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Restitution in Federal Criminal Cases

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Summary

Restitution endeavors to restore victims to the place where they stood when they became victims of crime. It seeks to make them whole and no more. In the case of a corporate or affluent defendant, victim restitution can be substantial; in some cases its value may be largely symbolic; in yet other cases it is irrelevant. Federal prosecutors collect roughly $1 billion a year for the victims of federal crimes. Yet prosecutors will likely never secure more than $1 out every $10 owed, and federal courts rarely, if ever, order restitution from the defendants convicted of the most commonly prosecuted federal crimes.

Restitution in federal criminal cases is a matter of statute. A handful of statutes identify the victims who are eligible to receive restitution; what criminal convictions may trigger an obligation to pay restitution; the losses for which victims may be compensated; and the procedure by which restitution is ordered and enforced.

As a general rule, a victim is a person who is physically injured, or who suffers a property loss, as the proximate result of a qualifying offense. A victim may also be someone named as a beneficiary in a plea bargain or in a condition of probation or supervised release.

Federal crimes of violence, fraud, or property loss will usually require a sentencing court to order restitution. A court also may order restitution following a conviction for any other crime in the federal criminal code, in accordance with a plea bargain, or as a condition of probation or supervised release.

Restitution orders ordinarily must cover the full extent of a victim's losses that are the proximate result of the defendant's qualifying crime of conviction, no more and no less, even though the defendant may never be able to make full restitution.

Restitution in federal criminal cases is part of the sentencing process. The Probation Service prepares a presentencing report that includes a preliminary assessment of what restitution, if any, is appropriate. The parties are free to challenge and supplement the report. The government must establish the existence and extent of any right to victim restitution by a preponderance of the evidence. Both the government and the defendant may appeal the court's restitution determinations. A victim may appeal such determinations using mandamus.

The Department of Justice, acting on behalf of a victim, may enforce a restitution order in the manner it uses to collect fines or by "all other available and reasonable means." Victims may secure a lien in their own names against the defendant's property in order to secure restitution, and they may bring other civil actions in their own names against the defendant.

The courts do not agree on whether the abatement doctrine cuts off unfulfilled obligations under a restitution order. The abatement doctrine provides that when a defendant dies while his or her appeal is still pending the law treats the defendant's indictment and conviction as though they had never happened. The conviction is vacated and the indictment dismissed.

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Introduction

Criminal restitution is the "full or partial compensation paid by a criminal defendant to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."[1] Federal prosecutors recover roughly $1 billion a year for the victims of federal crimes.[2] Yet less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendants' inability to pay.[3] In addition, federal courts rarely order restitution in immigration and drug cases, the most commonly prosecuted federal crimes, because of the nature of the offenses.[4]

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless empowered to do so by statute.[5] Two general statutes vest the courts with authority to order restitution. One, 18 U.S.C. § 3663, permits it for certain crimes.[6] The second, 18 U.S.C. § 3663A, requires it for other crimes.[7] In addition, several individual restitution statutes authorize awards for particular offenses, i.e.:

- animal enterprise terrorism;[8]
- failure to provide child support;[9]
- human trafficking;[10]
- sexual abuse;[11]
- sexual exploitation of children;[12]

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[1] *Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] U.S. Government Accountability Office, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved*, GAO-18-203, at 22 (Feb. 2018).

[3] The Department of Justice estimates that only $10 billion of the $110 billion in uncollected restitution will ever be recovered due to the offenders' inability to pay. *Id*. at 25.

[4] Defendants in immigration and drug offenses make up 62.5% of those convicted in a given year. U.S. Sentencing Commission, *2018 Sourcebook: 2018 Primary Offense and Offender Characteristics - Figure 2*, available at https://www.ussc.gov/research/sourcebook-2018. Yet the courts order less than 2% of the defendants in such cases to pay restitution. U.S. Government Accountability Office, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved*, App. I, GAO-18-203, at 44 (Feb. 2018).

[5] United States v. Rankin, 929 F.3d 399, 410 (6th Cir. 2019); United States v. Steele, 897 F.3d 606, 609 (4th Cir. 2018); United States v. Polukhin, 896 F.3d 848, 851 (8th Cir. 2018); United States v. Sexton, 894 F.3d 787, 799 (6th Cir. 2018); United States v. Brooks, 872 F.3d 78, 88 (2d Cir. 2017); United States v. Collins, 854 F.3d 1324, 1329 (11th Cir. 2017); United States v. Wright, 848 F.3d 1274, 1284 (10th Cir. 2017).

This report is available in an abridged form—without footnotes, citations to most authorities, or appendices—as CRS Report RS22708, *Restitution in Federal Criminal Cases: A Sketch*. Related reports include CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. §3771*, by Charles Doyle, available in abridged form as CRS Report RS22518, *Crime Victims' Rights Act: A Sketch of 18 U.S.C. §3771*, by Charles Doyle.

[6] Section 3663 is sometimes referred to as the Victim and Witness Protection Act or VWPA. The text of Sections 3663, 3663A, and 3664 is appended.

[7] Section 3663A is sometimes referred to as the Mandatory Victim Restitution Act or MVRA.

[8] *Id*. § 43(c).

[9] *Id*. § 228(d) (the court must order restitution for misdemeanor child support offenses as well); *e.g.*, United States v. Hanna, 630 F.3d 505, 512 (7th Cir. 2010).

[10] 18 U.S.C. § 1593; *e.g*., United States v. Charles, 895 F.3d 560, 562 (8th Cir. 2018); United States v. Baston, 818 F.3d 651, 671 (11th Cir. 2016).

[11] 18 U.S.C. § 2248; *e.g*., United States v. Thunderhawk, 860 F.3d 633, 635 (8th Cir. 2017).

[12] 18 U.S.C. § 2259 (the court must order restitution for misdemeanor child sexual exploitation offenses as well); *e.g.*,

- stalking or domestic violence;[13]
- copyright infringement;[14]
- telemarketing fraud;[15]
- amphetamine or methamphetamine offenses;[16]
- reckless disregard of sex trafficking;[17] or
- transportation or travel for unlawful sexual purposes.[18]

Federal courts also may order restitution pursuant to a plea bargain or as a condition of probation or supervised release, even where it is not otherwise authorized.[19] Section 3664 supplies the procedure under which the restitution order is ordinarily imposed.

Background

Restitution has a diverse pedigree. Grounded in fairness[20] and often thought of as an equitable remedy,[21] its antecedents can as easily be found in law as in equity.[22] As its name implies, restitution restores the victim to the *status quo ante*, that is, making the crime-depleted victim whole again.[23] Restitution has been a feature of the federal system of criminal justice for over a century. In its earliest form, some federal judges claimed it as a component of their inherent

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United States v. Romero-Medrano, 899 F.3d 356, 358 (5th Cir. 2018); United States v. Dillard, 891 F.3d 151, 154-55 (4th Cir. 2018).

[13] 18 U.S.C. § 2264 (the court must order restitution for misdemeanor stalking/domestic violence offenses as well); *e.g.*, United States v. Hobgood, 868 F.3d 744, 748 (8th Cir. 2017).

[14] 18 U.S.C. § 2323.

[15] *Id*. § 2327.

[16] 21 U.S.C. § 853(q).

[17] 18 U.S.C. § 2421A, enacted as Section 3(a) of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, P.L. 115-164, 132 Stat. 1253 (2018).

[18] 18 U.S.C. 2429, enacted as Section 3(a) of the Abolish Human Trafficking Act of 2017, P.L. 115-392, 132 Stat. 5251 (2018).

[19] 18 U.S.C. §§ 3663(a)(3), 3663A(a)(3), 3563(b)(2), 3583(d); United States v. Rankin, 929 F.3d 399, 410 (6th Cir. 2019) (The obligation to pay restitution, ordered solely as a condition of supervised release, begins to run only after the defendant is released from prison.).

[20] Rankin v. Emigh, 218 U.S. 27, 35 (1910). ("[A]lthough restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation.").

[21] Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993) (emphasis added) ("'Equitable relief' can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages."); *see also* Warren A. Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257, 257 (1954) ("Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has received or its value to the other.").

[22] Collen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1598-1607 (2002); IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 356 (1769) ("[I]f any person be convicted of larciny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels, or the value of them out of the offender's goods, if [he] has any, by the writ to be granted by the justices. And this writ of restitution shall reach the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market overt.") (transliteration supplied).

[23] Firefighters v. Stotts, 467 U.S. 561, 582 n.l5 (1984) ("[F]ederal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victim ...").

authority to grant probation and suspended sentences.[24] Then in 1916, the Supreme Court held that the lower federal courts had no inherent power to suspend sentences.[25] Congress responded by granting the courts explicit authority to suspend sentences and to place defendants on probation.[26] In doing so, the courts were permitted to require probationers "to pay in one or several sums a fine imposed at the time of being placed on probation and ... to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and ... to provide for the support of any person or persons for whose support" they were "legally responsible."[27] This authority continued essentially unchanged for more than 50 years.[28] Even though the federal courts enjoyed no other power to order restitution in a criminal case,[29] the authority was "infrequently used and indifferently enforced."[30]

Congress found this situation unsatisfactory.[31] Thus, in the Victim and Witness Protection Act of 1982 (VWPA), it vested federal courts with the general discretion to order restitution in any criminal case arising out of a crime proscribed in Title 18 of the *United States Code* or in air piracy cases.[32] In the Violent Crime Control and Law Enforcement Act of 1994, Congress established mandatory restitution as a consequence of conviction for the federal crimes of sexual abuse, sexual exploitation of children, and domestic violence.[33] Then, in the Mandatory Victim Restitution Act (MVRA) portion of the Antiterrorism and Effective Death Penalty Act of 1996, Congress made mandatory restitution a consequence of conviction for most of the serious federal crimes (i.e., crimes of violence and, when proscribed in Title 18 of the *United States Code*, crimes against property, including fraud).[34]

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[24] H.R. Rep. No. 68-1377 at 3 (1925) ("[T]he United States district courts suspended sentence in many instances, and certain courts used a form of probation, though without legislative authority, placing defendant under the supervision of state probation officers or volunteers." State probation officers worked under systems in which "greatly increased sums [were] collected for fines, restitution, and especially family support.").

[25] *Ex parte* United States, 242 U.S. 27, 51-2 (1916).

[26] P.L. 68-596, 43 Stat. 1259 (1925).

[27] *Id.*, at 1260.

[28] 18 U.S.C. § 3651 (1976 ed.) ("While on probation and among the conditions thereof, the defendant—May be required to pay a fine in one or several sums; and May be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and May be required to provide for the support of any persons for whose support he is legally responsible.").

[29] United States v. Elkins, 731 F.2d 1005, 1010-11 (2d Cir. 1984) (holding that a federal court has no inherent power to order restitution; the authority must be conveyed by statute); *cf.* United States v. Jimenez, 600 F.2d 1172, 1174 (5th Cir. 1979) ("The government suggests no other basis for the reimbursement imposed as a condition of probation and we know of none. 18 U.S.C. § 3651 lists three monetary payments on which probation may be conditioned fines, restitution to aggrieved parties, and support payments to dependents. Repayments of court-appointed counsel is not listed among these conditions."); *see also* S. Rep. No. 97-532, at 30 (1982) ("Current law does not contain a provision covering an order of restitution as a part of any sentence other than probation.").

[30] *Id*.

[31] "Crime victims and their advocates have called on state legislators to restore restitution to its proper place in criminal law. They point out that the average dollar losses victims suffer total hundreds of dollars, not thousands, and that most ex-offenders, not just those on probation, have some means to undo the financial harm they have done. There is no reason to believe that victims of federal crimes do not have the same grievances," *id*.

[32] P.L. 97-291, 96 Stat. 1253 (1982); now found as amended at 18 U.S.C. § 3663.

[33] P.L. 103-322, 108 Stat. 1904, 1906, 1928 (1994), 18 U.S.C. §§ 2248, 2259, and 2264, respectively.

[34] P.L. 104-132, 110 Stat. 1227 (1996), 18 U.S.C. § 3663A.

Victims

The various federal restitution statutes address three questions: Who qualifies as a victim? What crimes trigger restitution authority? What type of injuries or losses does restitution cover? As general rule, a victim is:

- "A person *directly and proximately* harmed as a result of the commission of an offense for which restitution may be ordered …";[35]
- "… [I]n 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…";[36]
- "… In the case of a 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.";[37] or
- A person specified in the defendant's plea agreement.[38]

Under several specific sex offense and domestic violence restitution statutes, a victim is:

- "The *individual* harmed as a result of a commission of a crime under this chapter …";[39]
- "…[I]n the case of a 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, but in no event shall the defendant be named as such representative or guardian";[40] or
- A *person* specified in the defendant's plea agreement.[41]

Sections 3663 and 3663A, and the statutes that incorporate their provisions understand "person" to include individuals, corporations and other legal entities.[42] Moreover, although a victim must

[35] 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2).

[36] *Id.*

[37] *Id.*

[38] *Id.* §§ 3663(a)(3), 3663A(a)(3); United States v. Polukhin, 896 F.3d 848, 851 (8th Cir. 2018); United States v. Kieffer, 794 F.3d 850, 853 (7th Cir. 2015); *cf.* United States v. Mathew, 916 F.3d 510, 516 (5th Cir. 2019) (emphasis added) ("An award of restitution cannot compensate a victim for losses caused by conduct not charged in the indictment *or specified in a guilty plea*.").

[39] 18 U.S.C. §§ 1593(c) [18 U.S.C. ch. 77 (human trafficking)], 2248(c) [(18 U.S.C. ch. 109A (sexual abuse)], 2259(c)(4) [18 U.S.C. ch. 110 (sexual exploitation of children)], 2264(c) [18 U.S.C. ch. 110A (domestic violence)], 2429(d) [18 U.S.C. ch. 117 (travel or transportation for unlawful sexual purposes)].

[40] *Id.* §§ 1593(c) (18 U.S.C. ch. 77 (human trafficking)), 2248(c) (18 U.S.C. ch. 109A (sexual abuse)), 2259(c)(4) (18 U.S.C. ch. 110 (sexual exploitation of children)), 2264(c) (18 U.S.C. ch. 110A (domestic violence)), 2429(d) (18 U.S.C. ch. 117 (travel or transportation for unlawful sexual purposes).

[41] *Id.* §§ 3663(a)(3), 3663A(a)(3). In the absence of a conflict, the statutes, that call for restitution in domestic violence and sex offenses cases, incorporate the provisions of Sections 3663A and 3664, §§ 1593(b)(2), 2248(b)(2), 2259(b)(3), 2264(b)(2), 2429(b)(2).

[42] Under the Dictionary Act, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, associations, and joint stock companies, as well as individuals." 1 U.S.C. § 1; United States v. Benedict, 855 F.3d 880,

be a "person" and governmental entities are ordinarily not considered persons,[43] state, local, federal, and foreign governmental entities have been awarded restitution orders when they otherwise qualify as victims of a crime under §§3663 and 3663A.[44] The human trafficking, sex, and domestic violence mandatory restitution sections define victims as "individuals" rather than "persons," suggesting that only human victims and their representatives may claim restitution under those provisions.[45]

The two sets of statutes also use different language to describe the nature of the harm that qualified victims must experience. Sections 3663 and 3663A speak of victims harmed *directly and proximately.*[46] The sex-related statutes simply refer to victims as those harmed,[47] but until recently, they defined recoverable losses to include "any other losses suffered by the victim as a *proximate result* of the offense."[48] Under both sets of restitution statutes, victim qualification and loss qualification are two sides of the same coin. "Victims" are only those harmed by the defendant's crime; "losses" are only those harms caused by the defendant's crime. The courts frequently address the question as an issue of qualifying losses.

Most often under Sections 3663 and 3663A, a victim is a person or individual who suffers harm as the direct and proximate result of the defendant's crime of conviction or who receives

886-87 (8th Cir. 2017); *cf.* United States v. Ritchie, 858 F.3d 201, 212 (4th Cir. 2017) (concluding that Bank of America was a victim for purposes of the MVRA); United States v. Martin, 803 F.3d 581, 592-93 (11th Cir. 2015) (holding that three banks were victims within the meaning of the statute).

[43] United States v. United Mine Workers, 330 U.S. 258, 275 (1947) ("The Act does not define 'persons.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so."). Of course, human beings are persons even when victimized while acting in an official capacity, *see, e.g.*, United States v. Holthaus, 486 F.3d 451, 458 (8th Cir. 2007) (finding that "bankruptcy trustees qualify as victims under the statute if their compensation is negatively impacted by a debtor's misrepresentation," after the defendant argued that trustees could not be considered "persons" for restitution purposes).

[44] United States v. Ng Lap Seng, 934 F.3d 110, 116, 146 (2d Cir. 2019) (United Nations); United States v. Sawyer, 825 F.3d 287, 292-94 (6th Cir. 2016) (U.S. Environmental Protection Agency); United States v. Mei Juan Zhang, 789 F.3d 214, 216-17 (1st Cir. 2015) (U.S. Internal Revenue Service); United States v. Butler, 694 F.3d 1177, 1184 (10th Cir. 2012) (Kansas); United States v. Bryant, 655 F.3d 232, 253 (3d Cir. 2011) (state medical school); United States v. Bengis, 631 F.3d 33, 40-1 (2d Cir. 2011) (South Africa); United States v. Leahy, 464 F.3d 773, 793 (7th Cir. 2007) (Chicago); United States v. Washington, 434 F.3d 1265, 1268-270 (11th Cir. 2006) (Ormond Beach police department); United States v. Ekanem, 383 F.3d 40, 42-3 (2d Cir. 2004) (U.S. Department of Agriculture); *see also* United States v. Petruk, 484 F.3d 1035, 1038 (8th Cir. 2007) (In a fraud case, restitution to the government should be set at the amount the government "paid minus the amount that would have been paid in the absence of fraud."); *Leahy*, 464 F.3d at 794.

[45] *Id.* §§ 1593(c) (18 U.S.C. ch. 77 (human trafficking), 2248(c) (18 U.S.C. ch. 109A (sexual abuse)), 2259(c)(4) (18 U.S.C. ch. 110 (sexual exploitation of children)), 2264(c) (18 U.S.C. ch. 110A (domestic violence)), 2429(d) (18 U.S.C. ch. 117 (travel or transportation for unlawful sexual purposes).

[46] 18 U.S.C. § 3663(a)(2) (…"'victim' means a person directly and proximately harmed…"); *id.* § 3663A(a)(2).

[47] *Id.* §§ 1593(c) (…"'victim' means the individual harmed…"), 2248(c), 2259(c)(4), 2264(c), 2429(d).

[48] *Id.* §§ 2259(c)(2)(F) (…"'full amount of the victim's losses' includes … (F) any other relevant losses suffered by the victim as a proximate result of the offense."); 1593(b)(3) (…"'full amount of the victim's losses' has the same meaning as provided in section 2259(c)(2)…"); 2429(b)(3) (…"'full amount of the victim's losses' has the same meaning as provided in section 2259(b)(3)."). In *Paroline v. United States*, the Supreme Court pointed to the "proximate result" language and held that the language required a finding of proximate cause before a court could award restitution for losses under the child-pornography restitution statute. 572 U.S. 434, 448 (2014) ("Restitution is therefore proper under § 2259 only to the extent the defendant's offense proximately caused a victim's loss."). After the Court's *Paroline* decision, Congress in late 2018 enacted Public Law 115-299, the Amy Vicky, and Andy Child Pornography Victim Assistance Act, that changed the definition of "full amount of the victim's losses" in the child pornography restitution statute (18 U.S.C. § 2259(c)(2)(F)) to "any other relevant losses incurred by the victim" from "any other relevant losses suffered by the victim as a proximate result of the offense."

restitution under the defendant's plea bargain.[49] The definition of a victim for purposes of restitution under Sections 3663 and 3663A expands when the crime of conviction has as an element a conspiracy or a scheme or pattern of misconduct.[50] The expansion either requires or makes possible restitution for victims and offenses not mentioned specifically in the indictment, not covered by the crime of conviction, and consequently not otherwise reimbursable.[51]

In the case of conspiracy, the court may compel a defendant to make restitution both to the victims of the harm caused by his or her own misconduct and to the victims of the harm caused by the foreseeable misconduct of co-conspirators.[52]

As for the scheme and pattern exception, most federal crimes do not list schemes or patterns among their elements, although the mail fraud, wire fraud, health care fraud, and racketeering statutes do.[53] In such cases, restitution may include the losses incurred from a different episode of the scheme than the one mentioned in the indictment.[54] Yet the scheme must be the same; victims

[49] 18 U.S.C. §§ 3663(a)(2), (a)(3); 3663A(a)(2), (a)(3). United States v. Mathew, 916 F.3d 510, 516 (5th Cir. 2019) (internal citations omitted) (Section 3663A "limits restitution to the actual loss directly and proximately caused by the defendant's offense of conviction. An award of restitution cannot compensate a victim for losses caused by conduct not charged in the indictment or specified in a guilty plea."); United States v. Olson, 867 F.3d 224, 229 n.2 (1st Cir. 2017); United States v. Yijun Zhou, 838 F.3d 1007, 1012 & 1012 n.3 (9th Cir. 2016); United States v. Gushlak, 728 F.3d 194-95 & 195 n.7 (2d Cir. 2013).

[50] 18 U.S.C. §§ 3663(a)(2) ("… the term 'victim' means … 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…"), 3663A(a)(2) (same).

[51] United States v. Pena, 910 F.3d 591, 603 (1st Cir. 2018) (internal citations and quotation marks omitted) ("Pursuant to the MVRA, where the defendant's criminal conduct includes an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a victim is defined as any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern, and the district court may order restitution without regard to whether the conduct that harmed the victim was conduct underlying the offense of conviction."); United States v. Thompson, 830 F.3d 1049, 1065-66 (9th Cir. 2016) (internal citations and italics omitted) ("More specifically, in the case of a conviction for a crime or crimes that require proof of a scheme, conspiracy, or pattern of criminal activity, such as mail fraud, restitution may be ordered for all persons directly harmed by the entire scheme. Such restitution is not limited to harm caused by the particular counts of the conviction (as it would be absent the scheme element)."); United States v. Jones, 641 F.3d 706, 714 (6th Cir. 2011) ("In the context of mail fraud convictions, we have read this statutory definition of 'victim' to allow for restitution for the loss attributable to all the victims of a defendant's scheme to defraud, even when the defendant was not indicted or convicted of fraud with respect to each victim."); *see also* United States v. Benedict, 855 F.3d 880, 887 (8th Cir. 2017); United States v. Foley, 783 F.3d 7, 29 (1st Cir. 2015).

[52] *Pena*, 910 F.3d at 603; United States v. Sawyer, 825 F.3d 287, 295-96 (6th Cir. 2016); United States v. Battista, 575 F.3d 226, 232 (2d Cir. 2009); United States v. Rand, 403 F.3d 489, 495 (7th Cir. 2005); United States v. Riley, 335 F.3d 919, 931-32 (9th Cir. 2003); United States v. Osborne, 332 F.3d 1307, 1314 (10th Cir. 2003) ("[T]he losses caused by the entire conspiracy, not just the losses caused by those acts committed by the defendant, can be attributed to the defendant when the district court orders restitution.").

[53] 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1347, 1962 (racketeer influenced and corrupt organization (RICO) offenses).

[54] United States v. Sanjar, 876 F.3d 725, 748 (5th Cir. 2017) (internal citations omitted) ("When the offense of conviction involves a 'scheme', the restitution statute broadens the definition of victim to include any person directly harmed by the defendant's criminal conduct in the course of the scheme. In such a situation, restitution may include losses suffered by victims not named in the indictment so long as they are victims of the scheme described therein. Conspiracy to commit health care fraud requires a scheme."); United States v. Wirth, 719 F.3d 911, 917 (8th Cir. 2013) ("[V]ictim restitution may be ordered for criminal conduct that is part of a broad scheme to defraud, without regard to whether the defendant is convicted for each fraudulent act in the scheme."); United States v. Johnson, 440 F.3d 832, 850 (6th Cir. 2006) ("Stone does not dispute that one element of a RICO offense and a RICO conspiracy is a pattern of criminal activity ... The district court could therefore award restitution to any victim harmed by the defendant's criminal conduct in the course of the RICO activity."); United States v. Belk, 435 F.3d 817, 819 (7th Cir. 2006) ("The crime covered by §1341 is the scheme to defraud, not (just) the mailings that occur in the course of the scheme. This indictment laid out, and the jury convicted Belk of, a multi-year scheme to defraud Rogge's brokerage. The eight

entitled to restitution do not include those harmed by an otherwise identical scheme but different in time or place than the crime of conviction.[55]

The restitution definitions of "victim" usually mention family members as permissible representatives of a child or deceased victim. Nevertheless, although the courts enjoy authority to award family members restitution on behalf of the victims of crime,[56] it is unclear whether the victimization of one member of a family constitutes victimization of its other members sufficient to warrant a restitution order for the benefit of a victim's family members in their own name.[57]

Finally, under Sections 3663 and 3663A, a "victim" is anyone the defendant and the government agree is a victim.[58]

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mailings [listed in the indictment] were just overt acts. Restitution for the whole scheme is in order."); United States v. Dickerson, 370 F.3d 1330, 1342 (11th Cir. 2004) ("Therefore, we hold that where a defendant is convicted of a crime of which a scheme is an element the district court must under 18 U.S.C. 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme even where such losses were caused by conduct outside of the statute of limitations."); United States v. Grice, 319 F.3d 1174, 1177 (9th Cir. 2003) ("When a charged crime involves a scheme to defraud, the court can base restitution under the VWPA on related conduct for which the defendant was not convicted.").

[55] United States v. Thomsen, 830 F.3d 1049, 1067 (9th Cir. 2016) (internal citations omitted) ("To prove the necessary close relationship to the scheme of conviction, it is not enough to show another fraud against the victim that had aspects in common with the scheme of conviction, or even show that both frauds were built upon the same central falsity. Rather, there must be a causal link between the two, and that link may be lacking where the fraud against the victim and the fraud scheme of conviction were accomplished by different means, had different victims, and took place primarily in different locations. To put it another way, the fraud against the victim must not be linked too tangentially to be part of the same scheme, conspiracy, or patter of criminal activity."); United States v. Lozano, 791 F.3d 535, 538 (5th Cir. 2015) (internal citations omitted) ("As previously stated, because this case involved a fraudulent scheme, the district court was authorized to award restitution for actions pursuant to that scheme. 'However, the restitution for the underlying scheme to defraud is limited to the specific temporal scope to the indictment.'"); United States v. Flaschberger, 408 F.3d 941, 943 (7th Cir. 2005) ("Losses from the years preceding the scheme alleged in the indictment must be subtracted from the [restitution] award.").

[56] 18 U.S.C. 3663(a)(2); 3663A(a)(2).

[57] United States v. Villalobos, 879 F.3d 169, 171 (5th Cir. 2018) ("[T]he 'victim' includes a minor's guardians."); United States v. Nossan, 647 F.3d 822, 828 (8th Cir. 2011) ("The district court did not focus on the potential victims in Gunderson's family who purportedly paid the costs of Gunderson's funeral and burial, and who requested the restitution [in the amount of $22,626.40], We focus on the issues addressed by the district court.").United States v. Wilcox, 487 F.3d 1163, 1176-178 (8th Cir. 2007) (holding restitution may not include income lost by the mother of a rape victim under the theory that the child's mother was likewise a victim of the crime, but may include reimbursement to the mother for the cost of transporting the child to receive crime-necessitated medical treatment); United States v. Hayward, 359 F.3d 631, 642 (3d Cir. 2004) (upholding a restitution order for parents whose children had been transported to London for illicit sexual purposes with the terse observation that the parents "incurred reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial. The restitution order will therefore be affirmed."); *see also* United States v. Douglas, 525 F.3d 225, 254 (2d Cir. 2008) (affirming a restitution order to compensate the father of a murdered victim for the annual leave the father used to assist in the investigation and attend court proceedings. Before rejecting the defendant's contention that annual leave could not be considered lost income, the court observed without further comment that the defendant had "conceded that Morgan Sr. clearly is a victim within the meaning of the MVRA.").

[58] 18 U.S.C. 3663(a)(3) ("The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."); 3663A(a)(3) (same). The language suggests that the parties may agree to restitution for the benefit of persons not otherwise qualified as victims or in amounts that otherwise qualified victims would not be entitled to, or both. United States v. Mathew, 916 F.3d 510, 516 (5th Cir. 2019) (internal citations omitted) (emphasis added) (Section 3663A "'limits restitution to the actual loss directly and proximately caused by the defendant's offense of conviction. An award of restitution cannot compensate a victim for losses caused by conduct not charged in the indictment or *specified in a guilty plea.*'"); United States v. Polukhin, 896 F.3d 848, 851 (8th Cir. 2018) ("The Victim and Witness Protection Act, however, provides that the court may order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."); United States v. Olson, 867 F.3d 224, 229 n.2 (1st Cir.

Crimes

Although Sections 3663 and 3663A employ the same definition of *victim*, they do not authorize restitution for the same crimes. The list of crimes for which Section 3663 permits restitution supplements the list for which Section 3663A demands restitution.

Section 3663A (Mandatory Restitution)

The mandatory restitution of §3663A applies upon conviction for a felony or misdemeanor that is:

- a crime of violence, as defined in Section 16(a);
- an offense against property under 18 U.S.C., or under Section 416(a) of the Controlled Substances Act (21 U.S.C. § 856(a)), including any offense committed by fraud or deceit;
- an offense described in Section 1365 (relating to tampering with consumer products); or
- an offense under Section §670 (relating to theft of medical products).[59]

Section 16 describes a crime of violence as either "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

In *Sessions v. Dimaya*, the Supreme Court held that Section 16(b), as incorporated into the Immigration and Nationality Act, is unconstitutionally vague.[60] The lower federal appellate courts have held that for purposes of Section 3663A the term "crimes of violence," as defined in Section 16(a), includes Hobbs Act robbery,[61] threats,[62] assault,[63] and arson,[64] but not a false statement offense,[65] interfering with a flight attendant,[66] or second degree murder.[67] Elsewhere, the Supreme Court has explained that "crime of violence as defined by §16" does not encompass crimes committed negligently or accidently, such as driving under the influence.[68] The controlled

2017).

[59] 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A). *e.g.,* United States v. Wells, 873 F.3d 1241, 1247-48 (10th Cir. 2017). In the case of misdemeanors, the district court has the discretion to impose only restitution or to order restitution in addition to any other penalties that attend conviction.

[60] 138 S. Ct. 1204, 1210 (2018).

[61] United States v. Garcia-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018) (18 U.S.C. § 1951).

[62] United States v. Haileselassie, 668 F.3d 1033, 1034-35 (8th Cir. 2012) 18 U.S.C. § 876(c) (anthrax threat) United States v. DeLaFuente, 353 F.3d 766, 770-71 (9th Cir. 2003) (same).

[63] United States v. Cowden, 882 F.3d 464, 476 n. 3 (4th Cir. 2018) (18 U.S.C. § 242) (use of excessive force under color of law); United States v. Schmidt, 675 F.3d 1164, 1167 (8th Cir. 2012) (18 U.S.C. § 113(a) (assault with a dangerous weapon); United States v. Martinez, 486 F.3d 1239, 1248 (11th Cir. 2007) (18 U.S.C. § 111(a) (forcibly assaulting a corrections officer).

[64] United States v. Patrick V., 359 F.3d 3, 9 (1st Cir. 2004) (18 U.S.C. § 844(i)) (arson).

[65] United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006) (18 U.S.C. § 1001).

[66] United States v. Diaz, 865 F.3d 168, 178-79 (4th Cir. 2017) (49 U.S.C. § 46504).

[67] United States v. Begay, 934 F.3d 1033, 1038 (9th Cir. 2019) ("Second-degree murder does not constitute a crime of violence under the elements clause – 18 U.S.C. § 924(d)(3)(A) – because it can be committed recklessly.").

[68] Leocal v. Ashcroft, 543 U.S. 1, 11 (2004); *see also* United States v. Daye, 571 F.3d 225, 232 (2d Cir. 2009) (noting

substance offense that carries with it a restitution requirement under Section 3663A (21 U.S.C. § 856) consists of maintaining a place where controlled substances are manufactured, stored, or used.[69]

The property damage/fraud predicate in Section 3663A must involve a violation proscribed under title 18 of the *United States Code* rather than an offense found in another title.[70] Yet the general conspiracy provision in title 18 can provide the necessary basis for a mandatory restitution order when the defendant is convicted of conspiracy to commit property damage or fraud in violation of a federal law found outside of title 18.[71]

The court need not order restitution following conviction for an otherwise qualified property damage or fraud offense when the number of identifiable victims or complexity of the issues makes the effort impractical.[72] The complexity exception under which the court may decline to order mandatory restitution seems fairly narrow for a number of reasons. First, all else being equal, the section seems to favor restitution: reimbursing the victims of crime outweighs conforming to a sentencing time table.[73] Second, balancing requires only a reasonable assessment of the amount of the defendant's restitution obligations, not an assessment with "exact precision."[74] Third, and perhaps most compelling, after the Supreme Court's decision in *Dolan v.*

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for the same reason that reckless manslaughter and driving while intoxicated are not crimes of violence as defined in Section 16).

[69] *E.g.*, United States v. Kaplan, 839 F.3d 795, 799-800 (9th Cir. 2016). Most other controlled substance offenses come within the purview of Section 3663.

[70] 18 U.S.C. § 3663A(c)(1)(A)(ii); United States v. Chalupnik, 514 F.3d 748, 755 (8th Cir. 2008).

[71] United States v. Quarrell, 310 F.3d 664, 677 (10th Cir. 2002) ("The Quarrells also argue the MVRA is inapplicable because a violation of ARPA, 16 U.S.C. 470ee, is not an offense 'under this title,' referring to Title 18. However, the Quarrells were also convicted of conspiracy under 18 U.S.C. 371, which is an offense under Title 18. The Quarrells' conspiracy conviction satisfied the 'under this title' requirement of the MVRA."); *see also* United States v. Sawyer, 825 F.3d 287, 292 (6th Cir. 2016) (conspiracy to violate the Clean Air Act); United States v. Butler, 694 F.3d 1177, 1183 (10th Cir. 2012) (conspiracy to violate the Lacey Act).

[72] 18 U.S.C. § 3663A(c)(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."). This does not necessarily mean that restitution is barred for identifiable victims simply because other victims may be unidentifiable, United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999). The number-of-victims and complexity-of-restitution limitations are only available to defendants convicted of property damage/fraud predicate offenses; they are not available to other defendants subject to mandatory restitution under § 3663A. United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2006); United States v. Murray, 700 F.3d 241, 243 (5th Cir. 2012).

[73] 18 U.S.C. § 3663A(c)(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 … (B) . . . the need to provide restitution to any victim is outweighed by the burden on the sentencing process.").

[74] United States v. Carpenter, 841 F.3d 1057, 1060 (8th Cir. 2016) (internal citation omitted) ("In cases where the amount of loss (and by extension the amount of restitution) caused by fraud is difficult to calculate, a district court is charged only with making a reasonable estimate of the loss."); United States v. Ferdman, 779 F.3d 1129, 1133 (10th Cir. 2015) (internal citations and emphasis omitted) ("A district court may resolve restitution uncertainties with a view towards achieving fairness to the victim so long as it still makes a reasonable determination of appropriate restitution rooted in a calculation of actual loss. True, the MVRA does not require a court to calculate a victim's actual loss with 'exact' precision."); United States v. Anderson, 741 F.3d 938, 954 (9th Cir. 2013) ("Nonetheless, exact precision is not required and district courts do have a degree of flexibility in accounting for a victim's complete losses; thus, a 'reasonable estimate' will suffice."); *but see* United States v. Flete-Garcia, 925 F.3d 17, 37 (1st Cir. 2019) (internal citations omitted) ("And whereas loss calculations require only a reasonable estimate of the range of loss, the entire amount of restitution must be supported – albeit only by a 'modicum of reliable evidence.'").

United States,[75] the restitution time table is no longer as consequential. In *Dolan*, the Court held that the 90-day deadline for issuance of a restitution order applies to the determination that some restitution is due, nor the amount due.[76]

Beyond the general description of crimes covered, Section 3663A lists two specific offenses for which restitution is mandatory. The product tampering offense consists of tampering with a product or its labeling that affects interstate or foreign commerce or spreading false rumors that such a product is contaminated.[77] The medical products offense consists of the theft of, or unlawful trafficking in, pre-retail medical products.[78]

Other Restitution Statutes

A few other federal statutes require restitution orders. Most apply the procedures that govern Sections 3663 and 3663A to a narrower range of crimes but a wider range of losses than Sections 3663 and 3663A and their attendant enforcement procedures might otherwise permit. Numbered among these provisions are

- 18 U.S.C. § 43 (animal enterprise);
- 18 U.S.C. § 228(d) (restitution child support cases);[79]
- 18 U.S.C. § 1593 (restitution in cases under chapter 77 relating to peonage, slavery, and trafficking in persons);[80]
- 18 U.S.C. § 2248 (restitution in cases under chapter 109A relating to sexual abuse);[81]
- 18 U.S.C. § 2259 (restitution in cases under chapter 110 relating to sexual exploitation of children);[82]
- 18 U.S.C. § 2264 (restitution in cases under chapter 110A relating to domestic violence and stalking);[83]
- 18 U.S.C. § 2323(c) (restitution in copyright infringement cases);
- 18 U.S.C. § 2327 (restitution in telemarketing fraud cases);

[75] 560 U.S. 605 (2010).

[76] *Id.* at 607-8 ("The statute in question focuses upon mandatory restitution for victims of crimes. It provides that 'the court shall set a date for the final determination of the victim's losses not to exceed 90 days after sentencing.' 18 U.S.C. § 3664(d)(5). We hold that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount.").

[77] 18 U.S.C. §§ 1365, 3663A(c)(1)(A)(iii).

[78] *Id.* §§ 670, 3663A(c)(1)(A)(iv).

[79] *E.g.*, United States v. Hanna, 630 F.3d 505, 507 (7th Cir. 2010).

[80] *E.g.*, United States v. Charles, 895 F.3d 560, 562 (8th Cir. 2018); United States v. Baston, 818 F.3d 651, 665-66 (11th Cir. 2016).

[81] *E.g.*, United States v. Thunderhawk, 860 F.3d 633, 635 (8th Cir. 2017).

[82] *E.g.*, United States v. Romero-Medrano, 899 F.3d 356, 358 (5th Cir. 2018); United States v. Dillard, 891 F.3d 151, 155 (4th Cir. 2018).

[83] *E.g.*, United States v. Hobgood, 868 F.3d 744, 746 (8th Cir. 2017).

- 21 U.S.C. § 853(q) (restitution in controlled substances cases involving amphetamine and methamphetamine offenses);[84]
- 18 U.S.C. § 2421A (reckless disregard of sex trafficking);[85] and
- 18 U.S.C. § 2429 (transportation or travel for unlawful sexual purposes).[86]

Discretionary Restitution

Section 3663 permits restitution when the defendant has been convicted of a crime proscribed under title 18 of the *United States Code* for which restitution is not mandatory.[87] It also authorizes, but does not require, restitution when the defendant is convicted of any of several drug trafficking offenses under the Controlled Substances Act or of any of a few air safety offenses.[88] Elsewhere, the court may order restitution following conviction pursuant to a plea bargain[89] or as a condition of either probation[90] or supervised release.[91]

Losses

But-For and Proximate Cause

As a general rule, restitution requires that the defendant's offense be both the actual (or but-for) cause of the victim's loss and the proximate cause of that loss.[92] "Proximate cause asks 'whether the harm alleged has a sufficiently close connection to the conduct at issue.' In other words, was the harm foreseeable"?[93] Proximate cause "preclude[s] liability in situations where the causal link

[84] 21 U.S.C. § 853(q).

[85] 18 U.S.C. § 2421A, enacted as Section 3(a) of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, P.L. 115-164, 132 Stat. 1253 (2018).

[86] 18 U.S.C. 2429, enacted as Section 3(a) of the Abolish Human Trafficking Act of 2017, P.L. 115-392, 132 Stat. 5251 (2018).

[87] 18 U.S.C. § 3663(a).

[88] The Controlled Substance Act offenses consist of violations of 21 U.S.C. §§ 841 (manufacture, distribution, or possession with intent to distribute), 848(a) (drug kingpin), 849 (tracking at truck stops), 856 (maintain a place where controlled substances are manufactured, stored, or used), 861 (using a child to traffic), 863 (trafficking in drug paraphernalia). The aircraft safety offenses consist of violations of 49 U.S.C. §§ 5124 (tampering with the labels on hazardous cargo), 46312 (unlawful transportation of hazardous cargo), 46502 (air piracy), and 46504 (interfering with a flight crew).

[89] 18 U.S.C. § 3663(a)(3); United States v. Sizemore, 850 F.3d 821, 824-25 (6th Cir. 2017); United States v. Lo, 839 F.3d 777, 785-86 n.2 (9th Cir. 2016).

[90] 18 U.S.C. § 3563(b)(2); United States v. Alvarez, 835 F.3d 1180, 1184-85 (9th Cir. 2016); United States v. Udo, 795 F.3d 24, 34 n.5 (D.C. Cir. 2015).

[91] 18 U.S.C. § 3583(d); *Alvarez*, 835 F.3d at 1185; United States v. Kilpatrick, 798 F.3d 365, 391 (6th Cir. 2015).

[92] *Cf.* Burrage v. United States, 571 U.S. 204, 210 (2014) (internal citations omitted) ("When a crime requires 'not merely conduct but also a specified result of conduct,' a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the 'legal' cause (often called the proximate cause) of the result."); United States v. Wells, 873 F.3d 1241, 1266 (10th Cir. 2017) (quoting 3 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 546 (4th ed. 2011) ("Generally, the government must show [under the federal restitution statute] both that the defendant is the but-for cause of the person's harm and that the defendant was the proximate cause of the person's harm.").

[93] United States v. Stein, 846 F.3d 1135, 1155 (11th Cir. 2017); United States v. Soto, 799 F.3d 68, 98 (1st Cir. 2015) (quoting Robers v. United States, 572 U.S. 639, 645 (2014) and citing Paroline v. United States, 572 U.S. 434, 445 (2014)); United States v. Clark, 787 F.3d 451, 463 (7th Cir. 2015) ("Direct and proximate harm means that the loss

between the conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[94]

The child pornography restitution statute, Section 2259, presents the courts with one of the few instances in which restitution was required in spite of the absence of but-for cause. In *Paroline v. United States*, a man videoed his 9-year old niece in sexually abusive poses.[95] He was convicted, imprisoned, ordered to pay $6,000 in restitution.[96] Years later, the victim discovered the video had gone viral on the internet further traumatizing and humiliating her.[97] Paroline pleaded guilty to possession of a downloaded copy of the video and the victim sought restitution in the amount of a little less than $3.4 million from him of the accumulated harm of years of wide-spread distribution.[98] There was no question that Paroline's offenses had harmed the victim. Nevertheless, his offense was not the but-for cause of the total harm the victim suffered and unraveling his contribution from the thousands of other unidentified past and future possessors of the pornographic material would be "incredibly difficult."[99] And so the Court declared:

> In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace [particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses.[100]

Subsequent lower federal appellate courts have emphasized that the government must prove that the defendant's conduct caused some of the victim's harm,[101] but have granted district courts some latitude in assessing the defendant's portion of the victim's total losses.[102]

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would not have occurred 'but for' the offense and that it was 'foreseeable.'").

[94] *Paroline*, 572 U.S. at 445.

[95] In re Amy, 591 F.3d 792, 794 (5th Cir. 2009), *vac'd en banc sub nom*., In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012); *vac'd and remanded*, Paroline v. United States, 572 U.S. 434 (2014).

[96] *Paroline*, 572 U.S. at 440.

[97] *Id.* at 440-41.

[98] *In re Amy Unknown*, 701 F.3d at 752-53.

[99] *Paroline*, 572 U.S. at 450 ("In this case, however, a showing of but-for causation cannot be made. The District Court found that the Government failed to prove specific losses caused by Paroline in a but-for sense and recognized that it would be 'incredibly difficult' to do so in a case like this.").

[100] *Id.* at 458.

[101] United States v. Winchel, 896 F.3d 387, 390 (5th Cir. 2018) (trial court erred in ordering the defendant to pay $1.5 million in restitution without determining whether the defendant's conduct proximately caused the victim's losses); United States v. Villalobos, 879 F.3d 169, 171-72 (5th Cir. 2018) (district court could not award $10,000 in restitution when it found that the total losses to the defendant were $0).

[102] United States v. Rothenberg, 923 F.3d 1309, 1333 (11th Cir. 2019) (after reviewing decisions in other circuits) (internal citations omitted) ("*Paroline* directed district courts to hold a defendant accountable only for his own individual conduct and set a restitution amount that comports with the defendant's relative role in causing the victim's general losses. How a district court arrives at that figure is largely up to the district court, so long as the number is a reasonable and circumscribed award that is suited to the relative size of the defendant's causal role in the entire chain of events that caused the victim's loss."); United States v. Halverson, 897 F.3d 645, 654-55 (5th Cir. 2018) (upholding a restitution order consisting of a base amount of $5,000 plus an amount based on the number of images of the victim the defendant possessed);); United States v. Bordman, 895 F.3d 1048, 1057-59 (8th Cir. 2018) (upholding a district court restitution order that divided the victim's losses by the number of offenders whose conduct caused the victim's losses among other factors); United States v. Dillard, 891 F.3d 151, 162 (4th Cir. 2018) (rejecting the contention that mere possessors of child pornography are immune from restitution orders) ("[C]ourts of appeals have approved of various methods of determining a restitution award that is not token or nominal … District courts have great discretion in

Property Loss or Damage

Sections 3663 and 3663A

Sections 3663 and 3663A have essentially identical restitution provisions: both call for the return of the property, if that provides full victim restitution.[103] If not, restitution takes the form of compensatory payments, in whole or in part.[104] As a general rule, victims are entitled only to be made whole; unlike the sentencing guidelines which calculate sentence enhancements based on both actual and intended losses,[105] the restitution statutes permit awards only for actual losses.[106] It is often not the fact of a reimbursable loss, but its measure, that challenges the courts. Nevertheless, the types of reimbursable property losses contemplated by Sections 3663(b)(1) and 3663A(b)(1) include things like the salary of a faithless employee,[107] or the insurance

selecting a an appropriate methodology …"); United States v. Sainz, 827 F.3d 602, 605-607 (7th Cir. 2016).

[103] 18 U.S.C. § 3663(b)(1) ("The order may 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, impractical, or inadequate, pay an amount equal to 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 the value (as of the date the property is returned) of any part of the property that is returned."); *see id.* § 3663A(b)(1) below.

[104] *Id.* ("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."); *see id.* § 3663(b)(1) above; *e.g.*, United States v. Ritchie, 858 F.3d 201, 215 (4th Cir. 2017) (internal citations omitted) ("The 'owner of the property' that was lost (i.e., money lent), … is entitled to a restitution award that is equivalent to the outstanding amount of the money that remains due under the fraudulently obtained loan. And because the money that was lent to the borrower is 'property' under MVRA, that amount necessarily takes into account any portion of the money that was 'returned' to the owner … when the collateral that secured the loan was sold.").

[105] U.S.S.G. §2B1.1 and accompanying *Application Note* 3.

[106] United States v. Naphaeng, 906 F.3d 173, 179 (1st Cir. 2018) (internal citations omitted) ("In a fraud case resulting in financial loss the defendant's guideline sentencing range is determined in part by calculating the greater of either the intended loss or the actual loss. … So viewed, intended loss serves a punitive purpose, punishing the defendant for the harm that he sought to inflict. In contract, restitution is designed to compensate the victim, not to punish the offender. To this end, the MVRA mandates that a defendant convicted of certain federal crimes … make restitution to victims commensurate with the victims' actual losses."); United States v. Lacey, 699 F.3d 710, 721 (2d Cir. 2012) ("We note that unlike the loss calculation for the purposes of sentencing, which may incorporate a merely intended loss in order to punish a culpable defendant, restitution is designed to make the victim whole, and must therefore be based only on the actual loss caused by the scheme."); United States v. Harvey, 532 F.3d 326, 339 (4th Cir. 2008) ("We and other circuits have interpreted this language [18 U.S.C. 3664(f)(1))A)] to require that an order of restitution be based on 'actual loss,' rather than 'intended loss'.") (citing cases from the First, Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits). The Identity Theft Enforcement and Restitution Act, however, recognizes restitution awards for either the actual or intended harm caused by certain identity theft offenses (violations of either 18 U.S.C. §§ 1027(a)(7) or 1028A(a)), 18 U.S.C. 3663(b)(6). Moreover, a plea agreement may call for restitution that §§ 3663 and 3663A would not otherwise allow. *Id.* §§ 3663(a)(3), 3663A(a)(3).

[107] United States v. Bahel, 662 F.3d 610, 648-49, 650 (2d Cir. 2011) ("[T]he money the U.N. paid in the form of his salary was plainly 'property' that belonged to the U.N., at least some of which the U.N lost as a result of Bahel's offense [receiving kickbacks from U.N. contractors], since the U.N. paid him for his honest services, which is what he failed to provide.... [We] find that requiring Bahel to repay less than 10% of his total salary was a conservative estimate of the costs of the fraud with respect to his salary.") (citing, United States v. Crawley, 533 F.3d 349 (5th Cir. 2008), and United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998)); *see also* United States v. Hunter, 618 F.3d 1062, 1066 (9th Cir. 2010) (holding restitution in amounts paid by former employers as salary and benefits to the defendant convicted for stealing the identity of a registered nurse and using to gain employment).

replacement costs of a stolen car,[108] or the losses visited upon a loan guarantor by a mortgage fraud scheme.[109]

Both Sections 3663 and 3663A, nevertheless, permit restitution for losses other than those caused by the crime of conviction when the offense "involves as an element a scheme, conspiracy, or pattern of criminal activity."[110]

The Supreme Court resolved uncertainty when it held in *United States v. Lagos* on May 29, 2018, that restitution under Section 3663A for a victim's attorneys' fees and other expenses incurred during an investigation and proceeding relating to the offense of conviction applies only to government investigations and proceedings and not to private investigations or civil proceedings.[111] The Court left unresolved whether private investigations conducted or private judicial proceedings initiated at the government's request might be covered.[112]

Section 3663(b), unlike its counterpart, permits the court to order those convicted of crime-assisting identity theft or aggravated identity theft to pay for the costs incurred by their victims to remedy the actual or intended harm associated with the offense.[113]

Again unlike Section 3663A, Section 3663(c) authorizes community restitution in the form of awards apportioned between state victim assistance agencies and state agencies dedicated to the

[108] United States v. Burks, 678 F.3d 1190, 1198-99 (10th Cir. 2012).

[109] Robers v. United States, 572 U.S. 639, 640-41 (2014) ("A provision in the statute says that, when return of the property lost by the victim is 'impossible, impracticable, or inadequate,' the offender must pay the victim 'an amount equal to ... the value of the property' less 'the value (as of the date the property is returned) of any part of the property that is returned.' §3663A(b)(1)(B). The question before us is whether 'any part of the property' is 'returned' when a victim takes title to collateral securing a loan that an offender fraudulently obtained from the victim. We hold that it is not. In our view, the statutory phrase 'any part of the property' refers only to the specific property lost by a victim, which, in the case of a fraudulently obtained loan, is the money lent. Therefore, no 'part of the property' is 'returned' to the victim until the collateral is sold and the victim receives money from the sale. The import of our holding is that a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it.").

[110] 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2); United States v. Anieze-Smith, 923 F.3d 565, 572 (9th Cir. 2019) (internal citation omitted) ("Because an element of health care fraud is a scheme or pattern of criminal conduct, the MVRA permits the district court to base restitution on related but uncharged conduct that was part of Anieze-Smith's fraud scheme"); United States v. Cornelsen, 893 F.3d 1086, 1090-91 (8th Cir. 2018); United States v. Sanjar, 876 F.3d 725, 748 (5th Cir. 2017).

[111] Lagos v. United States, 138 S. Ct. 1684, 1687 (2018) ("The Mandatory Victims Restitution Act of 1996 requires defendants convicted of a listed range of offenses to 'reimburse the victim for lost income and necessary child care, transportation, and other expenses *including during participation in the investigation or prosecution of the offense or attendance at proceedings relating to the offense*.' 18 U.S.C. § 3663A(b)(4) (emphasis added.). We must decide whether the words 'investigation' and 'proceedings' are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and proceedings."); *see also Cornelsen*, 893 F.3d at 1091. The same language appears in 18 U.S.C. § 3663(b)(4).

[112] *Lagos*, 138 S. Ct. at 1690.

[113] 18 U.S.C. § 3663(b)(6). ("(b) The order may require that such defendant ... (6) in the case of an offense under §§ 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.").

Section 1028(a)(7) condemns whoever "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." Section 1028A condemns similar misconduct committed during and in relation to a number of other designated federal offenses.

reduction of substance abuse.[114] The authority is limited to certain drug trafficking cases where there are no identifiable victims; may not exceed the amount of the fine that might be imposes; and may not take priority over any fines imposed, forfeitures ordered, or penalties assessed.[115]

Individual Restitution Sections

Several individual restitution sections follow the same general pattern as Section 3663A but add at least one unique feature of their own.[116] For example, the child support restitution section, 18 U.S.C. § 228(d), adopts the procedures of Section 3663A in cases of interstate evasion of child support orders.[117] Yet the amount of restitution that must be awarded is determined by reference to a state court support order or by other governing state law[118] and, as such, may include the interest on overdue support payments[119] and support owed after children have reached their majority.[120]

The peonage restitution section, 18 U.S.C. §1593, uses the common definition of "victim"[121] and affords victims of human trafficking offenses[122] a wide range of compensation that, unlike

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[114] 18 U.S.C. § 3663(c) ("(1) Notwithstanding any other provision of law ... when sentencing a defendant convicted of an offense described in ... 21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection. (2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.... (3) Restitution under this subsection shall be distributed as follows: (A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred. (B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds ...").

[115] *Id.*; *id*. § 3663(c)(2)(B); *id*. § 3663(c)(4) ("The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act."); *id*. § 3663(c)(5) ("Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 [relating to fines for federal offenses] shall take precedence over any order of restitution under this subsection.").

[116] The copyright restitution statute is an exception to this general rule; it adopts Sections 3663A and 3664 by cross reference with no additional features other than the offenses that trigger the mandatory restitution requirement. *Id*. § 2323(c) ("When a person is convicted of an offense under §506 of Title 17 or §2318, 2319, 2319A, 2319B, or 2320, or chapter 90 of this title, the court, pursuant to §§3556, 3663A, and 3664 of this title, shall order the person to pay restitution to any victim of the offense as an offense against property referred to in §3663A(c)(1)(A)(ii) of this title.").

[117] *Id*. § 228(d) ("Upon a conviction under this section, the court shall order restitution under Section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing."); United States v. Hanna, 630 F.3d 505, 512 (7th Cir. 2010).

[118] 18 U.S.C. § 228(f)(3) ("[T]he term 'support obligation' means any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.").

[119] United States v. Gill, 264 F.3d 929, 931-33 (9th Cir. 2001).

[120] United States v. Molak, 276 F.3d 45, 51 (1st Cir. 2002).

[121] 18 U.S.C. § 1593(c) ("As used in this section, the term 'victim' means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.").

[122] Chapter 77 of Title 18 of the *United States Code* houses the following criminal prohibitions: *id*. §§ 1581 (peonage), 1582 (vessels in the slave trade), 1582 (enticement into slavery), 1584 (sale into involuntary servitude), 1585 (transportation or sale of slaves), 1586 (service on vessels in the slave trade), 1587 (possession of slaves aboard a vessel), 1588 (transportation of slaves from the United States), 1589 (forced labor), 1590 (human trafficking), 1591 (sex trafficking), 1592 (documentation in aid of trafficking).

§§3663 and 3663A, includes the economic benefits derived from the victim's services and a catch-all clause ensuring compensation for predicate crime-related injuries and losses.[123]

The telemarketing fraud restitution statute, 18 U.S.C. § 2327, originally enacted two years before the passage of the mandatory restitution provisions of Section 3663A, once had highly individualistic features.[124] Congress has since been amended it so that its provisions more closely track those of the general restitution provisions for losses caused by predicate crimes.[125]

The methamphetamine statute, 21 U.S.C. § 853(q), covers the cleanup cost of closing down illicit amphetamine and methamphetamine production sites.[126] At one time, the section applied only to those convicted of manufacturing offenses and consequently reached convictions for attempted manufacture but not for possession with intent to distribute.[127] The USA PATRIOT Improvement and Reauthorization Act amended the section so that it now authorizes restitution upon conviction

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[123] *Id*. § 1593(b)(3) (emphasis added) ("As used in this subsection, the term 'full amount of the victim's losses' has the same meaning as provided in §2259(b)(3) and *shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor* as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)."). Section 2259(b)(3) (emphasis added) defines "full amount of the victim's losses" to include "any costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and (F) *any other losses suffered by the victim as a proximate result of the offense*."); United States v. Baston, 818 F.3d 651, 660 (11th Cir. 2016) ("The district court ordered Baston to pay $99,270 in restitution … The district court calculated these amounts based on worksheets provided by the government, which multiplied the hours that the victims prostituted for Baston by the amounts that they charged and then subtracted their estimated living expenses."). The court in *Baston* also held that the district court should have ordered restitution covering the $400,000 Baston received for prostituting the victims in Australia. *Id*. 818 F.3d at 665-68. *See also*, *In re* Sealed Case, 702 F.3d 59, 66 (D.C. Cir. 2012) ("Section 1593 requires that the defendant pay the victim 'the full amount of the victim's losses,' *id*. §1593(b)(1) defined as the sum of two components: (1) ill-gotten gains plus (2) the 'full amount of the victim's losses'...").

[124] 18 U.S.C. § 2327 (1994 ed.).

[125] 18 U.S.C. § 2327 now provides:
"(a) *In general*—Notwithstanding §3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under §2326.
"(b) *Scope and nature of order*.—(1) *Directions*.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2). (2) *Enforcement*.—An order of restitution under this section shall be issued and enforced in accordance with §3664 in the same manner as an order under §3663A. (3) *Definition*.—For purposes of this subsection, the term 'full amount of the victim's losses' means all losses suffered by the victim as a proximate result of the offense. (4) *Order mandatory*—(A) The issuance of a restitution order under this section is mandatory. (B) A court may not decline to issue an order under this section because of—(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.
"(c) *Victim defined*—In this section, the term 'victim' has the meaning given that term in §3663A(a)(2)."

[126] 21 U.S.C. § 853(q) ("The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—(1) order restitution as provided in §§3612 and 3664 of Title 18; (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant or on premises or in property that the defendant owns, resides, or does business in; and (3) order restitution to any person injured as a result of the offense as provided in §3663A of Title 18.").

[127] United States v. Gramling, 417 F.3d 891, 895-96 (8th Cir. 2005) (attempt); United States v. Lachowski, 405 F.3d 696, 698-700 (8th Cir. 2005) (possession).

for offenses involving possession, possession with intent to distribute, or manufacture of amphetamine and methamphetamine.[128]

The animal enterprise interference section, 18 U.S.C. § 43(c), permits a sentencing court to order a defendant convicted of violating its proscriptions to pay restitution for specific kinds of damage (i.e., the cost of repeating disrupted experiments, the loss of farm income, and the costs of economic disruption).[129]

Personal Injuries

Sections 3663 and 3663A

Sections 3663 and 3663A have parallel provisions governing the restitution for personal injuries that permit or, in the case of Section 3663A require, compensation for medical expenses,[130] lost income,[131] rehabilitation,[132] and, in the event the victim is killed, funeral and related expenses.[133]

The medical expenses covered by a restitution order may include those paid on the victim's behalf by a third party,[134] and may include the costs of psychiatric and psychological treatment

[128] Section 743, P.L. 109-177, 120 Stat. 272 (2006).

[129] 18 U.S.C. § 43(c) ("An order of restitution under section 3663 or 3663A of this title with respect to a violation of this section may also include restitution—(1) for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense; (2) for the loss of food production or farm income reasonably attributable to the offense; and (3) for any other economic damage, including any losses or costs caused by economic disruption, resulting from the offense."). Note that Section 43 outlaws misconduct involving either property damage, personal injury, or both.

[130] *Id.* §§ 3663(b)(2)(A), 3663A((b)(2)(A) ("[A]n 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."); *e.g.*, United States v. Keelan, 786 F.3d 865, 872-73 (11th Cir. 2015); United States v. Church, 731 F.3d 530, 536 (6th Cir. 2013); United States v. Schmidt, 675 F.3d 1164, 1169 (8th Cir. 2012).

[131] 18 U.S.C. §§ 3663(b)(2)(C), 3663A(b)(2)(C); United States v. Messina, 806 F.3d 55, 67-8 (2d Cir. 2015) (noting that section 3663A(b)(2)(C) requires restitution awards for the lost income of the victims of physical injuries, both those who survive and those that do not).

[132] 18 U.S.C. §§ 3663(b)(2)(B), 3663A(b)(2)(B) ("[A]n amount equal to the cost of necessary physical and occupational therapy and rehabilitation.").

[133] *Id.* §§ 3663(b)(3), 3663A(b)(3) ("... [A]n amount equal to the cost of necessary funeral and related services."); *e.g.*, United States v. Amador-Huggins, 799 F.3d 124, 133-34(1st Cir. 2015); United States v. Bostick, 791 F.3d 127, 160-61 (D.C. Cir. 2015); United States v. Douglas, 525 F.3d 225, 253-54 (2d Cir. 2008).

[134] *Church*, 731 F.3d at 535; United States v. Johnson, 400 F.3d 187, 199-201(4th Cir. 2005) ("Under the MVRA, a district court properly orders restitution to be paid to a third party when the party bears the cost of providing necessary medical care to a victim of a covered offense who suffered bodily injury as a result of the offense.") (quoting United States v. Cliatt, 338 F.3d 1089, 1091 (9th Cir. 2003)); *Schmidt*, 675 F.3d at 1169.

when the victim has suffered a physical injury.[135] Restitution for lost income extends to both past and future lost income.[136]

Other Restitution Statutes

Prior to passage of the general mandatory restitution authority in Section 3663A, Congress authorized restitution for three related sets of offenses. Those authorizations, found in 18 U.S.C. §§ 2248, 2259 and 2264, require the courts to order restitution following conviction for an offense proscribed in chapters 109A (sexual abuse), 110 (sexual exploitation of children), and 110A (domestic violence and stalking), respectively.[137] Other than their designation of predicate offenses, the sections are identical. They each:

- insist on restitution of the "full amount of the victim's losses,"[138]
- define "victims" in much the manner of §§3663 and 3663A;[139]
- supply a list of losses for which restitution must be ordered;[140]

[135] *Keelan*, 786 F.3d at 872 ("The statutory language does not limit restitution only to care necessary to narrowly treat the physical manifestations of the victim's injury. The statute explicitly encompasses mental health treatment necessary to treat the psychological trauma of the victim."); United States v. Reichow, 416 F.3d 802, 805-6 (8th Cir. 2005); United States v. Follet, 269 F.3d 996, 1001 (9th Cir. 2001); United States v. Husky, 924 F.2d 223, 226 (11th Cir. 1991). Physical injury is ordinarily a necessary prerequisite for recovery for psychological harm, United States v. Maynard, 743 F.3d 374, 380 (2d Cir. 2014). No such physical injury is required, however, when restitution is ordered under the authority of individual sexual abuse restitution statute although the sexual abuse statute may impose greater limits on payments to third parties. *Follet*, 269 F.3d at 998-1001 (sexual abuse victim).

[136] *Messina*, 806 F.3d at 67-8; United States v. Cienfuegos, 462 F.3d 1160, 1163-69 (9th Cir. 2006); United States v. Oslund, 453 F.3d 1048, 1062-63 (8th Cir. 2006) (but explaining that in a given case complications associated with calculating the value of income lost by a murder victim might justify a refusal to award them). Note, however, that while the Ninth Circuit held that restitution for future income can be awarded to the estate or representative of a deceased victim, *Cienfuegos*, 462 F.3d at 1163-69, it had previously held that the wife of a deceased victim was not entitled to restitution for the victim's lost income in her own right unless she also suffered a physical injury as consequence of the offense. United States v. Dayea, 73 F.3d 229, 231-32 (9th Cir. 1995).

[137] The crimes in chapters 109A, 110 and 110A of Title 18 consist of those proscribed in 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (material involving sexual exploitation of children), 2252A (child pornography), 2252B (misleading internet domain names), 2252C (misleading internet words or digital images), 2257 (record keeping requirements), 2257A (simulated sexual conduct records), 2258 (failure to report child abuse), 2260 (overseas production child pornography for the United States), 2260A (sex offender registration), 2261 (interstate domestic violence), 2262 (interstate stalking), 2261 (violation of protection orders).

[138] *Id.* §§ 2248(b)(1), (b)(4)(A); 2259(b)(1), (b)(4)(A); 2264(b)(1), (b)(4)(A); *e.g.*, United States v. Thunderhawk, 860 F.3d 633, 636-37 (8th Cir. 2017).

[139] 18 U.S.C. §§ 2248(c), 2259(c), 2264(c) ("For purposes of this section, the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a 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, but in no event shall the defendant be named as such representative or guardian."); United States v. Rothenberg, 923 F.3d 1309, 1324 (11th Cir. 2019).

[140] 18 U.S.C. §§ 2248(b)(3), 2259(b)(3), 2264(b)(3) ("For purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and (F) any other losses suffered by the victim as a proximate result of the offense."); United States v. Osman, 853 F.3d 1184, 1189 (11th Cir. 2017).

- make it clear that neither the defendant's poverty nor victim compensation from other sources absolves the court of its obligation to order restitution;[141] and
- otherwise adopt the procedural mechanisms used for restitution under Section 3663A.[142]

Unlike Sections 3663 and 3663A, the three sections on their face do not require bodily injury of the victim as a precondition for the award of the cost of psychiatric treatments. They also have a catch-all clause that has no counterpart in either Section 3663 or 3663A.[143] On the other hand, unlike §§3663 and 3663A, they do not authorize payments to third parties to reimburse them for treatment of a victim's crime-related injuries.[144]

Procedure

Except to the limited extent otherwise provided in the individual authorization statutes, Section 3664 supplies the procedure that governs the issuance of restitution orders.[145] Upon conviction of a defendant, the court directs the probation service to investigate and prepare a report identifying each victim of the offense and the extent of their injuries, damages, or losses.[146] Prosecutors are to provide the probation officer with pertinent information.[147] The officer is also to ask victims to

[141] 18 U.S.C. §§ 2248(b)(4)(B), 2259(b)(4)(B), 2264(b)(4)(B) ("(B) A court may not decline to issue an order under this section because of—(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source."); *Rothenberg*, 923 F.3d at 1324.

[142] 18 U.S.C. §§ 2248(b)(2), 2259(b)(2), 2264(b)(2) ("An order of restitution under this section shall be issued and enforced in accordance with §3664 in the same manner as an order under §3663A."); *Osman*, 853 F.3d at 1189.

[143] 18 U.S.C. §§ 2248(b)(3), 2259(b)(3), 2264(b)(3) ("For purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for ... (F) any other losses suffered by the victim as a proximate result of the offense.").

[144] United States v. Johnson, 400 F.3d 187, 199-200 n.5 (4th Cir. 2005) (emphasis of the court) ("… That statute [18 U.S.C. § 2248] required the defendant to pay the victim the 'full amount of the victim's losses,' which it defined to include 'any costs *incurred* by the victim' for enumerated expenses."); United States v. Follet, 269 F.3d 996, 998-1001 (9th Cir. 2001) (also noting that §§3663 and 3663A "although broader in these respects than §2248, are narrower in another. Under §3663(b)(2)(A) and §3663A(b)(2)(A), restitution orders can cover psychological care only when there has been a bodily injury, while restitution orders under §2248 are subject to no such limitation.").

[145] 18 U.S.C. § 3664(a) ("For orders of restitution under this title.... "); each of the individual provisions also contains a corresponding cross reference, *id*. §§ 43(c), 228(d), 1593(b)(2), 2248(b)(2), 2259(b)(2), 2264(b)(2), 2323(c), 2327(b)(2). 21 U.S.C. § 853(q)(1)("The court ... shall—(1) order restitution as provided in §§ 3612 and 3663 of Title 18."). Section 3612 provides the procedure for the collection of restitution once it has been ordered.

[146] 18 U.S.C. § 3664(a) ("For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court."); Dolan v. United States, 560 U.S. 605, 612-13 (2010); United States v. Pleitez, 876 F.3d 150, 158 (5th Cir. 2017); United States v. Scalzo, 764 F.3d 739, 744 (7th Cir. 2014); United States v. Zaic, 744 F.3d 1040, 1042 (8th Cir. 2014).

[147] 18 U.S.C. § 3664(d)(1) ("Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution."); United States v. Stone, 866 F.3d 219, 225 (4th Cir. 2017); *Zaic*, 744 F.3d at 1042.

detail the extent and specifics of their predicate crime-related losses.[148] The defendant is obliged to give the officer a complete description of his or her financial situation.[149]

The probation officer's report is presented to the court, the defendant, and the prosecutor. The court resolves contested restitution issues by a preponderance of the evidence[150] following a hearing, at which the prosecution bears the burden of establishing the existence and extent of the victim's losses,[151] and the defendant bears the burden on questions regarding his or her finances and the extent to which the defendant has already compensated the victim for the losses.[152] The court may conduct a hearing or task the probation officer to secure additional information and resolve disputes.[153]

Section 3664 is precise when it describes how the court must frame the restitution order. The order must envision full compensation for the losses of each victim without regard to the financial circumstances of the defendant.[154] In its calculation of the manner and schedule of payment for each victim, however, the court is to consider the defendant's assets, anticipated future income, and other financial obligations.[155] Compensation may be made in a lump sum, in-kind payments,

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[148] 18 U.S.C. § 3664(d)(2) ("The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—(A) provide notice to all identified victims of—(i) the offense or offenses of which the defendant was convicted; (ii) the amounts subject to restitution submitted to the probation officer; (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses; (iv) the scheduled date, time, and place of the sentencing hearing; (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and (B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi)."). United States v. Stoerr, 695 F.3d 271, 279 (3d Cir. 2012); United States v. Zangari, 677 F.3d 86, 96 (2d Cir. 2012) ("But the fact that the victims did not claim a loss does not mean that they did not sustain a loss, and where, as here, restitution is governed by the MVRA, a victim's decision not to participate in the sentencing process does not relieve the defendant from having to pay restitution.").

[149] 18 U.S.C. § 3664(d)(3) ("Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate."); United States v. Smiley, 553 F.3d 1137, 1145 (8th Cir. 2009); United States v. Manning, 526 F.3d 611, 620 (10th Cir. 2008); United States v. Yousef, 327 F.3d 56, 165 (2d Cir. 2003).

[150] 18 U.S.C. § 3664(e); United States v. Naphaeng, 906 F.3d 173, (1st Cir. 2018); United States v. Sexton, 894 F.3d 787, 799 (6th Cir. 2018); United States v. Cornelsen, 893 F.3d 1086, 1090 (8th Cir. 2018); United States v. Ritchie, 858 F.3d 201, 211 (4th Cir. 2017).

[151] 18 U.S.C. § 3664(e); Robers v. United States, 572 U.S. 639, 645 (2014); United States v. Ricard, 922 F.3d 639, 658-59 (5th Cir. 2019); United States v. Steele, 897 F.3d 606, 613 (4th Cir. 2018); United States v. Smathers, 879 F.3d 453, 460 (2d Cir. 2018); United States v. Wells, 873 F.3d 1241, 1265 (10th Cir. 2017).

[152] 18 U.S.C. 3664(e); *Ricard*, 922 F.3d at 658 ("The MVRA, however, approves burden shifting based on which party is best able to satisfy those burdens and who has the strongest particular incentive to litigate the particular issues involved."); United States v. Smathers, 879 F.3d 453, 460-61 (2d Cir. 2018); United States v. Foster, 878 F.3d 1297, 1307-308 (11th Cir. 2018); *cf.*, United States v. Corrigan, 912 F.3d 422, 431 (7th Cir. 2019).

[153] 18 U.S.C. 3664(d)(4); United States v. Pleitez, 876 F.3d 150, 158 (5th Cir. 2017); United States v. Finazzo, 850 F.3d 94, 119 n.26 (2d Cir. 2017); United States v. Kilpatrick, 798 F.3d 365, 388 (6th Cir. 2015).

[154] 18 U.S.C. 3664(f)(1)(A). United States v. Brazier, 933 F.3d 796, 804 ((7th Cir. 2019) ("[T]he district court considered in depth [the defendants'] financial resources. The court expressly recognized it is unlikely they would pay the restitution in full. The court chose to order restitution despite their poverty."). Nevertheless, victims are not entitled to more than full compensation; restitution may not be ordered for amounts in excess of the victim losses. United States v. Naphaeng, 906 F.3d 173, 179 (1st Cir. 2018); United States v. Steele, 897 F.3d 606, 610-11 (4th Cir. 2018); United States v. Ferdman, 779 F/.3d 1129, 1132 (10th Cir. 2015).

[155] 18 U.S.C. 3664(f)(2); United States v. Hughes, 914 F.3d 947, 949 (5th Cir. 2019); United States v. Sizemore, 850 F.3d 821, 825 (6th Cir. 2017); United States v. Inouye, 821 F.3d 1152, 1156 (9th Cir. 2016).

installments, or any combination of such methods of payment.[156] In-kind payments may take the form of a return of lost property, replacement in-kind or otherwise, or personal services.[157] When the defendant's financial condition precludes any alternative, the order may call for nominal periodic payments.[158] Several courts have emphasized the importance of the court's close attention to the restitution payment schedule by prohibiting sentencing courts from initially ordering that restitution be paid immediately when it is readily apparent that the defendant is unable to do so, thereby effectively leaving the task of establishing a payment schedule to the probation officer or the Bureau of Prisons.[159]

When it sets the restitution owed by the defendant, the court may not take into account the fact that a victim may have been compensated by insurance or any other alternative form of

[156] 18 U.S.C. 3664(f)(3)(A); United States v. Holden, 908 F.3d 395, 404 (9th Cir. 2018); United States v. Thunderhawk, 860 F.3d 633, 637-38 (8th Cir. 2017); United States v. Martinez, 812 F.3d 1200, 1205-206 (10th Cir. 2015).

[157] 18 U.S.C. 3664(f)(4); *Martinez*, 812 F.3d at 1206; United States v. Simmonds, 235 F.3d 826, 832 (3d Cir. 2000) (since restitution may take the form of replacement, a district court may validly consider replacement costs in assessing a victim's losses); *but see*, United States v. Fazal-Ur-Raheman-Fazal, 355 F.3d 40, 53-6 (1st Cir. 2004) (a defendant guilty of international parental kidnaping cannot be ordered to make restitution in the form of a return or transfer of the kidnapped children to their mother either as property or as a service under §3663(f)(4): "Children are not 'property' nor is their transfer a 'service,' and we decline the invitation to hold otherwise.").

[158] 18 U.S.C. 3664(f)(3)(B); Thunderhawk, 860 F.3d at 638; United States v. Day, 418 F.3d 746, 758 (7th Cir. 2005).

[159] Ward v. Chavez, 678 F.3d 1042, 1049-50 (9th Cir. 2012) ("[W]e explicitly oppose[ ] a district court's attempt to minimize its responsibility to set a restitution schedule by ordering 'immediate' payment. Such an arrangement effectively transfers the district court's responsibility for setting a restitution schedule to the probation office, which is inconsistent with the statute."). In the same vein, the Ninth Circuit has observed that "The circuits have split over how to interpret the MVRA and to what extent it permits delegation of restitution scheduling duties. The First, Second, Third, Sixth, Eighth, Tenth and Eleventh Circuits have all held that a district court must set a restitution repayment schedule, and those that have reached the issue have concluded ... that court may not simply order immediate payment and leave to the BOP the task of setting the actual schedule.... In contrast, the Fourth, Fifth, and Seventh Circuits have held that a judgment of conviction need not contain a schedule of restitution payments to be made during the period of incarceration." United States v. Lemoine, 546 F.3d 1042, 1048 n.4 (9th Cir. 2008). The Ninth Circuit permits a district court to order immediate restitution where the defendant has the resources at hand to comply, but in other instances holds that, "the district court—not BOP, nor Probation—must set a repayment schedule in the judgment of conviction in order to discharge its responsibilities under MVRA." *Ward*, 678 F.3d at 1050; *see also* United States v. Ahidley, 486 F.3d 1184, 1191-193 (10th Cir. 2007); United States v. Thigpen, 456 F.3d 766, 771 (7th Cir. 2006). When a trial court finds a defendant unable to make full payment yet orders restitution both in immediate full payment or pursuant to a schedule of small installments, an appellate court will instruct the lower court to strike the immediate full payment portion of its order. *Holden*, 908 F.3d at 404.

compensation of his or her injury, loss, or damage.[160] The amount of a restitution order may later be reduced to account for compensatory damages for the same loss recovered in a civil action.[161]

When the government and the probation officer have been unable to determine the full extent of victim losses within 10 days of sentencing, they are obligated to inform the court.[162] The court is then to set a date, no later than 90 days after sentencing, for the final determination of victim losses.[163] Thereafter, victims have a limited option to present claims for restitution relating to undiscovered losses.[164] The Supreme Court held in *Dolan v. United States* that a sentencing court may determine the extent of a victim's losses and order restitution after the expiration of the statutory 90-day deadline, as long as the defendant was aware beforehand that the court intended to order restitution.[165]

Victims may assign their right to receive restitution payments to Crime Victims Fund,[166] but there is no consensus over whether the court may order restitution to be paid to the Crime Victims Fund on its own initiative if the victim refuses to accept it.[167]

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[160] 18 U.S.C. § 3664(f)(1)(B); United States v. Johnson, 911 F.3d 849, 852 (7th Cir. 2018) (internal citations omitted) ("It [§ 3664(f)(1)(B)] deals with setting the base amount of restitution, not with how collections from joint wrongdoers are credited" or how the amount restitution is apportioned among victims); United States v. Ritchie, 858 F.3d 201, 215-16 (4th Cir. 2017) (internal citations omitted) ("Initially, the statute requires the district court to calculate the full amount of each victim's losses caused by the defendant's illegal conduct, regardless of the financial resources or condition of the defendant, or the fact that the victim has received or may receive compensation from another source … However, the statute also provides for credits against the offender's restitution obligation to prevent a victim from obtaining a windfall. For example, if a victim has received compensation from other sources for the same loss, the court will order that this portion of the restitution be paid to the person or entity that provided the compensation instead of to the victim. The defendant is also entitled to an offset for any amount that the victim recovered as compensatory damages for the same loss in federal or state civil proceedings."); United States v. Thompson, 792 F.3d 273, 279-80 (2d Cir. 2015). Section 3664(f)(1)(B), however, imposes no limitation on the discretion of the court to §3663A(c)(3) decline to order restitution because of the impracticality or the complexity of task. United States v. Gallant, 537 F.3d 1202, 1253 (10th Cir. 2008) (emphasis in the original) ("[W]hile the complexity exception in §3663A addresses *whether* a court must provide a restitution award to a victim, the prohibition of §3664(f)(1)(B) relates to *how much* restitution should be awarded once the sentencing court has determined that an award is required.").

[161] 18 U.S.C. § 3664(j)(2); United States v. Smathers, 879 F.3d 453, 459-60 (2d Cir. 2018) United States v. Kovall, 857 F.3d 1060, 1072 (9th Cir. 2017).

[162] 18 U.S.C. § 3664(d)(5).

[163] *Id.*; *Ritchie*, 858 F.3d at 211.

[164] 18 U.S.C. § 3664(d)(5); *Ritchie*, 858 F.3d at 211; United States v. Oman, 879 F.3d 453, 1192 (11th Cir. 2017).

[165] 560 U.S. 605, 608 (2010); United States v. Gurrola, 898 F.3d 524, 542 (5th Cir. 2018). United States v. Thunderhawk, 860 F.3d 633, 635-36 (8th Cir. 2017); United States v. Ferguson, 831 F.3d 850, 853 n.1 (7th Cir. 2016); *see also* United States v. Pleitez, 876 F.3d 150, 159 (5th Cir. 2017) (Whenever it occurs, "the final determination of a mandatory restitution award under § 3664(d)(5) constitutes a critical stage during which a defendant is entitled to the assistance of counsel.").

[166] 18 U.S.C. § 3664(g); United States v. Edwards, 595 F.3d 1004, 1013 (9th Cir. 2010).

[167] United States v. Hawkins, 858 F.3d 1273, 1276-81 (9th Cir. 2017) (disagreeing with *Speakman* and *Pawlinski* as to whether the district court might redirect the defendant's restitution obligation to the benefit of the Crime Victims Fund); United States v. Speakman, 594 F.3d 1165, 1174-78 (10th Cir. 2010) (holding that the court has no authority to order restitution paid to Crime Victims Fund when the victim refuses to accept restitution); United States v. Pawlinski, 374 F.3d 536, 539-41 (7th Cir. 2004) (holding that except pursuant to a plea bargain or on assignment by a victim, the court has no authority to award restitution to the Crime Victims Fund); *cf.* United States v. McHenry, 849 F.3d 699, 707 (8th Cir. 2017) (noting that a mandatory restitution order had not been issued "because the victim elected to not participate in any phase of determining the restitution order."); *but see* United States v. Johnson, 378 F.3d 230, 245 (2d Cir. 2004) ("Hunter also urges us to vacate the District Court's restitution award on the basis that it was error for the District Court to assign Felix's interest in restitution, should Felix renounce it, to the Crime Victims Fund. Hunter argues that §3664(g)(2) provides the statutory authority to assign interest in restitution only to victims, and that the Court therefore had no authority to do so. We disagree.").

Should the court determine that more than one defendant contributed to the victim's loss, it may apportion restitution accordingly or it may make the defendants jointly and severally liable.[168] When defendants are made jointly and severally liable, each is liable for the entire amount, but the victim is entitled to no more than what is required to be made whole, regardless of what portion each of the defendants ultimately contributes.[169]

There was once a difference of opinion over whether joint and severable liability might be imposed other than with respect to co-defendants.[170] The Supreme Court has recently provided some clarification as to how courts should deal with restitution when those who are not co-defendants are responsible for a substantial portion of the victim's losses.[171] The defendant in the case viewed child pornography of which the victim was the subject. To hold the defendant liable for all of the victim's losses attributable to production, distribution, and viewing of the material might contravene the proscriptions of the Eighth Amendment's excessive fines clause, the Court suggested.[172] Rather, it held that the defendant's restitution order should be calculated to reflect his relative contribution to the harm caused.[173]

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[168] 18 U.S.C. § 3664(h) ("If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."); United States v. Brazier, 933 F.3d 796, 805 (7th Cir. 2019); United States v. Rodriguez, 915 F.3d 532, 535 (8th Cir. 2019); United States v. Sexton, 894 F.3d 787, 799 (6th Cir. 2018); United States v. Puentes, 803 F.3d 597, 605 (4th Cir. 2015); United States v. Cano-Fores, 796 F.3d 83, 95 (D.C. Cir. 2015).

[169] United States v. Sheets, 814 F.3d 256, 261-62 (5th Cir. 2016); United States v. Rozin, 664 F.3d 1052, 1066-67 (6th Cir. 2012); United States v. Nucci, 364 F.3d 419, 423 (2d Cir. 2004); United States v. Scott, 270 F.3d 30, 52 (1st Cir. 2001); United States v. Adeniji, 221 F.3d 1020, 1029 (7th Cir. 1999).

[170] In re Amy Unknown, 701 F.3d 749, 770 (5th Cir. 2012), vac'd and rem'd on other grounds sub nom., Paroline v. United States, 572 U.S. 434 (2014) ("And although the D.C. Circuit has express that it is 'unclear ... whether joint and several liability may be imposed on defendants in separate cases,' [United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011)], nothing in §3664 forbids it, either expressly or through implication; the fact that it conforms well to this context supports its application."); United States v. Laraneta, 700 F.3d 983, 992-93 (7th Cir. 2012) ("That section authorizes the sentencing court to make liability for restitution joint and several 'if the court finds that more than 1 defendant has contributed to the loss of a victim,' 18 U.S.C. 3664(h), and there is only one defendant in this case. So there is no statutory authorization for what the district court did here [when it ordered joint and several restitution].... On the basis both of practical considerations and the absence of statutory authorization, the Second Circuit in another case involving Amy held that contribution is not permissible unless the defendants from whom contribution is sought are defendants in the same case as the defendant seeking contribution. United States v. Aumais, 656 F.3d [147, 155-56 (2d Cir. 2011)].").

[171] *Paroline*, 572 U.S. 434 (2014). The case arose under one of the special restitution statutes, 18 U.S.C. § 2259, which but for its individual features is governed by the provisions of. §§ 3663A and 3664. *Id*. § 2259(b)(2).

[172] *Paroline*, 572 U.S. at 455 ("The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors with no legal or practical avenue for seeking contribution. That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment.").

[173] *Id.* at 458-59 ("In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying §2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims.").

Section 3664(i) declares that when it comes to restitution, the United States is to be served last.[174] The provision is cited most often to confirm that under the appropriate circumstances, the government and its departments and agencies may be considered victims for restitution purposes.[175] When the government is not a victim, the defendant is not entitled to have the restitution award offset by the value of any forfeited property.[176] Although there may be some doubt, it seems the same thing can be said when the government is both the victim of the offense and the recipient of the forfeited property.[177]

Section 3664(j) permits a court to order restitution to paid third parties who, as insurers or otherwise, have assumed some or all of the victim's losses, although in such cases, the victim must be fully compensated first.[178] It also permits a court to reduce an earlier restitution order by any amounts that the victim later receives in the course of related federal or state civil litigation.[179]

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[174] 18 U.S.C. § 3664(i) ("... In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."); United States v. Mei Juan Zhang, 789 F.3d 214, 216-17 (1st Cir. 2015); United States v. Williams, 612 F.3d 500, 510 (6th Cir. 2010).

[175] *Mei Juan Zhang*, 789 F.3d at 216-17; United States v. Mateos, 623 F.3d 1350, 1370 (11th Cir. 2010); United States v. Senty-Haugen, 449 F.3d 862, 865 (8th Cir. 2006); United States v. Ekanem, 383 F.3d 40, 43 (2d Cir. 2004).

[176] United States v. Arnold, 878 F.3d 940, 946 (10th Cir. 2017) ("[T]he statutes mandating restitution and forfeiture do not allow a defendant's payments toward one to offset the amount owed to the other."); United States v. Carter, 742 F.3d 440, 446 (9th Cir. 2014) ("[D]efendants may be required to pay restitution and [to] forfeit the same amounts. And a defendant has no right to a credit against a restitution order equal to any part of the amount forfeited. However, the Government may choose to assign forfeited proceeds to victims."); United States v. Adetiloye, 716 F.3d 1030, 1041 (8th Cir. 2013).

[177] United States v. Sanjar, 876 F.3d 725, 750 (5th Cir. 2017) ("The government's sole issue on appeal concerns the district court's decision to offset defendants' restitution obligations with any amount collected pursuant to the forfeiture order. The district court thought it proper to do so because there was no private victim, meaning the government would receive both the restitution amount and any forfeited proceeds. The government contends this was error. We agree.") *Mei Juan Zhang*, 789 F.3d at 217 ("We join the analysis set forth in the Eleventh Circuit's opinion in *Joseph*."); United States v. Joseph, 743 F.3d 1350, 1353 (11th Cir. 2014) ("[U]nder the plain language of the MVRA and the applicable forfeiture provisions, the district court had no authority to offset the amount of restitution owed to the IRS by the amount of the funds Joseph forfeited to the government."); United States v. Perry, 714 F.3d 570, 578-79 (8th Cir. 2013) (declining to address the "complex and difficult issues" raised by "the question of whether funds forfeited to the government should offset a criminal restitution to the government as victim in order to avoid a double recovery by the United States."); United States v. Taylor, 582 F.3d 558, 567-68 (5th Cir. 2009) ("Several courts have found that the plain language of the MVRA does not require that restitution be offset against amounts forfeited to the government.... Generally, courts decline to offset restitution when there is no evidence that doing so would result in double recovery to the victim.... Courts that permit offset of restitution have done so only after finding that forfeited funds have been remitted to the victims in lieu of restitution.").

[178] 18 U.S.C. 3664(j)(1); United States v. Charles, 895 F.3d 560, 566 (8th Cir. 2018); United States v. Ritchie, 858 F.3d 201, 215 (4th Cir. 2017); United States v. Thompson, 792 F.3d 273, 278 (2d Cir. 2015) ("[W]here a third party has assumed the victim's losses by reimbursing the victim, the court must order a defendant to pay restitution directly to that third party … Any funds still owed to the original victim, however, must be repaid in full before any payments may be diverted to a third-party provider of compensation."); *see also* United States v. Church, 731 F.3d 530, 535 (6th Cir. 2013) ("[P]erpetrators of crimes of violence must pay the total amount of the cost of their victim's medical expenses, not just those the victim personally incurred.").

[179] 18 U.S.C. 3664(j)(2). The defendant generally bears the burden of establishing that the civil recovery corresponds to the injury for which restitution was ordered. United States v. Parker, 927 F.3d 374, 381-82 (5th Cir. 2019); United States v. Smathers, 879 F.3d 453, 461 (2d Cir. 2018) ("We see no abuse of discretion in the district court's determination that justice required that Smathers – who caused injury to AOL and seeks credit for payments to AOL by other persons – have the burden of proving that recoveries by AOL in civil litigation were for the same loss that he caused and that AOL has been compensated in full for the loss he caused."); *cf.* United States v. Whitbeck, 869 F.3d 618, 620 (8th Cir. 2017); United States v. Sizemore, 850 F.3d 821, 829 (6th Cir. 2017).

The victim, the defendant, or the government may petition to have a restitution order's payment schedule amended to reflect the defendant's changed economic circumstances.[180] The changed economic circumstances envisioned in Section 3664(k) do not include anticipated future changes[181] or a later, better-informed understanding of the defendant's financial condition at the time of sentence.[182]

There are several means to enforce a restitution order. Section 3664(m) provides that the Department of Justice may enforce restitution orders in the manner used to collect fines or "by all other available and reasonable means."[183] Thus, the government may use garnishment and the other collection mechanisms of the Federal Debt Collection Procedures Act (FDCPA) to enforce a restitution order.[184] A restitution order also operates as a lien in the name of the United States on the defendant's property that remains in effect for 20 years.[185] In addition, a victim may use a

[180] 18 U.S.C. § 3664(k) ("A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require."); United States v. Simpson-El, 856 F.3d 1295, 1300 (10th Cir. 2017) (finding that receipt of a $200,000 legal settlement constituted a change in circumstances); United States v. Grant, 715 F.3d 552, 554 (4th Cir. 2013).

Section 3664 deals specifically with one change in the defendant's financial circumstances by requiring that he apply any windfall he receives while in prison to his obligation to make restitution, 18 U.S.C. 3664(n) ("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, such person shall be required to apply the value of such resources to any restitution or fine still owed.") *Simpson-El*, 856 F.3d at 1300 ("Because Mr. Simpson-El received the settlement funds when he was no longer a prisoner, § 3664(n) did not apply.").

[181] United States v. Vanhorn, 399 F.3d 884, 886 (8th Cir. 2005) (defendant's desire to begin saving while in prison for the future costs of medical treatment provided at government expense pending his release does not constitute a change in economic circumstances for purposes of §3664(k)).

[182] United States v. Wyss, 744 F.3d 1214, 1219 (10th Cir. 2014) ("If the district court determines a material change in defendant's financial circumstances has occurred, subsection (k) authorizes the court to 'adjust the payment schedule as the interests of justice require.' Neither subsection (k) nor any other provision of § 3664, however, authorizes a reduction in the amount of restitution ordered."); *Grant*, 235 F.3d at 100 ("[I]t cannot be that a court's later understanding that it had sentenced a defendant without full knowledge of his assets alone constitutes a material change in economic circumstances. A change of the sort contemplated by the statute is identified by an objective comparison of a defendant's financial condition before and after a sentence is imposed.").

[183] 18 U.S.C. § 3664(m)(1)(A) ("An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or (ii) by all other available and reasonable means."); United States v. Rand, 924 F.3d 140, 142-43 (5th Cir. 2019).

[184] United States v. Parker, 927 F.3d 374, 380 (5th Cir. 2019) (internal citations largely omitted) ("Under the Federal Debt Collection Procedures Act of 1990, the Government can collect on judgments in its favor through, among other things, a writ of execution. The writ of execution allows a United States marshal to 'levy' the defendant's property to satisfy the judgment. Once levied the property becomes the Government's to sell to satisfy the defendant's judgment. Every writ of execution directs the marshal to not only levy but also to sell the property, subject to a few relevant exceptions. *See* 28 U.S.C. § 3203(c)(2)(B). The marshal may continue to use the same writ of execution to levy property until the judgment is satisfied."); United States v. Scully, 882 F.3d 549, 554 (5th Cir. 2018) (some internal citations omitted) ("[T]he government may enforce restitution orders in the same way that it enforces fines and by any other available means. Moreover, under 18 U.S.C. § 3613(a), the government may collect criminal fines and restitution according to the practices and procedures for enforcing a civil judgment under federal or state law. In practice, this means that the government may use the garnishment provisions of the Federal Debt Collection Procedures Act to collect a restitution obligation imposed by a judgment of conviction."); United States v. Cohan, 798 F.3d 84, 89 (2d Cir. 2015); United States v. Carter, 742 F.3d 440, 445 (9th Cir. 2014). United States v. Witham, 648 F.3d 40, 41 (1st Cir. 2011); United States v. Hosking, 567 F.3d 329, 334-35 (7th Cir. 2009).

[185] 18 U.S.C. § 3613(c).

restitution order to secure a lien in his own name against the defendant's property to ensure the payment of restitution.[186] Moreover, the victims' rights provisions of 18 U.S.C. 3771 entitle a victim to "full and timely restitution as provided in law," a right, enforceable in the face of a legally insufficient restitution order through a liberalized form of mandamus.[187] When restitution is a condition of probation or supervised release, failure to make restitution may provide the grounds for revocation.[188]

In most instances, a victim may also sue the defendant based on the conduct that led to the conviction and the issuance of the restitution order. During the course of such civil litigation, the defendant may be precluded from denying the facts that formed the basis of the conviction.[189]

Section 3664(o) provides that the court's restitution order constitutes a final order for purposes of appeal by the government or the defendant, notwithstanding the fact the order may later be corrected, modified, or appealed under various court rules and statutory provisions.[190] This does not mean that the district court may later reduce a restitution order in the absence of specific authority.[191] Nor does it convey appellate rights upon third parties who claim a right to restitution for expenses necessarily incurred on behalf of a victim.[192]

Abatement

In a criminal law context, the lower federal courts have generally taken the view that the death of a defendant at any time prior to the determination of his or her final direct appeal abates all underlying proceedings; appeals are dismissed as moot, convictions are overturned, indictments are dismissed, and abated convictions cannot be used in related civil litigation against the estate—

[186] 18 U.S.C. § 3664(m)(1)(B) ("At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State."); United States v. Kovall, 857 F.3d 1060, 1071 (9th Cir. 2017).

[187] 18 U.S.C. § 3771(a)(6), (d)(3). Federal Insurance Co. v. United States, 882 F.3d 348, 361-62 (2d Cir. 2018); *Kovall*, 857 F.3d at 1069-70. Congress amended Section 3771(d)(3) in 2015 to provide that "… In deciding such application [for a writ of mandamus], the court of appeals shall apply ordinary standards of appellate review …"

[188] 18 U.S.C. §§ 3583(e)(3), 3565(a); United States v. Marino, 833 F.3d 1, 3-4 (1st Cir. 2016); *cf.* United States v. Colosuonno, 697 F.3d 164, 183 (2d Cir. 2012).

[189] 18 U.S.C. § 3664(*l*); Doe v. Hesketh, 828 F.3d 159, 174 n.19 (3d Cir. 2016).

[190] 18 U.S.C. § 3664(o) ("A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that- (1) such a sentence can subsequently be- (A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title; (B) appealed and modified under section 3742; (C) amended under subsection (d)(5); or (D) adjusted under section 3664(k), 3572, or 3613A; or (2) the defendant may be resentenced under section 3565 or 3614."); Dolan v. United States, 560 U.S. 605, 618 (2010); United States v. Johnson, 875 F.3d 422, 424 (9th Cir. 2017); United States v. Tulsiram, 815 F.3d 114, 117-18 (2d Cir. 2016).

[191] United States v. Wyss, 744 F.3d 1214, 1218 (10th Cir. 2014).

[192] United States v. Stoerr, 695 F.3d 271, 278 (3d Cir. 2012).

all as if the defendant was never criminally charged.[193] It might seem from this that a restitution order would abate as well, but there is some authority to the contrary.[194]

Constitutional Considerations

Restitution's varied lineage—equitable and legal, civil and criminal—has spurred a number of constitutional challenges over the years. Some initially saw restitution as an alternative to civil litigation on behalf of the victims of crime. If this were the case, defendants claimed that they should enjoy a Seventh Amendment right to have a jury determine the facts upon which a restitution order rests. Their challenges came to naught. The Supreme Court held that the Seventh Amendment extends only to civil actions similar to those tried before a jury when the Amendment was ratified in 1791.[195] The lower courts have rejected the Seventh Amendment challenges either because they have concluded that restitution was a criminal rather than a civil sanction or because, at common law, restitution was not a matter presented to a jury; in some cases, the challenges have been rejected for both reasons.[196]

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[193] Durham v. United States, 401 U.S. 481, 48-82 (1971) ("The status of abatement caused by death on direct review has recently been discussed by the Court of Appeals for the Eighth Circuit in *Crooker v. United States*, 325 F.2d 318. In reviewing the case that court concluded that the lower federal courts are unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.... We believe they have adopted the correct rule.").

The Supreme Court later cryptically called the vitality of *Durham* into question when it announced that, "The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States*, 401 U.S. 481 (1971), may be inconsistent with this ruling, *Durham* is overruled." Dove v. United States, 423 U.S. 325, 325 (1976). The lower federal courts apparently understand *Dove* to mean that death during the pendency of a certiorari petition does not abate the underlying proceedings, but that otherwise the statement from *Durham* remains in effect, *see* United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) (quoting the statement from *Durham* and citing post-*Dove* findings in accord from the Second, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits).

[194] United States v. Volpendesto, 755 F.3d 448, 454 (7th Cir. 2014) (internal quotation marks and citations omitted) ("The rule of abatement terminates criminal proceedings *ab initio*, vacating the conviction entered against the defendant. Under the doctrine of abatement *ab initio* the defendant stands as if he never had been indicted or convicted. The absence of a conviction precludes imposition of the restitution order against defendant or his estate pursuant to §3663. The fact that criminal restitution serves a compensatory purpose does not enable it to be imposed in the absence of a final conviction."); United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010) (internal citations and quotation marks) ("The Restitution Order must be abated because the defendant is no longer a wrongdoer once his conviction has abated. Just as it is inappropriate to impose restitution on a living individual who was never indicted or convicted, so it is inappropriate to impose restitution on the estate of a deceased individual who, in the eyes of the law, was never indicted or convicted."); Estate of Parsons, 367 F.3d 409, 415 (5th Cir. 2004) (en banc) ("[R]egardless of its purpose, the order of restitution cannot stand in the wake of Parsons's death. Because he now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio*."); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) ("Under the doctrine of abatement ab initio, however, the defendant stands as if he never had been convicted. The absence of a conviction precludes imposition of the restitution order against Kuczek or his estate pursuant to § 3663."); United States v. Lay, 456 F.Supp.2d 869, 875 (S.D. Tex. 2006); *contra* United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001) ("We are persuaded that abatement should not apply to the order of restitution in this case, thus, it survives against the estate of the deceased convict."); United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984); *see also* United States v. Brooks, 872 F.3d 78, 88-91 (2d Cir. 2017) (holding that, following the death of the defendant while an appeal was pending, restitution orders relating to the counts of conviction covered by the appeal would be abated, but restitution orders unrelated to counts on appeal would not).

[195] Tull v. United States, 481 U.S. 412, 417-18 (1987).

[196] United States v. Palma, 760 F.2d 475, 479 (3d Cir. 1985); United States v. Keith, 754 F.2d 1388, 1392 (9th Cir. 1985); United States v. Watchman, 749 F.2d 616, 617 (10th Cir. 1984); United States v. Brown, 744 F.2d 905, 910-11 (2d Cir. 1984); United States v. Satterfield, 743 F.2d 827, 836-37 (11th Cir. 1984); United States v. Florence, 741 F.2d 1066, 1068 (8th Cir. 1984).

However, if restitution is a criminal sanction, must a court observe the constitutional restrictions that attend a criminal sanction—ex post facto, excessive fines, and the right to trial by a jury in a criminal case? On the question of retroactive application of new laws and the ex post facto clause, there is no consensus among the lower federal appellate courts, although a majority take the position that the clause applies and, consequently, exposure to increased restitution liability may not be applied retroactively.[197]

"The circuits that have considered challenges to restitution orders under the [Eighth Amendment's] Excessive Fines Clause have held that where the restitution order reflects the amount of the victim's loss no constitutional violation has occurred."[198] Moreover, "[t]his is not surprising, as restitution is inherently proportional …"[199] The Supreme Court in *Paroline v. United States*, however, suggested that the question of Excessive Fines Clause protection may be unresolved.[200]

As for the Sixth Amendment right to jury trial and the Fifth Amendment right to conviction only on proof beyond a reasonable doubt, the Supreme Court held in a series of cases beginning with *Apprendi v. New Jersey*[201] and culminating in *United States v. Booker*,[202] that the Sixth Amendment right to a jury trial and the Fifth Amendment right to due process require that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[203]

This might seem to pose a problem for federal restitution procedures under which restitution is determined by the court (not a jury) on the basis of a preponderance of the evidence (not beyond a

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[197] United States v. Leahy, 438 F.3d 328, 335 (3d Cir. 2006)(ex post facto clause applies); *accord* United States v. Grice, 319 F.3d 1174, 1177 (9th Cir. 2003); United States v. Schulte, 264 F.3d 656, 662 (6th Cir. 2001); United States v. Siegel, 153 F.3d 1256, 1260 (11th Cir. 1998); United States v. Bapack, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997); United States v. Thompson, 113 F.3d 13, 15, n.1 (2d Cir. 1997); *contra* United States v. Nichols, 169 F.3d 1255, 1279-280 (10th Cir. 1999); United States v. Newman, 144 F.3d 531, 538 (7th Cir. 1998). *See also* United States v. Gupta, 572 F.3d 878, 891 (11th Cir. 2009) ("Although the Mandatory Act ordinarily does not apply to offenses that occurred before it became effective ... the Act applies to conspiratorial offenses that began before that date but concluded after it."); United States v. Williams, 612 F.3d 500, 511 (6th Cir. 2010) ("[T]he MVRA applies to crimes that occurred prior to and continued past the effective date of the MVRA ... this application does not violate Ex Post Facto Clause.").

[198] United States v. Newell, 658 F.3d 1, 35 (1st Cir. 2011) (citing United States v. Lessner, 498 F.3d 185, 205-06 (3d Cir. 2007); United States v. Newsome, 322 F.3d 328, 342 (4th Cir. 2003); United States v. Dubose, 146 F.3d 1141, 1145 (9th Cir. 1998)).

[199] *Newell*, 658 F.3d at 35.

[200] 572 U.S. 434, 455-56 (internal citations and quotation marks omitted) ("The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution. That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment. To be sure, this Court has said that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government. But while restitution under § 2259 is paid to a victim, it is imposed by the Government at the culmination of a criminal proceeding and requires conviction of an underlying crime. Thus, despite the differences between restitution and a traditional fine, restitution still implicates the prosecutorial powers of government. The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes. That may be sufficient to bring it within the purview of the Excessive Fines Clause. And there is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances.").

[201] 530 U.S. 466 (2000).

[202] 543 U.S. 220 (2005).

[203] *Id*. at 244; *see also Apprendi*, 530 U.S. at 490.

reasonable doubt). Nevertheless, the lower federal appellate courts have rejected arguments that the *Apprendi* line of cases clouds the validity of a restitution order under such circumstances—either because they do not consider restitution a criminal sanction and thus see no Fifth or Sixth Amendment concerns or because they feel the restitution statutes fail to set the "statutory maximum" necessary to trigger *Apprendi* concerns.[204]

None of the other due process or equal protection challenges appear to have survived appellate scrutiny thus far.[205]

Statutory Text

18 U.S.C. 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, Section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or Section 5124, 46312, 46502, or 46504 of Title 49, other than an offense described in Section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider—

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered 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

[204] United States v. Alvarez, 835 F.3d 1180, 1185 (9th Cir. 2016); United States v. Sawyer, 825 F.3d 287, 297 (6th Cir. 2016); United States v. Burns, 800 F.3d 1258, 1261 (10th Cir. 2015); United States v. Bengis, 783 F.3d 407, 411-13 (2d Cir. 2015).

[205] *E.g.*, United States v. Kovall, 857 F.3d 1060, 1072-73 (9th Cir. 2017) (holding that due process does not require affording a nonparty victim a right of appeal); United States v. Yalincak, 853 F.3d 629, 639-40 n.11 (2d Cir. 2017) (defendant was afforded sufficient opportunity to be heard on reconsideration of restitution order); United States v. Battles, 745 F.3d 436, 461 (10th Cir. 2014) (the procedure afforded the defendant notice and opportunity to contest sufficient to satisfy due process); United States v. Pole, 741 F.3d 120, 128 (D.C. Cir. 2013) (same); United States v. Torres, 703 F.3d 194, 204 (2d Cir. 2012) ("Eight other Circuits to have considered orders of forfeiture and restitution in the face of 'double recovery,' due process-type challenges have affirmed their concurrent imposition."); United States v. Veerapol, 312 F.3d 1128, 1134 (9th Cir. 2002) (notice and opportunity to contest sufficient); United States v. Dubose, 146 F.3d 1141, 1147 (9th Cir. 1998) (no due process or equal protection infirmity); United States v. Craig, 181 F.3d 1124, 1129 (9th Cir. 1999) (notice sufficient to satisfy due process); United States v. Smith, 944 F.2d 618, 622 (9th Cir. 1991) (restitution procedure, which afforded the defendant fewer discovery options than he would have enjoyed had the victim brought a civil action on the same grounds, did not offend due process); United States v. Gomer, 764 F.2d 1221, 1229 (7th Cir. 1985) (defendant received adequate notice and opportunity to contest); United States v. Palma, 760 F.2d 475, 477-79 (3d Cir. 1985) (restitution procedure met the demands of due process and equal protection); United States v. Keith, 754 F.2d 1388, 1392 (9th Cir. 1985) (no due process violation in light of defendant's opportunity to contest); United States v. Florence, 741 F.2d 1066, 1068-69 (8th Cir. 1984) (sentencing hearing's evidentiary standards satisfied due process).

the case of a 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 may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may 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, impractical, or inadequate, pay an amount equal to 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 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 including an offense under chapter 109A or chapter 110—
(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 also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;
(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;
(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and
(6) in the case of an offense under Sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in Section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.
(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.
(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.
(3) Restitution under this subsection shall be distributed as follows:
(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.
(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.
(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding Section 3612(c) or any other provision of law, a penalty assessment under Section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.
(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.
(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.
(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with Section 3664.

18 U.S.C. 3663A. Mandatory restitution

(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 as a result of the commission of an offense for which restitution may be ordered 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 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
(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.

(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 section 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;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary 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 Section 3664.

18 U.S.C. 3664. Procedure

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable —

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the

defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.
(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.
(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.
(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to Section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.
(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the

defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.
(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—
(A) any Federal civil proceeding; and
(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

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

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or
(ii) by all other available and reasonable means.
(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.
(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) 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, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—
(1) such a sentence can subsequently be—
(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and Section 3742 of chapter 235 of this title;
(B) appealed and modified under Section 3742;
(C) amended under subsection (d)(5); or
(D) adjusted under Section 3664(k), 3572, or 3613A; or
(2) the defendant may be resentenced under Section 3565 or 3614.

(p) Nothing in this section or Sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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