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Forfeiture and Restitution in the Federal Criminal System: The Conflict of Victims' Rights and Government Interests

BY: SCOTT JONES

I. INTRODUCTION

In recent years, Congress has expressed increasing concern for victims of crime. In 2004 it passed the Crime Victims' Rights Act ("CVRA"),¹ which grants victims certain rights during the prosecution of their victimizer, including the right to consult with the government before plea agreements are entered and the right to be heard in court before sentence is imposed. It has also required, through enactment of the Mandatory Victims Restitution Act ("MVRA"),² that courts impose an obligation to pay restitution to victims as part of criminal sentences.

That mandate, however, was not accompanied by any modification to existing criminal forfeiture law,³ the statutory framework under which the government takes title to the proceeds and instrumentalities of crime.⁴ There is no single, coherent statute or rule that governs these two processes. Furthermore, Congress has not acknowledged the reality that both forfeiture and restitution draw from the same limited source: the financial and property resources of the defendant. As a result, federal law now grants both the government and the victim a right to the same limited pool of assets.

In the absence of guidance from Congress, courts construe the conflict between the mandatory forfeiture and restitution provisions as rendering them powerless to order the government to turn forfeited assets over to victims. Since forfeiture normally begins before restitution is ordered, the government can have complete control over whether the victim receives restitution. The law thereby allows the victim to be twice victimized—first by the offender who deprives him of his property by theft, fraud, or embezzlement, then by the government which uses the criminal justice system to prevent the return of stolen property.

This outcome should be corrected as it is contrary to congressional intent, fundamental concepts of fairness, and the overall goals of criminal sentencing. Although all three branches of government could affect the relative prioritization of forfeiture and restitution, only Congress can completely remedy the

problem. Congress should therefore enact a few relatively minor statutory modifications to better align the forfeiture and restitution systems with the ideals of American justice.

II. THE HISTORY, LAW, AND PRACTICE OF FEDERAL FORFEITURE AND RESTITUTION

A. ORIGINS OF RESTITUTION AND CRIMINAL FORFEITURE

Modern restitution and forfeiture are both rooted in the earliest era of the rule of law.⁵ These principles arose when criminal law was indistinct from the law of tort, and stem from the belief that offenders owe two duties—compensation to their victims and payment to the sovereign for its role in administering justice⁶—as well as from a desire to ensure that criminals do not profit from their crimes.⁷

As criminal law became distinct from civil law, the two punishment theories diverged. Although judges occasionally ordered offenders to compensate their victims for the effects of their crimes, the formal duty to do so was relegated to the civil law.⁸ The idea that offenders should be sentenced to pay a fine to the sovereign,

meanwhile, became a core assumption of criminal sentencing. Methods by which courts could impose payment obligations became somewhat complex—the state eventually was given (or rather, created for itself) additional methods to draw monetary and other assets from offenders, including forfeiture of the proceeds and instrumentalities of their crime.⁹

B. THE LAW OF RESTITUTION

In the past few decades, restitution has made something of a return from its exile in tort law, largely as an expression of congressional concern for crime victims. In 1996, Congress enacted the MVRA,¹⁰ which requires courts to order restitution when imposing a sentence for, *inter alia*, any "offense against property, including any offense committed by fraud and deceit



. . . in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.”¹¹

The legislative history of the MVRA suggests that Congress intended to reform the criminal justice system to prioritize the needs of crime victims.¹² It also suggests that Congress wanted to make it easier for victims to obtain restitution by making it a penalty separate from civil remedies and by preventing its administration from taking on the procedural complications of civil suits.¹³

It is worth emphasizing that the MVRA made restitution mandatory: “Notwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence, property crime, including fraud, or tampering with consumer products], the court *shall order*, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense.”¹⁴ The court is required to order restitution “in the full amount of each victim’s losses,”¹⁵ and cannot consider the economic circumstances of the defendant.¹⁶

Congress recently reaffirmed its desire to improve the criminal justice system’s treatment of victims and to ensure the payment of restitution with the 2004 enactment of the CVRA.¹⁷ The CVRA provides, in pertinent part, that “a crime victim has . . . the right to be reasonably heard at any public proceeding . . . involving . . . sentencing; the reasonable right to confer with the attorney for the Government in the case; . . . the right to proceedings free from unreasonable delay . . . [and] the right to full and timely restitution *as provided in law*.”¹⁸

C. THE LAW OF CRIMINAL FORFEITURE

Criminal forfeiture statutes are scattered throughout the federal criminal code. Forfeiture provisions are written into a number of individual statutes, including the Racketeer Influenced and Corrupt Organizations (“RICO”) Act¹⁹ and the Continuing Criminal Enterprise (“CCE”) Act,²⁰ and are to some extent consolidated in 21 U.S.C. § 853²¹ and 18 U.S.C. § 982.²² For purposes of simplification, the discussion here will focus on criminal forfeiture of the instrumentalities and proceeds of fraud and other property crimes as governed by § 982.

Section 982 is something of a catchall provision, which mandates²³ forfeiture of any assets involved in, and/or the proceeds of, a large number of predicate offenses.²⁴ Notably included in that list are 18 U.S.C. §§ 1956 and 1957,²⁵ the two federal money laundering provisions. Since committing a property crime or fraud will almost inevitably lead to conducting transactions with the proceeds, § 982 makes criminal forfeiture available in prosecutions for almost any property crime or fraud—the same set of offenses for which the MVRA requires restitution.

Regardless of the offense of conviction, Federal Rule of Criminal Procedure 32.2 controls the manner in which a court

forfeits the asset in question to the government.²⁶ The Rule was adopted in 2000 in an attempt to unify and codify the procedural requirements of criminal forfeiture.²⁷ There is no indication in Rule 32.2 that the interests of victims should be taken into account by the court during the forfeiture process; the statute, in fact, makes no reference to restitution.

Rule 32.2 contains a number of procedural protections for the defendant, including the requirement that a charging document notify the defendant that the government intends to seek forfeiture.²⁸ It also requires that the government prove, by a preponderance of the evidence,²⁹ that a nexus exists between the offense and the property to be forfeited—that the assets in question are proceeds or instrumentalities of the underlying crime.³⁰ The court³¹ makes the nexus determination only after the defendant has been found guilty or has a guilty or *nolo contendere* plea accepted by the court.³² If the court finds a nexus, Rule 32.2(b)(2) requires that the government enter a preliminary order for the forfeiture of specific property or a specific amount of money. The court is required to issue the order “without regard to any third party’s interest in all or part” of the assets to be forfeited.³³

After entering the preliminary order of forfeiture, the court may hold an ancillary hearing to determine (1) if the defendant truly has an interest in the property; and (2) whether any third parties have claims to the property.³⁴ No ancillary hearing is held in cases of monetary forfeiture, since a monetary judgment is regarded as an *in personam* judgment that does not implicate any third-party interests.³⁵ Ancillary hearings are not part of sentencing, and function similarly to a standard civil proceeding where third party claims may be dismissed for failure to state a claim or lack of standing.³⁶ These two provisions of the Rule effectively render victims of fraud unable to assert claims in ancillary forfeiture proceedings. In cases in which the victim has lost monetary assets, there is no ancillary hearing at which they could raise a claim. In cases of real property loss, the victims are considered to have no standing, because “third-party interests” are limited to ownership interests and fraudsters obtain title when victims transfer their assets to them.³⁷ At the conclusion of the ancillary hearing, the court can amend the preliminary order of forfeiture to reflect the interests of third parties and its determination of the defendant’s interests in the property.

D. FORFEITURE AND RESTITUTION IN PRACTICE

The everyday practices of forfeiture and restitution are greatly affected by the fact that the vast majority of federal prosecutions result in guilty pleas pursuant to plea agreements.³⁸ This gives the government an advantage over crime victims in obtaining the assets of the offender.

The process of forfeiture normally begins before restitution is even considered, because the government can seize the

assets at issue before trial by requesting that the court enter a protective order of restraint.³⁹ Furthermore, forfeiture “relates back” to the time of the offense, so that when the final order of forfeiture is entered, courts apply the legal fiction that title to the property transferred to the government when the crime was committed.⁴⁰ These constructions give the government, at least to some degree,⁴¹ possession of the assets before the court enters an order of restitution—a distinct advantage in any later dispute with the victim over the assets.

Unlike the jury determination of assets to be forfeited, the court determines the amount of restitution, normally on the basis of a pre-sentence report prepared by a Probation Officer.⁴² That portion of the typical pre-sentence report is based on either the evidence presented to the jury or the facts stipulated in the plea agreement. However, the Probation Officer preparing the report will normally review evidence submitted by any victim who contests the loss amount.⁴³

Since most prosecutions end in guilty pleas, decisions made by Assistant U.S. Attorneys (“AUSAs”) in plea agreements usually control the outcome of property involved in each case. The parties typically stipulate to a restitution amount in the plea agreement,⁴⁴ a norm that at least raises the possibility that the government will negotiate away some of the victim’s right to repayment in exchange for consideration it finds more valuable. Because of the court’s reliance on Probation Officers and their use of plea agreements as a basis for the determination of loss, AUSAs can effectively set the amount of restitution that a victim will receive. AUSAs also have the theoretical ability to deviate from Department of Justice (“the Department”) restitution and forfeiture policy—since plea negotiations occur before entry of a final forfeiture order, they do not implicate Department directives. The AUSA prosecuting the case can therefore effectively agree to transfer restrained assets to the victim to satisfy the forthcoming restitution order without the involvement of the Department hierarchy.

III. THE CONFLICT BETWEEN FORFEITURE AND MANDATORY RESTITUTION

A. CONGRESS HAS CREATED INCENTIVES FOR THE GOVERNMENT TO KEEP FORFEITED FUNDS RATHER THAN REMIT THEM TO CRIME VICTIMS

Under the provisions of the Comprehensive Crime Control Act of 1984 (“CCA”),⁴⁵ forfeited assets are collected into the Assets Forfeiture Fund (“the Fund”), an account controlled by the Department. The Fund is used to “pay the costs associated with . . . forfeitures, including the costs of managing and disposing of property, satisfying . . . innocent owner claims,⁴⁶ and . . .

accomplishing the legal forfeiture of the property [as well as] financ[ing] certain general investigative expenses.”⁴⁷ Those general investigative expenses include “joint law enforcement operations,”⁴⁸ meaning the Department can use forfeited assets to pay state and local law enforcement agencies for their participation in federal operations, including participation in operations that have no connection to any forfeiture. Under the CCA, the Department can pay any amount for “overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency participating in the Fund.”⁴⁹ The Department can therefore use forfeited assets to fund an entire operation with no connection to a crime resulting in forfeiture, like a joint anti-terrorism task force, as long as the

operation involves at least one federal agent.

Furthermore, many of those expenditures, like training and equipping personnel, are not consumable—rather than be exhausted in the course of the joint operation, they eventually benefit the state or local law enforcement agency involved. Retaining forfeited funds thereby enables the Department to semi-federalize state law enforcement. At the very least, it allows the Department to subsidize agencies that align their priorities with those of the federal government.

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In short, the CCA creates incentives for the Department to retain forfeited assets by transforming them into a source of non-appropriated funding, which is a powerful lure for the leadership of any federal agency.

B. THE DEPARTMENT OF JUSTICE SEEMS TO BE RESPONDING TO THOSE INCENTIVES IN A WAY THAT PREVENTS VICTIMS FROM OBTAINING ALL THE RESTITUTION TO WHICH THEY ARE ENTITLED

There is evidence that the incentives created by the CCA are affecting the Department's remission decisions, in that the government does not always put the interests of victims ahead of its own pecuniary interests. One example is the alleged conduct of the government in *Adams v. United States Department of Justice Asset Forfeiture Division*,⁵⁰ in which the plaintiffs claimed that forfeited funds that should have been turned over to them were instead given to local law enforcement agencies for their assistance in the investigation of a fraud.⁵¹ The suit was dismissed on jurisdictional grounds before discovery, but there is no indication in the decision that the government denied possession of funds forfeited from the criminal defendant.⁵²

Although it was decided before passage of the CVRA and the MVRA and involved a civil forfeiture action, *United States v. Chan*⁵³ is a similar example of the government prioritizing its interests above those of the victim. There, prior to the entry of a plea agreement with a defendant charged with bank fraud, an AUSA met with the president of the bank, asked him not file a civil suit against the defendant, and told him that the bank would be the recipient of funds forfeited to the government.⁵⁴ The plea agreement eventually entered was consistent with that understanding, and provided that the forfeited assets be credited towards the defendant's restitution obligation.⁵⁵ Yet after the court accepted the plea agreement and entered a judgment requiring restitution, the Department did not volunteer any funds to the victim and eventually affirmatively denied the bank's petition for remission.⁵⁶ In an order granting the bank's motion to enforce the terms of the plea agreement,⁵⁷ the district court ordered the Department to remit the forfeited funds as agreed, along with attorney's fees and costs, and described the conduct of the Department as "outrageous and an embarrassment to the United States."⁵⁸

In other cases, the Department has refused to allow forfeited assets to be credited towards defendants' restitution obligation.⁵⁹ Victims are entitled to restitution in an amount equal to, but no greater than, their loss.⁶⁰ In making that refusal, the government effectively requires victims to file remission petitions before getting stolen assets back, at least in cases where the defendant's total assets are less than the sum of the forfeiture and the ordered restitution.

Department statistics obtained by the Government Accountability Office ("GAO") further suggests that the government sometimes puts its interests ahead of those of victims. In 2001, the GAO reported that:

Proceeds from forfeiture are typically used to make owners (e.g., a mortgager) whole and to fund law enforcement activities, and are not necessarily used to fulfill restitution orders. Therefore, the use of forfeiture, as we reported in June 1994, could decrease amounts that might otherwise be available for paying restitution to crime victims and reducing outstanding criminal debt. According to Justice statistics, of the estimated \$536 million of forfeited cash and property recovered during fiscal year 1999, approximately \$39 million (or 7 percent) was applied to restitution in victim-related offenses. The remaining amounts were either converted to cash and used for law enforcement purposes or retained for official law enforcement use.⁶¹

Reality may not be as grim as the GAO suggests—not all of the seizures included in the Department's statistics were related to cases in which restitution was ordered⁶²—but even if the numbers cited misstate the frequency with which the Department fails to remit forfeited funds to victims by a factor of ten, the report still indicates a problem.

C. FAILURE TO REMIT FORFEITED FUNDS APPEARS TO BE MORE THAN A SERIES OF ISOLATED DECISIONS MADE BY INDIVIDUAL GOVERNMENT LAWYERS

The policies, procedures, and bureaucratic inefficiencies of the Department seem to be responsible for much of the failure to remit forfeited funds. The policy of the Department is that "[t]he disposition of property forfeited to the United States is an executive branch decision and not a matter for the court."⁶³ The Department therefore requires that its attorneys draft forfeiture orders "broadly, [in order] to direct forfeiture of the property to the United States 'for disposition in accordance with law'."⁶⁴ Use of the phrase "in accordance with law" preserves unfettered government discretion over remission. If the phrase were replaced with "for disposition in the interests of justice" or "for disposition that would provide victims with restitution in accordance with the MVRA and the CVRA," there would at least be internal pressure on Department actors to remit forfeited property to victims.

The Department also states that its asset forfeiture program has three main goals:

- (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities;
- (2) to enhance cooperation among foreign, federal, state and local law enforcement agen-

cies through the equitable sharing of assets recovered . . . (3) to produce revenues to enhance forfeitures and strengthen law enforcement.⁶⁵

Those goals take full advantage of the CCA, and seem to embrace the incentives this statute creates for denying petitions for remission. The list does not include “furthering the interests of victims” or “ensuring that victims of crime are made whole.”

The procedure by which the Department considers petitions for remission may also increase the institutional reluctance to turn forfeited assets over to victims. Rather than place the decision to remit with the U.S. Attorney’s Office responsible for the case, the Attorney General has delegated his authority to grant petitions for remission of forfeited property to the Chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division (“Asset Forfeiture Chief”).⁶⁶ The Asset Forfeiture Chief may use that authority to “restore forfeited property to victims or take other actions to protect the rights of innocent persons in civil or criminal forfeitures that are in the interest of justice and that are not inconsistent with the provisions of the statute.”⁶⁷

It is important to note that the language quoted above is permissive rather than compulsive, and imposes no obligation on the Department to ensure that victims are made whole. Department policy also imposes restrictions on the Asset Forfeiture Chief’s discretion, only allowing remission petitions to be granted when the involved U.S. Attorney certifies in writing that:

- (1) All known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order;
- (2) To the best of knowledge and belief after consultation with the seizing agency, the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, refunds, settlement payments, lawsuit awards, and any other sources of compensation for their losses;
- (3) To the best of knowledge and belief after consultation with the seizing agency, reasonable efforts to locate additional assets establish that the victims do not have recourse reasonably available to other assets from which to obtain compensation for their losses, including, other assets owned or controlled by the defendant(s);
- and (4) There is no evidence to suggest that any of the victims knowingly contributed to, participated in, benefitted [sic] from, or acted in a willfully blind manner toward the commission of the offenses underlying the forfeiture, or related offenses.⁶⁸

The default, then, is to keep the money for the Department’s use. Furthermore, by taking the decision to grant remission away from the prosecuting AUSA, the Department has removed it from the person most knowledgeable about the victim’s financial status and the overall equities of the remission decision.

A 2005 GAO investigation showed that bureaucratic inefficiencies can also be responsible for failure to give forfeited funds to victims, even when the Department has decided to remit.⁶⁹ The GAO’s report examined five high-dollar-value fraud cases, and found in one that the Department’s records demonstrated the forfeiture of \$125 million less than the court’s documents.⁷⁰ The GAO also found that the Department’s unit responsible for ensuring payment of restitution “was not certain whether any forfeited assets had been, or could be, applied toward the offender’s restitution debt.”⁷¹ If, as the GAO report suggests, the government does not have appropriate accounting measures for tracking payment and remission of forfeiture, victims should doubt its ability to ensure that they are made whole.

D. COURTS HAVE CONSTRUED THE MVRA AND THE CVRA AS NOT LIMITING GOVERNMENT DISCRETION

Before passage of the CVRA and MVRA, victims without title to the property forfeited to the government were not entitled to judicial relief, and instead had to petition the Attorney General for a discretionary remission of forfeiture.⁷² Strangely, enactment of the two statutes has had no effect on that reality.

The MVRA may actually *encourage* the government to retain seized assets. In the pre-MVRA era, restitution orders could be offset by the value of property seized by the government.⁷³ The possibility of such a credit gave the victim something of a proprietary interest in the forfeited property (or at least could make the victim feel that he had one), thereby increasing pressure on the government to remit the assets.

After passage of the MVRA, however, the court must order restitution in the amount of the victim’s loss regardless of any compensation from insurance or other sources, other than “any amount later recovered as compensatory damages for the same loss by the victim in—(A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State.”⁷⁴ The Fourth Circuit held in *United States v. Alalade*⁷⁵ that the potential for forfeited assets to be remitted to the victim should not be considered in determining the amount of restitution due.⁷⁶ Other courts considering this issue have followed the *Alalade* rule, and have only credited restitution obligations by the value of forfeited assets when the government voluntarily remits that property to the victim before sentencing.⁷⁷

In the post-MVRA world, then, the Department may believe that turning over forfeited assets to the victim makes it possible for the victim to double-collect. However, over-compensation would only be possible if the offender had enough assets left after the forfeiture to pay the ordered amount of restitution. Since offenders' assets are normally consumed by the forfeiture,⁷⁸ this is a poor foundation for a policy of retaining forfeited property.

The only published opinion addressing the effects of the CVRA on forfeiture held that the statute did not grant courts the power to order forfeited funds be remitted to victims. That decision, from *United States v. Rubin*,⁷⁹ contains pretty clear language: "[R]ecognizing that the CVRA only mandates restitution as provided by law, the Court notes that no law transforms forfeiture into a pool for restitution .

. . . Bluntly and simply, forfeiture and restitution are parallel, and therefore separate, processes."⁸⁰ A footnote from the case is directly on point: "Congress did not compel that the forfeiture pool must be applied first to restitution or that restitution have first call on a defendant's assets, either in the CVRA or elsewhere."⁸¹ Partly on the basis of that analysis, the *Rubin* court went on to hold that the government fulfilled its CVRA and MVRA obligations merely by consulting the victim regarding the victim's losses and desire for restitution.⁸²

The Fourth Circuit has suggested that it would accept the *Rubin* court's analysis. Dicta in the unpublished *In re Doe*⁸³ decision address the government's obligations under the CVRA and notes:

[A]lthough the CVRA provides the vehicle for Petitioner to assert her right to restitution, it does not create an independent obligation for a district court to order or a defendant to pay such an award. Rather, the CVRA merely protects the right to receive restitution that is provided for elsewhere.⁸⁴

The only other case that seems to address the effect of the CVRA on forfeiture is *United States v. Zaranek*, where in the context of a wage garnishment order the court deferred to the Department, noting, "[t]he government has the sole discretion to decide if forfeited assets will be used to pay a restitution obligation."⁸⁵

A. CONGRESS SHOULD ACT TO ENSURE THAT CRIMINAL FORFEITURE DOES NOT PREVENT VICTIMS FROM RECEIVING THE RESTITUTION TO WHICH THEY ARE ENTITLED

The law should be changed to prioritize restitution over forfeiture. Doing so would ensure that congressional intent regarding victims' rights is realized, further the interests of justice, and promote rehabilitation of the offender. Although the Judiciary and the Executive can act to minimize the current problem, the best approach is for Congress to modify the relevant statutes.

i. Congressional Intent

The current state of the law does not reflect Congressional intent, as there is no evidence that Congress intended for forfeiture to the government to be prioritized over restitution to the victim. Instead, Congress has repeatedly expressed the view that victim restitution should be a priority of criminal sentencing.⁸⁶

ii. Interests of Justice

Ensuring that victims are fully compensated for their loss, even at a cost to the government, fits within our conception of justice. Americans generally believe that individual interests should prevail unless they are substantially outweighed by government interests. Courts have translated that belief into a test for the constitutionality of statutes that infringe upon individual rights.⁸⁷ If restitution

is truly a "right," as the title of the Crime Victims' Rights Act suggests, it would make sense that the traditional rights balancing test would apply.

In this case, the interests of the victim in obtaining restitution outweigh those of the government in retaining forfeited assets. Beyond the obvious pecuniary stakes, the victim has an interest that the government does not, as victims are uniquely harmed by crime and the attention of the justice system should thus focus on making them whole. Being made whole financially (and perhaps by the attention of the system, emotionally) provides victims with a sense of closure and relief. Moreover, consistent payment of restitution also provides victims with an incentive to report the crimes they otherwise would have ig-

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nored,⁸⁸ thereby furthering the government's interest in reducing crime.

By comparison, the interests of the government in retaining forfeited assets are minimal. The primary goals of criminal forfeiture (ensuring that criminals do not profit from their crimes and deterring crime) are met by restitution. The only interest the government has in forfeiture that is not satisfied by mandatory restitution is pecuniary. That interest is not, under our ethos, compelling—a fact that has been recognized by philosophers such as Sir Thomas More,⁸⁹ practicing attorneys,⁹⁰ and foreign governments.⁹¹

iii. Promoting Rehabilitation of the Offender

Prioritizing restitution over forfeiture also promotes rehabilitation, one of the main goals of criminal punishment.⁹² The legislative history of the MVRA conveys Congress' belief that restitution could "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."⁹³ The National Institute of Justice suggests that "the very act of making restitution can be rehabilitative as well as punitive, since the offender is forced to confront and make reparations for the harm caused by his actions."⁹⁴ Others have theorized that restitution rehabilitates because it presents the harm caused by the offender to him in the form of an "identifiable human being," an effect that forfeiture of assets to the government lacks.⁹⁵ In sum, forcing an offender to pay his victim directly may also force him to think about his crime—precisely the type of "penitent reflection" that early punishment theorists believed would aid in rehabilitation.

Restitution may have rehabilitative effects beyond those caused by confrontation. Proponents of restorative justice, a system that balances criminal punishment with making victims whole, argue that restitution "build[s] on offenders' abilities and good qualities, increase[s] their accountability and, potentially, their understanding, and allow[s] them to earn reacceptance in the community."⁹⁶ Punishment theorist Gilbert Geis proposed that restitution could "produce in the offender a feeling of having been cleansed, a kind of redemptive purging process which inhibits subsequent wrongdoing."⁹⁷

If the above theories are correct, and it is in the offender's interest to be rehabilitated, then even he has an interest in the identity of the recipient of his assets. At the very least, society has an interest—if rehabilitation is a just outcome, then justice is better served by providing the assets to the victim.

B. HOW TO PRIORITIZE RESTITUTION OVER FORFEITURE

Changing the law to provide for the payment of restitution with forfeited assets could be accomplished by any of the actors in the system. The Executive could modify Department policy, the Judiciary could construe existing law differently, or Con-

gress could modify the existing statutes. Because of the reach of congressional power, action by that branch of government would be the most effective solution.

The Executive could act on its own, without statutory change. The Department could, as a matter of policy, mandate transfer of forfeited assets to the victim anytime that forfeiture renders a defendant unable to comply with an order of restitution. Such a policy change could be adopted quickly, with no likely congressional objection and with no requirement of congressional action. There are, however, several disadvantages to the approach. Because assets would be funneled through the government, none of the rehabilitative benefits of restitution would likely occur. Furthermore, unilateral Executive action would leave the government with no recourse to recoup from the defendant forfeited assets transferred to the victim. The offender could therefore benefit.

Alternatively, courts could construe the MVRA and/or the CVRA as requiring that restitution be prioritized over forfeiture and begin ordering the government to pass forfeited assets on to victims. Like Executive action, no congressional action would be required here. Such a construction would be more consistent with the congressional intent behind the MVRA and CVRA than the cases described above. Since the MVRA and the CVRA are so new (the discussion above details every relevant decision thus far), and as there are no published appellate court decisions regarding the interaction of criminal forfeiture with the CVRA and MVRA, a change in their construction would raise few *stare decisis* concerns.

A judicial shift in interpretation of the MVRA and CVRA would, however, not be quick. It would likely take awhile for circuit courts to articulate the law, during which time victims would be deprived of restitution. It might also be difficult to achieve a circuit consensus—the logic of the *Rubin* and *Doe* courts is not entirely unpersuasive. Any disagreement between the circuits might be enduring, since there would be little to attract the attention of the Supreme Court other than the split itself given that no constitutional issue is raised and the conflict cannot fairly be described as a matter of great national importance.

The best way to ensure that the restitutionary rights of victims are prioritized over the pecuniary interests of government would be for Congress to make minor modifications to Federal Rule of Criminal Procedure 32.2. The first required change would be the addition to the Rule of language such as: "In the event that forfeiture of property to the government has reduced or eliminated the defendant's ability to make restitution, the court shall order that the government transfer forfeited property to the victim. This transfer shall be limited to an amount required to fulfill the defendant's restitutionary obligation." Those two sentences would fix the problem of prioritization.

To prevent the offender from benefiting from the transfer of assets from government to victim, Congress should also alter

the Rule to give the government either a lien on the defendant's future earnings equal to the amount it gave to the victim, or provide for automatic forfeiture of those earnings. The second option would be more efficient, since the government would not have to pursue a civil claim against the defendant—litigation that would be pointless, since all relevant facts would have been proved in the criminal proceeding.

The first proposed addition to the Rule is similar to those made by David Fried and David B. Smith. Almost two decades ago, prior to the passage of the CVRA and MVRA, Fried proposed replacing the Asset Forfeiture Fund, which he believed perverted the incentives of prosecution, with a system in which “[a]ll sums collected from the offender, whether as fines or forfeitures . . . be allocated in accordance with a scheme of priorities”⁹⁸ in which victims were prioritized above the government.⁹⁹ Fried also suggested that victims retain their right to civil remedies against the offender to receive compensation for all their losses, less sums passed on to them from forfeited assets.¹⁰⁰

In 2008, David B. Smith, in his testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, suggested that Congress could “provide that all property forfeited under federal law be deposited in the Victims Fund. That would . . . take away the undue pecuniary incentive that law enforcement now has to . . . [seek] forfeitures that are unjust or excessive. Congress could also make it clear that restitution takes priority over forfeitures.”¹⁰¹

Neither Fried nor Smith, however, provided for a mechanism for the government to recoup the funds passed on to the victim, even if the defendant was later able to repay them. That is at least a theoretical flaw. Although convicts would likely be able to pay the funds back in rare circumstances, reformation of the law should not reduce the likelihood of eventual payment of both restitution and forfeiture obligations.

Congressional addition of those two provisions to the Rule would fix the underlying problem. Furthermore, since all judges ordering forfeiture have to consider and comply with Rule 32.2, modifying it rather than the MVRA, the CVRA, or all of the numerous criminal forfeiture statutes, would ensure that congressional intent was clear that restitution took priority over forfeiture.

There are, of course, disadvantages. The proposal could deprive the Department of a substantial amount of funds: the total value of assets forfeited to the government totaled \$536 million in 1999¹⁰² and just over two billion dollars in 2006.¹⁰³ It is unclear what percentage of those assets would be lost under this proposal, because there do not seem to be any studies regarding the amount of restitution that goes unpaid because the defendant forfeits all available funds.¹⁰⁴

Modifying the Rule in the manner proposed would likely affect the everyday processes of forfeiture and restitution, since

each party to the system would face altered incentives to claim or contest the amount of loss. Victims could begin exaggerating their claims of loss, a real possibility given that research indicates the potential for restitution frequently leads to inflated claims.¹⁰⁵

Conversely, the proposed modifications would create incentives for the government to underestimate loss. Since the severity of the sentence for the typical property crime is determined largely by the amount of loss suffered,¹⁰⁶ government underestimation of loss would effectively be equivalent to under-prosecution.

More disturbingly, modifying Rule 32.2 to prioritize restitution over government forfeiture would create incentives for the government to contest the amount of loss claimed by victims. Absent an affirmative policy from the Department prohibiting litigation against victims, more litigation could be added to an already crowded federal court docket, cause further stress to victims, and conflict with the general intent of the CVRA. It would also be contrary to our scheme of criminal justice—even absent the CVRA, there is a belief that the role of government in prosecution is to represent the interests of victims, not to act against them. The absence of a policy against opposing victims' claims of restitution would also require modification of 18 U.S.C. 3664(e), which currently provides that

any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.¹⁰⁷

If the government and the victim contested the amount of loss before the trial court, the government attorney would be unable to represent the victim.

Most of the risks described above could be alleviated with minimal changes to the law and practice of forfeiture. The Department, on its own initiative or as compelled by Congress, would have to institute a policy of not litigating against victims' loss claims. That change, together with the remainder of the proposal detailed above, would ensure that victims' rights are no longer subservient to government interests.

V. CONCLUSION

As currently construed, the law of forfeiture conflicts with the law of restitution. As a result, the government appears to at least occasionally profit at the expense of crime victims. That outcome should not be tolerated, since it runs counter to congressional intent, the interests of justice, and the goals and justifications of criminal punishment. Congress should therefore

modify Rule 32.2 in a way that ensures prioritization of victims' interests while minimizing deleterious effects on the everyday practice of forfeiture and restitution.

¹ 18 U.S.C. § 3771(a) (2006) (listing various rights of crime victims such as the right to be reasonably protected, to be notified of proceedings, escapes and/or releases, to be included in timely proceedings and subsequent hearings, and to be treated with fairness and respect).

² 18 U.S.C. §3663A (2006) (granting the victim or his estate the right to restitution).

³ For purposes of simplification, the discussion below focuses exclusively on criminal forfeiture, rather than the parallel civil procedure.

⁴ See e.g., 18 U.S.C. §§ 982, 1961-1968 (2006) (stating that a defendant who violates or is part of a conspiracy that benefits from the violation of a financial institution must forfeit the real or personal property to the United States).

⁵ As to restitution, see generally Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223 (1965) (quoting sections from KITTRIE, ZENOFF & ENG, SENTENCING, SANCTIONS, AND CORRECTIONS 1078 (2002)).

⁶ See Joe Hudson & Burt Galaway, *Restitution and the Justice Model*, in JUSTICE AS FAIRNESS: PERSPECTIVES ON THE JUSTICE MODEL, (David Fogel & Joe Hudson eds., 1981) (stating the offender had to “buy back the peace” by making restitution to both entities); see generally David J. Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 412 (1988).

⁷ See Fried, *supra* note 6, at 333 (arguing that because of this, forfeiture of illegal profits should be mandatory).

⁸ See Hudson & Galaway, *supra* note 6, at 53 (asserting restitution and torts were viewed as lesser than criminal law, and crimes against victims were less important than those against the state).

⁹ See, e.g., 18 U.S.C. § 982 (2006) (illustrating the struggle within the court system for clarity).

¹⁰ 18 U.S.C. §§ 3663A, 3664 (2006).

¹¹ 18 U.S.C. §3663A(c)(1)(A)-(B) (2006).

¹² See S. REP. NO. 104-179 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 925-26, 930-31; see also H. REP. NO. 104-16 (1996), reported at 1995 WL 43586, at 5-6, 10; 142 Cong. Rec. H3605 (1996); 141 Cong. Rec. S19,273 (1995).

¹³ See S. REP. NO. 104-179, at 931-34 (noting that Congress streamlined the process for restitution while preventing the sentencing phase from determining the facts and issues of civil trials).

¹⁴ 18 U.S.C. § 3663A(a)(1) (2006) (emphasis added).

¹⁵ 18 U.S.C. § 3664(f)(1)(A) (2006).

¹⁶ *Id.*

¹⁷ See 18 U.S.C. 3771(a) (2006) (listing the eight rights of crime victims).

¹⁸ *Id.* at subsections 3-8 (emphasis added). The emphasized text is significant; as will be discussed in greater detail below, it has been construed as limiting victims' right to restitution when that right conflicts with mandatory forfeiture.

¹⁹ 18 U.S.C. §§ 1961-1968 (2006).

²⁰ 21 U.S.C. § 848 (2006).

²¹ This section provides for criminal forfeiture of property related to felony drug crimes.

²² This section provides for criminal forfeiture of property related to a list of enumerated, mostly non-drug related, offenses.

²³ See *United States v. Monsanto*, 491 U.S. 600, 606 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied”)

²⁴ The statute of conviction controls whether the proceeds of the crime or the instrumentalities of the crime (or both) are forfeitable.

²⁵ Those offenses prohibit transactions involving the proceeds of most frauds and property crimes, including crimes not listed as § 982 predicates.

²⁶ FED. R. CRIM. P. 32.2.

²⁷ See 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 632.2.02 (2010) (asserting the Rule combines portions of Rule 7 on indictment, Rule 31 on verdicts, and Rule 32 on sentencing).

²⁸ See FED. R. CRIM. P. 32.2 (a) (stating that the notice should not be a count of the indictment but also that the indictment does not have to identify the property subject to forfeiture or specify the amount of money judgment the government seeks).

²⁹ See *United States v. Schlesinger*, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) (stating that this is a generally settled principle in the Second Circuit); see also *United States v. Huggins*, 376 F. Supp. 2d 580, 582 (D. Del. 2005) (asserting that because forfeiture is not an element of the underlying crime, it is not necessary for the government to establish its right to it beyond a reasonable doubt).

³⁰ See *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007) (finding the court may determine the existence of a nexus “based on the evidence in the record, or on additional evidence”); see also *United States v. Juluke*, 426 F.3d 323, 327 (5th Cir. 2005) (applying the nexus standard to the defendant's heroin sales and his house and bank account).

³¹ Or, if either of the parties so demands, the jury. FED. R. CRIM. P. 32.2 (b)(4).

³² FED. R. CRIM. P. 32.2 (b)(1).

³³ FED. R. CRIM. P. 32.2 (b)(3).

³⁴ FED. R. CRIM. P. 32.2 (c).

³⁵ Committee Note to FED. R. CRIM. P. 32.2.

³⁶ See *United States v. Boulter*, 927 F. Supp. 911, 916-17 (W.D.N.C. 1996) (holding that to meet the burden of standing, a claimant challenging forfeiture must present evidence of dominion and control or other proof of true ownership) (citing 526 Liscum Drive, 866 F.2d 213, 217 (6th 1988)).

³⁷ See e.g., *United States v. BCCI Holdings (Luxembourg) S.A.*, 69 F. Supp. 2d 36, 59 (D.D.C. 1999) (commenting that a victim who voluntarily transfers his property to the defendant no longer has a legal interest in the property, and therefore lacks standing to contest the forfeiture); see also *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D.V.A. 1995).

³⁸ For example, eighty-five percent of federal prosecutions in 2005 resulted in guilty pleas. Specifically, there were 74,226 guilty or no-contest pleas out of 86,680 terminated prosecutions in 2005. U.S. DEP'T OF JUSTICE, *Federal Justice Statistics, 2005*, BUREAU OF JUSTICE STATISTICS (Mar. 10, 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2005/tables/fjs05st402.cfm>.

³⁹ See 21 U.S.C. § 853(e) (2006), incorporated in 18 U.S.C. § 982(b) (2006) (granting the court the power to enter a restraining order or injunction if the government alleges that the property would be subject to forfeiture, there is a “substantial probability” that the government will win on the issue of forfeiture, and the need to preserve the property outweighs hardship to the defendant).

⁴⁰ 21 U.S.C. § 853(n) (2006), incorporated in 18 U.S.C. § 982(b) (2006); see also *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 507 U.S. 111, 112 (1993) (stating that the previous sections are merely a codification of the common law doctrine, which “vests title to the offending rest in the Government as of the date of the offending conduct”).

⁴¹ Final orders of forfeiture and restitution orders are typically entered near-simultaneously during the sentencing hearing. Email from Jean Hudson, Assistant U.S. Attorney, Western District of Virginia to author (May 2, 2009) (on file with author).

⁴² Email from Daniel P. Arnold, United States Probation Officer, Eastern District of Virginia to author (April 30, 2009) (on file with author).

⁴³ *Id.*

⁴⁴ Email from Jean Hudson to author, *supra* note 41.

⁴⁵ 28 U.S.C. § 524 (2006).

⁴⁶ “Innocent owner” refers to the determination of third-party claims discussed above in the context of ancillary hearings, not to competing restitutionary claims.

⁴⁷ *Asset Forfeiture Program: The Fund*, UNITED STATES DEPARTMENT OF JUSTICE (Jan. 2011), http://www.usdoj.gov/jmd/afp/02fundreport/02_2.html.

⁴⁸ *Id.*

⁴⁹ 28 U.S.C. § 524(c)(1)(I) (2006).

⁵⁰ 2007 WL 3085986 (C.D. Ill. Oct. 18, 2007).

⁵¹ *See id.* at *1, 4 (finding that because the plaintiffs did not ask for monetary damages, sovereign immunity applied).

⁵² *Id.* at *4. Correspondence with the plaintiff’s attorney attempting to confirm this fact has, as yet, been unanswered.

⁵³ 22 F. Supp. 2d 1123 (D. Haw. 1998).

⁵⁴ *Id.* at 1125.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ It is more than a little unusual that a court would grant a third party’s motion to enforce a plea agreement.

⁵⁸ *Chan*, 22 F. Supp. 2d at 1127.

⁵⁹ *See, e.g.*, *United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000) (finding that the language of the MVRA did not allow the district court the discretion to reduce the amount of restitution by the value of property seized and forfeited to the government); *see also United States v. Wafa*, 2007 WL 445485, at *3 (D. Or. Feb. 5, 2007) (demonstrating petitioner signed a plea agreement stating that the government did not allow forfeited assets to count towards restitution); *United States v. Zaraneck*, 2007 WL 1455923 (E.D. Mich., Apr 26, 2007) (“The government has the sole discretion to decide if forfeited assets will be used to pay a restitution obligation . . .”).

⁶⁰ *See* 18 U.S.C. §§ 3663A(b)(1)-(b)(4) (2006) (commenting that other than “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.”)

⁶¹ U. S. GEN. ACCOUNTING OFFICE, GAO 01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 33 (2001).

⁶² *Id.* at 33 n.2.

⁶³ U. S. DEP’T OF JUSTICE, UNITED STATES ATTY’S MANUAL § 9-115.300 (2010).

⁶⁴ *Id.*

⁶⁵ U. S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-118.010 (2009).

⁶⁶ 28 CFR 9.1(b)(2) (2008).

⁶⁷ ATT’Y GEN. ORDER NO. 2088-97 (June 14, 1997) (as cited in USAM 9-2290, *Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission*).

⁶⁸ U. S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-2290 (2010).

⁶⁹ *See* U.S. GEN. ACCOUNTING OFFICE, GAO 05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 14 (2005) (discussing lack of certainty in application of forfeiture funds despite

inter-department cooperation).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See* *Fried*, *supra* note 6, at 334 (stating that under federal law, profits from crime were automatically given to the government upon conviction, and the judge may sentence the defendant to make restitution out of his personal funds).

⁷³ *See United States v. Khan*, 53 F.3d 507, 519 (2d Cir. 1995) (noting on remand for resentencing in a pre-MVRA case that the district court may reduce the amount of restitution to be ordered by the amount of forfeiture); *see also United States v. Barnette*, 902 F. Supp. 1522, 1531 (M.D. Fla. 1995) (crediting the defendant the seven million dollars he paid in restitution against the forfeiture to the government).

⁷⁴ 18 U.S.C. § 3664(f)(1)(B) (2006).

⁷⁵ 204 F.3d 536, 540 (4th Cir. 2000).

⁷⁶ *See id.* (“The plain language of the [Act does] not grant the district court discretion to reduce the amount of restitution required to be ordered by an amount equal to the value of the property seized.”)

⁷⁷ *See United States v. Seward*, 272 F.3d 831, 839 (7th Cir. 2001) (agreeing with the defendant that the potential for forfeited assets are consequential or incidental damages); *see also United States v. Coriarty*, 300 F.3d 244, 252 (2d Cir. 2002) (stating that the court can only order restitution correlating to actual loss); *United States v. Smith*, 297 F. Supp. 2d 69, 72 (D.D.C. 2003) (noting if the defendant has remitted assets before being sentenced, the court may be required to offset the restitution amount by the value of the actual loss).

⁷⁸ *See* U. S. GEN. ACCOUNTING OFFICE, GAO 01-664, *supra* note 61, at 33 (stating that restitution is often assessed “without regard to an offender’s ability to pay . . .”).

⁷⁹ 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

⁸⁰ *Id.* at 426.

⁸¹ *Id.* at 429 n.13.

⁸² *See id.* at 424 (“The right to be heard [reasonably at public court proceedings] does not give the victims of crime veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole.”).

⁸³ 264 Fed. Appx. 260 (4th Cir. Aug. 6, 2007).

⁸⁴ *Id.* at 265 n.2.

⁸⁵ 2007 WL 1455923 (E.D. Mich. Apr. 26, 2007).

⁸⁶ *See generally* the legislative histories of the CVRA and MVRA (repeatedly emphasizing the importance of victims’ right to timely restitution under the law); *see also Restitution for Victims of Crime Act of 2007: Hearing on H.R. 4110 Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2008) (discussing ways to improve collection and distribution of restitution to victims).

⁸⁷ *See e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (discussing the constitutionally protected right to privacy); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (examining the right to equal protection regarding use of race as a criterion in a college admissions policy).

⁸⁸ *Hudson & Galaway*, *supra* note 6, at 61-62.

⁸⁹ “The Prince has no more right to stolen goods than the thief.” Sir Thomas More, *UTOPIA*, 23-24 (J. Churton Collins ed., Oxford University Press 1930) (1904).

⁹⁰ “It is certainly undesirable for the state to compete with the victim for the often meager resources of the defendant.” ABA, ADVISORY COMMITTEE ON SENTENCING AND REVIEW, *Standards Relating to Sentencing Alternatives and Procedures* at 2.7(c)(III) Comment d. (1968) (discussing prioritization of restitution over fines).

⁹¹ For example, in very limited circumstances the United Kingdom’s laws allow judges to modify forfeiture orders in the interest of justice. *See* *Forefeiture Act 1982*, 1982, c. 34 (Eng.). The Act applies, strangely, only

to orders of forfeiture that would otherwise be entered against homicide defendants—typically those that would strip them of survivor benefits they would otherwise obtain because of their crime. British judges occasionally use the provisions of the Act to allow sympathetic, morally blameless defendants to keep such benefits. *See e.g.*, In Re. K., [1986] 1 Ch. 180 (affirming that the defendant could not be morally criticized and should thus not lose what her husband devised to her in his will under the Forfeiture Act of 1982).

⁹² As for the other goals of punishment, prioritization of restitution would likely have little effect on deterrence (neither specific nor general deterrence is likely to be affected by the identity of the party to whom payment is made); a self-evident effect on restitution (unless you believe that society is victimized by crime more than individual victims); and no effect on either retribution (also not likely to be affected by the identity of the party to whom payment is made) or incapacitation.

⁹³ S. Rep. No. 104-179, at 15 (1996).

⁹⁴ Daniel McGillis, U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *Crime Victim Restitution*: 13 (1986) (citing P. FINN AND B. LEE, *SERVING CRIME VICTIMS AND WITNESSES* (1986)).

⁹⁵ Fried, *supra* note 6, at 413.

⁹⁶ Martin Wright, *Victim-Offender Mediation as a Step Towards a Restorative System of Justice*, in *RESTORATIVE JUSTICE ON TRIAL* 529 (H. Messmer & H.-U. Otto, eds., 1992).

⁹⁷ Gilbert Geis, *Restitution By Criminal Offenders: A Summary and Overview*, in *RESTITUTION IN CRIMINAL JUSTICE* 147 (Joe Hudson & Burt Galaway, eds. 1977).

⁹⁸ Fried, *supra* note 6, at 334.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Restitution for Victims of Crime Act of 2007: Hearing on H.R. 4110 Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of David B. Smith) (testifying but not specifying how exactly Congress should make that prioritization clear).

¹⁰² U. S. GEN. ACCOUNTING OFFICE, GAO 01-664, *supra* note 61, at 33.

¹⁰³ OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2006* 6 (2007).

¹⁰⁴ *See* U. S. GEN. ACCOUNTING OFFICE, GAO 01-664, *supra* note 61, at 33 (discussing generally the ability of certain defendants to pay restitution over others).

¹⁰⁵ Joe Hudson et al., *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 Vol. 7 JUDICATURE 313 (1977) (as quoted in KITTRIE, ZENOFF & ENG, *SENTENCING, SANCTIONS, AND CORRECTIONS* 1080 (2002)).

¹⁰⁶ *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2006) (delineating how to increase sentence levels based on amount of loss).

¹⁰⁷ 18 U.S.C. § 3664(e).

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