STATEMENT

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BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME

ON

IMPROVING RESTIUTION IN FEDERAL CRIMINAL CASES

ON

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Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today to discussion ways to improve restitution in the federal criminal justice system.

The core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[1] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[2] Unfortunately, because of limits in the current federal restitution statutes, this purpose is not being fully achieved. Congress should modify the federal restitution statutes to give judges the power to require convicted criminals to fully compensate their victims for harms caused by their crimes.

Several important bills have recently been introduced in Congress to improve restitution procedures. S. 973 by Senator Dorgan and others, the "Restitution for Victims of Crime Act," and H.R. 845 by Representative Chabot and others, the "Criminal Restitution Improvement Act," both would make valuable improvements for crime victims restitution. In my testimony today I will touch on some of the improvements that these bills would make, while urging Congress to go even further to improve restitution for crime victims.

Part I explains the vital importance of restitution to crime victims. When a convicted federal criminal has caused a loss to the victim, the victim should be entitled to have the criminal pay for the loss. This is not only a matter of common sense, but of long-established congressional policy. Restitution is particularly important given our nation's commitment to equal justice, as the losses from crimes fall disproportionately on racial minorities and the poor.

Part II of my testimony urges Congress to give judges the ability to award restitution for all losses suffered by crime victims. Current federal law authorizes judges to order restitution only for certain narrow categories of losses, such as to compensate victims for damage to their property or to reimburse them for medical expenses. The need to fit restitution awards into these narrow pigeonholes has led to considerable litigation about whether particular restitution awards made by district court judges were authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that restitution's purpose is to restore crime victims to where they would have been had no crime been committed. Unfortunately, by limiting restitution to a few specific categories of loss, the current restitution statutes do not permit trial judges to achieve that goal. My testimony discusses specific examples of appellate court cases that have overturned quite appropriate district court restitution orders on the grounds that they were not statutorily-authorized. Congress should extend these statutes and give judges appropriate power to require criminals to pay for the losses they have caused.

Part III of my testimony urges Congress to allow judges to impose restitution on

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

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

criminals convicted of *all* federal crimes, not just federal crimes that happen to be found in Title 18 of the Criminal Code and a few other areas. Perhaps because of a drafting oversight, the current federal laws only allow restitution for offenses found in a particular parts of the U.S. Code. This is a very artificial limit, meaning that while restitution can be awarded for wire fraud or bank robbery (which are forbidden in Title 18), it cannot be ordered for environmental offenses or securities offenses (which are forbidden in Title 42 and Title 15). Restitution should be broadly permitted for any federal criminal offense.

Part IV urges passage of legislation to give courts the authority to restrain a defendant's assets that might be used to satisfy a restitution award, upon a proper showing from the Government. Legislation is needed to prevent defendants from dissipating assets and thus thwarting the purposes of the restitution statute. Carefully drawn legislation would be fully consistent with the Constitution.

Part V of my testimony urges adoption of legislation that would allow restitution to be enforced even where the convicted criminal has passed away before exhausting his appeals. The recent Enron case, in which more than $43 million in restitution could not be ordered because of a glitch in statutes on this issue highlights the need for reform.

Finally, Part VI of my testimony urges Congress to it pass legislation giving judges greater power to prevent profiting by criminals. The current federal law on the subject is apparently unconstitutional, yet Congress has not taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes merely because no one had taken the time to draft appropriate, constitutional legislation. Corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering as a condition of supervised release. In addition, it is possible to draft a constitutional statute that forbids profiteering by criminals.

I testify today as a law professor from the S.J. Quinney College of Law at the University of Utah, where I teach Crime Victims' Rights and Criminal Procedure among other subjects. I have also published scholarly works on the subject of crime victims' rights.[3] From July 2002 to November 2007, I served as a federal district court judge for the District of Utah. From October, 2005, to November, 2007, I served as the Chair of the Judicial Conference's Criminal Law Committee.

I. RESTITUTION FOR CRIME VICTIMS MUST BE GIVEN A HIGH PRIORITY IN THE FEDERAL CRIMINAL JUSTICE SYSTEM.

While other aspects of the nation's criminal justice system may be controversial, there appears to be near universal agreement on the need for restitution. As commentators have

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

recognized, "In perhaps unique contrast [to the division of opinion about other aspects of criminal justice policy], the idea of requiring offenders to make restitution for the harm attributable to their crimes appears by every available indicator to command an almost universal level of favorable interest."[4] In the federal system specifically, the importance restitution for crime victims has been repeatedly recognized. The 2004 Crime Victims Rights Act (CVRA) specifically includes in its list of rights for victims a right "to full and timely restitution as provided in law."[5]

The CVRA's right to restitution build on a long line of statutes designed to ensure that victims are made whole when they suffer losses at the hands of criminals. The idea behind these statutes was well expressed by the President's Task Force on Victims of Crime in 1982:

> Crime exacts a tremendous economic cost. In the vast majority of cases it is the victim, not the offender, who eventually shoulders this burden. This is unjust. The concept of personal accountability for the consequences of one's conduct, and the allied notion that the person who causes the damage should bear the cost, are at the heart of civil law. It should be no less true in criminal law.[6]

Building on these ideas, in 1982 Congress passed the Victim and Witness Protection Act that required restitution in many federal criminal cases. The goal behind the legislation was to ensure that "restitution to the victim will be the expected norm, and no longer an afterthought."[7] Thus, it was the intent of Congress "that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim, . . . to make the victim whole once again. It is the duty of the court to insure that the convicted criminal be the one who pays."[8]

Congress expanded restitution rights in 1996 with the Mandatory Victim Restitution Act.[9] The legislative history surrounding the Act explains: "The true cost to the victims and survivors of crime, particularly violent crime, is incalculable. Even so, where known, the direct costs of crime to its victims are staggering. In 1991, the direct economic costs of personal and household crime was estimated at $19.1 billion, a figure that does not include the costs associated with homicides or costs attributed to the criminal justice system."[10] As a result, Congress concluded that "[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held accountable to repay these costs."[11]

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[4] Alan T. Harland & Cathryn J. Rosen, *Impediments to the Recovery of Restitution by Crime Victims*, 5 VIOLENCE AND VICTIMS 127, 128 (1990).
[5] 18 U.S.C. § 3771(a)(6).
[6] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 79 (1982).
[7] 128 CONG. REC. 26810 (Oct. 1, 1982) (statement of Sen. Heinz).
[8] 128 CONG. REC. 26811 (Oct. 1, 1982) (statement of Sen. Laxalt).
[9] Codified at 18 U.S.C. § 3663A.
[10] S. Rep. 104-179 at 17.
[11] *Id.* at 18.

In spite of these lofty goals, however, victims of federal crimes still face significant hurdles to receiving full restitution for their losses. The challenges are of two types: First, not every loss from a crime is covered by the current federal restitution statutes. Some losses are not covered and some crimes simply fall outside of the restitution regime. Second, even where restitution is ordered, collection of the restitution order remains far from perfect. While federal prosecutors have made heroic efforts in many cases to obtain restitution for victims, too often their efforts are in vain because of inadequate enforcement tools.

In my testimony today, I will talk about ways to improve both the coverage of federal restitution statutes and the enforcement of federal restitution statutes. Because of the limited time available, I will not talk about every reform that has been suggested. In particular, the Department of Justice has provided a detailed review of some of the ways in which collection of restitution could improved, and I endorse those proposals.

But before turning to the specifics of needed reforms, one more point should be highlighted: Restitution becomes even more important when we remember that victimization does not strike all segments of American society equally. Instead, it is clear that racial minorities and the poor are much more likely to be victimized by crime (especially violent crime) than are whites and the affluent. According to the latest data from the Bureau of Justice Statistics, African-Americans are victimized at a rate more than 37% higher than are whites.[12] For completed crimes of violence, the victimization rate is more than double that for whites.[13] For the poor, the same pattern reappears. Those earning less than $15,000 a year are far more likely to become the victim of a crime than are those earning more than $50,000 a year.[14] Indeed, for completed crimes of violence. Those earning less than $15,000 a year or more than twice as likely to be victimized as those earning more than $50,000 a year.[15]

As part of our nation's commitment to equal justice, Congress should ensure that all victims of federal crimes receive full restitution from the criminals who victimized them. Along the same lines, some may argue that restitution should be restricted because racial minorities and the poor are disproportionately represented among federal offenders. If I understand the argument correctly, the concern is that oversized restitution awards will make it difficult for these offenders to reintegrate into law-abiding society. This argument, however, fails to recognize that judges are already required – and will continue to be required – to set an appropriate payment for any restitution award, taking full account of the offender's ability to pay.[16] Thus, no offender will ever be required to pay more than is economically reasonable under the circumstances. More important, with regard to race, it is well known that most crimes

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[12] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 at Table 5.

[13] *Id.*

[14] *Id.* at Table 14.

[15] *Id.*

[16] 18 U.S.C. § 3664(f)(2).

are intra-racial.[17] When considering restitution, then, the choice will typically be whether a loss from a crime should be borne by a victim or a criminal of the same race. In making this choice, the interests of the law-abiding victim must be given precedence over those of the offender. As the President's Task Force on Victims of Crime has explained, "It is simply unfair that victims should have to liquidate their assets, mortgage their homes, or sacrifice their health or education or that of their children while the offender escape responsibility for the financial hardship he has imposed."[18]

To achieve the goal of full and enforceable restitution for crime victims, several important reforms must be made to federal restitution laws. I turn, then, to these reforms.

II. JUDGES SHOULD BE EMPOWERED TO AWARD RESTITUTION FOR ALL LOSSES INCURRED BY A VICTIM, NOT JUST NARROW CATEGORIES OF LOSSES.

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

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

The Supreme Court has held that a district court's power to order restitution must be conferred by statute.[19] The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A – permit courts to award restitution for several specific kinds of loss, including restitution for loss of property, medical expenses, physical therapy, lost income, funeral expenses, and expenses for participating in all proceedings related to the offense. The statutes contain no general authorization for restitution to crime victims, even where such restitution is indisputably just and proper.

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[17] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 at Table 42.

[18] *Id.*

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

A case I handled in 2006 will illustrate the problem. In *United States v. Gulla*,[20] I sentenced a defendant for the crimes of bank fraud and aggravated identity theft. Ms. Gulla had pled guilty to stealing personal information out of the mail from more than 10 victims, and then running up false credit charges of more than $50,000. Government search warrants recovered an expensive Rolex watch and eleven leather jackets purchased by Ms. Gulla. Following the recommendation of the government, I sentenced Ms. Gulla to a term of 57 months in prison. I also ordered her to pay restitution for the direct losses she caused.

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

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

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

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

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

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[20] 2:05-CR-634-PGC (D. Utah Mar. 8, 2006).

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

In light of these victim statements, it seemed to me (as I said in court) that I should be able to order restitution beyond the direct financial losses of the phony charges run up by the defendant. In particular, I thought it would be fair to order restitution for the lost time the victims suffered in responding to the defendant's crime. Unfortunately, as the government explained at the hearing, current law does not allow this. Restitution is not permitted for consequential losses[21] or other losses too remote from the offense of conviction.[22]

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

- In *United States v. Reed*,[23] the trial court ordered restitution to victims whose cars were damaged when the defendant, an armed felon, fled from police. The Ninth Circuit reversed the restitution award because the defendant was convicted of being a felon in possession of a firearm and the victims were not victimized by *that* particular offense.

- In *United States v. Romines*,[24] a defendant on supervised release absconded from his residence and employment, driving away on his employer's motorcycle and later cashing an $8,000 check from his employer's bank account. He was caught, and the district court ordered restitution of $8,000 to the employer as part of the sentence for the supervised release violation. The Eleventh Circuit reversed

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

[22] *See, e.g.*, *United States v. Havens*, 424 F.3d 535 (7th Cir. 2005) (a victim of identify theft "takes the position that she is entitled to reimbursement for all the time she spent in this endeavor [of clearing credit], but in our view that goes too far"); *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (victim's attorney's fees too remote); *United States v. Kenney*, 789 F.2d 783, 784 (9th Cir. 1986) (wages for trial witnesses too remote).

[23] 80 F.3d 1419, 1421 (9th Cir. 1996).

[24] 204 F.3d 1067 (11th Cir. 2000).

because the government, rather than the employer, was the victim of the defendant's violation: "The only victim of that crime was the government, whose confidence in [the defendant's] rehabilitation seems to have been misplaced." [25] Accordingly, the Eleventh Circuit overturned the restitution order because "of the absence of textual authority to grant restitution."[26]

- In *United States v. Cutter*,[27] the defendant sold a house to his niece, then filed a fraudulent bankruptcy petition. The defendant was convicted of false statements in the petition. At sentencing, the district court ordered the defendant to pay his niece $21,000 in restitution because of her losses in a fraudulent conveyance action instituted by the bankruptcy trustee. The First Circuit overturned the order because the niece was not a direct victim of the defendant's criminal action of filing a fraudulent petition before the bankruptcy court.[28]

- In *United States v. Havens*,[29] the defendant pleaded guilty to various offenses relating to identity theft. The victim had earlier pursued a civil action against the defendant, receiving $30,000 in damages, and the district court ordered restitution in that amount. The Seventh Circuit reversed this restitution order, holding that it was unclear which damages and costs qualified as appropriate losses under the Mandatory Victims Rights Act.[30]

- In *United States v. Shepard*,[31] a hospital social worker drained a patient's bank account through fraud. The hospital paid the patient $165,000 to cover the loss. The social worker was later convicted of mail fraud and the district court ordered restitution of the $165,000 to the hospital. But the Seventh Circuit held that the patient was the only direct victim of fraud in the case and reversed the restitution order to the hospital.[32]

- In *United States v. Rodrigues*,[33] a defendant, an officer of a savings and loan, was convicted of numerous charges stemming from phony real estate transactions. The district court found that Mr. Rodrigues usurped a S&L's corporate opportunities by substituting himself for the S&L in four real estate deals and ordered him to pay $1.5 million in restitution – his profits in those deals. The Ninth Circuit reversed, holding that since the defendant's profits arose from the defendant taking his victim's corporate opportunities, rather than from direct

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[25] *Id.* at 1069.
[26] *Id*.
[27] 313 F.3d 1 (1st Cir. 2002).
[28] *Id*. at 8-9.
[29] 424 F.3d 535 (7th Cir. 2005).
[30] *Id*. at 538-39.
[31] 269 F.3d 884 (7th Cir. 2001).
[32] *Id*. at 886-87.
[33] 229 F.3d 842 (9th Cir. 2000).

losses by the S&L, restitution was improper. "Although the corporate opportunity doctrine allows recovery for a variety of interests, including mere expectancies, restitution under the VWPA is confined to direct losses."[34]

- In *United States v. Stoddard*,[35] the trial court ordered substantial restitution by the defendant, an official of a savings bank. The defendant misappropriated $30,000 from an escrow account and used the money to fund two real estate purchases. He subsequently netted $116,223 in profits from the real estate transactions. Although the trial court ordered restitution to the savings bank based on the defendant's profits, the Ninth Circuit set the order aside because that the restitution statute only allowed restitution for direct losses.[36]

- In *Government of the Virgin Islands v. Davis*,[37] the defendant pleaded guilty to conspiracy to defraud, forgery, and related counts in connection with an attempt to defraud an estate of more than a million dollars in real and personal property. The trial judge ordered restitution that included the attorney's fees spent by the estate to recover its assets, but the Third Circuit reversed: "Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order."[38]

- In *United States v. Arvanitis*,[39] the trial court awarded attorney's fees in favor of a victim who had spent considerable money investigating the defendant's fraud. The Seventh Circuit reversed because the restitution statute for property offenses "limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorney's fees, unavailable."[40]

- In *United States v. Sablan*,[41] a defendant was convicted of computer fraud, and the district court ordered restitution including consequential damages of $5,350 incurred by the victim. The Ninth Circuit reversed the part of the restitution order based on consequential damages, such as expenses arising from meeting with law enforcement officers investigating the crime, because such expenses were not strictly necessary to repair damage caused by defendant's criminal conduct.

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[34] *Id*. at 846.
[35] 150 F.3d 1140, 1147 (9th Cir. 1998).
[36] *Id*. at 1147.
[37] 43 F.3d 41 (3rd Cir. 1994).
[38] *Id*. at 47.
[39] 902 F.2d 489 (7th Cir. 1990).
[40] *Id*. at 496.
[41] 92 F.3d 865, 870 (9th Cir. 1996).

- In *United States v. Blake*,[42] the defendant was convicted of using stolen credit cards and the district court ordered restitution to victims for losses that resulted from their stolen credit cards. Even though there was a clear factual connection between Mr. Blake's conduct and the offense of his conviction, the Fourth Circuit reversed a restitution order reluctantly. "Although the result we are compelled to reach represents poor sentencing policy, the statute as interpreted requires the holding that the persons from whom Blake stole the credit cards do not qualify as victims of his offense of conviction, and as such he cannot be ordered to pay restitution to them . . . the factual connection between his conduct and the offense of conviction is legally irrelevant for the purpose of restitution."[43]

- In *United States v. Hays*,[44] the defendant was convicted of possession of stolen mail, specifically three credit cards. The trial court ordered him to pay restitution to the credit card companies of $3,255 for charges to those stolen credit cards. The Eleventh Circuit reversed, because the charges were not caused by the specific conduct that was the basis of the offense of conviction (mail fraud).

The point here is not that any of these restitution awards were correctly or incorrectly made by the trial judges under the current statutory framework. Instead, the point is that the judges in these cases *should* have had authority to make these awards. After all, at sentencing a trial judge has full and complete information about the nature of the offense, the impact of the crime on the victim, and the defendant's personal and financial circumstances.[45] When a judge has reviewed all of that information and determined that restitution is appropriate, it is not clear why that order should be subject to further litigation about whether it fits into some narrow statutory category. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[46] Indeed, the congressional mandate for restitution is "to restore the victim to his or her prior state of well-being to the highest degree possible."[47] Unfortunately, however, because judges must fit restitution orders within narrow pigeon holes, this congressional purpose may not be fully achieved.

B. The Restitution Statutes Should Be Broadened to Give Judges Power to Make

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[42] 81 F.3d 498, 506 (4th Cir. 1996).
[43] *Id*.
[44] 32 F.3d 171, 173-74 (11th Cir. 1995).
[45] *See* FED. R. CRIM. P. Rule 32(d)(1)(B), (2)(A)(i)-(iii) ("The presentence report must . . . calculate the defendant's offense level and criminal history category; . . . the defendant's history and characteristics, including; any prior criminal record; the defendant's financial condition; any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment . . ."); *see also* Rule 32(c)(B) ("If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.").
[46] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).
[47] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

Such Restitution Awards as are Just and Proper in Light of all the Circumstances.

The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A – should be amended to give judges broad discretionary authority to enter restitution awards that are just and proper in light of all the circumstances. The Judicial Conference has taken precisely this position, explaining:

> Currently, there is no authorization under federal law for general restitution to crime victims. A judge may order restitution only if the loss suffered by the victim falls within certain categories specified by statute. On recommendation of the [Criminal Law] Committee, the Judicial Conference agreed to support legislation that would authorize general restitution in any criminal case at the discretion of the judge when the circumstances of the case warrant it.[48]

In light with the recommendation of the Judicial Conference, Congress should amend § 3663A to read as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person ~~directly and proximately~~ harmed or who suffered loss or injury as a result of the commission of an offense for which restitution may be ordered, or who suffered harm, injury, or loss that would not have happened but for the defendant's crime, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a 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

[48] Report of the Judicial Conference of the United States, Sept. 2006, at 18.

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

(i) the greater of--

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

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

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

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and(C) reimburse the victim for income lost by such victim as a result of such offense;

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

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

(5) in any case, to pay to the victim any amount or transfer to the victim any property that the court in its discretion finds is just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury, harm, or loss, that the victim has suffered as a reasonably foreseeable result of the defendant's crime or that would not have happened but for the defendant's crime.

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

(A) that is–

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

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

consequential loss.

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

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

(A) the number of identifiable victims is so large as to make restitution impracticable; or(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

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

Parallel changes should be made to 18 U.S.C. § 3663.

These modifications make several important improvements. First, in section (c)(1)(A), restitution would be authorized for *any* federal offense. It is nonsensical to limit restitution to offenses found in certain parts of Title 18 – as discussed in Part III of this testimony.

Second and most important, the restitution statute would be changed to broadly authorize trial judges, in their discretion, to award restitution where it was fair. Restitution would be authorized any time it was "just and proper to help restore the victim to the position the victim would have been in had the defendant not committed the crime or to compensate the victim for any form of injury, harm, or loss, including emotional distress or other consequential injury, harm, or loss, that the victim has suffered as a result of the defendant's crime or that would not have happened but for the defendant's crime." This general authorization would avoid pointless litigation about whether a restitution award happened to fit into one statutory cubby hole or another. Instead, the focus would be on whether restitution was "just and proper." Obviously, a defendant would be free to appeal such awards (just as restitution awards can be appealed now). But the focus on appeal would be on the appropriateness of the award, not parsing technical statutory authorizations.

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

Third, the statute would be changed to give judges discretion in homicide cases to award restitution to surviving family members for the income that the murder victim would have earned. This is an issue that is currently before the appellate courts, with the question being whether the "lost income" provision in the statute applies only to bodily injury cases or to

homicide cases as well.[49] Regardless of how that litigation about the current statutory regime ultimately plays out, it is hard to see any argument for flatly denying judges the ability to award restitution against a convicted murderer in favor of the victim's survivors when the judge believes such restitution is appropriate. Members of Congress actively involved in victims' rights have spoken in favor of lost income restitution in homicide cases.[50] The proposed changes would reflect that position.

Fourth, the statute would be changed to recognize "but for" causation as a basis for awarding restitution. Under current law, the fact a loss would not have occurred "but for" the defendant's crime is an insufficient basis for a restitution award. As the Third Circuit explained, legal "fees might plausibly be considered part of [the victim's] losses, [but] expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy)" even if those expenses would not have resulted "but for" the criminal conduct.[51] Restitution for "but for" losses, however, seems entirely fair and is indisputably what Congress wants. Congress wants restitution "to restore the victim to his or her prior state of well-being to the highest degree possible."[52] Permitting judges to require defendants to make restitution for losses that would not have occurred but for the defendant's crimes would go a long way towards helping to restore victims to their prior state of well-being.

Fifth, the proposed changes would allow a judge to award restitution for reasonably foreseeable consequential damages. As a matter of policy, there is no justification for the results

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[49] *Compare United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007) (upholding district court lost income award in voluntary manslaughter case); *United States v. Bedonie*, 317 F. Supp. 2d. 1285 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005) (holding that lost income calculation and restitution proper under the MVRA); *and United States v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992) (holding that prosecution produced sufficient evidence that $100,000 award to widow of murder victim for lost income was relatively conservative and that the award had adequate support) *and United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996), *aff'd without discussion of restitution issues sub nom., United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (ordering restitution of direct and indirect victims of arson in which one firefighter was killed and one seriously injured, and requiring payment for the lost earnings of the deceased paid to his widow) *with United States v. Checora*, 175 F.3d 782, 795-96 (10th Cir.1999) (vacating a district court's restitution order based on insufficient evidence after the district court found that a murder victim paid Child and Family Services for the upbringing of his children) *and United States v. Jackson*, 978 F.2d 903, 914-15 (5th Cir. 1992), *cert. denied*, 508 U.S. 945 (1993) (reversing a district judge's restitution order for the victims' lost income and funeral expenses in a well-publicized murder and kidnaping because the district court did not make any factual findings concerning the amount of the victims' losses) *and United States v. Fountain*, 768 F.2d 790, 801-03 (7th Cir. 1985) (holding that future income calculations and restitution "unduly complicates the sentencing process and hence is not authorized by the [VWPA].").

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

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

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

in cases like *Government of the Virgin Islands v. Davis*, where a victim suffers a consequential loss from a crime (such as attorney's fees) and yet a sentencing judge is not empowered to award restitution.

S. 973 would take a modest, positive step in this direction by specifically authorizing crime victims to receive restitution (under both § 3663 and § 3663A) to "reimburse the victim for attorney's fees reasonably incurred in an attempt to retrieve damaged, lost, or destroyed property" or to "reimburse the victim for reasonably incurred attorneys' fees that are necessary and foreseeable results of the defendant's crime (which shall not include payment of salaries of Government attorneys)." This language would eliminate a conflict in the circuits regarding whether attorney's fees are recoverable under the existing restitution statutes. Thus, in most cases – such as *Government of the Virgin Islands v. Davis* – the circuit courts have held that attorney's fees are not recoverable as restitution.[53] A few circuit courts, however, have found restitution for attorney's fees to be proper – at least on the particular facts of the case.[54]

Attorney's fees should *always* be recoverable by a crime victim, so long as the fees were a reasonable foreseeable consequence of the defendant's crime. When a defendant is convicted of committing a crime that causes a loss to a victim, that victim should be made whole. If the defendant has forced the victim to spend money to hire an attorney, the defendant should suffer that financial cost – not the innocent victim. Anything else fails to restore a victim to his or her "prior state of well-being to the highest degree possible."

But attorney's fees are only small part of a much larger problem. Consequential losses take a variety of shapes and forms. The current restitution statute do not authorize award of such restitution.[55] When a victim suffers a loss as a reasonable foreseeable consequence of a

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[53] *See, e.g., United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002) (reversing restitution award for costs incurred by victim travel agencies in defending against lawsuits by airlines resulting from defendant's theft of airline tickets); *United States v. Diamond*, 969 F.2d 961, 968 (10th Cir. 1992) ("expenses generated in recovering a victim's losses . . . generally are too far removed from the underlying criminal conduct to form the basis of a restitution order"; striking district court restitution order of attorney's fees); *United States v. Barany*, 884 F.2d 1255 (9th Cir. 1989) (attorney's fees "too remote"; striking restitution award of attorney's fees in favor of victim); *United States v. Mitchell*, 876 F.2d 1178, 1184 (5th Cir. 1989) (no provision for attorney's fees in Victim Witness Protection Act).

[54] *See, e.g., United States v. Akbani*, 151 F.3d 774, 779 (8th Cir. 1998) (finding no clear error in restitution award for attorney's fees where defendant did not object to the amount of the award in the district court); *United States v. Mikolajczyk*, 137 F.3d 237, 246 (5th Cir. 1998) (while "[t]he VWPA does not generally authorize recovery of legal fees expended to recover stolen property," in this particular case victim Ford Motor Company was required to incur legal costs to defend against a fraudulent lawsuit, which were properly recoverable as restitution); *United States v. Blackburn*, 9 F.3d 353, 359 (5th Cir. 1993) (attorney's fees properly recoverable because fraudulent lawsuit against the victim was part of the offense).

[55] *See, e.g., United States v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007) (reversing $4,000 restitution award to motel for lost income stemming from defendant's use of motel room as a methamphetamine lab because, among other reasons, it was a consequential damage and therefore not recoverable); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) (in computer fraud case, reversing restitution award for

defendant's crime – be it attorney's fees or anything else -- the sentencing judge should be able to order a defendant to pay for the loss, if doing so is appropriate under the circumstances of the case.

Another form of consequential damage is emotional distress. Crime victims have often had to resort to a separate civil suit to obtain such damages. From a policy perspective, this makes little sense. When a criminal is convicted, his guilt has been established by proof beyond a reasonable doubt, and harm to a victim – such as emotional distress – is frequently an obvious and foreseeable consequence. It is therefore entirely appropriate to allow the sentencing judge to award restitution for emotional distress as part of the criminal proceeding when the judge believes it is appropriate to do so. Nothing in the proposal would alter existing law provided that, if a victim chooses to file a separate civil suit, any resulting civil judgment would be an offset against the restitution award.[56]

One last note: In a number of cases, defendants will lack the financial resources to pay sizable restitution awards. But that is not a good reason for depriving trial judges of authority to order such awards in appropriate cases. And in all cases, after restitution is awarded, the sentencing judge will set an appropriate payment schedule based on a defendant's ability to pay.[57]

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

Expanding restitution in the fashion described here will not violate a defendant's constitutional rights. It is important to understand that the changes proposed here would operate within the framework of a larger statutory scheme. Defendants would, of course, still be entitled to notice and hearing about any proposed restitution.[58] Defendants would also be able to appeal any inappropriate award.

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

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consequential expenses incurred due to the defendant's crime); *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) (reversing district court decision to award $344,000 in restitution to victim bank for accounting fees and costs to reconstruct bank statements during time when defendant was fraudulently withdrawing funds from bank customer's accounts because consequential damages not recoverable); *United States v. Wright*, 176 Fed. Appx. 373 (4th Cir. 2006) (unpublished) (security costs to firearms dealers after defendant's theft of firearms improper consequential damages).

[56] 18 U.S.c. § 3664(j)(2).

[57] 18 U.S.C. § 3664(f)(2)-(3).

[58] 18 U.S.C. § 3664(b), (d)(3), (e).

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

In 1990, the Supreme Court in *Hughey v. United States* considered a narrow statutory issue. The Court reviewed an award of restitution made by the federal trial court under VWPA which called for restitution for charged and convicted offenses.[59] After pleading guilty to one count of a six count indictment, the trial court ordered Mr. Hughey to pay restitution in the amount of $90,431. This figure resulted from Mr. Hughey's alleged theft and unauthorized use of 21 credit cards, although Mr. Hughey pleaded guilty to the use of only one specific credit card.[60] Looking at the language of the restitution statute itself, the Court held that "restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense."[61] Although faced with policy questions "surrounding VWPA's offense-of-conviction limitation on restitution orders," the Court declined to resolve such issues.[62] Rather, the Court relied on the "statutory language regarding the scope of a court's authority to order restitution," finding the language unambiguous.[63] And even if such language had been ambiguous, the Court's "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant . . . preclude[d its] resolution of the ambiguity" in favor of criminal restitution.[64]

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

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

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

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

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

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[59] 495 U.S. 411 (1990).
[60] *Id*. at 414.
[61] *Id*. at 416.
[62] *Id*. at 419.
[63] *Id*.
[64] *Id*.

The Circuits that have looked at the question in recent months have uniformly held that judges can undertake the fact-finding necessary to support restitution orders under *Blakely* and *Booker*.[65] As the Sixth Circuit has explained, "Nor does [] *Booker*'s analysis of the Sixth Amendment affect restitution, because a restitution order for the amount of loss cannot be said to 'exceed the statutory maximum' provided under the penalty statutes."[66] Of course, the proposed changes described above expand the existing statutory maximum, so that a defendant who commits a federal crime would be on notice that he was subject to a restitution order for any amount that was "just and proper" to restore a victim. Judicial fact-finding under that broad umbrella would not increase the penalty to which a defendant is exposed, the trigger for a Sixth Amendment jury trial right.

The conclusion that a defendant is not entitled to a jury trial on restitution is supported by another consideration: historically, dating to the earliest days of this country, judges have made restitution decisions.[67] At common law, for example, restitution was a statutory remedy "to be awarded *by the justices* on a conviction of robbery or larceny."[68] This common law rule was recognized by the Supreme Court in 1842 in *United States v. Murphy*:

> The statute of 21 Hen. VIII., c. 2, gave full restitution of the property taken, after the conviction of an offender, of robbery. The writ of restitution was to be granted by the justices of the assize . . . .[69]

And forcible entry and detainer is one crime in which it was common to encounter provision of a restitutionary remedy at common law. Upon conviction by a jury of forcible entry and detainer, for example, *Blackstone's Commentaries* explains that "besides the fine on the offender, the justices shall make restitution by the sheriff of the possession . . . ."[70] Many states early on

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[65] *See, e.g.*, *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam) ("We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment."); *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006) (same); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) ("We have accordingly held that *Apprendi v. United States* . . . does not affect restitution . . . and that conclusion is equally true for *Booker*."); *United States v. May*, 413 F.3d 841, 849 (8th Cir. 2005) ("Several circuits have affirmatively rejected the notion that . . . *Booker* affect the manner in which findings of restitution can be made. . . . These cases are persuasive."); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005) ("In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*."); *United States v. Antonakopoulos*, 399 F.3d 68, 83 (1st Cir. 2005) (*Booker* does not apply to restitution because restitution does not involve imprisonment).

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

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

[68] 16 C.J.S. *Criminal Law* §3255 (1918) (citing 21 Hen. VIII c 11; 7 & 8 Geo. IV c 29 § 57) (emphasis added).

[69] 41 U.S. 203, 206 (1842).

[70] 4 BLACKSTONE COMM. p. 117 (2001 Mod. Engl. ed. of the 9th ed. of 1793).

criminalized forcible entry upon and detainer of land, and often these statutes authorized the judge to order restitution and the payment of damages upon conviction.[71]

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

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

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

It might be argued that expanding restitution to cover such things a consequential damages (including emotional distress damages) would trigger a defendant's right to jury trial under the Seventh Amendment. The Seventh Amendment, of course, protects the constitutional right of all persons – not just criminal defendants – to a jury trial in a civil case. The amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[72] It would be odd, to say the least, to discover that while the amendment directly addressing the procedural rights of criminal defendants – the Sixth Amendment – does not give defendants a right to a jury trial on restitution, somehow the Seventh Amendment jury trial provision does. Such a conclusion would be contrary to the general rule of constitutional construction that the specific must take precedence over the general. Indeed, the Supreme Court has stated that if "a constitutional claim is covered by a specific provision . . , the claim must be analyzed under the

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

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

standard appropriate to that specific provision, not under the rubric of substantive due process."[73] As the Seventh Amendment applies only to civil suits, and does not specifically discuss criminal prosecutions, criminal procedures, or restitution orders, the specific again must take precedence over the general.

A few courts, however, have noted that there is a possible issue in this area. In *United States v. Scott*,[74] a panel of the Seventh Circuit stated that "to blur the line" between criminal restitution and common law damages "would create a potential issue under the Seventh Amendment because the amount of criminal restitution is determined by the judge, whereas a suit for damages is a suit at law within the amendment's meaning."[75] *Scott* dealt with a restitution order for audit expenses incurred by the employers which Mr. Scott defrauded. The Seventh Circuit concluded that the MVRA required restitution in the amount equal to the loss of the value of property that resulted from the criminal conduct. Although that court discussed whether common law damages applied to such a restitution order, it ultimately affirmed the award of restitution because "damage-to-property" had occurred.[76] At the end of the day, *Scott* does not actually say much about the Seventh Amendment as a potential barrier to judicially-determined restitution orders, but rather touches on the issue to point out the distinction between restitution and common law damages.

It is clear from the cases cited in *Scott*, however, that the overwhelming view in the Circuit Courts is that the Seventh Amendment does not apply to a criminal restitution hearing. While the Supreme Court itself has yet to reach the question, it has recognized that every "Federal Court of Appeals that has considered the question [of whether judicially-ordered restitution violates the Seventh Amendment] has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment."[77] The Circuits that have decided the issue often take the position that a restitution order is "penal" rather than "compensatory" and therefore conclude the Seventh Amendment simply does not apply.[78]

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[73] *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).
[74] 405 F.3d 615, 619 (7th Cir. 2005).
[75] *Id*.
[76] *Id*.
[77] *Kelly v. Robinson*, 479 U.S. 36, 53 n.14 (citing cases from Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 62 TEXAS L. REV. 671, 672 n.18 (1984)).
[78] *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) (citing *United States v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985) (citing cases from the Second, Eighth, Ninth, Tenth, and Eleventh Circuits)); *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) ("Congress made restitution . . . a criminal penalty."); *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984) ("Restitution is a permissible penalty imposed on the defendant as part of sentencing."); *United States v. Satterfield*, 743 F.3d 827, 837 (11th Cir. 1984) ("restitution as part of the criminal sentence"); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("restitution . . . serves . . . traditional purposes of punishment . . . [and is a] useful step toward rehabilitation"); *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984) (restitution as an "aspect of criminal punishment"). *See, e.g.*, Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory*

My own view is that it is better to avoid a debate about whether to label restitution as penal or compensatory. Indeed, a strong case can be made that restitution is, at least for some purposes, best described as "compensatory."[79] The notion of compensating victims for losses attributable to the defendant's crime is logically and intuitively non-punitive. Restitution is, instead, a device ultimately aimed at restoring the victim back into the position he occupied prior to his victimization. And regardless of the context, as the Seventh Circuit noted in *United States v. Newman*, while "[t]he criminal law may impose punishments on behalf of all of society, . . . equitable payments of restitution in this context inure only to the specific victims of a defendant's criminal conduct and do not possess a similarly punitive character."[80] After all, even the Supreme Court has noted that the ordinary meaning of restitution is to "restor[e] someone to a position he occupied before a particular event."[81]

Regardless of whether restitution is in some sense penal or compensatory, however, there is a straightforward way to reach the conclusion that restitution is not covered by the Seventh Amendment jury trial guarantee. As explained by the Second Circuit in *Lyndonville Savings Bank & Trust Co. v. Lussier*,[82] because "adjudication of the restitution is an adjunct of sentencing and is therefore part of a criminal proceeding, the Seventh Amendment providing for the preservation of the right of a trial by jury in civil suits does not apply."[83] The Circuit noted that "judicially ordered restitution in criminal cases has a long history, rooted in the common law at the time the Seventh Amendment was adopted."[84] Finally, the Second Circuit relies on "the purpose and process of adjudicating the amount of restitution in a criminal proceeding . . . as part of a defendant's sentence [to serve] the traditional penal functions of punishment, including rehabilitation."[85]

In a widely-quoted opinion written by Judge Richard Posner, the Seventh Circuit has reached much the same conclusion. In *United States v. Fountain*,[86] the Circuit considered the constitutionality of a federal restitution statute under the Seventh Amendment. The Circuit

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

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

[80] 144 F.3d 531, 538 (7th Cir. 1998).

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

[82] 211 F.3d 697, 702 (2d Cir. 2000).

[83] *Id*.

[84] *Id*.

[85] *Id.*

[86] 768 F.2d 790, 800-02 (7th Cir. 1985).

concluded that "criminal restitution is not some newfangled effort to get around the Seventh Amendment, but a traditional criminal remedy; *its precise contours can change through time without violating the Seventh Amendment*."[87] Looking at the historical analogy of the restitution statute, the Circuit commented that restitution of stolen goods was an established criminal remedy predating the Seventh Amendment.[88] And since restitution is "frequently an equitable remedy, meaning of course, that there is no right of jury trial," then a district judge's restitution order does not violate the Seventh Amendment.[89]

Judge Posner's conclusion makes sense as a matter of the historical record. Indeed, from certain historical examples, consequential damages, including treble damages were often awarded as restitution. This common law practice of restitution was retained in several state statutes in the early years of the Republic.[90] *Ross v. Bruce*,[91] *Commonwealth v. Andrews*,[92] and *Crane v. Dodd*,[93] cite state statutes which provided for treble damages to the victim of theft after the defendant had been convicted. It is clear that as a historical matter, consequential damages, through an award of treble damages upon conviction of the defendant, were awarded by some state courts as a matter of course. Thus restitution, including certain compensatory damages awards, were clearly an established criminal remedy in earlier times.

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

III. RESTITUTION SHOULD BE AN AVAILABLE OPTION FOR ALL FEDERAL CRIMES.

Remarkably, federal judges do not have authority to award restitution for all crimes. Instead,

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[87] *Id*. at 801 (emphasis added).
[88] *Id*.
[89] *Id*.
[90] *See* Act of September 15, 1786 (12 St.L. 282-283 Ch. 1241 (Penn.); *Ross v. Bruce*, 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft); *Commonwealth v. Andrews*, 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) (citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).
[91] 1 Day 100 (Conn. 1803) (citing state statute 413 authorizing "treble damages" for theft).
[92] 2 Mass. 14, 24, 1806 WL 735, 7 (Mass. 1806) citing larceny act of March 15, 1785, authorizing award of treble the value of goods stolen to the owner upon conviction).
[93] 2 N.J.L. 340 (N.J. 1808) (citing sec. 13 of the state's forcible entry and detainer act providing for an award of "treble costs").

the restitution statutes create a patchwork quilt of cases in which judges have restitution authority, as authority is limited to crimes that happen to be found in Title 18 of the U.S. Code and few other scattered provisions. Congress should eliminate this artificial barrier and give federal judges authority to award restitution to victims in *all* cases in which a victim has suffered a loss.

The main federal restitution statutes – 18 U.S.C. § 3663 and 18 U.S.C. § 3663A – authorize judges to award when sentencing a criminal for various prescribed offenses. Section 3663 permits a court to award restitution "when sentencing a defendant convicted of an offense under this title [i.e., Title 18]" or for and offense under "21 U.S.C. 841, 848(a), 849, 856, 861, 863" or for various offenses in title 49 (i.e., aircraft hijacking). Section 3663A permits a court to award restitution when sentencing a defendant for "a crime of violence," "an offense against property under this title [i.e., Title 18] or under . . . 21 U.S.C. § 856(a)," or for an offense involving tampering with consumer products under 18 U.S.C. § 1365.

The upshot is the federal district court judges lack the authority to award restitution when sentencing criminals who have committed many serious offenses that happen to lie outside the prescribed authority. A few illustrations will demonstrate this point:

- In *United States v. Elias*,[94] the defendant forced his employees to clean out a 25,000 gallon tank filled with cyanide sludge, without any treatment facility or disposal area. He was convicted of violating the Resource Conservation and Recovery Act by disposing of hazardous wastes and placing employees in danger of bodily harm. The district court ordered the defendant to pay $ 6.3 million in restitution. The Ninth Circuit overturned the restitution order because the restitution statute only authorizes imposition of restitution for violations of Title 18 and certain other crimes, not environmental crimes.[95]

- In *United States v. Simer*,[96] Defendant plead guilty to committing "lewd, obscene and indecent acts in the presence of a child on an aircraft". The district court ordered him to pay restitution for the "lost fuel, revnue and other costs as a result of [the defendant's] activity which cuased the flight not to be able to proceed." The 9th Circuit reversed the restitution order "because committing lewd, obscene and indecent acts in the presence of a child under the age of 16 on an aircraft does not meet the category of crimes within the statute's application [(18 U.S.C. §§ 3663 or 3663A)]."

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[94] 269 F.3d 1003 (9th Cir. 2001) (unpublished), 1999 WL 503831.

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

[96] 187 F.3d 650 (9th Cir. 1999) (unpublished),1999 WL 503831.

- In *U.S. v. Ortiz*,[97] Defendant pled guilty to drug charges in 1999 and was sentenced to 70 months in jail, followed by four years of supervised release. After his release from prison, he violated his conditions of release several times. At a supervised release hearing, the district judge ordered the defendant to pay $500 for his damaged ankle bracelet. The 5th Circuit vacated the restitution order because restitution could not be ordered under § 3663 or § 3663A or any other provision of law.

The only justification for this curious state of affairs is found in legislative history accompanying several of the restitution statutes. In 1982, when expanding restitution through the adoption of 18 U.S.C. § 3663, a Senate Report expressed the view that restitution should not extend to the antitrust laws, the securities laws and certain other regulatory statutes because such statutes "involve complex issues which are outside the intended scope of Section [3663] such as standing, reliance and causation" and "have historically contained their own methods of restituting victims – such as the authorization of treble damages – a system of sanctions and reparations the Committee believes should remain integral parts of the regulatory statutes themselves."[98] In 1996, when Congress expanded the coverage of the restitution statutes, the accompanying Senator Report stated:

> Other than offenses under part D of the Controlled Substances Act (21 U.S,C. 841 et seq.), the committee specifically rejects expanding the scope of offenses for which restitution is available beyond those for which it is available under current law. Regulatory or other statutes governing criminal conduct for which restitution is not presently available contain their own methods of providing restitution to victims and of establishing systems of sanctions and reparations that the committee believes should be left unaffected by this act.[99]

These explanations do not justify denying judges the ability to order restitution to victims of all federal crimes. First, it simply untrue that other statutes "contain their own methods of providing restitution to victims." As the examples recited above demonstrate, other statutes typically lack means of providing restitution. As shown in the *Elias* case, the environmental statutes contain no such means. Even the one example cited in the Senator reports – treble damages – is not particularly instructive. A victim of an antitrust crime, for example, would have to file an independent civil action to obtain such damages – even after a defendant had been found criminally culpable for an antitrust violation. The criminal antitrust statutes themselves provide no means for a judge to award restitution in the criminal case.

Second, even if it is assumed that the some of these other statutes provide a system of "sanctions and reparations," that is of little comfort to crime victims Crime victims who have suffered a loss from a crime need to have those losses restored – not fines assessed against criminals.

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[97] 252 Fed.Appx. 664 (5th Cir. 2007) (unpublished).
[98] S. Rep. No. 97-532 at 33, 1982 U.S.C.C.A.N. at 2539.
[99] S. Rep. No. 104-179 at 19, 1986 U.S.C.C.A.N. 924, at 932.

Third, to make things even more curious, it is clear that restitution could be awarded in a criminal antitrust case – if the Government charged an antitrust conspiracy or aiding and abetting an antitrust offense, both Title 18 offenses. For instance, in *United States v. All Star Industries*,[100] a corporation was charged with violating section 1 of the Sherman Act (15 U.S.C. § 1) and for aiding and abetting a price-fixing scheme (18 U.S.C. § 2). Because of the aiding and abetting charge, the district court awarded $859,935 in restitution for the inflated prices that resulted. The Fifth Circuit affirmed the award, noting that it was proper because of the Title 18 charge. Given that virtually every antitrust offense will likely involve more than one person, the ability of judges to award restitution in antitrust cases will come down to the happenstance of whether the prosecutors have elected to include a conspiracy charge or an aiding and abetting charge along with the substantive antitrust offenses. The form of the charging instrument should not determine the power of a judge to compensate crime victims.

Victims of all federal crimes should have the right to seek restitution from convicted criminals who have caused a loss to them. Congress should eliminate the artificial restraints currently found in the restitution statutes and give judges the power to award restitution in all federal criminal cases.

IV. CONGRESS SHOULD EXPAND THE ABILITY OF JUDGE'S TO RESTRAIN DEFENDANT'S FROM TRANSFERRING ASSETS THAT COULD BE USED TO SATISFY RESTITUTION AWARDS.

Congress should also expand the ability of judges to block defendants from transferring assets that could be used to satisfy a restitution award. Criminal defendants should not be able to defeat a restitution award by simply spending money criminally taken from a victim and then later pleading poverty. Yet this is precisely what is happening in many cases. The General Accounting Office recently documented this dissipation of assets:

> During the intervals between criminal activities and the related judgment, Justice acknowledge that dispositions and circumstances involving the offenders' assets or the offenders often occur that create major debt collection challenges for the [Financial Litigation Units charged with enforcing restitution awards]. According to Justice, criminals with any degree of sophistication, especially those engaged in fraudulent criminal enterprises, commonly dissipate their criminal gains quickly and in an untraceable manner. Assets acquired illegally are often rapidly depleted on intangible and excess "lifestyle" expenses. Specifically, travel, entertainment, gambling, clothes, and gifts are high on the lift of means to rapidly dispose of such assets.[101]

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[100] 962 F.2d 465 (5th Cir. 1992), *rev'd on other grounds*, *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994).

[101] GAO, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES, GAO-05-80 at 12 (Jan. 2005)

To deal with this serious problem, Congress should adopt legislation giving courts greater power, at the request of prosecutors, to secure assets that could be used to reimburse victims for their losses from federal crimes. The asset preservation provisions found in S. 973 (introduced by Senator Dorgan and others) and in H.R. 845 (introduced by Representative Chabot and others) would be valuable steps in this effort. Focusing for convenience on S. 973, it would make three valuable improvements in the law. First, S. 973 would amend the Anti-Fraud Injunction Statute to permit the Attorney General to seek a court order enjoining a person who is "committing or about to commit a Federal offense that may result in an order of restitution" from dissipating assets – expanding the provision from current law, which authorizes such orders only in cases of banking or health care fraud offenses. Second, S. 973 amends the Federal Debt Collection Procedures Act to allow the same prejudgment remedies to help collect restitution that are available to the United States in ordinary civil cases. Third, it would provide that the Government could make an *ex parte* application to a judge for an order restraining a defendant's assets or securing a bond from the defendant to ensure that restitution will be paid. The order would issue upon a finding of probable cause "that a defendant, if convicted, will be order to pay an approximate amount of restitution for a[] [felony] offense . . . ."

The first two changes appear to be completely non-controversial. It makes no sense to permit courts to enjoin the dissipation of assets for banking and health care offenses, but not drug dealing or environmental crimes. That power should broadly extend across the federal criminal code. Moreover, it is absurd that when the government seeks to collect funds on a defaulted student loan it has collection powers that are not available to it when it seeks to collect funds a swindler is stealing from crime victims. These two changes should be adopted without delay.

The third change should also be adopted rapidly, although an objection that has been raised that is worth a brief discussion. Several criminal defense attorneys have apparently taken the position that the restraining order provision is unfair to defendants and even unconstitutional.[102] This objection is without merit.

But before turning to this objection, it is important to understand its limited scope of an objection based on defendant's concerns. Third parties who have interest in the restrained property have elaborate protections under S. 973. In particular, any person other than a defendant "who has a legal interest in the property affected by a protective order" under the provision would have a right to seek modification of the order by showing that it "causes an immediate and irreparable hardship to the moving party" and that there are "less intrusive means . . .to preserve the property for the purpose of restitution." Upon such a showing, the court would then hear rebuttal evidence (if any) from the Government followed by any modification of the restraining order that might be appropriate, to extent that modification is possible without destroying the ability to provide restitution to crime victims.[103]

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[102] Letter from David B. Smith to Kyle O'Dowd, Legislative Director, National Association of Criminal Defense Lawyers (Oct. 31, 2007).

[103] These safeguards appear to go beyond what the Constitution requires. *Cf. United States v. Holy Land*

With regard to criminal defendants as well, S. 973 provides very significant protections – protections that exceed what the Constitution and sound public policy require. First, the order can issue only upon a finding of probable cause that the defendant has committed a federal felony offense. Thus, to put it simply, the legislation affects only those who are probably serious federal felons who have caused a loss to a victim. Second, if a court finds probable cause, the court can enter a restraining order for purposes of awarding restitution; but the order is limited to restitution collection purposes, such as "preserv[ing] the availability of any property traceable to the commission of the offense charged." Third, after such an order is entered, the defendant is then entitled to a hearing if he can establish a good basis for a hearing. In particular, a defendant can obtain a hearing either after indictment by showing that he lacks other assets to pay counsel or living expenses and there is a bona fide reason to believe that the restrained assets will not be needed to pay restitution to a crime victim. Fourth, the provisions operate against a backdrop of other federal laws protecting defendant's rights, including notably the Speedy Trial Act,[104] which guarantees a defendant (unless he or she moves for a continuance) a swift trial on the merits of the Government's allegations.

These provisions comply with the Constitution. The procedural protections are modeled on the asset forfeiture provisions found in 21 U.S.C. § 853, which were upheld against constitutional attack by the United States Supreme Court in *United States v. Monsanto*.[105] There the Court explained that "it would be odd to conclude that the Government may not restrain property . . . based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* [i.e., lock up a defendant without bail] where there is a finding of probable cause to believe that the accused has committed a serious offense."[106] The Court further noted that in some circumstances the Government can constitutionally *seize* property based on finding of probable cause. It is fair less intrusive to merely restrain disposition of property pending further court proceedings about what should happen to it. Likewise, S. 973 does not seize any property, but simply preserves the status quo until a court finally determines whether a defendant is guilty beyond a reasonable doubt and, if so, whether the restrained property should be used to compensate a crime victim for losses the defendant caused with his crime.

The Circuit courts that have examined the asset forfeiture provision have generally concluded that "that due process requires the district court to hold a prompt hearing at which the property owner can contest the restraining order -- without waiting until trial to do so -- at least when the restrained assets are needed to pay for an attorney to defend him on associated criminal charges." [107] S. 973 complies with that instruction by giving a defendant an opportunity to

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Foundation for Relief and Development, 493 F.3d 469, 477 (5th Cir. 2007) (en banc) (rejecting third-party challenges to asset freezing provisions in 21 U.S.C. § 853).

[104] 18 U.S.C. §§ 3161 *et seq.*

[105] 491 U.S. 600 (1989).

[106] *Id.* at 615 (*citing United States v. Salerno*, 481 U.S. 739 (1987) (upholding preventative detention provisions of the Bail Reform Act).

[107] *United States v. Melrose East Subdivision*, 357 F.3d 493, 499 (5th Cir. 2004) (*citing United*

challenge a restraining order that blocks retention of counsel or payment of reasonable living expenses. This complies with the due process requirement that, before trial, a defendant have "a brief hearing [to] . . . provide an opportunity . . . to prove by a preponderance of the evidence that the government seized untainted assets without probable cause that he needs those same assets to hire counsel."[108]

Confirming the constitutionality of the proposed provisions are parallel provisions in several states that provide for comparable restraints on assets. California law, for example, contains a "freeze and seize" provision[109] that allows a prosecutor to obtain a temporary restraining order or similar order to preserve assets for restitution:

> To prevent dissipation or secreting of assets or property, the prosecuting agency may, at the same time as or subsequent to the filing of a complaint or indictment charging two or more felonies, as specified in subdivision (a), and the enhancement specified in subdivision (a), file a petition with the criminal division of the superior court of the county in which the accusatory pleading was filed, seeking a temporary restraining order, preliminary injunction, the appointment of a receiver, or any other protective relief necessary to preserve the property or assets. This petition shall commence a proceeding that shall be pendent to the criminal proceeding and maintained solely to affect the criminal remedies provided for in this section. The proceeding shall not be subject to or governed by the provisions of the Civil Discovery Act as set forth in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. The petition shall allege that the defendant has been charged with two or more felonies, as specified in subdivision (a), and is subject to the aggravated white collar crime enhancement specified in subdivision (a). The petition shall identify that criminal proceeding and the assets and property to be affected by an order issued pursuant to this section.[110]

California trial courts are empowered to grant the petition. There then follows an opportunity for a defendant to request a court hearing regarding the restraining order. At the hearing, the court is directed to consider relevant factors as follows:

States v. Jones, 160 F.3d 641, 645-48 (10th Cir.1998); *United States Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991) (en banc); *United States v. Moya-Gomez*, 860 F.2d 706, 729-30 (7th Cir.1988); *United States v. Harvey*, 814 F.2d 905, 928-29 (4th Cir.1987), superceded as to other issues, *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir.1988) (en banc), *aff'd*, 491 U.S. 617 (1989). The Eleventh Circuit, however, holds that no pretrial hearing is required under 21 U.S.C. § 853(e) even when the restrained assets are needed to pay counsel. *United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989); *see also United States v. Reigster*, 182 F.3d 820, 835 (11th Cir. 1999).

[108] *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001).

[109] *See People v. Green*, 22 Cal.Rptr.3d 736, 738 (Cal. App. 2004).

[110] Cal. Penal Code § 186.11(e)(2).

> The court shall weigh the relative degree of certainty of the outcome on the merits and the consequences to each of the parties of granting the interim relief. If the prosecution is likely to prevail on the merits and the risk of the dissipation of assets outweighs the potential harm to the defendants and the interested parties, the court shall grant injunctive relief. The court shall give significant weight to the following factors:
>
> (A) The public interest in preserving the property or assets pendente lite.
> (B) The difficulty of preserving the property or assets pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude.
> (C) The fact that the requested relief is being sought by a public prosecutor on behalf of alleged victims of white collar crimes.
> (D) The likelihood that substantial public harm has occurred where aggravated white collar crime is alleged to have been committed.
> (E) The significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines.[111]

The California courts have found these procedures to be constitutionally adequate.[112]

A similar provision is found in Pennsylvania law. Pennsylvania prosecutors are allowed to obtain a temporary restraining order on the following grounds:

> A temporary restraining order under subsection (e) may be entered upon application of the Commonwealth without notice or opportunity for a hearing, whether or not a complaint, information, indictment or petition alleging delinquency has been filed with respect to the property, if the Commonwealth demonstrates that there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this section and that provision of notice will jeopardize the availability of the property to satisfy such restitution order and judgment. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this subsection shall be held at the earliest possible time and prior to the expiration of the temporary order.[113]

Likewise, Minnesota law allows prosecutors to obtain an order to a financial institution freezing funds of an accused felon.[114] And, last but certainly not least, my home state of

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[111] Cal. Penal Code § 186.11(g)(3).
[112] *See, e.g., People v. Pollard*, 109 Cal.Rptr.2d 207 (Cal. App. 2001); *People v. Semaan*, 64 Cal.Rptr.3d 1 (Cal. App. 2007).
[113] 42 Pa. Con. Stat. Ann. § 9728(f).
[114] Minn. Stat. § 609.532.

Utah allows prosecutors to obtain an *ex parte* order preserving assets.[115] The law then provides for a hearing about the need for such an order.[116]

In light of these significant state examples, the similar provisions of S. 973 comply with constitutional requirements. But not only does S. 973 comply with the Constitution, its provisions simply make good sense. Once a federal district judge has found probable cause to believe that a defendant has committed a federal crime that will require an order of restitution, the significant interests of crime victims must be considered. It is fundamentally unfair for a defendant to be able to steal money from a victim and then continue to live "the high life" on the victim's own money – while courts remain powerless to enjoin this wasting of funds. S. 973 strikes a proper balance, ensuring that funds will be available to satisfy a restitution award in favor of a crime victim while allowing the accused to demonstrate a need for access to any improperly restrained assets to pay for an attorney or reasonable living expenses.

V. THE ABATEMENT AB INITIIO DOCTRINE SHOULD BE REPEALED FOR RESTITUTION AWARDS.

Congress should also act to repeal the doctrine of abatement ab initio, which sets aside the conviction of a criminal if he dies pending his appeal. This problematic doctrine was highlighted in the recent Enron-related case of *United States v. Lay.*[117] Kenneth Lay was convicted on May 25, 2006, of all counts against him in a case involving securities and wire fraud, following a sixteen-week jury trial and a separate one-week bench trial. Lay was scheduled to be sentenced on October 23, 2006. But before that could happen, on July 5, 2006, Lay suffered a heart attack and died.

Because of Lay's death, the federal district court presiding over the matter was required to vacate Lay's conviction. As a result, the Government was not able to pursue in the criminal case a restitution claim for more than $43 million.

The district judge was required to vacate Lay's conviction under the doctrine known as "abatement *ab initio.*" This doctrine hold that, until a defendant's conviction has been affirmed on appeal, the defendant's death operate to void the conviction *ab* initio. The doctrine developed from a common law notion that, when a defendant has not had a chance to test his conviction in appellate courts, then it is unfair to maintain the conviction against him.[118] For example, the Fifth Circuit has asserted that: "When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of them merits of appeal, which is an integral part of our system for finally adjudicating his guilt or innocence."[119] This

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[115] Utah Code Ann. § 77-39a-601(2).
[116] Utah Code Ann. § 77-38a-601(4)
[117] 456 F.Supp.2d 869 (S.D. Tex. 2006).
[118] *See* Greg Rios, *Abatement Ab Initio and a Crime Victim's Right to Restitution*, NCVLI News, Fall 2006, at p.6.
[119] *United States v. Estate of Parsons*, 367 F.3d 409, 413-14 (5th Cir. 2004).

view, however, unfairly disparages the skill with which the nation's federal district judges conduct criminal trials. While it is always possible that a district judge might make an error during the course of a trial, the odds are certainly against it; the vast majority of guilty verdicts in criminal cases are affirmed on appeal. As a matter of sound public policy, surely the law ought to at least presume that at trial produced an accurate result, rather than making the counter-factual, contrary assumption.

In addition, it is simply not the case that a convicted criminal has a "right" to an appeal. There is no federal due process right to take an appeal.[120] Instead, a criminal ability to appeal derives from a federal statute authorizing appeals in criminal cases.[121] That appeal provision should be construed in light of another, much more recent federal statute – the Crime Victims' Rights Act.[122] That statute requires all crime victims to be "treated with fairness." It certainly is not fair to let a criminal steal from a victim, be convicted by a jury of the theft beyond a reasonable doubt, and yet escape an order of restitution because of the happenstance that he dies before his appeal is finally decided.

A growing number of state courts have rejected the abatement doctrine. A good illustration comes from the decision of the Washington Supreme Court in *State v. Devin.*[123] *Devin* overruled an earlier precedent requiring abatement *ab initio*. *Devin* explained that the earlier decision rested on the "outdate premise that convictions and sentences serve only to punish criminals, and not to compensate their victims."[124] In light of an amendment to the Washington Constitution requiring that crime victims be treated with dignity and respect, that assumption could no longer be sustained. The Court also noted that the doctrine rests on the incorrect assumption that a convicted criminals are innocent. In fact, as the United States Supreme Court has recognized, "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."[125] Finally, with regard to prevent financial harm to a convicted criminal's heir, "it makes no sense to protect the heirs of criminals but not their victims."[126] For all these reasons, the Washington Supreme Court overturned the rule requiring automatic abatement of a conviction when a defendant died pending appeal. Other state courts have recently reached similar holdings.[127]

It is clear that the doctrine of abatement *ab initio* can be overruled by statute.[128] Congress should pass such a statute to ensure that a result like that in the *Lay* case never occurs again.

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[120] *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (""[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears").

[121] 18 U.S.C. § 3742(a).

[122] 18 U.S.C. § 3771.

[123] 158 Wash.2d 157, 142 P.2d 599 (Wash. 2006).

[124] *Id.* at 604.

[125] *Devin*, 142 P.3d at 604 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

[126] *Devin*, 142 P.3d at 605.

[127] *Alabama v. Wheat*, 907 So.2d 461 (Ala. 2005); *Idaho v. Korsen*, 111 P.3d 130 (Idaho 2005); *Michigan v. Peters*, 537 N.W.2d 160 (Mich. 1995).

[128] *See State v. Devin*, 142 P.3d 599, 604 (Wash. 2006) (noting that historically abatement has applied only "in the absence of a statute expressing the contrary").

H.R. 4111 has been introduced on a bi-partisan basis in this Congress and would achieve that goal by abolishing the automatic abatement doctrine. In its place, the bill would forbid criminal punishments (i.e., imprisonment or a fine) after the death of a convicted defendant, while allow restitution awards to be imposed. At the same time, however, the bill would allow the estate of a convicted person to seek appellate review of a restitution order. This bill strikes a reasonable balance between competing concerns and should be swiftly adopted.

VI. CONGRESS SHOULD GIVE JUDGES GREATER AUTHORITY TO PREVENT CRIMINALS FROM PROFITING FROM THEIR CRIMES.

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

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

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

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

The federal statute is widely regarded as almost certainly unconstitutional, as it contains

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[129] Pub. L. No. 98-473, 98 Stat. 2175 (Oct. 12, 1984).
[130] N.Y. Exec. Law § 632-a (McKinney 1982 and Supp.1991).
[131] 502 U.S. 105 (1991).
[132] *Id.* at 116.
[133] N.Y. Exec. Law § 632-a(1) (McKinney 1982), *reprinted in* 502 U.S. at 109.

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

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

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

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

> 18 U.S.C. § 3583
>
> . . .
>
> (b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.
>
> Not withstanding any other provision of law, a court may impose a term of supervised release for any term of years or life that includes as a provision the

[134] 18 U.S.C. § 3681(a).
[135] *See* 502 U.S. at 115.
[136] *See* DOJ Criminal Resource Manual 1105.
[137] 650 N.E.2d 87 (Mass. 1995).

requirement that a defendant not profit from his or her crime. Notwithstanding any other provision of law, at any time the court may extend an existing term of supervised release to any term of years or life upon a finding that a defendant may profit from his or her crime.

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

C. Broader Legislation Could Forfeit any Profits from Profiteering.

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

To deal with such situations, it would be appropriate to amend the federal anti-profiteering statute – 18 U.S.C. § 3681 – so that it can address such situations by forfeiting any profits a defendant obtains from a crime. The problem with the statute now, as with the old New York law, is that it targets First Amendment speech – and only First Amendment speech – for forfeiture. The statute could be redrafted to cover *all* forms of profiteering from a crime, not just those involving speech. A new statute could also be put in place to forbid defendants from profiting by selling tangible articles that have gained notoriety (and thus value) because of their association with the crime.

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

After *Simon & Schuster, Inc.*, a number of states adopted what might be called "second generation Son of Sam laws. These statutes attempted to comply with *Simon & Schuster, Inc.* by broadening their focus.[139] Surprisingly, however, many of these statutes continued to target

[138]*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991).
[139]*See, e.g.*, CAL. CIV. CODE § 2225 (adopted in 1994); COLO. STAT. § 24-4.1-204 (adopted in 1994); IOWA CODE ANN. § 910.15 (adopted in 1992); 42 PENN. CON. STAT. § 8312 (adopted in 1995); TENN.

expressive activity protected by the First Amendment, leading to a rocky reception in appellate courts.

The fate of Nevada's anti-profiteering statute can serve to illustrate the problem of laws focusing on speech. In 1993, the Nevada legislature changed its Son of Sam law – Nevada Revised Statute § 217.007 – to address constitutional issues raised in *Simon & Schuster, Inc*.[140] The revised Nevada statute created a cause of action for a victim's right to sue within five years of the time when a convicted person "becomes legally entitled to receive proceeds for any contribution to any material that is based upon or substantially related to the felony which was perpetrated against the victim."[141] The Nevada Legislature defined "material" as "a book, magazine or newspaper article, movie, film, videotape, sound recording, interview or appearance on a television or radio station and live presentations of any kind."[142] In 2004, the Nevada Supreme Court invalidated the statute in *Seres v. Lerner*.[143] Given that the statute clearly targeted expressive activity and was content-based, the Nevada Supreme Court concluded that the statute was unconstitutional because it chilled First Amendment speech. Indeed, the statute targeted solely expressive activity, rather than "all fruits of the crime" or anything "related to the crime" to provide a victim's right of action to the proceeds due a convicted person.

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

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CODE ANN. § 29-13-403 (adopted in 1994); VA. CODE ANN. § 19.2-368.20 (adopted in 1992).

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

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

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

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

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

[145] *Id*. at 718.

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

[147] *Id*. at 731.

[148] *Id*. at 722.

value enhanced by their crime-related notoriety value.

As one last example, in 2002 the Massachusetts Supreme Judicial Court found that a proposed Massachusetts' "Son of Sam" law violated the First Amendment and a parallel provision in the Massachusetts Declaration of Rights.[149] The proposed statute required "any entity (contracting party) contracting with a 'defendant' to submit a copy of the contract to the [Attorney General's] division within thirty days of the agreement if the contracting party [knew] or reasonably should [have known] that the consideration to be paid to the defendant would constitute 'proceeds related to a crime.'"[150] The statute was not limited to convicted felons, but also swept in persons with pending criminal charges. And it defined "proceeds related to a crime" as "any assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime from whatever source received by or owing to a defendant or his representative, whether earned, accrued, or paid before or after the disposition of criminal charges against the defendant."[151] It then provided the Massachusetts Attorney General's Office the opportunity to determine whether the proceeds under the contract were "substantially related to a crime, rather than relating only tangentially to, or containing only passing references to, a crime," and required the contracting party to pay the Attorney General's Office the monies owed to the defendant under the contract or post a bond covering such amount within fifteen days.[152]

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

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[149] *Opinion of the Justices to the Senate*, 764 N.E.2d 343, 352-53 (Mass. 2002). In the interest of full disclosure, I consulted on the drafting of an amicus brief in the case which urged that the proposed statute was constitutional.
[150] *Id*. at 345.
[151] *Id*.
[152] *Id*.
[153] *Id*. at 348-49.
[154] *Id*. at 349-50.
[155] *Id*. at 351-52.
[156] *Id.* at 347.
[157] *Id*. at 350.

speech."[158]

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

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

As the Arizona Court of Appeals found, "Arizona's forfeiture statutes contain[ed] no reference to the content of speech or expressive materials."[162] It also found that the "purposes of these statutes apparently include removing the economic incentive to engage in [criminal racketeering], . . . compensating victims of racketeering, and reimbursing the State for the costs of prosecution." As such, despite the concern "the work from which the Mr. Gravano's royalties arise is expressive in nature," that court found that the "purposes [of the statute were] speech- and content-neutral, and any effect on speech [was] incidental.[163] In addition, the forfeiture would "not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law [was] based on a causal connection with racketeering, not just a mention of it in an expressive work."[164] Finally, that court distinguished Arizona's forfeiture statute with the Supreme Judicial Court's decision in *Opinion of the Justices to the Senate* because "Arizona's forfeiture laws require the State to file an action in court and to prove the underlying racketeering and the connection between the racketeering and the property subject to forfeiture."[165] Such a "burden of

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[158] *Id*.
[159] ARIZ. REV. STAT. ¢ 13-2314(G)(1),(3).
[160] *Id*. at (N)(3).
[161] *See, e.g.*, *State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 253 (Ariz. Ct. App. 2002).
[162] *Id*. at 253.
[163] *Id*. at 252.
[164] *Id*. at 255.
[165] *Id*.

proof . . . on the State [would alleviate] the due process concerns expressed by the Massachusetts Supreme Court."[166]

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

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

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

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

> § 3681. Order of special forfeiture
> (a) Upon the motion of the United States attorney or a victim of a crime, as recognized under section 3771 of this title, made at any time after conviction of a defendant for ~~an~~ a felony offense ~~under section 794 of this title [18 U.S.C. § 794] or for an offense~~ against the United States ~~resulting in physical harm to an individual~~, or upon the court's own motion, and after notice to any interested party, the court shall, if the court determines that ~~the interest of justice~~ the defendant is profiting from the crime or an order of restitution

[166] *Id*.

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

~~under this title~~ so requires, order such defendant to forfeit all or any part of funds and property received from any source by a person convicted of a specified crime to the extent necessary to prevent profiting from the crime or to satisfy an order of restitution. ~~proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.~~ A defendant is not profiting from a crime if the financial advantage he or she obtains is only tangentially or incidentally connected with the crime.~~(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.(c)~~ (b)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may--(A) be levied upon to satisfy--(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) a fine imposed by a court of the United States; and(B) if ordered by the court in the interest of justice, be used to--(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

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

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

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

[169] *See Napolitano*, 60 P.3d at 255 ("Forfeiture should not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law is based on a causal connection with racketeering,

to satisfy a previously-entered restitution award, but this part of the statute is simply an enhancement of already well-established law.)

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

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

The relationship between preventing profiteering and awarding restitution deserves brief exploration. Any income source available to a convicted person who has been ordered to pay restitution should be tapped to satisfy the restitution award. An example of the compelling need to attach a defendant's income to satisfy a restitution award comes from the District of Maryland case of *Kimberlin v. Dewalt*.[170] This case dealt with a parolee convicted of detonating eight dynamite bombs in the Speedway, Indiana area in 1978. The victims were grievously injured, and one committed suicide a few years later. One of the victims obtained a $1.61 million jury verdict for her injuries and the wrongful death of her husband. The parolee did not satisfy this award and was released on supervised parole. He then inherited a substantial amount of money from his father. He also entered into a recording and book contract, centering around allegations he had sold marijuana to Dan Quayle and his subsequent treatment by the Bureau of Prisons. The Probation Office imposed a special condition of parole ordering the parolee to make payments to the victim in accordance with the civil judgment. Although the Probation Office required payment by the parolee, it did not cite the federal restitution statute as its authority for the special condition of parole.[171] When challenged, the district court held that the order did not violate *Simon & Schuster* because, the District Court concluded, "the book money was but one of several resources from which the judgment could have been paid."[172]

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

> If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment,

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not just a mention of it in an expressive work."); *see also* ARIZ. REV. STAT. ¢ 13-2314(G)(1),(3), (N)(3).

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

[171] *Id*. at 496.

[172] *Id*.

during a period of incarceration, supervised release, or probation, such person shall be required to apply the value of such resources to any restitution or fine still owed.

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

The problem of preventing profiteering from crimes will not be completely addressed unless Congress also puts in place a statute preventing criminals from profiting by trafficking in what is known as "murderabilia." In recent years, a number of notorious criminals have tried to make money by selling items that have gained noteriety (and thus value) simply because of their association with the criminal or his crime.[173] For example, numerous items belonging to convicted serial killers, including toenail clippings, hair, autographed t-shirts, and used television sets, among others, have all recently been sold within the last five years.[174] All of these types of items have become known as "murderabilia." A typically used definition for such items is "manufactured items representative of criminals or crimes, such as murderer trading cards or figurines, and non-manufactured items associated with the criminals or crimes themselves."[175]

The proposed revisions to the federal anti-profiteering statute described above may go a long way towards addressing such deplorable money-making by federal felons. After all, selling tangible crime-related items for money is a classic example of "profiting from the crime," which

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[173] Andy Kahan in the City of Houston's Crime Victims' Office deserves special recognition for leading the crusade on this issue. *See* Tracey B. Cobb, *Comment, Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1503 n.156 (2003) ("[Andy] Kahan has been a leader in the movement to prevent the trade of murderabilia and worked with the Texas Legislature to draft the murderabilia statute in 2001."); ABC News: 20/20 (ABC television broadcast, Nov. 7, 2001) (interviewing Andy Kahan, who stated that "No one should be able to rob, rape and murder and then turn around and make a buck off it."); Jeff Barnard, *Murderabilia: People Want to get Closer to Killer; Internet Accessible: City Official Wants to Eradicate the Ghoulish Industry*, TELEGRAPH-HERALD (Dubuque, IA), at A4 (Oct. 8, 2000) (crediting the coining of the term "murderabilia" to Andy Kahan, and crediting him as a key player in the "crusade to wipe [the murderabilia market] out.").

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

[175] Cobb, *supra* note 173.

would lead to forfeiture under my proposal. But to avoid any misunderstanding, a federal statute squarely addressing the point should be put on the books.

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

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

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

[176] *See* CAL. CIV. CODE § 2225.

used.(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.
(c) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

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

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

Title 18 U.S.C. § 3681A. Forfeiture of Proceeds from Sale of Memorabilia by Convicted Felon
(a) Upon a motion of the United States attorney or a victim of a crime, made at any time after conviction of a defendant for a felony offense against the United States, or upon the court's own motion, and after notice to any interested party, the court shall determine whether a sale has occurred of tangible property belonging to the defendant, the value of which is increased by the notoriety gained from the conviction. Upon a finding by the court that such a sale has occurred, the court shall transfer to the Crime Victims Fund in the Treasury all income from the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person convicted of the crime. The court shall determine the fair market value of the property that is substantially

[177] *See supra* note 144-148; *Keenan*, 40 P.3d 718 (Cal. 2002).
[178] CAL. CIV. CODE § 2225, as described in *Keenan v. Superior Court*, 40 P.3d 718, 730-31 (Cal. 2002).
[179] *Id.* at 729 n.14 (emphasis added).
[180] *Id*. at 722.
[181] TEX. CODE. CRIM. PROC. art. 59.06(k)(1)-(2).

similar to that property that was sold but that has not increased in value by the notoriety and deduct that amount from the proceeds of the sale. After transferring the income to the Crime Victims Fund, the United States attorney shall transfer the remainder of the proceeds of the sale to the owner of the property.

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

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

This approach, mirroring the Texas murderabilia statute, would essentially tax the profits of the convicted felon's sale of tangible property as long as the profit arose from the notoriety of the conviction. It would not prohibit convicted felons from selling their tangible property, but would only forfeit the proceeds of any sale based on the value of similar items. The Texas murderabilia provision has yet to be challenged in the Texas courts, but recent commentary concludes that the "murderabilia provision [is the] Texas Son of Sam law's strongest element."[182] That commentary indicates that by "shifting the focus away from speech and toward a more generalized category of notoriety for profit, the murderabilia provision lends acceptability to the Texas Son of Sam law under the [*Simon & Schuster, Inc.*] framework."[183] As the proposed statute avoids content-based speech, does not consider whether the content of what is sold is related to the crime, and allows for felons to reap fair market value for the sale, the proposed statute would pass constitutional muster as well.

One last note is worth briefly mentioning. Congress might reasonably conclude that the problem of trafficking in "murderabilia" is an inter-state problem that warrants a federal prohibition. Congress might reasonably conclude that in this age of the Internet, the only way to truly stamp out the gruesome trade is to pass a federal law forbidding not only criminals but all

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

persons from dealing in murderabilia. Such a statute would go beyond the scope of my testimony today, which focuses on sentencing issues related to criminals. I simply highlight the point here in case Congress is interested in pursuing it.

CONCLUSION

Restitution to crime victims ought to be the norm in the federal criminal justice system. When a victim has suffered a loss at the hands of convicted criminal, the criminal should bear that loss – not the victim. In my testimony today, I have tried to offer a number of specific suggestions about how Congress could reform the federal restitution statutes to move in that direction. There has been considerable rhetoric about the importance of restitution to crime victims. To ensure that the rhetoric becomes a reality, Congress should act quickly to ensure that victims receive full and enforceable restitution awards.