

Federal Criminal Restitution:

Basic Steps and Developing Issues

Catharine M. Goodwin
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Overview: basic principles

- Statutory authority and criteria
- Most R orders are:
 - a separate sentence
 - 20+ year-life of its own
 - mandatory
- Criteria for victims and harms different than for GL economic loss or for civil damages



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Historical Mileposts

1. 1982: Victim Witness Protection Act (VWPA)
– §§3663 and 3664
2. 1990: Hughey case; scheme provision added (§§ 3663a (a)(2), 3663A(a)(2))
3. 1994: Violence vs. Women Act – e.g. § 2259
4. 1996: Mandatory Victims Restitution Act (MVRA) – changes §§ 3663, 3664; adds § 3663A
5. 2004: Crime Victims Rights Act (CVRA)–§ 3771



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Main Statutory Provisions

- **§ 3663A(a)(2)**: Mandatory R; victims “directly and proximately” harmed; specified offenses (violence; fraud).
- **18 U.S.C. § 3663**: “Discretionary” R; victims “directly & proximately” harmed; remaining title 18 & drug offenses.
- **§ 3664(f)(1)**: “In each order of restitution, the court *shall* order restitution to each victim in the *full amount of each victim’s losses*” (without regard to defendant’s financial circumstances) **Applies to all R orders per 18 USC 3556.**

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4-STEPS in determining restitution:

- **Step 1** – ID the *offense of conviction* (OC)
- **Step 2** – ID the *victims* of the OC
- **Step 3(a)** – ID the harms *caused* to the victims by the OC
- **Step 3(b)** – Are those harms *compensable*?
- **Step 4** – How are those harms *measured*?



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Step 1: What is the Statutory Offense of Conviction (OC)?



The OC determines –

- IF the restitution is a separate *Sentence*
[It is, so long as the OC is listed in or otherwise covered by a restitution statute]
- IF the restitution is *Mandatory* or *Discretionary* [Mandatory if covered by a mandatory R statute; otherwise discretionary]
- The scope of conduct as basis for Steps 2 - 4

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Step 2: Who are the Victims of the Offense of Conviction (OC)?

Restitution is only authorized to victims of the conduct underlying the OC.

Not to victims of related conduct, or to non-victims of the OC.



Courts must specifically ID victims and their losses.

Restitution is authorized for the listed offenses “in which an *identifiable* victim or victims suffered a *physical injury or a pecuniary loss*.” § 3663A(c)(1)(B).

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Victim/causation statutory language

§ 3663, 3663A:

- Pre-MVRA: a “victim of the offense;” or “directly harmed” by a scheme. The offense “resulted in” damage to property of, or bodily injury to, a victim.
- MVRA: A person “directly and proximately harmed by the commission of an offense for which restitution may be ordered.”

§ 3771(e):

- CVRA: A person “directly and proximately harmed by the commission of a Federal offense.”

§ 2259:

- A person “harmed as a result of a commission of a crime under this chapter (sex crimes)” [1994: not changed by MVRA]
- Issue in child pornography possession cases: Is this broader, narrower or substantially the same as MVRA definition??

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Step 3(a): What harms were caused by the Offense of Conviction (OC)?

* Harms must have been *caused* to the victims *by the defendant's OC conduct*.



Supreme Court law: "The loss caused by the conduct underlying the [OC] establishes the outer limits of a restitution order." *Hughey v. U.S.*, 495 U.S. 411, 413 (1990).

Statutory language: The victims were "directly and proximately" harmed by the offense (§§3663, 3663A, 3771); "Harmed as a result of the commission" of the offense (§§2248, 2259, 2264 and pre-MVRA 3663).

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Causation analysis

- "Proximately caused" harms:
 - a) would not exist "*but for*" the defendant's offense conduct; AND
 - b) were "*reasonably foreseeable*" to the defendant.
[minority view of b): a natural consequence of the defendant's conduct.]
- Even pre-MVRA causation was at least "but for," and more; same as proximate cause?: *U.S. v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011). Otherwise is strict liability (*U.S. v. McGarrity*, 11th Cir 2011).

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Pop Quiz: Is the Person a (Restitution) Victim?

- No
 - Person killed by handgun (OC: unlawful sale/possession of the handgun)
 - Girlfriend of drug purchaser or person killed as consequence of drug deal (OC drug dealing)
 - Person extorted by defendant, who later *assists defendant* in money laundering OC. [Basic Rule: *Participants in the OC are not entitled to restitution.*]
- Yes
 - Police car damaged in getaway after robbery (reasonably foreseeable)
 - Bystander shot *by police* during robbery. (same)
 - Investors in OC scheme who were themselves defrauded by the scheme leader, but who did *not* participate with the leader in the OC. [victim, not co-partic. of OC]

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Step 3(b): Are the Harms Statutorily Compensable?



*The caused harms must also be statutorily **compensable** as restitution (actual loss; covered by statute)*

- Some are **listed** in the statutes ("bodily injury," "property loss," broader list in 1994 statutes)
- Others are **unlisted** -- but included if actual loss to Victim and reasonably foreseeable (e.g. victims' attorneys fees; deceased victims' future lost wages)
- [Victims' participation expenses are **listed** in §§ 3663(b)(4) and 3663A(b)(4).]

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General Rules on Compensability:

- I. Restitution is Only compensable for Victim's **actual loss**.
- II. Restitution Not compensable for:
 - intended loss
 - pain & suffering, invasion of privacy, emotional distress
 - harm from conduct of others (absent scheme or conspiracy)
 - value of defendant's gain.
- III. Exceptions where specified: e.g. gain for human trafficking, value of victim's time for ID theft. (needed for child porn possession cases)

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Step 4: How are the Harms Measured?



- The victim's harms (caused by the defendant's conduct) must be **given a specific value (Quantified)**
 - Cannot be based on generalized, speculative or "market harm" (e.g. copyright infringement cases);
 - Must be victim's *actual loss* caused by *defendant's conduct*;
 - Statutory criteria for *When* harms are measured but not for *How* to measure harms (e.g. replacement; fair market value, etc.)
- **Default Measuring Rule:** Restore the victim to his or her pre-offense condition

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Need for Quantification

- Court must be able to estimate, based upon facts in the record, the amount of the victim's loss with some "*reasonable certainty*."
- Mathematical precision not required, but there must be reliable evidence supporting the court's reasonable estimation of harm caused to the victim *by the defendant's conduct*.

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AMOUNT RESULTING FROM THE STEP-ANALYSIS:

- Is the restitution authorized for the offense, i.e. the "full amount of each victim's losses."
- Imposed in all mandatory restitution cases (§ 3663A or specific statutes); (Presumptively imposed for all discretionary restitution cases (§ 3663 or as a condition)).



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**After the Steps, check whether:
The Plea Agreement permits more
restitution than otherwise authorized -**

- § 3663(a)(3) - “to any extent;”
- § § 3663A(a)(3) & 3663(a)(1)(A) – to “other than the victim” of the offense.

Also: Pleas may broaden or narrow the offense of conviction.



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**Issue: Restitution for Possession of
Child Pornography?**

- Proliferation of cases:
 - FY 2010 - 1,886 CP cases nationwide;
 - 2% of national total;
 - Motions filed by victims Vicky and/or Amy in hundreds of cases since 2009.
- Wide disparity of results:
 - 0 to over \$3 million.

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How did we get here?

- 1994 – §§ 2259, 2248, 2264, 2327
 - Harmed “as a result” of the offense; includes harm suffered as a “proximate result” of the offense.
- 1996 – MVRA (§§ 3663, 3663A, 3664)
 - Added cross ref’s; changed vic. def. in only § 2327.
- 2004 – CVRA (§ 3771)
 - New procedures; gov’t duties/sanctions
- 2008 - Gov’t begins ID’g and notifying victims in child pornography cases.

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How Much is Ordered?

- Range: 0 to over \$3 million
- Mean order (F & R): \$15,110
- Median order (F & R): \$3,000
- \$1,500 (civil statutory damage in § 2252)
- Recent appellate cases: 1st Cir – upheld \$3800; 11th Cir. upheld \$12,700 and remanded \$3 million; D.C. Cir. remanded \$5,000; 2nd Cir. vacated \$48,483 entirely; 9th Cir. vacated \$65,000 entirely.

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18 U.S.C.A. § 2259

- Covers all offenses in §§ 2251-2258 (includes possession of child pornography as well as manufacturing, etc.)
- Restitution authorized for the “full amount of the victim’s losses”
- Victim is harmed as a result of the offense
- List of compensable losses, “and any other losses suffered by the victim as a proximate result of the offense.”

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Application of the “steps”

- Most *skip Step 1* (they do not narrow the scope of the offense to the D’s conduct).
- They identify Amy or Vicky as victims of the (un-narrowed) “offense” – also relying on S. Ct. perspective of victims harmed by the entire sequence of events (non-restitution context).
- They go on to Steps 3 & 4 with too broad a scope; run into inevitable need to narrow scope to defendant’s conduct; divergence begins.

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Step 3 (part 1): Were the Harms Caused by the Defendant’s Conduct?

- A) Statutory standard: All but 5th Cir. (so far) find §2259 requires proximate cause. (5th Cir. rehearing en banc).
- Need more causal connection than simply “but for” even for pre-MVRA causation, or it is simply strict liability (11th Cir. McGarity)
- B) More difficult: applying the standard to defendant’s conduct.
- Fundamental rule: **Causation must be based on defendant’s conduct.**
- Cases split on whether they find D’s conduct (possession) proximately caused harm to victim.

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Step 3 (part 2): Are the harms that were caused compensable as restitution?

- Restitution is only authorized for **actual loss**.
- Not authorized for emotional distress, pain and suffering, embarrassment, or invasion of privacy.
- Compensable harms listed in § 2259 – so long as they were caused by the defendant’s conduct.
- S.Ct. cases focus on broader scope of harm – in constitutional context. (Second way courts are led astray by the Ferber cases)

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Step 4: Can the Harm Caused to the Victim by the Defendant's Conduct be Reasonably Quantified?

- Biggest obstacle for applying traditional restitution criteria?
- Must narrow scope to defendant's conduct (last chance)
- The court must be able to *"estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty."*
- Cannot be a speculative, generalized, market, societal measure of harm; must be defendant-specific
- Some courts try to evade this problem by imposing jointly/severally outside the case (e.g., all others who harmed the victim(s)).

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Quantification: "An evidentiary nightmare"

- As one court said, to quantify the losses caused by the defendant's conduct in these cases is *"an evidentiary nightmare."*
- *And while it is undisputed that the victims were harmed by the production and subsequent distribution of the images ... there is "scant evidence ... as to what specific losses were proximately caused by [the defendant's] receipt of those images years later ... Without more specific evidence, any award of restitution would be an arbitrary calculation based on speculation and guess work, at best."* U.S. v. Solsbury, 727 F.Supp.2d 789, 796 (D.N.D. 2010).

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Some Possible Options for the Court:

- Impose R for harm done to victim by her knowledge of the case (i.e. portion of future counseling costs).
- Impose R for victim participation expenses – need not meet causation criteria, are compensable, & quantifiable.
- In the alternative, impose a Fine for punishment, deterrence (but ability to pay is a factor).

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Congressional help needed?

- Unique, compelling, and competing interests – justify special treatment.
- Wide disparity indicates problem with fairness, consistency and predictability.
- Too broad imposition (for harm beyond Def's conduct) could lead to possible constitutional issues, and negative impact in other contexts of restitution law.
- Congress has done it before, such as for human trafficking, drug labs, identity theft.

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- “These cases cry out for an appropriate restitution remedy, but one best determined by Congress – not by a variety of conflicting and inconsistent awards and decisions...[Congress could] “arguably offer a more practical solution to the unworkable restitution provisions in 18 U.S.C.A. § 2259.”
- U.S. v. Solsbury, 727 F.Supp.2d 789, 797 (D.N.D. 2010).

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Some Options for Congress:

- Include a criminal statutory damage (cf. civil damage cited in § 2252);
- Direct fines into special fund for child porn victims or general victims fund;
- Specify damages per image;
- Direct the Commission to establish a restitution schedule, and/or a restitution range.

See suggestions in *U.S. v. Kennedy* (9th Cir.), *U.S. v. Solsbury* (D.N.D.) and others. (See handout for cites.)

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Restitution Update 2012

(See Handout for Cites)

- Importance of defendant’s objection at sentencing;
- Pre-MVRA authority for changing orders or delayed orders;
- Offset OK against restitution for value of defendant’s services if *no license* required – No offset if license required.

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Restitution Update 2012 (cont.)

(See Handout for Cites)

- Co-conspirator in Offense of Conviction cannot be victim, even if victim of other acts by defendant;
- CVRA v. MVRA: some courts think CVRA may be broader authorization of R, others not;
- CVRA petitions: 3 mo delay in ruling on V’s motion may be denial of rights; generally same Restitution and Victim standards as under restitution law.

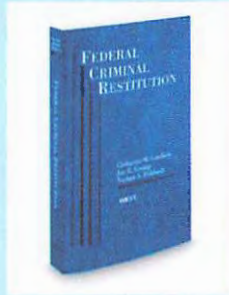
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West 2012 Edition (out in July)

New Sections on: Child pornography
possession & Mortgage fraud



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