

CRIME DOESN'T PAY BUT NEITHER CAN EX-OFFENDERS:
A COMPARATIVE ANALYSIS OF CRIMINAL RESTITUTION
IN THE UNITED STATES AND CANADA

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I. INTRODUCTION

The plights of Rosemary McCoy and Sheila Singleton demonstrate some of the problems inherent in the U.S. criminal restitution system. Ms. McCoy, a Florida resident, was convicted in 2015 of three felony offenses.¹ The court imposed a twenty-four-month sentence, followed by eighteen months of probation and a criminal restitution order.² Ms. McCoy was released from the custody of the Florida Department of Corrections in March of 2016 and completed probation in September of 2017.³ Years after her release, however, Ms. McCoy has been unable to pay off the approximately \$7,500 she owes in victim restitution; interest on that amount continues to accrue.⁴

Sheila Singleton, also a Florida resident, was convicted in 2011 for a single felony offense.⁵ The court sentenced her to six months of incarceration, three years of probation, and imposed a criminal restitution order.⁶ Ms. Singleton was released from incarceration that same year and completed probation in 2014.⁷ Although the better part of a decade has passed since her release, she has been unable to pay off the approximately \$15,000 in victim restitution that she owes.⁸ Like Ms. McCoy, Ms. Singleton's debt continues to accrue interest, making it increasingly unlikely that she will ever satisfy the restitution order.⁹

Despite their releases from incarceration, the unfortunate reality is that neither Ms. McCoy nor Ms. Singleton are free. Outstanding restitution orders cause them to be subject to several judicial

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¹ Complaint at 5, *McCoy v. DeSantis*, No. 4:19-CV-304-MW-CAS (CCH) (N.D. Fla. July 1, 2019) (subsequently consolidated with *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020)).

² *Id.*

³ *Id.*

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 7.

⁸ *Id.*

⁹ *Id.* at 6.

enforcement mechanisms designed to compel payment of outstanding restitution.¹⁰

Criminal restitution has been part of criminal justice systems since some of the earliest civilizations.¹¹ The underlying justifications are twofold: the wrongdoer should be held accountable for his actions,¹² and those economically harmed by the perpetrator's actions should be made whole.¹³ Throughout history, various legal systems have assigned differing weight to these two, sometimes competing, goals. Early societies and biblical codes generally focused on victim restoration,¹⁴ while modern systems have become focused more on offender punishment.¹⁵ This Note argues that the U.S. approach to criminal restitution must be reformed to effectively meet both goals.

In the United States, an overwhelming number of criminal restitution orders are never satisfied.¹⁶ Ex-offenders are certainly not getting off easy, however. Serious penalties are imposed for failing to meet these financial obligations, ranging from property liens¹⁷ to voting disenfranchisement in several U.S. states,¹⁸ and even incarceration.¹⁹ Because most criminal defendants in the United States are indigent when they are charged,²⁰ insurmountable restitution debts and accompanying penalties loom over the heads of many ex-offenders. Because a criminal restitution order's lifespan can last for decades,²¹

¹⁰ Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 98 (2014).

¹¹ Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICHMOND L. REV. 71, 72 (1970).

¹² Lollar, *supra* note 10, at 115.

¹³ *United States v. Webb*, 30 F.3d 687, 690 (6th Cir. 1994).

¹⁴ Laster, *supra* note 11, at 72; *see discussion infra* Section II.B.

¹⁵ Laster, *supra* note 11, at 97; *see discussion infra* Section II.B.

¹⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION, MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 1 (2018).

¹⁷ CHARLES DOYLE, CONG. RSCH. SERV., RS22708, RESTITUTION IN FEDERAL CRIMINAL CASES: A SKETCH 1 (2019).

¹⁸ *See* ALA. CODE § 15-22-36.1(a)(3) (2022); ARIZ. REV. STAT. ANN. § 13-907 (2022); ARK. CONST. amend. LI, § 11(d)(2); CONN. GEN. STAT. § 9-46a(a) (2021); FLA. STAT. § 98.0751 (2021); KY. REV. STAT. ANN. § 196.045(2) (West 2022); TENN. CODE ANN. § 40-29-202 (2022); TEX. ELEC. CODE ANN. § 11.002(a)(4) (West 2021); TEX. CODE CRIM. PROC. ANN. art. 43.01(a) (West 2021).

¹⁹ Lollar, *supra* note 10, at 93, 123. Note, however, that some jurisdictions, including Alabama, only allow individuals eighteen years of age or older to be incarcerated for failure to pay restitution. *See* ALA. CODE § 12-15-117(d) (1975).

²⁰ *See* CAROLINE WOLF HARLOW, DEP'T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000); *see also* Lollar, *supra* note 10, at 93, 98.

²¹ CATHARINE M. GOODWIN, FEDERAL CRIMINAL RESTITUTION § 1:7 (2021).

these negative impacts create a seemingly endless barrier to the effective rehabilitation of criminal offenders in the United States.

But the restitution system's failures don't just harm the criminal defendant. That so much restitution debt is never collected produces ill effects that extend to the very victims for which the restitution orders are intended to benefit. While victims may leave the courtroom with a large judgment and a temporary sense of vindication, that sense too often leads to feelings of revictimization when the victim realizes they will never receive the money owed to them.²² Uncollected criminal restitution orders also harm society as a whole because the U.S. system imposes heavy administrative costs on our already overburdened courts by charging the judiciary with enforcement of those orders despite statistics showing this is often a futile effort.²³

In critiquing the U.S. approach to criminal restitution, this Note compares it to the more workable but still imperfect Canadian system. This Note will suggest certain modifications to the U.S. system considering lessons derived from the comparative analysis.

As in the United States, the Canadian criminal courts impose restitution orders upon criminal defendants where their transgressions cause economic harm.²⁴ Unlike judges in the United States, their Canadian counterparts are instructed to consider the negative impacts that criminal restitution orders may have on an ex-offender's future prospects for effective rehabilitation.²⁵ Canadian courts must also consider the defendant's financial ability to comply with such orders, while maintaining the focus on the victim's needs.²⁶

Part I of this Note examines the historical development of criminal restitution in the United States, tracing its progression from a system focused on offender disgorgement to one significantly more focused on punishment. Part II then examines the current state of U.S. federal law governing federal restitution orders. Part III thereafter examines the multitude of negative implications a criminal restitution order imposes upon the indigent offender. Part IV then takes a

²² Alison C. Cares, Stacy Hoskins Haynes & R. Barry Ruback, *Reducing the Harm of Criminal Victimization: The Role of Restitution*, 30 *VIOLENCE & VICTIMS* 450 (2015) (manuscript at 18), <https://digitalcommons.assumption.edu/cgi/viewcontent.cgi?article=1004&context=sociology-and-criminology-faculty> [<https://perma.cc/B4YY-2G3S>].

²³ DOYLE, *supra* note 17, at 8.

²⁴ Canadian Victims Bill of Rights, R.S.C. 2015, c 13, s 2 art 16.

²⁵ JO-ANNE WEMMERS, MARIE MANIKIS & DIANA SITOIANU, *RESTITUTION IN THE CONTEXT OF CRIMINAL JUSTICE* 5 (2017).

²⁶ *See infra* Part IV.

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comparative approach by examining the Canadian criminal justice system's criminal restitution scheme. Part V takes the lessons derived from Parts I through IV to make recommendations regarding proposed modifications to the U.S. system of criminal restitution. Part VI will thereafter provide concluding remarks.

II. CRIMINAL RESTITUTION IN THE UNITED STATES: A HISTORICAL PERSPECTIVE

A. *What is Criminal Restitution?*

To recognize the flaws in the U.S. criminal restitution system, one must realize its role in modern criminal judicial proceedings. In both federal and state courts,²⁷ a convicted criminal defendant may be ordered to reimburse victims for losses incurred as a result of the offender's crime.²⁸ The term "restitution" refers to this judicial reimbursement order,²⁹ and such restitution may be ordered for lost income, property damage, counseling, medical expenses, funeral costs, or "other financial costs directly related to the crime."³⁰

While it is the prosecutor's role to gather "financial loss information" and recommend a restitution amount to the court, it is the judge who controls whether a restitution order will be imposed at sentencing.³¹ Victims have no control over the amount of criminal restitution ordered.³² Whether a restitution order will be imposed on a criminal defendant is dependent upon the extent to which federal and state statutes allow or require one.³³ Once a court order of criminal restitution is entered, compliance with that order becomes a condition of an offender's probation or supervised release.³⁴ This requirement subjects the offender to several harsh enforcement mechanisms that courts may or must implement to compel compliance.³⁵

²⁷ *Restitution Process*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-vns/restitution-process> [<https://perma.cc/9ZNW-Z6TZ>] (Sept. 18, 2020); OFF. OF JUST. PROGRAMS, *Ordering Restitution to the Crime Victim*, U.S. DEP'T OF JUST. (Nov. 2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin6/ncj189189.pdf [<https://perma.cc/W866-36EA>].

²⁸ *Restitution Process*, *supra* note 27.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 3:3 (3d ed. 2020).

³³ *Id.*

³⁴ *Restitution Process*, *supra* note 27.

³⁵ *See infra* Part III.

B. Criminal Restitution Through History

The notion that a victim should receive compensation for the harm inflicted upon him was imbedded in the rules governing many early societies. The Torah, the Code of Hammurabi, and the early English Codes all codified rules whereby an offender had to pay restitution to his victim to compensate victims rather than punish offenders or exact revenge.³⁶ Any punishment associated with restitution was viewed as incidental.³⁷

Whether criminal law should focus primarily on punishment or rehabilitation has been an ongoing and emotionally charged debate.³⁸ These competing perspectives have influenced the development of criminal restitution law over time, with one scholar noting that the topic has been given “considerable attention but little rational thought” as a result.³⁹

As far back as 1895, victims’ rights advocates have favored punishment. Supporters of this paradigm explained that incarcerating an offender serves as a “consolation” to his victim because “he can think that by taxes he pays to the Treasury, he has contributed towards the paternal care, which has guarded the criminal during his stay in prison.”⁴⁰ Conversely, those arguing for a rehabilitation model have contended that a focus on punishment at the expense of rehabilitation results in unacceptable rates of recidivism. Expressing this view, one scholar wrote that incarceration without rehabilitation leaves offenders to seek company amongst “the only company in which he is welcome: the society of criminals.”⁴¹ As a result, that scholar argued, “[t]he criminal, far from being deterred from crime, is forced into it; and the citizen whom his punishment was meant to protect suffers”⁴²

For purposes of federal criminal law, the explicit purpose of restitution, whether punitive or rehabilitative, has not been addressed by the U.S. Supreme Court, nor can it be garnered from relevant statutory

³⁶ Laster, *supra* note 11, at 72.

³⁷ *Id.* at 75.

³⁸ Charles R. Pengilly, *Restitution, Retribution, and the Constitution*, 7 ALASKA L. REV. 333, 333 (1990).

³⁹ *Id.*

⁴⁰ *Id.* (quoting S. SCHAFER, *RESTITUTION TO VICTIMS OF CRIME* vii (1960)).

⁴¹ *Id.* (quoting GEORGE BERNARD SHAW, *THE CRIME OF IMPRISONMENT* 32–33 (Greenwood Press 1969) (1946)).

⁴² *Id.* (quoting SHAW, *supra* note 41, at 32–33).

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authority.⁴³ Lower courts are left to discern such a purpose, which has created a split in authority.⁴⁴ Some federal courts have fixated on the primarily punitive purpose of restitution orders, while others have held that its purpose is primarily victim compensation; still others view it as an amalgamation of these two goals.⁴⁵ This debate has influenced the evolution of criminal restitution law and practice in the United States.

C. *Development of Criminal Restitution in the United States*

Like in the early societies, the initial purpose of criminal restitution in the United States was to disgorge an offender of gains resulting from his criminal activity.⁴⁶ While disgorgement is the righting of an economic imbalance, punishment is the consequence of committing a moral wrong.⁴⁷ Thus, the focus was not on the victim but rather on the offender's actions and gains. Criminal restitution simply sought to restore the status quo by disgorging an offender of his unlawful gains.

Modern scholars focus on two theories of restitution. First is the "victim restoration" theory, which holds that restitution is an "integral" part of the criminal justice system and "holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being."⁴⁸ A secondary justification is that criminal restitution should be ordered as an additional means to punish an offender for his wrongs.⁴⁹ Accordingly, the focus morphed from offender disgorgement to victim restoration and wrongdoer punishment.

Criminal restitution has existed under U.S. criminal law for more than one hundred years.⁵⁰ Courts imposed restitution without legislative authorization, claiming their ability to do so was part and parcel

⁴³ Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and the MVRA Through the Lens of the Ex Post Facto Clause, The Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711, 2712 (2005).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Lollar, *supra* note 10, at 97.

⁴⁷ *Id.*

⁴⁸ *United States v. Webb*, 30 F.3d 687, 690 (6th Cir. 1994) (citing S. Rep. No. 532, 2d Sess. 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

⁴⁹ Lollar, *supra* note 10, at 115.

⁵⁰ CHARLES DOYLE, CONG. RSCH. SERV., RL34138, *RESTITUTION IN FEDERAL CRIMINAL CASES 2* (2019).

to their discretion to place a criminal defendant on probation and to suspend sentences.⁵¹ This practice was suspended in 1916 when the U.S. Supreme Court held that lower federal courts lacked the authority, in the absence of legislative authorization, to suspend sentences.⁵²

In response, Congress enacted legislation explicitly empowering federal district courts to suspend sentences and place defendants on probation in conjunction with issuing a restitution order as a condition of completion.⁵³ This statutory authority, along with the increased emphasis on punishing the offender, has resulted in the modern framework where federal trial courts often order defendants to pay restitution for harms “only tangentially related to specific, articulable losses the victims of crime claim,” including “abstract emotional and psychological injuries.”⁵⁴

Since the victims’ rights movement of the 1980s,⁵⁵ American society has manifested an increasingly vengeful approach to punishing criminal defendants.⁵⁶ Criminal restitution in the United States has become “primarily punitive” in nature.⁵⁷ No longer do courts impose restitution solely to disgorge an offender’s unlawful gains.⁵⁸ Instead, today courts impose criminal restitution orders to compensate for economic, emotional, and psychological losses.⁵⁹ Criminal restitution is no longer attached to specific, precise, and calculable unlawful economic gains.⁶⁰

In 1982, the federal Victim and Witness Protection Act (“VWPA”) was enacted, and “for the first time, restitution became a common element in federal sentencing.”⁶¹ The VWPA ushered in a new era for criminal restitution; criminal restitution orders could now

⁵¹ *Id.* at 2–3.

⁵² *Ex parte* United States, 242 U.S. 27, 51–52 (1916); *see also* DOYLE, *supra* note 54, at 3.

⁵³ DOYLE, *supra* note 50, at 2.

⁵⁴ Lollar, *supra* note 10, at 100, 119.

⁵⁵ For more about the victims’ rights movement, *see* MARLENE YOUNG & JOHN STEIN, NAT’L ORG. FOR VICTIM ASSISTANCE, THE HISTORY OF THE CRIME VICTIMS’ MOVEMENT IN THE UNITED STATES (2004), https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pdf/historyofcrime.pdf [<https://perma.cc/NBP3-52KP>].

⁵⁶ Lollar, *supra* note 10, at 97.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 96 n.5 (citing Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009)).

be entered to compel an offender to pay a victim compensation for physical injuries, mental injuries, emotional losses,⁶² and even lost wages.⁶³ That same year, a federal task force commissioned by President Ronald Regan encouraged federal courts to order restitution in “all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record.”⁶⁴

In 1994, the Violence Against Women Act (“VAWA”) was enacted, which was first introduced as a bill by then-Senator Joseph Biden.⁶⁵ VAWA was the first federal statute to mandate criminal restitution as part of a federal sentence.⁶⁶ Reflecting on the two purposes of criminal restitution orders, Senator Biden said, “there are two parts to this equation. One is get the bad guy and punish the bad guy. The second is take the victim and try to restore them.”⁶⁷

VAWA required offenders to compensate victims for physical and psychological injuries resulting from sex-related and domestic violence related crimes.⁶⁸ The Act also mandated that a criminal restitution order be imposed for these offenses regardless of the defendant’s financial wherewithal.⁶⁹

In 1996, the Mandatory Victims Restitution Act (“MVRA”) made restitution for the “full amount of each victim’s losses” mandatory for all federal convictions in which there was an “identifiable victim.”⁷⁰ The Senate’s goal with the MVRA was “to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due,” and “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.”⁷¹ Straying further from restitution’s roots as a method of disgorgement, some federal courts held that offenders could be ordered to pay restitution for any damages to the victim that were the

⁶² *Id.* at 100 n.17.

⁶³ *Id.* at 102.

⁶⁴ *Id.* at 96 n.5 (quoting PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 73 (1982), <http://ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf> [<https://perma.cc/RA4W-L77M>])).

⁶⁵ Pub. L. No. 103-322, 108 Stat. 1798 (1994); Lollar, *supra* note 10, at 114.

⁶⁶ Lollar, *supra* note 10, at 114; *see* 18 U.S.C. § 3664.

⁶⁷ Lollar, *supra* note 10, at 114 (quoting 140 CONG. REC. S121 (daily ed. Aug. 22, 1994) (statement of Sen. Joseph Biden)).

⁶⁸ 18 U.S.C. § 3663A; Lollar, *supra* note 10, at 100 n.17.

⁶⁹ 18 U.S.C. § 3664(f)(1)(A).

⁷⁰ 18 U.S.C. §§ 3663A(c)(1), 3664(f)(1)(A).

⁷¹ Lollar, *supra* note 10, at 114–15 (quoting S. REP. NO. 104-179, at 12 (1995)).

“proximate result” of the offense, even if the offender’s actions were not the “proximate cause” of the victim’s losses.⁷²

In 2014, the Supreme Court in *Paroline v. United States* rejected the “proximate result” standard.⁷³ The Court held that where it is not possible to trace a specific amount of a victim’s economic loss to an offender, a federal district court should order criminal restitution in an amount reflecting the offender’s role in causing the victim’s total loss.⁷⁴ Under *Paroline*, a precise mathematical formula is “neither necessary nor appropriate”⁷⁵ because “district courts might, as a starting point, determine the amount of the victim’s losses . . . then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant’s conduct in producing those losses.”⁷⁶

Criminal restitution in the United States has thus morphed from its original purpose of offender disgorgement to a system which is “primarily punitive” in nature.⁷⁷ As retribution has become a prevailing goal, offenders are subject to increasingly harsh punishment.⁷⁸

III. CRIMINAL RESTITUTION IN PRACTICE IN U.S. FEDERAL COURTS

A. *When Ordered*

Federal law currently distinguishes between “mandatory” restitution offenses and those offenses where the imposition of restitution is discretionary.⁷⁹ Congress has labeled a growing number of offenses as mandatory. Today, under federal law, restitution is mandated for those offenses that have an identifiable victim and constitute: (1) a “crime of violence,” (2) an offense against property, (3) a violation of the Controlled Substances Act, (4) a crime committed by fraud or deceit, (5) an offense involving the theft of medical products, or (6) a crime that involves tampering with consumer products.⁸⁰

⁷² See, e.g., *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (en banc), *overruled by* *Paroline v. United States*, 572 U.S. 434 (2014).

⁷³ *Paroline*, 572 U.S. at 463.

⁷⁴ Lollar, *supra* note 10, at 103–04.

⁷⁵ *Paroline*, 572 U.S. at 459.

⁷⁶ *Id.* at 460.

⁷⁷ Lollar, *supra* note 10, at 97.

⁷⁸ *Id.* at 99.

⁷⁹ See 18 U.S.C. § 3663A.

⁸⁰ *Id.*

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District courts may also exercise discretion in choosing whether to impose criminal restitution in any case that does not fall within the six categories of mandatory restitution cases enumerated above.⁸¹ Where a victim is identifiable, “[t]here is a strong presumption” that a restitution order will be imposed.⁸²

B. Inability to Collect Due to Offender Indigency

Significantly more criminal restitution is ordered in federal court than is ever collected. It is not uncommon for offenders to be ordered to pay hundreds of thousands, or even millions, of dollars in restitution to many victims.⁸³ Because so many criminal defendants lack sufficient assets to satisfy the amount of restitution ordered, the United States Department of Justice (“DOJ”) has recognized that “[r]ealistically . . . [a victim’s] chance of full recovery is very low.”⁸⁴

At the end of Fiscal Year 2016, the DOJ identified \$110 billion in outstanding debt from restitution orders,⁸⁵ but noted that \$100 billion of that money is uncollectible.⁸⁶ Further, a 2019 report noted that while courts impose about \$1 billion per year in criminal restitution orders, “less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendant’s inability to pay.”⁸⁷

C. Inability to Consider Offender’s Financial Situation

In recent years, there has been decreasing concern over whether criminal restitution will be collected after it gets ordered. Once a court determines that restitution will be ordered in some capacity, federal law forbids the sentencing court from considering the defendant’s ability to pay when deciding the amount that should be imposed.⁸⁸

⁸¹ 18 U.S.C. § 3663(a).

⁸² GOODWIN, *supra* note 21, § 10:16.

⁸³ *Restitution Process*, *supra* note 27.

⁸⁴ *Id.*

⁸⁵ GAO-18-203, *supra* note 16, at 1.

⁸⁶ *Id.*

⁸⁷ DOYLE, *supra* note 17, at 1.

⁸⁸ 18 U.S.C. § 3664(f).

Since 1996,⁸⁹ when Congress passed the MVRA,⁹⁰ the defendant's financial position has been primarily only relevant to how the court orders payment of the restitution.⁹¹ In mandatory restitution cases, the defendant's resources are only considered when fashioning a payment schedule, not when determining *whether* to impose restitution or what the *amount* should be.⁹² Meanwhile, discretionary restitution cases allow the offender's financial situation to play a larger, but still limited, role. In these cases, the court may consider the defendant's financial situation in determining *whether*, but not *how much*, restitution should be imposed.⁹³

This approach of allowing a sentencing court to consider a defendant's resources in determining *whether* to order restitution but not to determine the *amount* is a haphazard safeguard considering the modern "judicial presumption" in favor of restitution.⁹⁴ Accordingly, consideration of a defendant's resources now serves as a merely "perfunctory" analysis, "only allowing the court to impose (presumably full) restitution . . . or none at all."⁹⁵

Perhaps because of the MVRA, the amount of uncollected criminal debt in the United States more than doubled between 1995 and 1999.⁹⁶ Between 1996 and 2010, outstanding federal criminal debt swelled from \$6 billion to more than \$64 billion.⁹⁷ In addition, "restitution collection rates have dropped precipitously since restitution became mandatory" in some cases under the VAWA in 1994.⁹⁸ Prior to the VAWA, debt collection rates from offenders with court ordered

⁸⁹ Before 1996, federal sentencing judges could consider a defendant's resources in determining the amount of restitution a defendant should be ordered to pay. GOODWIN, *supra* note 21, § 11:5; *see also* 18 U.S.C. § 3664(f).

⁹⁰ Mandatory Victims' Restitution Act of 1996, 18 U.S.C. §§ 3663, 3663A, 3664.

⁹¹ GOODWIN, *supra* note 21, § 11:5; *see also* 18 U.S.C. § 3664(f).

⁹² GOODWIN, *supra* note 21, § 11:5.

⁹³ *Id.* § 11:6.

⁹⁴ *Id.* ("[T]he effect of this consideration is further limited because there is a presumption for full (not partial) restitution, if any is imposed, based on other parts of the statutory scheme.")

⁹⁵ *Id.* § 11:6.

⁹⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 32 (2001).

⁹⁷ Lollar, *supra* note 10, at 126–27 n.124 (citing *Criminal Restitution Improvement Act of 2006: Hearing on H.R. 5673 Before the H. Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Rep. Coble, Chairman, Subcomm. on Crime, Terrorism, & Homeland Sec.)).

⁹⁸ *Id.*

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restitution were as high as fifty-four percent.⁹⁹ That rate of debt collection dropped as low as five percent in 2011.¹⁰⁰ The DOJ has acknowledged that this dramatic decline in collection resulted from “the lack of relationship between the amount ordered and its corresponding collectability,” which is attributable to VAWA and MVRA requirements since federal judges may not consider an offender’s financial wherewithal before ordering criminal restitution under those laws.¹⁰¹

IV. PROBLEMS WITH U.S. CRIMINAL RESTITUTION

Restitution orders have a substantial impact on the lives of criminal defendants, their heirs, victims, and society at large. For defendants, a restitution order’s consequences often extend long past the completion of all other terms of criminal sentencing, including probation or parole.¹⁰² An average restitution order remains in force for approximately twenty years.¹⁰³ Because criminal restitution is not dischargeable in bankruptcy, a low-income defendant may spend the remainder of his life trying to pay off the ordered amount.¹⁰⁴ In addition, because jurisdictions are split on the issue of whether a victim is precluded from collecting criminal restitution against a decedent’s estate, a defendant’s heirs may suffer the impact of a criminal restitution order even after the defendant’s death.¹⁰⁵

Additional negative consequences of criminal restitution result from the enforcement mechanisms courts utilize to punish noncompliance, including but not limited to: (1) adding costly interest charges to amounts owed;¹⁰⁶ (2) imposing a lien in favor of the victim on the defendant’s property;¹⁰⁷ (3) negatively impacting a defendant’s credit report for years, creating a long-term barrier to securing gainful

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2011 tbl. 8 (2011), available at http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf).

¹⁰¹ *Id.*

¹⁰² *Id.* at 126–27.

¹⁰³ *Restitution Process*, *supra* note 27; see also GOODWIN, *supra* note 21, § 1:7.

¹⁰⁴ Lollar, *supra* note 10, at 126 n.126.

¹⁰⁵ DOYLE, *supra* note 50, at 27 n.194 (noting that the Fifth, Seventh, Ninth, and Eleventh Circuits have ruled that abatement precludes the collection of criminal restitution from a decedent’s estate, while the Second, Third, and Fourth Circuits have ruled that criminal restitution may be collected from a decedent’s estate).

¹⁰⁶ 18 U.S.C. § 3612(f)(1).

¹⁰⁷ § 3664(m)(1)(B); see also DOYLE, *supra* note 17, at 1.

employment that persists even after restitution is fully paid;¹⁰⁸ and (4) preventing a defendant from possessing a firearm or serving on a jury in many states.¹⁰⁹ In addition, failure to comply with a restitution order can result in a driver's license suspension, continued court supervision, and re-incarceration.¹¹⁰ Legislation in a number of jurisdictions also prevents former offenders from voting if restitution related to a former criminal offense is still outstanding.¹¹¹

A. *Disenfranchisement*

At least seven states prohibit former offenders from participating in the electoral process if restitution has not been paid in full.¹¹² While these prohibitions present several issues beyond the scope of this Note, it is notable here given research that shows felon disenfranchisement has an adverse impact on the self-confidence and effective re-integration of ex-offenders back into society.¹¹³

In Florida, for example, a 2018 state constitutional amendment was passed to grant ex-felons who completed "all terms of sentence" the right to vote.¹¹⁴ In 2019, the Florida Legislature implemented the amendment via statute, interpreting completing "all terms of sentence" to encompass the full payment of a criminal restitution order and other court-imposed fines.¹¹⁵ Faced with a constitutional challenge to this law, the Northern District of Florida struck down the portion of the law conditioning restoration of voting rights on full payment of financial obligations like restitution.¹¹⁶ The Eleventh Circuit, however,

¹⁰⁸ See Lollar, *supra* note 10, at 125.

¹⁰⁹ See *id.* at 129.

¹¹⁰ See *id.* at 123.

¹¹¹ See *infra* Part IV.A.

¹¹² Alabama, Arizona, Arkansas, Florida, Kentucky, Tennessee, and Texas all have such laws. See ALA. CODE § 15-22-36.1(a)(3) (2022); ARIZ. REV. STAT. ANN. § 13-907 (2022); ARK. CONST. amend. LI, § 11(d)(2); FLA. STAT. § 98.0751 (2021); KY. REV. STAT. ANN. § 196.045(2) (West 2022); TENN. CODE ANN. § 40-29-202 (2022); TEX. ELEC. CODE ANN. § 11.002(a)(4) (West 2021); TEX. CODE CRIM. PROC. ANN. art. 43.01(a) (West 2021).

¹¹³ See Victoria Shineman, *Restoring Voting Rights: Evidence that Reversing Felony Disenfranchisement Increases Political Efficiency*, 41 POL'Y STUD. J. 131 (2019).

¹¹⁴ Gary Fineout, *Federal Appeals Court Considers Whether to Uphold Florida Felon Voting Law*, POLITICO (Aug. 18, 2020), <https://www.politico.com/states/florida/story/2020/08/18/federal-appeals-court-considers-whether-to-uphold-florida-voting-law-1309985> [<https://perma.cc/KQ9T-H6CD>].

¹¹⁵ FLA. STAT. § 98.0751.

¹¹⁶ Jones v. DeSantis, 410 F. Supp. 3d 1284,1310–11 (N.D. Fla. 2019); Fineout, *supra* note 114.

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overturned the decision, effectively permitting Florida's disenfranchisement of individuals with unpaid criminal restitution orders.¹¹⁷ Thus, even after a former offender has served the period of incarceration he was sentenced to, he will continue to be disenfranchised under Florida law for failure to pay criminal restitution.

Scholars have criticized these laws as creating a system that has been referred to as "wealth-based penal disenfranchisement."¹¹⁸ In their critiques, these scholars have noted that such laws prevent "up to one million people or more from voting, particularly in low-income communities and communities of color."¹¹⁹

B. Adverse Impact on Juvenile Offenders

Additionally troublesome are the long-lasting effects that a criminal restitution order may have when imposed upon a juvenile offender. The federal system¹²⁰ and all fifty states¹²¹ authorize courts to order restitution from youthful defendants. While eight states impose a clear statutory cap on the amount of restitution that may be imposed upon a juvenile, most states do not.¹²² As a result, criminal restitution orders have significant impacts on the juvenile justice experience.

Of all the fines and fees imposed upon juvenile offenders, criminal restitution orders typically represent the largest portion.¹²³ Accordingly, juvenile offenders are often burdened by such debt for large portions of their adult life.¹²⁴ This leads to some young adults finding themselves "homeless and in debt, paying off victims many years after they've served their sentences."¹²⁵ Critics have argued that this unfortunate reality sometimes leads children to abandon hopes of pursuing

¹¹⁷ See *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. Sept. 11, 2020).

¹¹⁸ See Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 60–61 (2019).

¹¹⁹ *Id.*

¹²⁰ CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 14 (2018) (citing 18 U.S.C. § 5037).

¹²¹ *Juvenile Restitution Statutes*, NAT'L JUV. DEF. CTR. (Mar. 2015), <https://njdc.info/juvenile-restitution-statutes/> [<https://perma.cc/55Q7-7M2Q>].

¹²² *Id.*

¹²³ Eli Hager, *Victim Restitution Payments for Childhood Crimes Often Linger into Adulthood, Analysis Finds*, WASH. POST (June 11, 2019), https://www.washingtonpost.com/national/victim-restitution-payments-for-childhood-crimes-often-linger-into-adulthood-analysis-finds/2019/06/11/e88de6ca-86de-11e9-a870-b9c411dc4312_story.html [<https://perma.cc/96DY-8HNR>].

¹²⁴ *Id.*

¹²⁵ *Id.*; *Juvenile Restitution Statutes*, *supra* note 121.

further education to instead work full-time, attempting to pay their debts.¹²⁶ This is not only harmful to the youthful offender, who became indebted before the age of adulthood, but it is also harmful to society as it arguably contributes to the cycle of mass incarceration in the United States.¹²⁷

C. Threat of (Re-)Incarceration

After sentencing, individuals of all ages are also subject to a constant threat of re-incarceration if they fail to comply with a restitution order.¹²⁸ Troubled by the practice of jailing individuals who lacked the financial wherewithal to pay court imposed restitution, in 1983 the U.S. Supreme Court held in *Bearden v. Georgia* that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”¹²⁹

By focusing on a defendant’s “reasons for nonpayment,” *Bearden* provided district courts with limited authorization to revoke probation or supervised release where a defendant “willfully” refuses to pay or fails to make “sufficient bona fide efforts legally to acquire the resources to pay” the amount ordered.¹³⁰ In an apparent effort to prevent individuals who truly could not pay from being re-incarcerated as a result of that nonpayment, the *Bearden* Court wrote that the “reasons” a defendant failed to satisfy a restitution order was a factor of “critical importance.”¹³¹ *Bearden* was consistent with the Court’s earlier holding in *Williams v. Illinois*, which directed that it is a violation of the Equal Protection Clause to convert the requirement to pay a fine into imprisonment based solely on an indigent defendant’s inability to pay the fine.¹³²

In practice, *Bearden* has been insufficient in safeguarding low-income defendants from being jailed due to nonpayment. While courts are directed to refrain from revoking probation or supervised release

¹²⁶ Hager, *supra* note 123; *Juvenile Restitution Statutes*, *supra* note 121.

¹²⁷ For more about the mass incarceration crisis, see Nicole P. Dyszlewski, Lucinda Harrison-Cox & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 *ROGER WILLIAMS UNIV. L. REV.* 471 (2016).

¹²⁸ See Lollar, *supra* note 10, at 123. Note, however, that some jurisdictions, including Alabama, only allow individuals eighteen years of age or older to be incarcerated for failure to pay restitution. See ALA. CODE § 12-15-117(d).

¹²⁹ *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983).

¹³⁰ See *id.* at 672.

¹³¹ See *id.* at 668.

¹³² *Williams v. Illinois*, 399 U.S. 235, 240–42 (1970).

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solely on the basis of failure to pay restitution or other court imposed fines, courts often do so without conducting a hearing to determine whether a defendant is financially capable of paying the amount ordered.¹³³ Some scholars have criticized *Bearden*'s effect, however, writing that courts often employ a "very loose interpretation of the 'willfulness' requirement" whereby "it is rare for a judge to not find a defendant's failure to pay 'willful.'"¹³⁴ Even when a hearing is held, judges at times "don't believe" defendants who claim indigency as their basis for being unable to comply with a restitution order.¹³⁵ As a result, many defendants subject to a criminal restitution order are re-incarcerated upon defaulting on their court imposed financial obligation.¹³⁶

D. Harm to the Victim

Criminal restitution aims to assist victims in recuperating losses sustained due to criminal activity.¹³⁷ However, the likelihood that a victim will actually collect the restitution ordered is compromised by the fact that such orders are rarely a stand-alone sanction.¹³⁸ Criminal restitution orders are often combined with probation, incarceration, and/or other economic sanctions that make it infeasible for the criminal defendants to fulfil their restitution obligations.¹³⁹ Accordingly, criminal restitution orders frequently artificially inflate a victim's hope of being made whole.¹⁴⁰

Because so much criminal restitution is uncollectible,¹⁴¹ many victims will inevitably come to perceive the process as a second victimization.¹⁴² This feeling is aggravated by the fact that, once a case is initiated, crime victims have little control over criminal proceedings

¹³³ Lollar, *supra* note 10, at 128; AM. CIV. LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010)

("[C]ourts across the United States routinely disregard the protections and principles the Supreme Court established in *Bearden v. Georgia* over twenty years ago. In the wake of the recent fiscal crisis, states and counties now collect legal debts more aggressively from men and women who have already served their criminal sentences, regardless of whether they are able to pay these debts.")

¹³⁴ Lollar, *supra* note 10, at 128.

¹³⁵ AM. CIV. LIBERTIES UNION, *supra* note 133, at 34.

¹³⁶ Lollar, *supra* note 10, at 128.

¹³⁷ Cares, Haynes & Ruback, *supra* note 22, at 5.

¹³⁸ *Id.* at 17.

¹³⁹ *Id.* at 17.

¹⁴⁰ *Id.* at 13.

¹⁴¹ *See supra* Section II.B.

¹⁴² Cares, Haynes & Ruback, *supra* note 22, at 13.

against their offender.¹⁴³ Unsatisfied criminal restitution orders amplify this feeling of lost control, reinforcing a victim's perception of justice unfulfilled.¹⁴⁴ This negative experience may lead to a victim feeling revictimized, making him less likely to contact law enforcement in the future due to lost confidence in the system.¹⁴⁵

E. Harm to Society

In addition to its detrimental impacts on criminal defendants and victims, criminal restitution creates negative consequences for the public at large. Studies show that monetary obligations imposed on criminal defendants undermine the prospect of an offender's successful reentry into society, paving his way back to incarceration and resulting in further cost to the taxpayer.¹⁴⁶

An incarcerated individual is at a greater risk of losing a job while incarcerated and experiencing family disruption as a result of their incarceration,¹⁴⁷ and many offenders have difficulty securing employment after release from incarceration due to their criminal conviction.¹⁴⁸ To pay restitution, an offender needs an income. These factors

¹⁴³ *Id.* at 18. The decision to prosecute a case, or to end a prosecution, ultimately rests with the prosecutor assigned to the case. Therefore, cases can be prosecuted without victim participation. This is frequently the case in domestic violence prosecutions, where certain jurisdictions have enacted "no-drop" policies stipulating that cases will continue to be prosecuted even if the victim declines to participate. For more about no drop policies in domestic violence cases, see Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383 (2001).

¹⁴⁴ Cares, Haynes & Ruback, *supra* note 22, at 18.

¹⁴⁵ *Id.*

¹⁴⁶ ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 33 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [<https://perma.cc/Z74P-FY5X>]. For more information on the impact of incarceration on families, see PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003).

¹⁴⁷ BANNON, NAGRECHA & DILLER, *supra* note 146, at 28.

¹⁴⁸ Lollar, *supra* note 10, at 124; see also Adam Looney, *5 Facts About Prisoners and Work, Before and After Incarceration*, BROOKINGS INST. (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/> [<https://perma.cc/EEK8-WLBC>] ("About one third of all 30-year-old men who aren't working are either in prison, in jail, or are unemployed ex-prisoners. Almost half of ex-prisoners have no reported earnings in the first several years after leaving prison; among those who do find work, half earn less than \$10,090 a year or less than a full-time job at minimum wage."). While a full discussion of the reasons individuals have trouble securing employment after incarceration is beyond the scope of this Note, some reasons include outright

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increase the probability that the defendant will reoffend and be re-incarcerated, a cost passed onto the community that often far exceeds any amount which could have been collected in the form of restitution.¹⁴⁹

F. Harm to the System

There is also a significant cost of attempting to enforce such restitution orders. Various state actors are involved in the frequently unsuccessful attempts to collect outstanding restitution dollars. Before restitution is ordered, a probation officer is tasked with creating a report detailing the victim's financial loss and the offender's financial situation.¹⁵⁰ U.S. District Courts are charged with ordering restitution, and the clerk of each court must receive any payments made and disburse them to victims.¹⁵¹ There is also the additional complication of locating victims with inaccurate contact information on file. The Administrative Office of the U.S. Courts reported that as of 2017, courts had collected more than \$132 million in restitution that could not be disbursed due to an inability to locate the intended recipient of that money.¹⁵² Given that U.S. courts are already overburdened¹⁵³ and most of these restitution orders are futile, there is an obvious conclusion: the current system must be reformed.

prohibitions on ex-offenders holding certain jobs and the social stigma that accompanies a criminal conviction. See Jonathan Blanks, *Our Criminal Justice System Is Making it Really Hard for People to Find Jobs*, WASH. POST (Sept. 30, 2014, 8:58 AM), <https://www.washingtonpost.com/posteverything/wp/2014/09/30/our-criminal-justice-system-is-making-it-really-hard-for-the-poor-to-find-jobs/> [<https://perma.cc/L2FC-N9JD>].

¹⁴⁹ BANNON, NAGRECHA, & DILLER, *supra* note 146, at 19 (“[T]he costs of arrest and incarceration – passed on to the taxpayer – are often more than the state can ever hope to collect from debtors.”). Recent statistics show an annual cost of \$39,158 to house federal inmates. 86 Fed. Reg. 49060 (Sept. 1, 2021).

¹⁵⁰ GAO-18-203, *supra* note 16, at 8.

¹⁵¹ *Id.*

¹⁵² *Id.* at 24.

¹⁵³ Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIB. (Sept. 28, 2015, 12:32 AM), <https://www.chicagotribune.com/nation-world/sns-bc-us—federal-case-backlog-20150927-story.html>.

V. THE CANADIAN APPROACH

The Canadian criminal justice system differs from that of the United States.¹⁵⁴ In Canada, criminal law is exclusively federal, whilst its implementation is administered locally by its provinces.¹⁵⁵ In the United States, there are both federal criminal laws and criminal laws enacted by the states.¹⁵⁶

Section 718 of the Criminal Code of Canada states that a “fundamental purpose” of sentencing offenders is to help achieve “one or more of the following objectives”:

- (a) to denounce unlawful conduct . . . ;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) *to assist in rehabilitating offenders;*
- (e) *to provide reparations for harm done to victims or to the community;* and
- (f) *to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.*¹⁵⁷

The last three “fundamental purpose[s]” of sentencing provided by Section 718—reparations, rehabilitation, and responsibility—are key components of the Canadian system of criminal restitution. As compared to the U.S. system, however, when considering the offender, the Canadian system places less emphasis on punishment and more emphasis on rehabilitation.¹⁵⁸ As will be discussed below, the offender’s ability to pay a restitution amount and the impact a restitution order would have on an offender’s successful rehabilitation are two elements that a Canadian court will consider before imposing restitution in a criminal case. Thus, in determining whether and how much restitution should be ordered, the offender’s financial circumstances are considered more fully in the Canadian system than the U.S. system.

¹⁵⁴ Joanne Katz & Gene Bonham, Jr., *Restorative Justice in Canada and the United States: A Comparative Analysis*, 6 J. INST. JUST. & INT’L STUD. 187, 191 (2006).

¹⁵⁵ *Id.* at 188.

¹⁵⁶ *Id.*

¹⁵⁷ Canada Criminal Code, R.S.C. 1985, c C-46, art 718 (emphasis added).

¹⁵⁸ See discussion *infra* Section V.B.

A. Criminal Restitution in Canada

In 2015, the Parliament of Canada passed the Canadian Victims Bill of Rights.¹⁵⁹ Article Sixteen provides that “[e]very victim has the right to have the court *consider* making a restitution order against the offender.”¹⁶⁰ Unlike in the United States, however, criminal restitution orders are a “seldom-used measure” in Canada.¹⁶¹ While 189,546 offenders were found guilty in the country between 2019 and 2020, just 4,098—or approximately two percent—of those individuals faced restitution orders as part of their sentence.¹⁶² Because each Canadian province administers its own system of criminal restitution, further differences arise if the data is examined at the provincial level.¹⁶³ During that same period, restitution orders were imposed at the highest rates in Yukon (7.3%) and Nova Scotia (4.93%), while the lowest rate was found in Manitoba (0.03%).¹⁶⁴

The low rate at which restitution orders are imposed in Canada may be at least partially due to the consideration courts are instructed to give to an offender’s circumstances. Canadian courts are instructed to consider the offender’s ability to pay in determining whether a restitution order should be imposed and, if so, how much that order should be.¹⁶⁵ If a court determines that an offender is unlikely to be able to satisfy the amount of restitution to be ordered, the court must consider the negative effect such a restitution order would have on that individual’s rehabilitation and reintegration into society.¹⁶⁶

In Canada, a restitution order can be imposed one of three ways. Such an order can be deemed: (1) a stand-alone order, given as an additional sentence,¹⁶⁷ (2) a condition of probation,¹⁶⁸ or (3) a

¹⁵⁹ Canadian Victims Bill of Rights, R.S.C. 2015, c 13, s 2; *see* WEMMERS, MANIKIS & SITOIANU, *supra* note 24, at 2.

¹⁶⁰ Canadian Victims Bill of Rights, R.S.C. 2015, c 13, s 2, art 16 (emphasis added).

¹⁶¹ *See* WEMMERS, MANIKIS & SITOIANU, *supra* note 25, at 6.

¹⁶² *Adult Criminal Courts, Guilty Cases by Type of Sentence*, STATS. CAN. (Sept. 28, 2021), <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003001> [<https://perma.cc/GDL8-42HM>].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Susan McDonald, *Understanding Restitution*, VICTIMS CRIME RSCH. DIG., Spring 2009, at 10, 11.

¹⁶⁶ *See, e.g., R. v. Biegus*, [1999] O.J. No. 4963, para. 15 (Can. Ont. C.A.); WEMMERS, MANIKIS & SITOIANU, *supra* note 25, at 5.

¹⁶⁷ Canada Criminal Code, R.S.C. 1985, c C-46, art 738.

¹⁶⁸ *Id.* art 732.1(3.1)(a).

conditional sentence.¹⁶⁹ The court must pay additional attention to the offender's financial situation if it seeks to impose a restitution order as a condition of probation. Because non-payment will result in a breach of the probation order, the court must first ensure that the offender may reasonably make the payment ordered during the term of probation.¹⁷⁰

A unique aspect of Canada's system of criminal restitution is seen in its method of enforcement. If an offender fails to pay the full amount of a restitution order, the victim must use civil enforcement methods to collect the money.¹⁷¹ Article Seventeen of the Canadian Victims Bill of Rights provides, "[e]very victim in whose favour a restitution order is made has the right, if they are not paid, to have the order entered as a *civil court judgement* that is enforceable against the offender."¹⁷² Under this framework, the victim bears the burden of seeking civil judicial enforcement because Canadian criminal courts do not interfere with the execution of criminal restitution orders.¹⁷³

Canada's enforcement of these orders through the civil system has been criticized for creating obstacles to a victim's ability to secure criminal restitution.¹⁷⁴ In 2017, Canada's Office of the Federal Ombudsman for Victims of Crime noted that a system putting the onus on crime victims to enforce criminal restitution orders as civil judgments: (1) is cost prohibitive for victims, (2) requires victims to spend time and energy fighting to obtain restitution owed to them, (3) creates a system where "victims continue to bear costs of the crimes committed against them," and (4) places additional burdens on victims who have to "track down" monies owed to them, a process which can be "overwhelming and re-victimizing."¹⁷⁵

At least one Canadian province has worked to minimize the burden placed on a victim in enforcing criminal restitution as civil judgments. Saskatchewan has established government offices that allow victims to voluntarily register their restitution orders with the

¹⁶⁹ *Id.* art 742.3(2)(f); *see also* CAN. RES. CTR. FOR VICTIMS OF CRIME, RESTITUTION (2009), <https://crcvc.ca/wp-content/uploads/2021/09/Restitution.pdf> [<https://perma.cc/A8SC-FBWT>].

¹⁷⁰ McDonald, *supra* note 165 at 10, 11.

¹⁷¹ *Id.*

¹⁷² Canadian Victims Bill of Rights, R.S.C. 2015, c 13, s 2, art 17 (emphasis added).

¹⁷³ WEMMERS, MANIKIS & SITOIANU, *supra* note 25, at 8.

¹⁷⁴ OFF. OF THE FED. OMBUDSMAN FOR VICTIMS OF CRIME, CANADIAN VICTIMS BILL OF RIGHTS: GETTING FAIR OUTCOMES FOR VICTIMS IN CANADA'S CRIMINAL JUSTICE SYSTEM 11 (2017).

¹⁷⁵ *Id.* at 9.

Province's Ministry of Justice, which in turn allows collection officers to act on a victim's behalf to initiate collection efforts.¹⁷⁶

B. Comparison of Canadian & American Criminal Restitution

Canada's treatment of criminal restitution bears striking differences from that of the United States. Recall that in the United States, the twin aims of criminal restitution are victim restoration and offender punishment.¹⁷⁷ Conversely, in Canada, scholars have written that the "goal is centred on offenders and targets their rehabilitation and reintegration into society,"¹⁷⁸ as it is a system of restitution that often gives priority to "the means and the needs of the offender."¹⁷⁹

Unlike their U.S. counterparts, Canadian criminal judges must consider the impact a restitution order will have on an offender's successful rehabilitation. This analysis can significantly influence whether restitution will be imposed in any given case and, if so, how much restitution will be ordered. Canadian courts have held that the timing and amount of criminal restitution must not significantly impede an offender's will or ability to satisfy a restitution order.¹⁸⁰ Further, in determining the impact such an order may have on an offender, Canadian courts have given weight to the notion that financially destroying an accused would impair his chances of rehabilitation.¹⁸¹

Recall that in the U.S. federal criminal court system, courts may consider an offender's financial situation in determining whether restitution should be ordered at all—however the offender's financial circumstances may not be considered when determining how much restitution should be ordered.¹⁸² Recall also that, in the U.S. federal system, there is a modern "judicial presumption" in favor of imposing restitution in any case with an identifiable victim.¹⁸³ The differences between the Canadian and American systems have real impacts on the frequency with which restitution orders are imposed under the two systems. As discussed above, restitution is infrequently imposed in

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *See supra* Section II.C.

¹⁷⁸ WEMMERS, MANIKIS & SITOIANU, *supra* note 25, at 4.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *See R. v. Bullen*, 2001 Carswell Yukon 91, para. 19 (Can. Yukon Terr. Ct.) (WL).

¹⁸¹ *See R. v. Siemens*, 1999 CarswellMan 305, para. 8(3) (Can. Manitoba C.A.) (WL).

¹⁸² GOODWIN, *supra* note 21 § 11:6.

¹⁸³ *Id.*

Canada, ordered in just two percent of those cases where the offender was found guilty. In the United States, restitution was imposed in 12.4% of all cases in which an individual was the offender in 2021.¹⁸⁴ Thus, in 2021, U.S. offenders were more than 600% more likely to face a restitution order as part of their sentence than Canadian offenders were in the year between 2019 and 2020.

A further difference between the United States and Canada lies in the enforcement mechanisms available to compel compliance with criminal restitution orders. While enforcement of criminal restitution orders in the United States is overseen by the criminal court system,¹⁸⁵ in Canada a criminal restitution order results in a civil judgment for the victim levied against the offender.¹⁸⁶ Thus, enforcement of these orders in Canada are a civil matter, and accordingly collection is left to the victim rather than government.

Notwithstanding the increased difficulty stemming from requiring victims to enforce restitution as a civil judgment, Canada's system produces restitution orders that are paid more often than in the U.S. system. Recall another statistic from above: at the end of Fiscal Year 2016, the U.S. DOJ identified \$110 billion in outstanding debt from restitution orders.¹⁸⁷ However, during that time, only \$880 million—or 0.8%—of that \$110 billion was collected.¹⁸⁸ \$100 billion of that amount—or approximately 91%—was simply deemed uncollectible by the DOJ.¹⁸⁹ In Canada, no data exists at the national level as to the amount of restitution ordered or the amount collected.¹⁹⁰ However, certain individual provinces do maintain that information, and when examining the data a difference in collection is readily apparent compared to the U.S. system. In Saskatchewan, for example, where restitution was ordered in 3.69% of the 12,156 cases where an offender was found guilty between 2019 and 2020,¹⁹¹ data shows that almost

¹⁸⁴ U.S. SENT'ING COMM'N, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 10 (2022) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf [<https://perma.cc/LWE5-M5SF>].

¹⁸⁵ See *supra* Part III.

¹⁸⁶ Canadian Victims Bill of Rights, R.S.C. 2015, c 13, s 2, art 17; see also McDonald, *supra* note 165, at 11.

¹⁸⁷ GAO-18-203, *supra* note 16, at 1.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ McDonald, *supra* note 165, at (“No data are collected on a national scale on the value of the orders or on the amount collected.”).

¹⁹¹ *Adult Criminal Courts, Guilty Cases by Type of Sentence*, *supra* note 162.

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seventy percent of restitution orders imposed are either fully or partially paid.¹⁹²

In 1988, the Parliament of Canada considered a U.S.-type system which would have created a “criminal enforcement scheme for restitution orders.”¹⁹³ Concerns were raised with associated costs that the provinces would incur in implementation, and the bill was never enacted because “[i]t was determined that the annual operating costs would far exceed the financial benefits realized by victims.”¹⁹⁴ In other words, Canada’s parliament considered and rejected the U.S. system of restitution on the grounds that it would cost more money to enforce the system than the system would actually collect.

VI. PROPOSED MODIFICATIONS TO U.S. CRIMINAL RESTITUTION

A. Proposal

To improve outcomes for offenders, victims, and society, the United States should reform its system of restitution. The current framework of the American criminal restitution system revictimizes victims while simultaneously overburdening offenders, all too often at the expense of the taxpayer. The American taxpayer is made to fund inefficient compliance programs, while victims frequently receive little to none of the restitution ordered and offenders are saddled with insurmountable debt they are unable to pay. To redress these inadequacies, the United States should revert to the historical roots of restitution theory and practice.

As it did initially, restitution should once again focus on disgorging offenders of illicitly gained property still within their possession and control. A more workable system would order the offender to pay restitution to the victim for the fair value, as determined by the court, of loss caused by the crime to the extent the offender (1) currently has financial resources to pay, and (2) is projected to have disposable income considering any realistic employment prospects. This system would likely prove more efficient than the current scheme, which saddles offenders with debts equal to a victim’s total loss, notwithstanding their current and future financial wherewithal.

¹⁹² CAN. RES. CTR. FOR VICTIMS OF CRIME, *supra* note 169, at 6 (“The majority of restitution orders [in Saskatchewan] are either paid or partially paid – almost 48% are paid in full, with an additional 20% that are partially paid. Only 32% involve no payment at all.”).

¹⁹³ McDonald, *supra* note 165, at 11; Bill C-89, R.S. 1988, c 65 (Can.).

¹⁹⁴ *Id.*

Following Canada's example, the United States should consider reforms at both the state and federal levels that would: (1) mandate consideration of an offender's current and future financial resources in determining the *amount* of restitution ordered, not just the initial determination of *whether* restitution will be ordered, (2) ensure the amount of restitution levied upon an offender is an amount that the offender may realistically be able to pay, and (3) instruct federal district courts to consider how a restitution order may adversely impact an offender's chances at rehabilitation. Society would benefit from these reforms and victims would likely report greater confidence in and satisfaction with the justice system.

To ensure victims receive the help they often desperately need, federal and state governments should divert funds dedicated to enforcing uncollectible criminal restitution orders toward a centralized victim compensation crime fund. Notably, such a fund does exist in the United States at the federal level.¹⁹⁵ However, this Note argues that it is insufficiently funded. As of March of 2022, the United States' Crime Victims Fund had a balance of approximately \$2.9 billion.¹⁹⁶ When compared to the \$110 billion in outstanding restitution debt that DOJ identified in 2016,¹⁹⁷ this amount is grossly insufficient.

Finding the most effective way to implement such a crime fund would be a matter of trial and error. For example, the administering agency would need to determine how to deal with a situation where Victim A is owed far more money than Victim B, but an amount is ordered to be paid to Victim A was ordered before such an order was made in favor of victim B. The question then becomes whether Victim A should be paid in full before Victim B receives a disbursement. One way of handling this situation would be for the fund to impose a limit on the amount of money that may be paid out to any one victim. After reaching that limit, a victim would have to petition the administering agency to receive any more compensation.

No matter what that limit is set at, and even if the fund is implemented differently, simply creating a victim's crime fund of this sort would provide victims with a reliable method of recourse for any amounts of restitution that the offender lacks the present and/or realistic future ability to pay. From the victim's perspective, this would be

¹⁹⁵ *Crime Victims Fund*, U.S. OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/about/crime-victims-fund> [<https://perma.cc/YS7C-S9MU>] (last visited May 5, 2022).

¹⁹⁶ *Id.*

¹⁹⁷ GAO-18-203, *supra* note 15, at 1.

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preferable to the current system where a victim's chance of recovery rests so heavily on the available financial assets of the offender that caused the harm.

B. Anticipated Objections

1. Shifting the Burden of Criminal Restitution to the State Would be too Costly

Some may take issue with the utilization of a centralized victim crime fund, arguing that it unfairly shifts the burden of paying restitution to a victim from the offender to the government. This objection is misguided on several grounds, however. First, as mentioned above, such a fund already exists at the federal level,¹⁹⁸ although it is grossly underfunded. The Crime Victims Fund, as it exists today, is funded by “federal criminal fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorneys’ Offices, federal courts, and the Federal Bureau of Prisons” as well as federal revenue stemming from “gifts, donations, and bequests from private parties.”¹⁹⁹ While government spending for such a program may not be politically popular, tax revenue should be allocated to the fund such that its balance increases significantly and comes closer to the amount currently ordered in private restitution orders each year.

Second, like the Canadian model, any amount that viably could be paid by an offender without causing tremendous financial hardship would still be imposed as a restitution order. The government, through this fund, would simply step up to fill the gap between what a victim is entitled to and what the offender realistically can pay.

Third, even under the current system, the government bears substantial costs associated with its mostly futile attempts to enforce these orders against indigent criminal offenders. Although it is the offender who is ordered to pay criminal restitution, it is the United States government that is charged with actually collecting and distributing those funds to victims.²⁰⁰ Accordingly, the taxpayer already bears a

¹⁹⁸ *Crime Victims Fund*, *supra* note 195.

¹⁹⁹ *Id.*

²⁰⁰ 28 C.F.R. § 0.171(b) (2022) (“Each U.S. Attorney shall designate an Assistant U.S. Attorney, and such other employees as may be necessary, or shall establish an appropriate unit within [the] office, to be responsible for activities related to the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bail-bond forfeitures.)”); *see also* discussion *supra* Section III.G.

significant cost in funding DOJ's attempts to enforce criminal restitution orders.²⁰¹ By shifting these resources to make up for the criminal restitution shortfall in which criminal offenders have no reasonable probability of paying in the future, victims will undoubtedly stand a better chance of being compensated for their loss.

2. *Reforming Criminal Restitution Would Mean Under-Punishing the Offender*

One may also feel that the reformation of criminal restitution proposed in this Note would mean offenders are "getting off easy." Such critics would likely side with those supporters of the punitive theory of restitution.²⁰² This objection, however, misstates the argument in this Note. Criminal restitution can still exist; it simply must be reformed such that we no longer ask offenders to pay what they cannot. As Canada's system does,²⁰³ and as the United States system used to do,²⁰⁴ criminal courts should once again consider an offender's financial situation in determining the *amount* of restitution that should be ordered.

The reformation of criminal restitution does not mean offenders get to retain the fruits of their unlawful actions. Rather, we should simply return to the roots of criminal restitution as a means of offender disgorgement.²⁰⁵ The offender should be prevented from keeping any assets still in their possession at the time of sentencing, but after that disgorgement is ordered the offender's financial situation should be considered on a continuing basis.

Given that most criminal defendants in the United States are indigent, this would result in disgorgement and nothing more in a great

²⁰¹ *Financial Litigation Policy*, U.S. DEP'T OF JUST., <https://www.justice.gov/jm/4-9000-financial-litigation-policy> [<https://perma.cc/MQC9-Q7GW>] (last visited Feb. 10, 2022) ("The designated AUSA is the Financial Litigation Coordinator, and financial litigation should be the primary responsibility of the AUSA. In smaller United States Attorneys' offices, this may be a collateral duty for the designated AUSA."). The U.S. Attorney's Office in each federal jurisdiction appoints a "financial litigation coordinator" tasked with enforcement duties. Many offices maintain a whole unit for these purposes called the Financial Litigation Unit. Because jurisdictions operate differently in this respect, it is unclear exactly how much money is spent federally to fund financial litigation within the DOJ. However, as these units are maintained by the U.S. Attorney's Office for each jurisdiction, it is clear there is at least some cost to the taxpayer in maintaining the current system.

²⁰² *See supra* Section I.B.

²⁰³ *See supra* Section IV.B.

²⁰⁴ *See supra* Section II.C.

²⁰⁵ *See supra* Section I.C.

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many criminal cases. After disgorgement, the State could either choose to fill the gap (as proposed in this Note), or it could recognize the reality that the offender will be unable to pay and simply not order restitution beyond the offender's ability to pay. Even the latter situation would likely be preferable to the current system that (1) continuously penalizes ex-offenders for their previous crimes,²⁰⁶ and (2) leaves victims with hopes of being made whole that usually go unfulfilled.²⁰⁷

3. *Restitution Reformation Serves to Discount its Deterrence Effect*

Critics of criminal restitution reform, namely advocates of the punitive theory of restitution,²⁰⁸ will likely argue that the type of reform espoused in this Note does not fully appreciate the deterrent impact criminal restitution serves upon engaging in criminal behavior. Such critics would likely take the position that “[criminal] restitution prevents future crime by punishing the defendant *financially*.”²⁰⁹ This argument, however, fails to recognize that, first and foremost, the reform espoused in this Note would only have a practical effect when applied to indigent criminal defendants who, regardless of which system of criminal restitution is in place, would not have the present or future financial wherewithal to fully satisfy a criminal restitution order.

Such arguments in opposition to reform also fail to recognize that there are several other punitive measures that a court can impose on a criminal offender, none of which are sensitive to the present and/or future financial condition of the offender. These punishments include court-ordered community supervision, community service, house arrest, and incarceration. Accordingly, criminal restitution is far from the only tool available to courts that provides a deterrent to crime. With these other forms of punishment at the court's disposal, the focus of criminal restitution should shift to a system which maximizes the probability of victim restoration rather than one designed to punish criminal offenders. It is worth reiterating that offenders would still be subject to disgorgement.

²⁰⁶ See *supra* Section III.

²⁰⁷ See *supra* Section III.E.

²⁰⁸ See *supra* Section I.B.

²⁰⁹ *The Purposes of Punishment*, UNIV. OF MINN. LIBRS., <https://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/> [<https://perma.cc/J9UT-TYVW>] (last visited Jan. 7, 2022).

4. *Victims Would Prefer Receiving Restitution from the Offender, not the State*

Critics of criminal restitution reform may argue that a crime victim would likely prefer that the perpetrator be the source of their compensation rather than the State by way of its taxpayers. However, this too overlooks the nature of the system of reformation put forth by this Note. The system of restitution proposed here focuses on disgorgement and thus still necessitates that the offender contribute what they can. Such a system allows the victim to take from the offender what he may viably recover but goes no further. Any amounts contributed by the State by way of a victim's crime fund would be funds in which the victim could not have had a reasonable expectation of collecting from the offender in the first place. Unlike today's system, this proposal would not leave victims less than whole and revictimized as a result. Victims of crime would no longer be subject to broken promises in the form of uncollectible judgements against indigent criminal offenders.

VII. CONCLUSION

The current system of criminal restitution in the United States is both counterintuitive and counterproductive to the goal of effective and efficient justice. The reintegration of former criminal offenders into productive members of society, rather than wards of the state, should be of at least equal importance. Today's system of criminal restitution is not only unworkable when it comes to indigent ex-offenders, but it also creates an insurmountable obstacle for the indigent offender to productive societal reentry.

The inability of indigent past criminal offenders to comply with criminal restitution orders hinders an ex-offender's reintegration, as failure to comply can lead to reincarceration as well as the denial of fundamental rights like participating in the electoral process.²¹⁰ These threats loom over indigent ex-offenders' heads, which likely deflate some, most, or all of that individual's hopes of rehabilitation and effective reentry.²¹¹ To remedy this, the United States should emulate Canada's system of requiring courts to assess the impact a restitution order would have on an offender's rehabilitation.²¹²

While victims of crime certainly have a desire and a need to be made whole, ordering unrealistic amounts of criminal restitution

²¹⁰ See *supra* Part III.

²¹¹ See BANNON, NAGRECHA, & DILLER, *supra* note 146, at 33.

²¹² See *supra* Part IV.

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payments from an indigent offender is by no way an effective and practical means to achieve that end. Our current system has evidenced that looking solely to the indigent ex-offender as a means of making a criminal victim whole often leads only to the victim feeling helpless and revictimized.

For the foregoing reasons, criminal restitution must be reformed to create a system which focuses equally on victim restoration, offender disgorgement, and offender rehabilitation. Doing so in the manner espoused in this Note would: (a) further the interests of crime victims, who would be more likely to recover full compensation for their loss; (b) promote judicial economy by shifting the burden of enforcement away from the nation's already overburdened court system; (c) save significant costs that the federal government currently expends in seeking to enforce such restitution orders; and (d) promote the rehabilitation and reintegration of indigent criminal defendants back into society by removing the insurmountable cloud of debt hanging over their heads even after serving their time in incarceration and/or community control.