going to have any meaning, that information must be allowed to have possible effect on critical sentencing issues, including issues about Guidelines calculations.

The proposed changes would allow the victim to comment at the sentencing hearing on matters within the pre-sentence report. While it might be objected that the victim is not a party to the case, Congress intended that the victim become a participant in the process with rights "independent of the government or the defendant."[50] Those independent rights include the opportunity to make "sentencing recommendations."[51] Given that matters in the pre-sentence report may often determine what effect a sentencing recommendation will have, the victim's right would seem to extend to participating in the process that determines the Guidelines range.

E. Giving Crime Victims Rights Will Not Overburden the System.

It is my understanding that some judges may have suggested to the Commission that giving crime victims rights will burden the system. One response to this concern is simply that Congress has ordered federal courts to take whatever time is necessary to hear victims at the appropriate point of the process. Congress has spoken, and the courts must implement the congressional will.

But a more direct response to this concern is that victims rights' will not overwhelm the federal system for the simple reason that only a relatively modest percentage of federal criminal cases present crime victims issues. Of course, for the victims in those particular cases, protecting their rights is extremely important. But from a system-wide perspective, the number of cases presenting crime victims issues is not overwhelming.

F. Coordination with the Criminal Rules on Committee.

As noted earlier, several of these proposed changes implicate possible changes in the Federal Rules of Criminal Procedure. For that reason, it would appear to be advisable for the Sentencing Commission to coordinate any action that it takes in this area with the Criminal Rules Committee. Indeed, the Criminal Rules Committee will apparently soon be circulating for public comment proposed changes to the Criminal Rules that would provide for a greater role for crime victims. Obviously, the Commission would want to consider those proposals in determining how best to proceed.

II. THE SENTENCING COMMISSION SHOULD RECOMMEND TO CONGRESS LEGISLATION TO EXPAND JUDICIAL AUTHORITY ON RESTITUTION.

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[50] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[51] *Id.*

The Sentencing Commission should urge Congress to expand the federal restitution statutes to give judges greater authority to order convicted criminals to pay restitution to their victims. Current federal law authorizes judges to order restitution only in certain narrow categories, such as to compensate for damage to property or medical or funeral expenses. These narrow categories have led to considerable litigation about whether various restitution awards were properly authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that judges should have broad authority to order defendants to make restitution to restore victims to where they would have been had no crime been committed.

Trial courts should have broader authority to award restitution where the interests of justice so require. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[52] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[53] Unfortunately, however, because judges must fit restitution orders within the existing narrow statutory pigeon holes, this congressional purpose is not being fully achieved.

Before turning to the details of my proposal, it is appropriate to explain why the Sentencing Commission should give its attention to restitution. The current sentencing guidelines say little on the subject, essentially deferring to existing law.[54] But the Sentencing Commission has been charged with "mak[ing] recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."[55] In my view, crime victims' rights at sentencing generally – and restitution awards at sentencing in particular – are areas where modification of current statutes is necessary for carrying out "an effective, humane and rational sentencing policy."

It is also important for the Sentencing Commission to speak to help implement provisions of the Crime Victims Rights Act. The Act guarantees crime victims the "right to full and timely restitution as provided by law."[56] In light of that statutory command, the Sentencing Commission should help insure that victims' rights to restitution are fully protected.

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[52] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).

[53] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

[54] U.S.S.G. § 5E1.1 ("In the case of an identifiable victim, the court shall . . . enter a restitution order for the full amount of the victim's loss, if such order is authorized . . . .").

[55] 28 U.S.C. § 995(a)(20).

[56] 18 U.S.C. § 3771(a)(6).

A. Current Restitution Statutes Permit Judges to Award Restitution Only for Very Specific Items of Loss and for Narrow Connections to a Crime.

The Supreme Court has held that a district court's power to order restitution must be conferred by statute.[57] The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A – permit courts to award restitution for several specific kinds of loss, including restitution for loss of property, medical expenses, physical therapy, lost income, funeral expenses, and expenses for participating in all proceedings related to the offense. The statutes contain no general authorization for restitution to crime victims, even where such restitution is indisputably just and proper.

A case I handled last week will illustrate the problem. In *United States v. Gulla*,[58]
I sentenced a defendant for the crimes of bank fraud and aggravated identity theft. Ms. Gulla had pled guilty to stealing personal information out of the mail from more than 10 victims, and then running up false credit charges of more than $50,000. Government search warrants recovered an expensive Rolex watch and eleven leather jackets purchased by Ms. Gulla. Following the recommendation of the government, I sentenced Ms. Gulla to a term of 57 months in prison. I also ordered her to pay restitution for the direct losses she caused.

But the victim impact statements in the case revealed that they had suffered more than just financially from these crimes. One victim wrote about the considerable time expended on straightening things out:

> I was 71 years of age when two fraudulent checks were written on courtesy checks that were stolen from my mailbox. . . . There is no way to describe the frustration and time involved in contacting the various financial institutions, to determine if there were any other fraudulent charges. We had to stop automatic withdrawals since there were not funds available to cover the checks. We are grateful that we did not have to cover the checks because this would have been a problem. There was considerable time and frustrations involved in getting everything straightened out. I believe that justice should be satisfied and the guilty person be held accountable for breaking the law. Even to this day we worry about someone tampering with our mail. We have investigated a locked mail box and have not made any decision as yet.

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[57] *Hughey v. United States*, 495 U.S. 411, 415-16 (1990); *see also United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991) ("Federal court have no inherent power to order restitution. Such authority must be conferred by Congress.").

[58] 2:05-CR-634-PGC (D. Utah Mar. 8, 2006).

Another victim wrote that she spent a great deal of time clean up her credit:

> My husband and I are victims of Ms. Gulla's scam. We had a check stolen from our mailbox, and apparently she forged her name to it, and changed the amount.. . . Since then, it has cost us more than $200 in check fees, fees for setting up a new account, and fees for stopping payment on checks. This does not include my time (about 20 hours, and still counting) to track down outstanding checks, talking to the banks (mine and the one where she tried to cash the check), rearranging automatic deductions, talking to the sheriff and filling out appropriate paperwork.
>
> Now I am not able to put mail out in my mailbox, so I have to make [a] special trip to the post office to mail letters. As of this date, I am still attempting to clear up the affected account.
>
> This has been a great inconvenience for us, and it makes me question my safety in my home, if someone is able to gain access to my personal mail, what is next?

Finally, one last victim wrote about losing time with her children to deal with the crime:

> We felt, and continue to feel, very vulnerable now that something has been stolen out of our mailbox, something that allows someone with dishonest, selfish intentions access into our personal information. . . .
>
> [Another way the crime] impacted us was by loss of time. Ms. Gulla's selfish act caused us countless phone calls to the credit card company (and although they've been very helpful, they have not always been very speedy). We have had to spend time filling out forms and sending in paperwork to resolve this situation, which was no fault of our own. It has been extremely frustrating to do all this, especially since we are self-employed and have 3 small children. Any time we have spen[t] on Ms. Gulla's theft is time we are not running our own livelihoods or enjoying our precious children. That has been the biggest loss of all.

In light of these victim statements, it seemed to me (as I said in court) that I should be able to order restitution beyond the direct financial losses of the phony charges run up by the defendant. In particular, I thought it would be fair to order restitution for the lost time the victims suffered in responding to the defendant's crime. Unfortunately, as the government explained at the hearing, current law does not allow this. Restitution is not permitted for consequential losses[59] or other losses too remote from the offense of conviction.[60]

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[59] *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996).

[60] *See, e.g., United States v. Havens*, 424 F.3d 535 (7th Cir. 2005) (a victim of identify theft "takes the position that she is entitled to reimbursement for all the time she spent in this

The case law around the country demonstrates that this the particular problem is not unique. In many circumstances, courts of appeals have overturned restitution awards that district judges thought were appropriate, not because of any unfairness in the award but simply because the current restitution statutes failed to authorize them:

- In *United States v. Reed*,[61] the trial court ordered restitution to victims whose cars were damaged when the defendant, an armed felon, fled from police. The Ninth Circuit reversed the restitution award because the defendant was convicted of being a felon in possession of a firearm and the victims were not victimized by *that* particular offense.

- In *United States v. Romines*,[62] a defendant on supervised release absconded from his residence and employment, driving away on his employer's motorcycle and later cashing an $8,000 check from his employer's bank account. He was caught, and the district court ordered restitution of $8,000 to the employer as part of the sentence for the supervised release violation. The Eleventh Circuit reversed because the government, rather than the employer, was the victim of the defendant's violation: "The only victim of that crime was the government, whose confidence in [the defendant's] rehabilitation seems to have been misplaced." [63] Accordingly, the Eleventh Circuit overturned the restitution order because "of the absence of textual authority to grant restitution."[64]

- In *United States v. Cutter*,[65] the defendant sold a house to his niece, then filed a fraudulent bankruptcy petition. The defendant was convicted of false statements in the petition. At sentencing, the district court ordered the defendant to pay his niece $21,000 in restitution because of her losses in a fraudulent conveyance action instituted by the bankruptcy trustee. The First Circuit overturned the order because the niece was not a direct victim of the defendant's criminal action of

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endeavor [of clearing credit], but in our view that goes too far"); *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (victim's attorney's fees too remote); *United States v. Kenney*, 789 F.2d 783, 784 (9th Cir. 1986) (wages for trial witnesses too remote).

[61] 80 F.3d 1419, 1421 (9th Cir. 1996).

[62] 204 F.3d 1067 (11th Cir. 2000).

[63] *Id.* at 1069.

[64] *Id.*

[65] 313 F.3d 1 (1st Cir. 2002).

filing a fraudulent petition before the bankruptcy court.[66]

- In *United States v. Havens*,[67] the defendant pleaded guilty to various offenses relating to identity theft. The victim had earlier pursued a civil action against the defendant, receiving $30,000 in damages, and the district court ordered restitution in that amount. The Seventh Circuit reversed this restitution order, holding that it was unclear which damages and costs qualified as appropriate losses under the Mandatory Victims Rights Act.[68]

- In *United States v. Shepard*,[69] a hospital social worker drained a patient's bank account through fraud. The hospital paid the patient $165,000 to cover the loss. The social worker was later convicted of mail fraud and the district court ordered restitution of the $165,000 to the hospital. But the Seventh Circuit held that the patient was the only direct victim of fraud in the case and reversed the restitution order to the hospital.[70]

- In *United States v. Rodrigues*,[71] a defendant, an officer of a savings and loan, was convicted of numerous charges stemming from phony real estate transactions. The district court found that Mr. Rodrigues usurped a S&L's corporate opportunities by substituting himself for the S&L in four real estate deals and ordered him to pay $1.5 million in restitution – his profits in those deals. The Ninth Circuit reversed, holding that since the defendant's profits arose from the defendant taking his victim's corporate opportunities, rather than from direct losses by the S&L, restitution was improper. "Although the corporate opportunity doctrine allows recovery for a variety of interests, including mere expectancies, restitution under the VWPA is confined to direct losses."[72]

- In *United States v. Stoddard*,[73] the trial court ordered substantial restitution by the

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[66] *Id*. at 8-9.

[67] 424 F.3d 535 (7th Cir. 2005).

[68] *Id*. at 538-39.

[69] 269 F.3d 884 (7th Cir. 2001).

[70] *Id*. at 886-87.

[71] 229 F.3d 842 (9th Cir. 2000).

[72] *Id*. at 846.

[73] 150 F.3d 1140, 1147 (9th Cir. 1998).

defendant, an official of a savings bank. The defendant misappropriated $30,000 from an escrow account and used the money to fund two real estate purchases. He subsequently netted $116,223 in profits from the real estate transactions. Although the trial court ordered restitution to the savings bank based on the defendant's profits, the Ninth Circuit set the order aside because that the restitution statute only allowed restitution for direct losses.[74]

- In *Government of the Virgin Islands v. Davis*,[75] the defendant pleaded guilty to conspiracy to defraud, forgery, and related counts in connection with an attempt to defraud an estate of more than a million dollars in real and personal property. The trial judge ordered restitution that included the attorney's fees spent by the estate to recover its assets, but the Third Circuit reversed: "Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order."[76]

- In *United States v. Arvanitis*,[77] the trial court awarded attorney's fees in favor of a victim who had spent considerable money investigating the defendant's fraud. The Seventh Circuit reversed because the restitution statute for property offenses "limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorney's fees, unavailable."[78]

- In *United States v. Elias*,[79] the defendant forced his employees to clean out a 25,000 gallon tank filled with cyanide sludge, without any treatment facility or disposal area. He was convicted of violating the Resource Conservation and Recovery Act by disposing of hazardous wastes and placing employees in danger of bodily harm. The district court ordered the defendant to pay $ 6.3 million in restitution. The Ninth Circuit overturned the restitution order because the restitution statute only authorizes imposition of restitution for violations of Title

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[74] *Id*. at 1147.

[75] 43 F.3d 41 (3rd Cir. 1994).

[76] *Id*. at 47.

[77] 902 F.2d 489 (7th Cir. 1990).

[78] *Id*. at 496.

[79] 269 F.3d 1003 (9th Cir. 2001).

18 and certain other crimes, not environmental crimes.[80]

- In *United States v. Sablan*,[81] a defendant was convicted of computer fraud, and the district court ordered restitution including consequential damages of $5,350 incurred by the victim. The Ninth Circuit reversed the part of the restitution order based on consequential damages, such as expenses arising from meeting with law enforcement officers investigating the crime, because such expenses were not strictly necessary to repair damage caused by defendant's criminal conduct.

- In *United States v. Blake*,[82] the defendant was convicted of using stolen credit cards and the district court ordered restitution to victims for losses that resulted from their stolen credit cards. Even though there was a clear factual connection between Mr. Blake's conduct and the offense of his conviction, the Fourth Circuit reversed a restitution order reluctantly. "Although the result we are compelled to reach represents poor sentencing policy, the statute as interpreted requires the holding that the persons from whom Blake stole the credit cards do not qualify as victims of his offense of conviction, and as such he cannot be ordered to pay restitution to them . . . the factual connection between his conduct and the offense of conviction is legally irrelevant for the purpose of restitution."[83]

- In *United States v. Hays*,[84] the defendant was convicted of possession of stolen mail, specifically three credit cards. The trial court ordered him to pay restitution to the credit card companies of $3,255 for charges to those stolen credit cards. The Eleventh Circuit reversed, because the charges were not caused by the specific conduct that was the basis of the offense of conviction (mail fraud).

The point here is not that any of these restitution awards were correctly or incorrectly made by the trial judges under the current statutory framework. Instead, the point is that it appears to me that the judges in these cases *should* have had authority to make these awards. After all, at sentencing a trial judge has full and complete information about the nature of the offense, the impact of the crime on the victim, and the defendant's personal and financial

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[80] *Id*. at 1021-22; *see also United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999) (holding that the district court lacked legal authority to order restitution to the IRS for the defendant's tax liability); *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) (holding that the VWPA does not authorize restitution for Title 26 tax offenses).

[81] 92 F.3d 865, 870 (9th Cir. 1996).

[82] 81 F.3d 498, 506 (4th Cir. 1996).

[83] *Id*.

[84] 32 F.3d 171, 173-74 (11th Cir. 1995).

circumstances.[85] When a judge has reviewed all of that information and determined that restitution is appropriate, it is not clear why that order should be subject to further litigation about whether it fits into some narrow statutory category. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[86] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[87] Unfortunately, however, because judges must fit restitution orders within narrow pigeon holes, this congressional purpose may not be fully achieved.

B. The Restitution Statutes Should Be Broadened to Give Judges Power to Make Such Restitution Awards as are Just and Proper in Light of all the Circumstances.

The main federal restitution statute – 18 U.S.C. § 3663A – should be amended to give judges broad discretionary authority to enter restitution awards that are just and proper in light of all the circumstances. Congress should amend § 3663A to read as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.
(2) For the purposes of this section, the term "victim" means a person ~~directly and proximately~~ harmed or who suffered loss or injury as a result of the commission of an offense for which restitution may be ordered, or who suffered harm, injury, or loss that would not have happened but for the defendant's crime, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a

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[85] *See* FED. R. CRIM. P. Rule 32(d)(1)(B), (2)(A)(i)-(iii) ("The presentence report must . . . calculate the defendant's offense level and criminal history category; . . . the defendant's history and characteristics, including; any prior criminal record; the defendant's financial condition; any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment . . ."); *see also* Rule 32(c)(B) ("If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.").

[86] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).

[87] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to–

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim–

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services and, in the court's discretion, any appropriate sum to reflect income lost to the victim's surviving family members or estate as a result of the death; ~~and~~

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense~~.~~; and

(5) in any case, to pay to the victim any amount or transfer to the victim any property that the court in its discretion finds is just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury, harm, or loss, that

the victim has suffered as a result of the defendant's crime or that would not have happened but for the defendant's crime.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense–

(A) that is–

~~(i) a crime of violence, as defined in [18 U.S.C. § 16];~~
~~(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or~~
~~(iii) an offense described in [18 U.S.C. § 1365] (relating to tampering with consumer products);~~ an offense against the United States and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss or other harm of any type, including any consequential loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with [18 U.S.C. § 3664].

These modifications make several important changes. First, in section (c)(1)(A), restitution would be authorized for *any* federal offense. It is nonsensical to limit restitution to offenses found in certain parts of Title 18. This leads to the results described above in cases such as *United States v. Elias*, where the Ninth Circuit was forced to overturn a restitution award against a defendant who committed criminal violations of environmental laws only because Congress had not thought to authorize it in the restitution statutes.

Second and most important, the restitution statute would be changed to broadly authorize trial judges, in their discretion, to award restitution where it was fair. Restitution would be authorized any time it was "just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury,

harm, or loss, that the victim has suffered as a result of the defendant's crime or that would not have happened but for the defendant's crime." This sweeping authorization would avoid pointless litigation about whether a restitution award happened to fit into one statutory cubby hole or another. Instead, the focus would be on whether restitution was "just and proper." Obviously, a defendant would be free to appeal such awards (just as restitution awards can be appealed now). But the focus on appeal would be on the appropriateness of the award, not parsing technical statutory authorizations.

It is important to emphasize that this authorization would give *discretion* to trial judges to enter broad restitution awards. Because a sentencing judge has considerable information – both about the defendant and the victim – it is appropriate to vest discretion over this particular kind of award. Other, more indisputable areas of restitution (such as for loss of property or medical or funeral expenses) would remain mandatory, as they are under current law.

Third, the statute would be changed to give judges discretion in homicide cases to award restitution to surviving family members for the income that the murder victim would have earned. This is an issue that is currently before the appellate courts, with the question being whether the "lost income" provision in the statute applies only to bodily injury cases or to homicide cases as well.[88] Regardless of how that litigation about the current statutory regime ultimately plays out, it is hard to see any argument against permitting judges to order this kind of restitution. Prominent members of Congress have spoken in favor of lost income restitution in

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[88] *Compare United States v. Bedonie*, 317 F. Supp. 2d. 1285 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005) (holding that lost income calculation and restitution proper under the MVRA) *and United States v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992) (holding that prosecution produced sufficient evidence that $100,000 award to widow of murder victim for lost income was relatively conservative and that the award had adequate support) *and United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996), *aff'd without discussion of restitution issues sub nom., United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (ordering restitution of direct and indirect victims of arson in which one firefighter was killed and one seriously injured, and requiring payment for the lost earnings of the deceased paid to his widow) *with United States v. Checora*, 175 F.3d 782, 795-96 (10th Cir.1999) (vacating a district court's restitution order based on insufficient evidence after the district court found that a murder victim paid Child and Family Services for the upbringing of his children) *and United States v. Jackson*, 978 F.2d 903, 914-15 (5th Cir. 1992), *cert. denied*, 508 U.S. 945 (1993) (reversing a district judge's restitution order for the victims' lost income and funeral expenses in a well-publicized murder and kidnaping because the district court did not make any factual findings concerning the amount of the victims' losses) *and United States v. Fountain*, 768 F.2d 790, 801-03 (7th Cir. 1985) (holding that future income calculations and restitution "unduly complicates the sentencing process and hence is not authorized by the [VWPA].").

homicide cases.[89] The proposed changes would reflect that position.

Fourth, the statute would be changed to recognize "but for" causation as a basis for awarding restitution. Under current law, the fact a loss would not have occurred "but for" the defendant's crime is an insufficient basis for a restitution award. As the Third Circuit explained, legal "fees might plausibly be considered part of [the victim's] losses, [but] expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy)" even if those expenses would not have resulted "but for" the criminal conduct.[90] Restitution for "but for" losses, however, seems entirely fair and is indisputably what Congress wants. Congress wants restitution "to restore the victim to his or her prior state of well-being to the highest degree possible."[91] Permitting judges to require defendants to make restitution for losses that would not have occurred but for the defendant's crimes would go a long way towards helping to restore victims to their prior state of well-being.

Fifth, the proposed changes would allow a judge to award restitution for consequential damages. As a matter of policy, there is no justification for the results in cases like *Government of the Virgin Islands v. Davis*, where a victim suffers a consequential loss from a crime (such as attorney's fees) and yet a sentencing judge is not empowered to award restitution. When a victim suffers a loss as a consequence of a defendant's crime, the sentencing judge should be able to order a defendant to pay for it.

One form of consequential damage is emotional distress. Crime victims have often had to resort to a separate civil suit to obtain such damages. From a policy perspective, this makes little sense. When a criminal is convicted, his guilt has been established by proof beyond a reasonable doubt, and harm to a victim – such as emotional distress – is a obvious and foreseeable consequence. It is therefore entirely appropriate to allow the sentencing judge to award restitution for emotional distress as part of the criminal proceeding when the judge believes it is appropriate to do so. Nothing in the proposal would alter existing law provided that, if a victim chooses to file a separate civil suit, any resulting civil judgment would be reduced by the amount of the restitution award.

One last note: In many cases, defendants will lack the financial resources to pay sizable restitution awards. But that is not a good reason for depriving trial judges of authority to order such awards in appropriate cases. And in all cases, after restitution is awarded, the sentencing

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[89] *See* 150 CONG. REC. S10910 (Oct. 9, 2004) (statement by Sen. Kyl) ("We specifically intend to endorse the expansive definition of restitution given . . . in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004 [awarding lost income in two homicide cases]").

[90] *Davis*, 43 F.3d at 46-47.

[91] *Hill*, 798 F.2d at 405 (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

judge will set an appropriate payment schedule based on a defendant's ability to pay.[92]

C. Expanding Judicial Authority to Award Restitution Does Not Violate a Defendant's Constitutional Rights.

Expanding restitution in the fashion described here will not violate a defendant's constitutional rights. It is important to understand that the changes proposed here would operate within the framework of a larger statutory scheme. Defendants would, of course, still be entitled to notice and hearing about any proposed restitution.[93] Defendants would also be able to appeal any inappropriate award.

The constitutional questions that have been raised about expanding restitution have typically centered around two points: first, whether the Supreme Court's decision in *United States v. Hughey* requires that losses be directly tied to an offense of conviction; and, second, whether expanded restitution awarded by judges would violate a defendant's right to a jury trial under either the Sixth or Seventh Amendments. Neither of these concerns is well-founded.

1. *Hughey v. United States Involved a Narrow Statutory Question.*

In 1990, the Supreme Court in *Hughey v. United States* considered a narrow statutory issue. The Court reviewed an award of restitution made by the federal trial court under VWPA which called for restitution for charged and convicted offenses.[94] After pleading guilty to one count of a six count indictment, the trial court ordered Mr. Hughey to pay restitution in the amount of $90,431. This figure resulted from Mr. Hughey's alleged theft and unauthorized use of 21 credit cards, although Mr. Hughey pleaded guilty to the use of only one specific credit card.[95] Looking at the language of the restitution statute itself, the Court held that "restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense."[96] Although faced with policy questions "surrounding VWPA's offense-of-conviction limitation on restitution orders," the Court declined to resolve such issues.[97] Rather, the Court relied on the "statutory language regarding the scope of a court's authority to

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[92] 18 U.S.C. § 3664(f)(2)-(3).

[93] 18 U.S.C. § 3664(b), (d)(3), (e).

[94] 495 U.S. 411 (1990).

[95] *Id*. at 414.

[96] *Id*. at 416.

[97] *Id*. at 419.

order restitution," finding the language unambiguous.[98] And even if such language had been ambiguous, the Court's "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant . . . preclude[d its] resolution of the ambiguity" in favor of criminal restitution.[99]

It is clear this case simply turned on what the restitution statute in question authorized – restitution only for the offense of conviction – and therefore the Court clearly held that the sentencing judge was without authority to do anything more. Of course, a broader statute of the type proposed above would not suffer from this defect. Because it is a decision of *statutory* interpretation, *Hughey* cannot be read as shedding light on constitutional issues.

2. *A Defendant Is Not Entitled to a Jury Trial on Restitution, Even if Broad Forms of Restitution are Allowed.*

Turning to constitutional issues, the main constitutional challenge that has been raised to broad restitution statutes is that they would trigger a need for a jury trial, under either the Sixth Amendment or the Seventh Amendment. These challenges are unfounded.

a. The Sixth Amendment Does Not Give a Defendant a Right to Jury Trial on Restitution Issues.

Even in the wake of *Blakely* and *Booker*'s expansion of a defendant's Sixth Amendment right to a jury trial, it is clear that restitution of the type proposed here would not trigger the need for a jury trial.

The Circuits that have looked at the question in recent months have uniformly held that judges can undertake the fact-finding necessary to support restitution orders under *Blakely* and *Booker*.[100] As the Sixth Circuit recently explained, "Nor does [] *Booker*'s analysis of the Sixth

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[98] *Id.*

[99] *Id.*

[100] *See, e.g.*, *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam) ("We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment."); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) ("We have accordingly held that *Apprendi v. United States* . . . does not affect restitution . . . and that conclusion is equally true for *Booker*."); *United States v. May*, 413 F.3d 841, 849 (8th Cir. 2005) ("Several circuits have affirmatively rejected the notion that . . . *Booker* affect the manner in which findings of restitution can be made. . . . These cases are persuasive."); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005) ("In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*.").

Amendment affect restitution, because a restitution order for the amount of loss cannot be said to 'exceed the statutory maximum' provided under the penalty statutes."[101] Of course, the proposed changes described above expand the existing statutory maximum, so that a defendant who commits a federal crime would be on notice that he was subject to a restitution order for any amount that was "just and proper" to restore a victim. Judicial fact-finding under that broad umbrella would not increase the penalty to which a defendant is exposed, the trigger for a Sixth Amendment jury trial right.

The conclusion that a defendant is not entitled to a jury trial on restitution is supported by another consideration: historically, dating to the earliest days of this country, judges have made restitution decisions.[102] At common law, for example, restitution was a statutory remedy "to be awarded *by the justices* on a conviction of robbery or larceny."[103] This common law rule was recognized by the Supreme Court in 1842 in *United States v. Murphy*:

> The statute of 21 Hen. VIII., c. 2, gave full restitution of the property taken, after the conviction of an offender, of robbery. The writ of restitution was to be granted by the justices of the assize . . . .[104]

And forcible entry and detainer is one crime in which it was common to encounter provision of a restitutionary remedy at common law. Upon conviction by a jury of forcible entry and detainer, for example, *Blackstone's Commentaries* explains that "besides the fine on the offender, the justices shall make restitution by the sheriff of the possession . . . ."[105] Many states early on criminalized forcible entry upon and detainer of land, and often these statutes authorized the judge to order restitution and the payment of damages upon conviction.[106]

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[101] *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005).

[102] The following material is taken from *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1323-26 (D. Utah 2004), *aff'd*, 428 F.3d 1300 (10th Cir. 2005).

[103] 16 C.J.S. *Criminal Law* §3255 (1918) (citing 21 Hen. VIII c 11; 7 & 8 Geo. IV c 29 § 57) (emphasis added).

[104] 41 U.S. 203, 206 (1842).

[105] 4 BLACKSTONE COMM. p. 117 (2001 Mod. Engl. ed. of the 9th ed. of 1793).

[106] *See Allen v. Ormsby*, 1 Tyl. 345 (Vt. 1802) (citing sec. 5 of the forcible entry and detainer act of February 27, 1797); *Crane v. Dodd*, 2 N.J.L. 340 (N.J. 1808) (citing sec. 13 of the state's forcible entry and detainer act providing for an award of "treble costs"); *People ex rel. Corless v. Anthony*, 4 Johns. 198 (N.Y. Supp. 1809) (citing St. 11th Sess. c. 6, forcible entry and detainer statute authorizing an award of restitution and damages to the aggrieved party). *But see Commonwealth v. Stoever*, 1 Serg. & Rawle 480 (Pa. 1815) (no damages allowed under state's forcible entry and detainer statute).

It is quite clear that restitution ordered by judges was routinely available at common law and in the early American courts as a remedy for the crimes of larceny and forcible entry and detainer. This also supports the conclusion that restitution has historically been understood as a "civil" and not a "punitive" remedy. Judge-ordered restitution as part of the sentence for these crimes did not appear to be controversial around the time of the country's founding. And even if most larceny sentences did not require judges to find additional facts to calculate restitution, the evidence does not establish that this was universally so and it seems probable that judges would sometimes have been required to set a specific valuation for restitutionary purposes when an indictment only specified (or the jury only found) value as "less than 200 shillings" for purposes of establishing the degree of the crime. To the extent that this kind of additional judicial fact-finding likely occurred in some larceny cases, it supports the conclusion that the Framers would have understood the "criminal prosecution" to which the Sixth Amendment right to a jury trial extended as not implicating restitution.

For all these reasons, a defendant has no Sixth Amendment right to a jury trial on restitution awards.

b. The Seventh Amendment Does Not Give Defendant's a Right to Jury Trial on Restitution Issues.

It might be argued that expanding restitution to cover such things a consequential damages (including emotional distress damages) would trigger a defendant's right to jury trial under the Seventh Amendment. The Seventh Amendment, of course, protects the constitutional right of all persons – not just criminal defendants – to a jury trial in a civil case. The amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[107] It would be odd, to say the least, to discover that while the amendment directly addressing the procedural rights of criminal defendants – the Sixth Amendment – does not give defendants a right to a jury trial on restitution, somehow the Seventh Amendment jury trial provision does. Such a conclusion would be contrary to the general rule of constitutional construction that the specific must take precedence over the general. Indeed, the Supreme Court has stated that if "a constitutional claim is covered by a specific provision . . , the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."[108] As the Seventh Amendment applies only to civil suits, and does not specifically discuss criminal prosecutions, criminal procedures, or restitution orders, the specific again must take precedence over the general.

A few courts, however, have noted that there is a possible issue in this area. In *United*

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[107] U.S. CONST. amend. VII.

[108] *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

States v. Scott,[109] a panel of the Seventh Circuit stated that "to blur the line" between criminal restitution and common law damages "would create a potential issue under the Seventh Amendment because the amount of criminal restitution is determined by the judge, whereas a suit for damages is a suit at law within the amendment's meaning."[110] *Scott* dealt with a restitution order for audit expenses incurred by the employers which Mr. Scott defrauded. The Seventh Circuit concluded that the MVRA required restitution in the amount equal to the loss of the value of property that resulted from the criminal conduct. Although that court discussed whether common law damages applied to such a restitution order, it ultimately affirmed the award of restitution because "damage-to-property" had occurred.[111] At the end of the day, *Scott* does not actually say much about the Seventh Amendment as a potential barrier to judicially-determined restitution orders, but rather touches on the issue to point out the distinction between restitution and common law damages.

It is clear from the cases cited in *Scott*, however, that the overwhelming view in the Circuit Courts is that the Seventh Amendment does not apply to a criminal restitution hearing. While the Supreme Court itself has yet to reach the question, it has recognized that every "Federal Court of Appeals that has considered the question [of whether judicially-ordered restitution violates the Seventh Amendment] has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment."[112] The Circuits that have decided the issue often take the position that a restitution order is "penal" rather than "compensatory" and therefore conclude the Seventh Amendment simply does not apply.[113]

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[109] 405 F.3d 615, 619 (7th Cir. 2005).

[110] *Id*.

[111] *Id*.

[112] *Kelly v. Robinson*, 479 U.S. 36, 53 n.14 (citing cases from Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 62 TEXAS L. REV. 671, 672 n.18 (1984)).

[113] *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) (citing *United States v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985) (citing cases from the Second, Eighth, Ninth, Tenth, and Eleventh Circuits)); *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) ("Congress made restitution . . . a criminal penalty."); *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984) ("Restitution is a permissible penalty imposed on the defendant as part of sentencing."); *United States v. Satterfield*, 743 F.3d 827, 837 (11th Cir. 1984) ("restitution as part of the criminal sentence"); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("restitution . . . serves . . . traditional purposes of punishment . . . [and is a] useful step toward rehabilitation"); *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984) (restitution as an "aspect of criminal punishment"). *See, e.g.*, Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto*

My own view is that it is better to avoid a debate about whether to label restitution as penal or compensatory. Indeed, I believe a strong case can be made that restitution is, at least for some purposes, best described as "compensatory."[114] The notion of compensating victims for losses attributable to the defendant's crime is logically and intuitively non-punitive. Restitution is, instead, a device ultimately aimed at restoring the victim back into the position he occupied prior to his victimization. And regardless of the context, as the Seventh Circuit noted in *United States v. Newman*, while "[t]he criminal law may impose punishments on behalf of all of society, . . . equitable payments of restitution in this context inure only to the specific victims of a defendant's criminal conduct and do not possess a similarly punitive character."[115] After all, even the Supreme Court has noted that the ordinary meaning of restitution is to "restor[e] someone to a position he occupied before a particular event."[116]

Regardless of whether restitution is in some sense penal or compensatory, however, there is a straightforward way to reach the conclusion that restitution is not covered by the Seventh Amendment jury trial guarantee. As explained by the Second Circuit in *Lyndonville Savings Bank & Trust Co. v. Lussier*,[117] because "adjudication of the restitution is an adjunct of sentencing and is therefore part of a criminal proceeding, the Seventh Amendment providing for the preservation of the right of a trial by jury in civil suits does not apply."[118] The Circuit noted that "judicially ordered restitution in criminal cases has a long history, rooted in the common law at the time the Seventh Amendment was adopted."[119] Finally, the Second Circuit relies on "the purpose and process of adjudicating the amount of restitution in a criminal proceeding . . . as part of a defendant's sentence [to serve] the traditional penal functions of punishment, including

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Implications of the Mandatory Victims Restitution Act of 1996, 68 U. CHI. L. REV. 463, 489 (2001) (arguing that construing the MVRA as a civil penalty raises serious Seventh Amendment concerns, and advocates courts considering restitution under the MVRA as a criminal penalty).

[114] *See Visinaiz*, 344 F. Supp. 2d at 1320-23 (developing the argument and citing supporting authority), *aff'd*, 428 F.3d 1300. *See, e.g.*, *United States v. Nichols*, 169 F.3d 1255, 1279 (10th Cir. 1999) ("[W]e believe the district court erred in viewing restitution as a punitive act, thus leading it into the albeit logical but nonetheless erroneous conclusion it could not apply the MVRA."); *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993) ("the VWPA's purpose is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses").

[115] 144 F.3d 531, 538 (7th Cir. 1998).

[116] *United States v. Hughey*, 495 U.S. 411, 416 (1990).

[117] 211 F.3d 697, 702 (2d Cir. 2000).

[118] *Id*.

[119] *Id*.

rehabilitation."[120]

In a widely-quoted opinion written by Judge Richard Posner, the Seventh Circuit has reached much the same conclusion. In *United States v. Fountain*,[121] the Circuit considered the constitutionality of a federal restitution statute under the Seventh Amendment. The Circuit concluded that "criminal restitution is not some newfangled effort to get around the Seventh Amendment, but a traditional criminal remedy; *its precise contours can change through time without violating the Seventh Amendment*."[122] Looking at the historical analogy of the restitution statute, the Circuit commented that restitution of stolen goods was an established criminal remedy predating the Seventh Amendment.[123] And since restitution is "frequently an equitable remedy, meaning of course, that there is no right of jury trial," then a district judge's restitution order does not violate the Seventh Amendment.[124]

Judge Posner's conclusion makes sense as a matter of the historical record. Indeed, from certain historical examples, consequential damages, including treble damages were often awarded as restitution. This common law practice of restitution was retained in several state statutes in the early years of the Republic.[125] *Ross v. Bruce*,[126] *Commonwealth v. Andrews*,[127] and *Crane v. Dodd*,[128] cite state statutes which provided for treble damages to the victim of theft after the defendant had been convicted. It is clear that as a historical matter, consequential damages,

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[120] *Id.*

[121] 768 F.2d 790, 800-02 (7th Cir. 1985).

[122] *Id*. at 801 (emphasis added).

[123] *Id*.

[124] *Id*.

[125] *See* Act of September 15, 1786 (12 St.L. 282-283 Ch. 1241 (Penn.); *Ross v. Bruce*, 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft); *Commonwealth v. Andrews*, 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) (citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).

[126] 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft).

[127] 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).

[128] 2 N.J.L. 340 (N.J. 1808) (citing sec. 13 of the state's forcible entry and detainer act providing for an award of "treble costs").

through an award of treble damages upon conviction of the defendant, were awarded by some state courts as a matter of course. Thus restitution, including certain compensatory damages awards, were clearly an established criminal remedy in earlier times.

Judge Posner's conclusion also makes sense as a matter of practicalities. Today, a defendant who is found guilty by a jury of, for example, bank fraud in violation of 18 U.S.C. § 1344 faces a penalty of up to 30 years in prison, a fine of up to $1,000,000, and restitution for property that the bank lost even if it is in the millions of dollars. It would odd in the extreme to say that, on her own, a judge could order a defendant to be sent off prison for many years and to pay restitution for millions of dollars in losses, but nevertheless had to hold a jury trial before awarding such things as attorney's fees or other consequential damages. The jury trial protections of the Constitution should not be trivialized by being read in such a haphazard fashion.

III. THE SENTENCING COMMISSION SHOULD URGE CONGRESS TO GIVE JUDGES GREATER AUTHORITY TO PREVENT CRIMINALS FROM PROFITING FROM THEIR CRIMES.

The Sentencing Commission should encourage Congress to pass legislation that would give judges sufficient power to insure that criminals do not profit from their crimes. The current federal law on the subject is apparently unconstitutional, yet neither the Justice Department nor the Congress has taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes merely because no one had taken the time to put in place an effective prohibition. Corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering, and the Sentencing Commission should urge Congress to do so.

A. The Current Federal Law Forbidding Profiteering from Crimes is Unconstitutional.

By way of background, the federal criminal code, like the codes of various states, contains a provision concerning forfeiture of profits of crime. This provision, found in 18 U.S.C. § 3681, allows federal prosecutors to seek a special order of forfeiture whenever a violent federal offender will receive proceeds related to the crime. Congress adopted this statute in 1984,[129] and modeled it after a New York statute popularly known as the "Son of Sam" law.[130] In 1977, New York passed its law in response to the fact that mass murderer David Berkowitz received a $250,000 book deal for recounting his terrible crimes.

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[129] Pub. L. No. 98-473, 98 Stat. 2175 (Oct. 12, 1984).

[130] N.Y. Exec. Law § 632-a (McKinney 1982 and Supp.1991).

In 1991, the United States Supreme Court found that the New York Son of Sam law violated the First Amendment. In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,[131] the Court explained that the New York law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[132] The New York statute that was struck down covered reenactments or depictions of a crime by way of "a movie, book, magazine article, tape recording, phonograph record, radio, or television presentation, [or] live entertainment of any kind."[133]

The federal statute is widely regarded as almost certainly unconstitutional, as it contains language that is virtually identical to the problematic language in the old New York statute. In particular, the federal statute targets for forfeiture depictions of a crime in "a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind."[134] Thus, it can easily be argued by a criminal that the statute contains the same flaw – the targeting of protected First Amendment activity – that the Supreme Court found unconstitutional in the New York statute. Indeed, the Supreme Court in *Simon & Schuster* cited the federal statute as similar to that of New York's.[135] Moreover, the current guidance from the Justice Department to its line prosecutors is that this law cannot be used because of constitutional problems.[136]

B. Anti-Criminal-Profiteering Legislation Could Give Judges Expanded Power to Prevent Profiteering as a Condition of Supervised Release.

Unfortunately, neither the Department of Justice nor Congress have taken steps to revise the defective federal anti-profiteering statute in the wake of *Simon & Schuster*. Fortunately, there appears to be a relatively straightforward and constitutional solution available to Congress. As the Massachusetts Supreme Court has recognized in analyzing *Simon & Schuster*, nothing in the First Amendment forbids a judge from ordering in an appropriate case, as a condition of a sentence (including supervised release), that the defendant not profit from his crime. As *Commonwealth v. Powers*[137] explains, such conditions can be legitimate exercises of court power to insure rehabilitation of offenders and to prevent an affront to crime victims. These conditions

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[131] 502 U.S. 105 (1991).

[132] *Id.* at 116.

[133] N.Y. Exec. Law § 632-a(1) (McKinney 1982), *reprinted in* 502 U.S. at 109.

[134] 18 U.S.C. § 3681(a).

[135] *See* 502 U.S. at 115.

[136] *See* DOJ Criminal Resource Manual 1105.

[137] 650 N.E.2d 87 (Mass. 1995).

do not tread on First Amendment rights, because they do not forbid a criminal from discussing or writing about a crime. Instead, they simply forbid any form of "profiteering."

I recommend that the Sentencing Commission urge Congress to give judges the power to order, in an appropriate case, that a term of supervised release be extended beyond what would otherwise be allowed for the sole purpose of insuring that a criminal not profit from his crime. For example, in a notorious case, upon appropriate findings, a judge might be empowered to impose a term of supervised release of life with the single extended condition that a criminal not profit from his crime. Legislation that the Sentencing Commission could urge Congress to pass might look like this:

> 18 U.S.C. § 3583
>
> . . .
>
> (b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.
>
> <u>Not withstanding any other provision of law, a court may impose a term of supervised release for any term of years or life that includes as a provision the requirement that a defendant not profit from his or her crime. Notwithstanding any other provision of law, at any time the court may extend an existing term of supervised release to any term of years or life upon a finding that a defendant may profit from his or her crime.</u>

This approach would recognize that sometimes after sentencing facts come to light suggesting that a defendant might be about to profit from his crime. Accordingly, this approach would allow extension of an existing term of supervised release (thereby assuring that the court has jurisdiction over a defendant) upon a finding that the defendant might profit.

C. Broader Legislation Could Forfeit any Profits from Profiteering.

While extending the terms of supervised release is a good way to prevent profiting that is about to occur, it does not address the problem of a criminal who has already profited. For example, a sentenced criminal might receive funds from a book deal before a court or victim becomes aware of this fact. Alternatively, a defendant might traffic in some tangible article that has gained notoriety – and value – because of its role in a crime

To deal with such situations, it would be appropriate to amend the federal anti-profiteering statute – 18 U.S.C. § 3681 – so that it can address such situations by forfeiting any profits a defendant obtains from a crime. The problem with the statute now, as with the old New York law, is that it targets First Amendment speech – and only First Amendment speech – for forfeiture. The statute could be redrafted to cover *all* forms of profiteering from a crime, not just

those involving speech. A new statute could also be put in place to forbid defendants from profiting by selling tangible articles that have gained notoriety (and thus value) because of their association with the crime.

"Son of Sam" laws generally target the profits from book or movie deals, thereby trying to prevent the specter of a criminal profiting at the expense of his victim. Son of Sam laws typically forfeit any profits a criminal obtains from his crime and makes them available to crime victims. As noted earlier, in 1991 the Supreme Court found that the New York Son of Sam law, which required any entity contracting with an accused or convicted person to turn over income relating to that contract, to be an unconstitutional restriction on speech.[138] *Simon & Schuster, Inc.*, held that the New York statute was a content-based restriction on speech because it imposed a financial disincentive only on one particular kind speech. The Court concluded that the statute was not narrowly tailored enough to constitutionally achieve the compelling state interest of compensating crime victims.

After *Simon & Schuster, Inc.*, a number of states adopted what might be called "second generation Son of Sam laws. These statutes attempted to comply with *Simon & Schuster, Inc.* by broadening their focus.[139] Surprisingly, however, many of these statutes continued to target expressive activity protected by the First Amendment, leading to a rocky reception in appellate courts.

The fate of Nevada's anti-profiteering statute can serve to illustrate the problem of laws focusing on speech. In 1993, the Nevada legislature changed its Son of Sam law – Nevada Revised Statute § 217.007 – to address constitutional issues raised in *Simon & Schuster, Inc*.[140] The revised Nevada statute created a cause of action for a victim's right to sue within five years of the time when a convicted person "becomes legally entitled to receive proceeds for any contribution to any material that is based upon or substantially related to the felony which was perpetrated against the victim."[141] The Nevada Legislature defined "material" as "a book, magazine or newspaper article, movie, film, videotape, sound recording, interview or appearance on a television or radio station and live presentations of any kind."[142] In 2004, the Nevada

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[138] *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991).

[139] *See, e.g.*, CAL. CIV. CODE § 2225 (adopted in 1994); COLO. STAT. § 24-4.1-204 (adopted in 1994); IOWA CODE ANN. § 910.15 (adopted in 1992); 42 PENN. CON. STAT. § 8312 (adopted in 1995); TENN. CODE ANN. § 29-13-403 (adopted in 1994); VA. CODE ANN. § 19.2-368.20 (adopted in 1992).

[140] *See Seres v. Lerner*, 102 P.3d 91, 94 (Nev. 2004).

[141] NEV. REV. STAT. § 217.007(1) (adopted 1993).

[142] *Id*. at (3)(a).

Supreme Court invalidated the statute in *Seres v. Lerner*.[143] Given that the statute clearly targeted expressive activity and was content-based, the Nevada Supreme Court concluded that the statute was unconstitutional because it chilled First Amendment speech. Indeed, the statute targeted solely expressive activity, rather than "all fruits of the crime" or anything "related to the crime" to provide a victim's right of action to the proceeds due a convicted person.

A similar fate befell California's anti-profiteering statute in 2002, which also singled out income from speech. The California statute, first enacted in 1983, sought to forfeit proceeds from expressive activities related to crime. The salient provision (enacted before *Simon and Schuster, Inc*.) imposed an involuntary trust, in favor of crime victims, on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound records, radio and television appearances, and live presentations) that "include or are based on" the "story" of a felony for which the felon was convicted, except where the materials mention the felony only in "passing . . . , as in a footnote or bibliography."[144] In *Keenan v. Superior Court*,[145] the California Supreme Court invalidated this provision, concluding that it "focuses *directly and solely on income from speech*."[146] As a content-based restriction on speech, it confiscated proceeds from "the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."[147] The statute was "calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies."[148] Interestingly, the California Supreme Court did not address a newer part of the statute – one that confiscated profits deriving from sales of memorabilia, property, things or rights for a value enhanced by their crime-related notoriety value

As one last example, in 2002 the Massachusetts Supreme Judicial Court found that a proposed Massachusetts' "Son of Sam" law violated the First Amendment and a parallel provision in the Massachusetts Declaration of Rights.[149] The proposed statute required "any

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[143] *Seres*, 102 P.3d at 94.

[144] CAL. CIV. CODE § 2225, as described in *Keenan v. Superior Court*, 40 P.3d 718, 730-31 (Cal. 2002).

[145] *Id*. at 718.

[146] *Id.* at 729 n.14 (emphasis added).

[147] *Id*. at 731.

[148] *Id*. at 722.

[149] *Opinion of the Justices to the Senate*, 764 N.E.2d 343, 352-53 (Mass. 2002). In the interest of full disclosure, I consulted on the drafting of an amicus brief in the case which urged that the proposed statute was constitutional.

entity (contracting party) contracting with a 'defendant' to submit a copy of the contract to the [Attorney General's] division within thirty days of the agreement if the contracting party [knew] or reasonably should [have known] that the consideration to be paid to the defendant would constitute 'proceeds related to a crime.'"[150] The statute was not limited to convicted felons, but also swept in persons with pending criminal charges. And it defined "proceeds related to a crime" as "any assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime from whatever source received by or owing to a defendant or his representative, whether earned, accrued, or paid before or after the disposition of criminal charges against the defendant."[151] It then provided the Massachusetts Attorney General's Office the opportunity to determine whether the proceeds under the contract were "substantially related to a crime, rather than relating only tangentially to, or containing only passing references to, a crime," and required the contracting party to pay the Attorney General's Office the monies owed to the defendant under the contract or post a bond covering such amount within fifteen days.[152]

The Supreme Judicial Court concluded the proposed statute was unconstitutional for a number of reasons. First, the statute was overbroad as it applied not only to convicted felons, but also to anyone with pending criminal charges.[153] Second, the statute held the funds in escrow for over three years, during which a claims process was required. The Supreme Judicial Court found this to be overexcessive and lengthy.[154] Finally, the statute called for a final determination by the Attorney General's Office, rather than the court, which the court found to be an invalid prior restraint of expressive speech.[155] The Court noted that the statute "burdens only expression with a particular content, namely, works that describe, reenact or otherwise are related to the commission of a crime."[156] In the alternative, it suggested "less cumbersome and more precise methods of compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety."[157] These included "probation conditions, specifically designed to deal with a defendant's future income and obligations, [to] be imposed," while lamenting the statute's targeting of "publishing and entertainment industries and interfering with an entire

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[150] *Id*. at 345.

[151] *Id*.

[152] *Id*.

[153] *Id*. at 348-49.

[154] *Id*. at 349-50.

[155] *Id*. at 351-52.

[156] *Id.* at 347.

[157] *Id*. at 350.

category of speech."[158]

To my mind, the First Amendment problem with these statutes (at least as determined by the courts that invalidated them) is that they continued to "directly and solely" target speech in some way or another. A broader statute aimed at *all* profits from a crime – not just profits from expressive activity – would not suffer from this First Amendment problem. A clear example comes from Arizona, which allows forfeiture of *anything* connected with a racketeering offense. An Arizona statute permits a prosecutor to obtain a forfeiture order for "any property or interest in property acquired or maintained by a person in violation [of the racketeering statute]" and "all proceeds traceable to an offense included in the definition of racketeering . . . [including] all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense."[159] And the statute defines the proceeds "as any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form."[160]

The validity of this statute was tested by "Sammy the Bull" Gravano. He was convicted of racketeering and drug distribution, and the state later moved for forfeiture of all of Mr. Gravano's rights to payments, royalties, and other interests in connection with a forthcoming book about his life as a New York mobster. In *Napolitano v. Gravano*,[161] the Arizona Court of Appeals upheld the constitutionality of the forfeiture statute because it was inherently content neutral and required forfeiture of *anything* connected with his racketeering offense.

As the Arizona Court of Appeals found, "Arizona's forfeiture statutes contain[ed] no reference to the content of speech or expressive materials."[162] It also found that the "purposes of these statutes apparently include removing the economic incentive to engage in [criminal racketeering], . . . compensating victims of racketeering, and reimbursing the State for the costs of prosecution." As such, despite the concern "the work from which the Mr. Gravano's royalties arise is expressive in nature," that court found that the "purposes [of the statute were] speech- and content-neutral, and any effect on speech [was] incidental.[163] In addition, the forfeiture would "not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law [was] based on a causal connection with racketeering, not just a mention of it in an expressive

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[158] *Id*.

[159] ARIZ. REV. STAT. § 13-2314(G)(1),(3).

[160] *Id*. at (N)(3).

[161] *See, e.g., State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 253 (Ariz. Ct. App. 2002).

[162] *Id*. at 253.

[163] *Id*. at 252.

work."[164] Finally, that court distinguished Arizona's forfeiture statute with the Supreme Judicial Court's decision in *Opinion of the Justices to the Senate* because "Arizona's forfeiture laws require the State to file an action in court and to prove the underlying racketeering and the connection between the racketeering and the property subject to forfeiture."[165] Such a "burden of proof . . . on the State [would alleviate] the due process concerns expressed by the Massachusetts Supreme Court."[166]

The Arizona forfeiture statute was not only content-neutral, but also dealt with the other concerns raised in cases such as *Seres*, *Keenan*, and *Opinion of the Justices to the Senate*. First, the statute did not target expressive activity, but targeted the "proceeds" of racketeering, including "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly." Finding that Mr. Gravano's book royalties "derived from the act" directly or indirectly, the court could reasonably find that such activity was ripe for forfeiture. And the court, rather than the Attorney General's Office, was to make such a determination. Finally, the court ordered forfeiture from the defendant, rather than the publishing company or any other person.

Congress should pass an anti-profiteering statute that follows the approach taken by Arizona. A defendant should not be permitted to profit from a crime. A crime should be an occasion for punishment and restoration of victims, not an occasion for profit – in short, crime shouldn't pay. There appears to be wide agreement on this proposition around the country, as proven by the pervasiveness of Son of Sam statutes.[167] Congress should make sure that federal felonies do not become profit-making ventures.

Congress should therefore adopt an anti-profiteering statute that broadly forbids profiting from a crime in any way – not profiting solely through protected First Amendment activities. Congress should amend the anti-profiteering statute – 18 U.S.C. § 3681 – to cover all profits that a defendant receives from a crime. In addition, the federal statute's coverage should be extended. Currently it applies to offenses under 18 U.S.C. § 794 (delivering defense information to a foreign government) or "an offense against the United States resulting in physical harm to an individual." There is no reason that the statute should be limited to such offense. Victims of *any* felony federal crime should be able to prevent any kind of profiteering by a defendant. The statute should cover serious criminals – e.g., felons – and only after they have been convicted. And, in addition to prosecutors, crime victims should be able to initiate forfeiture actions themselves.

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[164] *Id*. at 255.

[165] *Id*.

[166] *Id*.

[167] *See Validity Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R.4th 1210 (collecting about 20 state statutes).

Accordingly, Title 18 U.S.C. § 3681 should be revised to provide:

§ 3681. Order of special forfeiture

(a) Upon the motion of the United States attorney or a victim of a crime, as recognized under section 3771 of this title, made at any time after conviction of a defendant for ~~an~~ a felony offense ~~under section 794 of this title [18 U.S.C. § 794] or for an offense~~ against the United States ~~resulting in physical harm to an individual~~, or upon the court's own motion, and after notice to any interested party, the court shall, if the court determines that ~~the interest of justice~~ the defendant is profiting from the crime or an order of restitution ~~under this title~~ so requires, order such defendant to forfeit all or any part of funds and property received from any source by a person convicted of a specified crime to the extent necessary to prevent profiting from the crime or to satisfy an order of restitution. ~~proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.~~ A defendant is not profiting from a crime if the financial advantage he or she obtains is only tangentially or incidentally connected with the crime.

~~(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.~~

~~(c)~~ (b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--
(A) be levied upon to satisfy--
(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and
(ii) a fine imposed by a court of the United States; and
(B) if ordered by the court in the interest of justice, be used to--
(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and
(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.
(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

~~(d)~~ (c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the

defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

This reconstructed anti-profiteering statute would require a judicial determination that a convicted felon is "profiting from the crime." The phrase is not further defined, so that the federal courts can construe it broadly but constitutionally.[168] The phrase is negatively defined as *not* including any profits that are only tangentially or incidentally linked to the crime, an exclusion similar to that found in the Arizona statute and highlighted by the Arizona Court of Appeals as an appropriate qualification.[169] (In addition, the statute would allow a crime victim to obtain money to satisfy a previously-entered restitution award, but this part of the statute is simply an enhancement of already well-established law.)

Rather than linking to the content of any speech or the expressive activity, the statute attacks more broadly the general problem of criminals profiting from their crimes. As such, this proposed statute – like the Arizona statute – would not target any expressive activity. It therefore does not run afoul of any First Amendment constraints.

This reconstructed statute would retain the constructive trust provision found in current law. Under subsection (b), when the government forfeits profits from a crime, they would go to the Crime Victims Fund. This provision of the statute serves a compelling state interest, further enhancing the constitutionality of the statute.

The relationship between preventing profiteering and awarding restitution deserves brief exploration. Any income source available to a convicted person who has been ordered to pay restitution should be tapped to satisfy the restitution award. An example of the compelling need to attach a defendant's income to satisfy a restitution award comes from the District of Maryland case of *Kimberlin v. Dewalt*.[170] This case dealt with a parolee convicted of detonating eight dynamite bombs in the Speedway, Indiana area in 1978. The victims were grievously injured, and one committed suicide a few years later. One of the victims obtained a $1.61 million jury

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[168] *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems."); *Morrison v. Olson*, 487 U.S. 654, 682 (1990) ("[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities."); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (same).

[169] *See Napolitano*, 60 P.3d at 255 ("Forfeiture should not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law is based on a causal connection with racketeering, not just a mention of it in an expressive work."); *see also* ARIZ. REV. STAT. § 13-2314(G)(1),(3), (N)(3).

[170] 12 F. Supp. 2d 487 (D. Md. 1998).

verdict for her injuries and the wrongful death of her husband. The parolee did not satisfy this award and was released on supervised parole. He then inherited a substantial amount of money from his father. He also entered into a recording and book contract, centering around allegations he had sold marijuana to Dan Quayle and his subsequent treatment by the Bureau of Prisons. The Probation Office imposed a special condition of parole ordering the parolee to make payments to the victim in accordance with the civil judgment. Although the Probation Office required payment by the parolee, it did not cite the federal restitution statute as its authority for the special condition of parole.[171] When challenged, the district court held that the order did not violate *Simon & Schuster* because, the District Court concluded, "the book money was but one of several resources from which the judgment could have been paid."[172]

The situation in *Kimberlin* is addressed, at least to some extent, by current restitution law. The Mandatory Victims' Restitution Act's procedural provision – 18 U.S.C. § 3664(n) – requires any substantial new moneys received by a criminal to go to restitution. Unfortunately, that statute is restricted to situations where a defendant is incarcerated. It thus would not apply to the *Kimberlin* facts, which involved a defendant on supervised release. The restitution provision on this topic should therefore be amended as follows:

> If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, supervised release, or probation, such person shall be required to apply the value of such resources to any restitution or fine still owed.

D. Congress Should Adopt a Federal "Murderabilia" Statute.

The problem of preventing profiteering from crimes will not be completely addressed unless Congress also puts in place a statute preventing criminals from profiting by trafficking in what is known as "murderabilia." In recent years, a number of notorious criminals have tried to make money by selling items that have gained noteriety (and thus value) simply because of their association with the criminal or his crime.[173] For example, numerous items belonging to

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[171] *Id*. at 496.

[172] *Id*.

[173] Andy Kahan in the City of Houston's Crime Victims' Office deserves special recognition for leading the crusade on this issue. *See* Tracey B. Cobb, *Comment, Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1503 n.156 (2003) ("[Andy] Kahan has been a leader in the movement to prevent the trade of murderabilia and worked with the Texas Legislature to draft the murderabilia statute in 2001."); ABC News: 20/20 (ABC television broadcast, Nov. 7, 2001) (interviewing Andy Kahan, who stated that "No one should be able to rob, rape and murder and then turn around and make a buck

convicted serial killers, including toenail clippings, hair, autographed t-shirts, and used television sets, among others, have all recently been sold within the last five years.[174] All of these types of items have become known as "murderabilia." A typically used definition for such items is "manufactured items representative of criminals or crimes, such as murderer trading cards or figurines, and non-manufactured items associated with the criminals or crimes themselves."[175]

The proposed revisions to the federal anti-profiteering statute described above may go a long way towards addressing such deplorable money-making by federal felons. After all, selling tangible crime-related items for money is a classic example of "profiting from the crime," which would lead to forfeiture under my proposal. But to avoid any misunderstanding, a federal statute squarely addressing the point should be put on the books.

A federal statute addressing murderabilia should have several features. First, it should be limited to serious crimes – felony crimes seems like a reasonable approach. Second, it should cover federal offenses (unless Congress determines to stamp out the inter-state market in muderabilia, as discussed below). Third, it should cover not only a criminal but also his representatives and assignees, lest a criminal be able to profit by the simple expedient of using a family member or friend. Fourth, to avoid First Amendment complications, it should not cover book or movie rights, but rather should focus primarily on tangible, non-expressive items.

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off it."); Jeff Barnard, *Murderabilia: People Want to get Closer to Killer; Internet Accessible: City Official Wants to Eradicate the Ghoulish Industry*, TELEGRAPH-HERALD (Dubuque, IA), at A4 (Oct. 8, 2000) (crediting the coining of the term "murderabilia" to Andy Kahan, and crediting him as a key player in the "crusade to wipe [the murderabilia market] out.").

[174] *See* Eric Berger, *Lawmakers Seek to Halt Killer Sales*, HOUS. CHRON., Feb. 28, 2001, at 31 (reporting that Angel Maturino Resendiz, who murdered twelve people in a five-state killing spree, agreed to offer feet scrapings for sale); John Ellement, *SJC Offers Warning on Proposed Crime-Profits Law*, BOSTON GLOBE, Mar. 16, 2002, at B3 (noting that nails and hair clippings from admitted murderer Coral Eugene Watts were all sold via an Internet auction); *see also* Rog-Gong Lin II & Wendy Lee, *Unabomber "Murderabilia" for Sale*, LOS ANGELES TIMES, July 26, 2005 at A1 (noting following for sale on "murderabilia" websites: William George Bonin, known as the "Freeway Killer" -- 13-inch Sony stereo sound and color television, offered for $750; John William "Possum" King, who dragged to death a black man in Texas -- autographed T-shirt, offered for $2,000; Charles Manson -- Manson's handprint, signed, and a drawing done by another inmate depicting Manson behind bars with a saw, offered for $900; Scott Peterson, killer of his wife, Laci, and their unborn son -- a letter written from the county jail during his trial, sold for $500; Richard Ramirez, the "Night Stalker" serial killer -- photocopy of two childhood pictures of Ramirez with his inscription, "On a tricycle rolling on a highway to Hell, Richard," offered for $200; Aileen Wuornos, serial killer and subject of the movie "Monster" -- a handwritten envelope mailed from death row, offered for $300).

[175] Cobb, *supra* note 173.

One way of drafting such a federal statute would be as follows, based on the California provision:[176]

> Title 18 U.S.C. § 3681A. Forfeiture of Proceeds from Sale of Memorabilia by Convicted Felon
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> (a) Upon a motion of the United States attorney or a victim of a crime, made at any time after conviction of a defendant for a felony offense against the United States, or upon the court's own motion, and after notice to any interested party, the court shall, if the court determines that the defendant, his representative, or assignee, is profiting from the sale or transfer for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony for which the felon was convicted, order the proceeds received by the defendant, his representatives, or assignees, forfeited to the extent necessary to prevent profiting from the crime or to satisfy an order of restitution. Memorabilia and property shall include any tangible memorabilia, property, autograph, or other similar tangible thing, but not including any book, movie, painting, or similar rights addressed in 18 U.S.C. § 3681. An order of restitution shall not to apply to sale of materials where the defendant is exercising his or her First Amendment rights, and shall not apply to the sale or transfer of any other expressive work protected by the First Amendment, unless the sale or transfer is primarily for a commercial or speculative purpose.
>
> (b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--
> (A) be levied upon to satisfy--
> (i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and
> (ii) a fine imposed by a court of the United States; and
> (B) if ordered by the court in the interest of justice, be used to--
> (i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and
> (ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.
> (2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.
>
> (c) As used in this section, the term "interested party" includes the defendant and any

[176] *See* CAL. CIV. CODE § 2225.

transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

As discussed above, the California Supreme Court declared certain provisions of the California Son of Sam law facially invalid under the Free Speech Clause of the First Amendment and the California Constitution.[177] The salient provision of that statute imposed an involuntary trust, in favor of crime victims, on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound records, radio and television appearances, and live presentations).[178] Concluding that the statute "focuse[d] *directly and solely on income from speech*," the California Supreme Court declared it unconstitutional.[179] Indeed, that statute was "calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies."[180] But, as also noted above, the California Supreme Court failed to address the issue at play in this murderabilia proposal – confiscation of the profits derived from sales of memorabilia, property, things, or rights enhanced by their crime-related notoriety value. Narrowly drafting this proposed statute to solely target tangible items that do not constitute expressive activity or speech would enable it to survive constitutional review. It would also allow district court judges to insure that convicted felons do not profit further from their crimes, or the notoriety of their crimes.

Another possible way of drafting the federal statute would be to follow the approach taken in Texas.[181] A federal statute drafted to track that statute might look like the following:

Title 18 U.S.C. § 3681A. Forfeiture of Proceeds from Sale of Memorabilia by Convicted Felon

(a) Upon a motion of the United States attorney or a victim of a crime, made at any time after conviction of a defendant for a felony offense against the United States, or upon the court's own motion, and after notice to any interested party, the court shall determine whether a sale has occurred of tangible property belonging to the defendant, the value of which is increased by the notoriety gained from the conviction. Upon a finding by the court that such a sale has occurred, the court shall transfer to the Crime Victims Fund in

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[177] *See supra* note 144-148; *Keenan*, 40 P.3d 718 (Cal. 2002).

[178] CAL. CIV. CODE § 2225, as described in *Keenan v. Superior Court*, 40 P.3d 718, 730-31 (Cal. 2002).

[179] *Id.* at 729 n.14 (emphasis added).

[180] *Id*. at 722.

[181] TEX. CODE. CRIM. PROC. art. 59.06(k)(1)-(2).

the Treasury all income from the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person convicted of the crime. The court shall determine the fair market value of the property that is substantially similar to that property that was sold but that has not increased in value by the notoriety and deduct that amount from the proceeds of the sale. After transferring the income to the Crime Victims Fund, the United States attorney shall transfer the remainder of the proceeds of the sale to the owner of the property.

(b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--
(A) be levied upon to satisfy--
(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and
(ii) a fine imposed by a court of the United States; and
(B) if ordered by the court in the interest of justice, be used to--
(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and
(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.
(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

This approach, mirroring the Texas murderabilia statute, would essentially tax the profits of the convicted felon's sale of tangible property as long as the profit arose from the notoriety of the conviction. It would not prohibit convicted felons from selling their tangible property, but would only forfeit the proceeds of any sale based on the value of similar items. The Texas murderabilia provision has yet to be challenged in the Texas courts, but recent commentary concludes that the "murderabilia provision [is the] Texas Son of Sam law's strongest element."[182] That commentary indicates that by "shifting the focus away from speech and toward a more generalized category of notoriety for profit, the murderabilia provision lends acceptability to the

[182] Cobby, *supra* note 173, at 1514.

Texas Son of Sam law under the [*Simon & Schuster, Inc.*] framework."[183] As the proposed statute avoids content-based speech, does not consider whether the content of what is sold is related to the crime, and allows for felons to reap fair market value for the sale, the proposed statute would pass constitutional muster as well.

One last note is worth briefly mentioning. Congress might reasonably conclude that the problem of trafficking in "murderabilia" is an inter-state problem that warrants a federal prohibition. Congress might reasonably conclude that in this age of the Internet, the only way to truly stamp out the gruesome trade is to pass a federal law forbidding not only criminals but all persons from dealing in murderabilia. Such a statute would go beyond the scope of my testimony today, which focuses on sentencing issues related to criminals. I simply highlight the point here in case the Sentencing Commission, the Criminal Law Committee, or Congress is interested in pursuing it.

IV. A Crime Victim Representative Should Be Added Ex Officio to the Sentencing Commission

One last idea about how to improve the treatment of crime victims deserves a brief mention. Currently the Sentencing Commission is composed of seven voting members and two *ex officio* members – the Chair of the Parole Commission and the Attorney General or his designee. Jim Feldman has recently made the quite reasonable suggestion that, in addition to these two Justice Department representatives, a defense bar representative should be added. He has persuasively explained that the defense bar is an important player that has no voice on the Sentencing Commission.[184]

While the idea of adding a defense representative seems a good one, I would add that a representative of the crime victims' community would also make a good *ex officio* addition to the Commission. A crime victims' representative would be able to ensure that the needs of victims are not overlooked in the sentencing process.

CONCLUSION

In my testimony, I have tried to offer specific suggestions about how the Sentencing Commission should change the Guidelines and recommend legislation to Congress so as to improve the treatment of crime victims during sentencing. In closing, I would like to make a plea that, regardless of what the Commission does with my particular ideas, the Commission should at least take part in the discussion in this country about crime victims' rights.

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[183] *Id*.

[184] TESTIMONY OF JAMES E. FELDMAN BEFORE THE CRIME SUBCOMMITTEE OF THE HOUSE JUDICIARY COMM. ON THE EFFECTS OF *BOOKER* (Mar. 16, 2006).

The Commission's current contribution to the dialog – the proposed policy statement directing judges to follow existing victims' law – is not particularly instructive. Perhaps this is by design, as it can be argued that the Sentencing Commission should do nothing in the area of crime victims' rights, abandoning the field to the Criminal Rules Committee or the Criminal Law Committee (and perhaps ultimately Congress). But I would encourage the Commission to at least be a part of the victims' rights discussion. In particular, the Commission has fact-finding and other powers that may be particularly helpful in investigating the proper role of crime victims at sentencing. Crime victims' rights have received too little attention from the courts, from Congress, from the Executive, from academic commentators – and from the Sentencing Commission. I would respectfully urge the Commission to help bring to an end the benign neglect of this important topic.