COMMENT

UNSETTLED: VICTIM DISCRETION IN THE ADMINISTRATION AND ENFORCEMENT OF CRIMINAL RESTITUTION ORDERS

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INTRODUCTION

In 2008, a prominent Philadelphia businessman, Donald Dougherty, Jr., was charged with nearly one hundred counts of fraud, theft, bribery, and tax evasion.[1] Dougherty was accused of engaging in illegal accounting practices as the owner, president, and sole shareholder of Dougherty Electric, Inc., an electrical contracting business.[2] As a result of the accounting scheme, Dougherty defrauded the United States government of well over $1 million in taxes.[3] In addition, Dougherty defrauded IBEW Local 98, the union with which his business contracted, of more than $670,000 in contributions owed to the IBEW benefit and pension plan.[4] Dougherty pled guilty to all charges.[5]

After Dougherty entered his plea, the court sentenced him to twenty-four months in prison.[6] In addition, pursuant to the federal Mandatory Victims Restitution Act (MVRA),[7] the court ordered Dougherty to repay the victims of the crime for the losses suffered, $2.3 million owed in total to the United States government and the IBEW.[8] The colorful facts of the case aside, nothing about the proceeding was particularly unusual.[9]

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1 *See* United States v. Dougherty, Crim No. 07-361, 2008 WL 5428282, at *1 (E.D. Pa. Dec. 30, 2008).

2 *Id.*

3 Motion to Mark Restitution Award Satisfied at 1, United States v. Dougherty, No. 07-361, (E.D. Pa. Mar. 8, 2016), ECF No. 169 [hereinafter Motion to Mark Restitution Award Satisfied].

4 *Id.*

5 *Dougherty*, 2008 WL 5428282, at *1.

6 Motion to Mark Restitution Award Satisfied, *supra* note 3, at 1.

7 18 U.S.C. § 3663A (2012). Criminal restitution involves an offender compensating a victim for a wrong the offender inflicted on the victim. *Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8 *Id.*

9 Dougherty admitted to bribing both a bank vice president and a union official to cover up the scheme. *See* Dougherty, 2008 WL 542828, at *1.

That is until March 2016, when Dougherty petitioned the District Court for the Eastern District of Pennsylvania to have his restitution payment "marked as satisfied."[10] Dougherty had made a lump-sum payment of $2.5 million to the federal government in December 2015, which fully satisfied his outstanding restitution and back taxes.[11] Additionally, Dougherty had entered into a settlement agreement with the IBEW in 2011.[12] By the terms of the settlement, Dougherty paid a lump sum of $200,000 to the union in exchange for "satisfaction of all obligations owed to IBEW and the IBEW Benefit Funds arising from the conduct underlying the restitution order."[13] In his petition, Dougherty contended that he had fulfilled his restitution obligation and the court should recognize as much.

The court has yet to rule on Dougherty's petition.[14] But the question it raises is a difficult one—whether a victim and defendant may settle a restitution payment under the MVRA is one that courts have not fully resolved.

The MVRA is the federal statute that regulates restitution for the most serious federal crimes.[15] Congress enacted the MVRA to bring the federal restitution scheme more in line with the objectives of the victims' rights movement by forcing sentencing judges to enter orders of restitution for the full amount of a victim's loss. In passing the MVRA, Congress severely restricted judicial discretion in ordering restitution at the time of sentencing.[16] In the same legislative act, Congress also bolstered the MVRA's enforcement clause to ensure victims could control their participation in the restitution process.[17] These two provisions are in tension when courts seek to apply the MVRA: although both provisions are intended to promote victims' rights, they come into conflict when determining the scope of a victim's ability to settle outstanding restitution orders.

This Comment argues that the enforcement provisions of the MVRA provide mechanisms by which a willing victim may settle an outstanding restitution order with a criminal defendant. The MVRA's limitation on judicial discretion is not a limitation on a victim's ability to dispose of

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10 Motion to Mark Restitution Award Satisfied, *supra* note 3, at 1.

11 *Id.*

12 *Id.* at 2.

13 *Id.*

14 It seems unlikely that the court will rule on the petition, as over eighteen months have elapsed since the initial petition. The reason for this delay, or for the court's decision to not rule on the petition, is not entirely clear.

15 The MVRA applies to crimes of violence, property crimes, drug crimes, and consumer product crimes in which an identifiable victim or victims has suffered a physical injury or pecuniary loss. 18 U.S.C. § 3663A(c)(1)(A) (2012).

16 *See* § 3663A(a)(1) ("Notwithstanding any other provision of law . . . the court shall order . . . that the defendant make restitution to the victim of the offense.").

17 18 U.S.C. § 3664 (2012); *see also infra* Section I.A (discussing MVRA enforcement provisions).

restitution in a way she sees fit. Courts and judges err when they conflate a lack of judicial discretion in ordering restitution with a lack of victim discretion in settling such an order.

Not only is this a permissible reading of the statutory scheme, it is also a preferable one. The benefits of such an approach are twofold. First, it would safeguard the right of victims to participate in the criminal justice process, a central tenet of the victims' rights movement. Second, for at least a certain segment of the victim community, it would increase victim satisfaction with restitution.

Part I of this Comment explores the text, history, and enacting intent of the MVRA as well as the case law it has spawned. Part II provides a framework for analyzing whether the MVRA's enforcement provisions provide a victim with discretion that can be exercised to settle an outstanding restitution order. It then applies that framework to three specific provisions of the MVRA. Part III explains why victims may choose to settle an outstanding restitution order. Part IV explores potential negative implications of recognizing such victim discretion. Part V evaluates the procedural and information hurdles to settlement and explores policy recommendations for Congress and federal sentencing judges to lower those barriers.

I. RESTITUTION AND THE MVRA

A. *History of Restitution*

Restitution has a long legal history. It existed as a legal rule as far back as Hammurabi's Code.[18] From the Bible to the Common Law of England, restitution played an important role in the administration of justice in a variety of legal systems.[19]

Criminal restitution has a similarly long history in America. Borrowing from English common law, the early American Republic enacted restitution statutes. In 1802, Congress passed a law that provided monetary restitution to victims of robbery, larceny, or trespass committed by a U.S. citizen on Indian Territory.[20] But as criminal law became more formalized during the

18 *See* THE CODE OF HAMMURABI KING OF BABYLON 13 (Robert Francis Harper trans., 2d ed. 1904) (c. 2250 B.C.E.) ("If a man steal ox or sheep . . . or boat—if it be from a god (temple) or a palace, he shall restore thirtyfold; if it be from a freeman, he shall render tenfold. If the thief has nothing wherewith to pay he shall be put to death.").

19 *See* Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2717-19 (2005) (providing a brief history of criminal restitution from Hammurabi's Code through the early Republic era).

20 An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 13, § 4, 2 Stat. 139, 141 (1802).

later nineteenth and early twentieth centuries, the role of restitution diminished,[21] so much so that for a significant part of the twentieth century, restitution played only a bit part in the American criminal justice system.[22]

The victims' rights movement in the 1970s and 1980s revitalized restitution as a prominent element of the American criminal justice system. Emerging out of a societal fear of crime in America, the movement criticized the criminal justice system as being too focused on protecting the rights of offenders at the expense of victims.[23] Calling for a criminal justice system that focused on the needs of victims, the movement advocated for federal legislation that, *inter alia*, guaranteed restitution to victims.[24]

This advocacy culminated in the 1982 President's Task Force on Victims of Crimes, which conducted a national survey on the challenges faced by victims of crime and put forth policy recommendations to address those challenges.[25] A key component of those policy recommendations was legislation guaranteeing victims the right to restitution.[26] As the Task Force's Final Report concluded: "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."[27]

The same year the Task Force was created, Congress enacted the Victim and Witness Protection Act (VWPA) of 1982.[28] The VWPA created the framework for federal restitution, but, critically, it did not mandate restitution be ordered in all cases. The VWPA instructed sentencing judges to consider "the financial resources of the defendant," as well as "the financial needs and earning ability of the defendant and the defendant's dependents."[29]

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21 *See* Kleinhaus, *supra* note 19, at 2718 ("[A]s criminal law became more developed, the idea of payments between individuals became associated with tort or civil law; the state completely took over the administration of criminal law, and restitution became mostly divorced from the arena of state punishment.").

22 For example, pursuant to the Federal Probation Act of 1925, federal judges could order restitution only as a condition of probation. *See* 18 U.S.C. § 3651, *repealed by* Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1984) ("While on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.").

23 Kleinhaus, *supra* note 19, at 2719-20.

24 *Id.*

25 *See* U.S. DEP'T OF JUSTICE, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 17-18, 72-73 (1982).

26 *Id.* at 17-18.

27 *Id.* at 79.

28 *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1255 (codified at 18 U.S.C. §§ 1512–15, 3663–64 (2012)).

29 18 U.S.C. § 3663(a) (2012).

In effect, the statute gave sentencing judges broad discretion to ensure that a restitution order did not exceed a defendant's ability to pay.

The 1996 Mandatory Victims Restitution Act (MVRA) was enacted in part to address this grant of judicial discretion.[30] The legislation was first introduced because the victims' rights movement and their congressional allies were dissatisfied with the leniency shown by judges in determining whether to order restitution.[31] As the Senate Report that accompanied the MVRA observed: "This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due."[32]

The MVRA mandated that judges enter an award of restitution for the full amount of loss suffered by victims. Specifically, the MVRA provides that "[n]otwithstanding any other provision of law . . . the court shall order . . . the defendant [to] make restitution to the victim of the offense."[33] Moreover, Congress required that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court."[34] The statutory scheme curtailed judicial discretion in an attempt to bolster victim satisfaction with restitution.

An additional and related goal of the MVRA was to create a uniform procedure for awarding and enforcing restitution payments. The Senate Report stated that "this legislation is needed to replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure."[35] Prior to enactment of the MVRA, the VWPA provided that restitution orders "shall be issued and enforced in accordance with section 3664."[36] As initially drafted, however, 18 U.S.C § 3664 did not provide a clear means of enforcing restitution orders.[37] Although not explicit in the statutory scheme, victims awarded restitution under the VWPA enforced restitution orders through a civil enforcement mechanism.[38] In contrast, other statutes provided more specific and robust enforcement schemes. For example, the Violent Crime Control and Law Enforcement Act, which required defendants to make restitution awards to

30 Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified at 18 U.S.C. §§ 3613A, 3663A (2012)).

31 Senator Paul Simon, an opponent of the bill, complained that the sponsors wanted to "replace the current system, which allows judges to order victim restitution in certain types of cases," with an "an inflexible mandate" to order restitution. S. REP. NO. 104-179, at 30 (1995).

32 *Id.* at 12.

33 § 3663A(a)(1).

34 § 3664(f)(1)(A).

35 *See* S. REP. NO. 104-179, at 12 (1995).

36 § 3663A(d).

37 Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820.

38 *See, e.g.*, Lyndonville Sav. Bank & Tr. Co. v. Lussier, 211 F.3d 697, 703 (2d Cir. 2000) (upholding an award of criminal restitution obtained through civil enforcement).

victims, provides that "[a]n order of restitution also may be enforced by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action."[39]

With the enactment of the MVRA, Congress both streamlined and expanded the enforcement scheme for restitution orders. The MVRA replaced the piecemeal enforcement provisions with a single scheme, the procedures of a revised § 3664.[40] In addition, Congress fleshed out the provisions for calculating, awarding, and enforcing restitution.[41] According to Congress, the mechanisms provide "a streamlined process for the determination of both the amount of restitution owed to each victim and the terms of repayment based on a reasonable interpretation of the defendant's economic circumstances."[42] With only minor changes since its enactment in 1996, the MVRA remains the basis of the current federal restitution scheme.

B. *Critique of the MVRA*

Although the MVRA remains good law, several criticisms have been levied against the statute and the federal restitution scheme more broadly. First, commentators have argued that the federal restitution scheme does not comply with the requirements of the Fifth Amendment's Ex Post Facto Clause[43] and the Sixth Amendment's guarantee of a jury trial for all elements of a crime.[44] Although the commentators raise plausible arguments that the MVRA brushes up against the constitutional limits of the Fifth and Sixth Amendments, this Comment will not spend much time discussing these arguments for two reasons. First, courts have not found such arguments

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39 Pub. L. No. 103-322, 108 Stat. 1796, 1904 (1994).

40 Note that the enforcement scheme applies to all restitution orders. *See* 18 U.S.C. § 3556 (2012).

41 18 U.S.C. § 3664 (2012).

42 S. REP. NO. 179, at 20 (1995).

43 For discussion on whether retroactive application of the MVRA to a defendant who committed a crime before the statute's enactment is a violation of the Fifth Amendment Ex Post Facto Clause, see Irene J. Chase, Comment, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463, 468-75 (2001). *See also* Kleinhaus, *supra* note 19, at 2737-44 (summarizing the Circuit split on the MVRA and the Fifth Amendment); *cf.* Heidi M. Grogan, Comment, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079 (2005).

44 *See* Kleinhaus, *supra* note 19, at 2714-15, 2758-64 (discussing how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), have led to Sixth Amendment challenges to restitution orders under the MVRA and VWPA); *see also* Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will Courts Say so After* Southern Union v. United States*?*, 65 ALA. L. REV. 803, 809-10 (2013) (arguing that the MVRA and VWPA violate the Sixth Amendment).

persuasive enough to strike down the MVRA,[45] so the practical impact of the constitutional critique on the operation of the federal restitution scheme is limited. And, as will be discussed more fully below, the constitutional criticism is not particularly relevant for the question of settlement—whether victims may settle an outstanding restitution award is a question of statutory interpretation.

A second criticism of the MVRA, raised by scholars such as Matthew Dickman, is that the federal restitution scheme has not furthered its stated goal of ensuring victims are adequately compensated.[46] Dickman has noted that the amount of restitution owed by defendants to victims has exploded even as the percent of restitution repaid has declined.[47] This argument is much more salient to this Comment's focus and will be explored in depth later.[48]

C. *The Criminal/Civil Split*

Before moving on, it is important to note that the critiques over the constitutionality and effectiveness of the MVRA exists within the context of a more fundamental debate over the nature of criminal restitution. To sketch that debate quickly, restitution serves two related but distinct goals. First, restitution compensates victims of crime. Second, by forcing the criminal to pay, it holds criminals responsible for their actions.[49] Although these aims are not necessarily mutually exclusive, this dual purpose has led to a disagreement as to the proper characterization of restitution. That is, whether restitution is a criminal penalty akin to a fine, or a civil award like damages. Scholars have laboriously tried to resolve the criminal/civil debate and the circuit split that it precipitated.[50]

Although it is beyond the scope of this Comment to definitively resolve that debate, it nevertheless bears upon the following analysis. In interpreting the MVRA's enforcement scheme, courts have used the nature of restitution

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45 *See* Kleinhaus, *supra* note 19, at 2758 ("The vast majority of federal judges that have heard Sixth Amendment challenges to federal restitution orders have used the 'statutory maximum' language from the *Apprendi* decision as one method of striking down the challenges.").

46 Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1690-93 (2009).

47 *Id.* at 1690-99.

48 *See infra* Part III.

49 *See* Kleinhaus, *supra* note 19, at 2722 (inquiring whether Congress implemented the VWPA and the MVRA "to add a punitive measure to defendants' sentences, or a civil compensatory remedy for victims").

50 The majority view, endorsed by the First, Second, Third, and Ninth Circuits, is that restitution is criminal. The minority view, endorsed by the Tenth and Seventh Circuits, is that restitution is civil. *See* Chase, *supra* note 43, at 475-88 (discussing the Circuit split); Kleinhaus, *supra* note 19, at 2737-38 (same).

as a guide.[51] Moreover, a few courts have held that a victim may not settle a restitution obligation because "restitution is a criminal sentence."[52] Such courts have concluded that permitting such settlements violates "public policy," though precisely why that is the case has not yet been explained.[53] More concretely, courts have concluded that a victim does not have "the authority to settle, release, satisfy, or otherwise modify a restitution judgment."[54]

But such courts fail to recognize that whether a victim has "the authority to settle, release, satisfy, or otherwise modify a restitution judgment" depends upon the statutory scheme enacted by Congress. A victim may not have such authority, but not because restitution is inherently criminal. Rather, the ability of a victim to settle restitution is a function of a victim's right to participate in the administration and enforcement of restitution, which is determined by the scheme enacted by Congress to enforce restitution orders.[55] Thus, courts err in concluding that settlement is impermissible simply because restitution is (or is not) a criminal penalty. Put differently, the ability of victims to settle restitution is a matter of statutory interpretation. It is to that statutory language that this Comment now turns.

II. VICTIM SETTLEMENT

A. *A Framework for Settlement*

It may be useful to first define exactly what settlement entails within the context of criminal restitution orders. A settlement is a species of "contract that creates legally enforceable obligations."[56] In the civil litigation context, settlement refers to an agreement whereby parties settle a dispute or uncertainty concerning an obligation or other legal relationship.[57] Frequently, settlement entails the exchange of concessions to end a dispute or claim in an

51 *See e.g.*, United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006) ("More importantly, the prosecution's standing to seek restitution under the MVRA does not depend on a victim's actions. This is because . . . restitution ordered as part of a criminal sentence is a criminal penalty, not a civil remedy."); *see also* United States v. Brandner, No. 3:13-CR-00103-SLG, 2016 WL 4644463, at *4 (D. Alaska Sept. 6, 2016) ("The Court finds the Second Circuit's approach to be more consonant both with the statutory text and structure and with the Ninth Circuit's general approach to restitution, and adopts and applies that approach here.").

52 United States v. Hankins, 858 F.3d 1273, 1277 (9th Cir. 2017); *see also* United States v. Boal, 534 F.3d 965, 967-69 (8th Cir. 2008) (affirming the district court's ruling that a defendant's obligation to pay restitution cannot be waived or released by the victim).

53 *E.g.*, *Boal*, 534 F.3d at 967.

54 *Hankins*, 858 F.3d at 1277.

55 *See infra* Part II.

56 D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899, 906 (Mo. 2010).

57 *Settlement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

attempt to forestall or avoid litigation.[58] Within the criminal law context, the most analogous proceeding to a civil settlement is a plea bargain. Fundamentally, a plea bargain is "[a] defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state."[59]

This Comment defines settlement as a legally enforceable agreement by which a victim forgoes her entitlement to restitution, either in whole or in part, in exchange for some consideration from the defendant. As in the case of Dougherty and Local 98, a victim may release the defendant from paying the full amount of restitution in exchange for an upfront, lump-sum payment of a portion of that order.[60] At this point, let us put aside the question of when or why victims would be willing to strike such a bargain. As will be further demonstrated, assume that some segment of the victim population would be willing to do so.

Two conditions, then, must be met for a victim to settle a restitution order. First, the statutory scheme must provide the victim with an opportunity to exercise discretion to effectuate the agreement. Absent such discretion, a victim would not be able to carry out her end of the bargain. Second, the exercise of that discretion must absolve the defendant of paying restitution either in part or in full. If this is not possible, then the defendant will have no incentive to strike a deal. To reiterate, a victim must (i) have discretion to effectuate a settlement, and (ii) that discretion must be able to absolve a defendant of her restitution order.

B. *Applying the Framework*

Congress enacted § 3664 to manage the administration and enforcement of restitution orders. Section 3664 grants victims the right to participate at certain points in the administration and enforcement scheme.[61] It also makes clear that no victim is required to participate in any part of the administration of the restitution order.[62] Provisions that provide victims a right, but not an obligation, to participate in the enforcement scheme satisfy the first necessary prong of settlement. Inherent in the right to participate in the administration of restitution is the discretion of whether to exercise that right. If § 3664

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58 *Id*.

59 HERBERT S. MILLER, WILLIAM F. MCDONALD, & JAMES A. CRAMER, PLEA BARGAINING IN THE UNITED STATES 1-2 (1978).

60 This is not the only potential example of a bargain that a victim and defendant may strike, but it is probably the most common. *See infra* Part III.

61 Those courts who have found restitution impermissible often overlook this point. The explicit statutory grant of a victim's right to participate in the restitution process is why restitution payments may be settled.

62 *See* 18 U.S.C. § 3664(g)(1) (2012) ("No victim shall be required to participate in any phase of a restitution order.").

allows a victim to exercise that discretion in a way that absolves the defendant of paying restitution, then a victim may settle an outstanding order.

1. Pre-Issuance Mechanisms

Victims cannot settle restitution prior to the issuance of a restitution order because § 3664 provides victims with neither a grant of discretion nor the ability to absolve the defendant from paying restitution. Section 3663A(a)(1) of the MVRA mandates that sentencing judges order restitution in the full amount to victims: "Notwithstanding any other provision of law . . . the court shall order . . . defendant make restitution to the victim of the offense."[63] By eliminating judicial discretion in ordering restitution, the MVRA prevents victims from exercising discretion in the issuance of restitution orders. Moreover, the MVRA's enforcement scheme does not provide a mechanism for a victim to absolve the defendant from paying restitution at the pre-issuance stage.

Although not employing this analytical framework, several courts have affirmed this position. In *United States v. Gallant*, the Tenth Circuit held that the MVRA requires the sentencing court to order restitution to victims despite an agreement between the victim and the defendant to release the defendant from "further liability" in exchange for $60,000.[64] The court reasoned that a private settlement cannot abrogate the requirement of a district court to order restitution to victims.[65] This position is consistent with the text of the MVRA: Judges must order restitution. The absence of victim discretion leaves no means by which a victim can settle a restitution order prior to a sentencing judge ordering restitution.

2. Post-Issuance Mechanisms

Section 3664 grants victims much broader discretion in structuring, administering, and enforcing restitution orders once issued. This too is consistent with the text of the statutory scheme. Section 3663A(a)(1) requires judges to "order" restitution to victims, but § 3663A(d) dictates that orders are to be "enforced in accordance with section 3664."[66] Section 3664 contemplates more active victim participation in the post-issuance enforcement of restitution orders. In other words, the lack of judicial

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63 § 3663A(a)(1).

64 537 F.3d 1202, 1250 (10th Cir. 2008); *see also* United States v. Elson, 577 F.3d 713, 733 (6th Cir. 2009) (rejecting the argument that a private pre-order settlement prevented a district from issuing a restitution order).

65 *See Gallant*, 537 F.3d at 1250.

66 § 3663A(d).

discretion in issuing restitution orders should not be conflated to limit victim discretion in enforcing restitution.

Three such post-issuance provisions stand out as mechanisms by which victims could settle outstanding restitution orders. All three mechanisms provide victims with the necessary discretion to effectuate an agreement. Further, to varying degrees, the exercise of that discretion can be used to absolve defendants from paying outstanding restitution orders.

a. *Section 3664(f)*

Section 3664(f), which grants the sentencing court leeway in structuring the payment scheme of a restitution order, is the most limited mechanism by which a victim can effectuate a settlement.[67] A sentencing court must determine whether an order should take the form of "a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments."[68]

Importantly, § 3664(f)(A)(4) affords victims a limited right to participate in that determination. The provision provides that "if the victim agrees" a court may structure restitution as in-kind payments in the form of "services rendered to the victim or a person or organization other than the victim."[69] Here, the first necessary condition is met: the mechanism's contemplation of victim discretion is explicit. In fact, the drafters of the provision recognized and endorsed the mechanism as a means by which victims could exercise control over the restitution process.[70]

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67 §§ 3664(f)(3)(A)–(4).

68 § 3664(f)(3)(A).

69 § 3664(f)(4).

70 Although this author is not aware of a case in which the provision has been utilized, Congress recognized that victims could choose to structure restitution in this way. During a hearing before the Senate Judiciary Committee, an exchange between then-Senator Joe Biden and Judge Maryanne Barry (then a district court judge for the District of New Jersey as well as Chair of the Committee on Criminal Law for the Judicial Conference) illustrates this point:

> Judge Barry: There are other things that can be applied as well. You have it in your statute right now [referring to what became § 3664(f)], and quite candidly I have never seen it applied, but it is there and there is room for the indigent defendant to do something for the victim . . . if the victim consents, the court may order restitution in services in lieu of money or make restitution to a person or organization designated by the victim, or, I suggest, to the community . . . .
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> Senator Biden: Judge, I realize we put that in, but one of the frustrations is . . . no court has been imaginative enough or diligent enough or concerned enough or interested enough or aware enough to do that. I wonder why.
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> Judge Barry: No one has ever asked me to do it.
>
> Senator Biden: *Well, the statute says you have the authority to do it*. I doubt whether the victims know about it.

Utilizing § 3664(f)(4), a victim could absolve a defendant from paying an outstanding restitution order. The victim would petition the court to structure, or restructure, the restitution order to take the form of in-kind payments. The in-kind payment would be directed to the victim (or other entity) and consist of nominal services. The conversion of the monetary order into nominal services would absolve the defendant of obligations under the outstanding restitution order.

Even though both conditions for settlement are met, the § 3664(f) mechanism is perhaps the most difficult tool with which to effectuate settlement. First, the scope of victim discretion is ambiguous. A sentencing judge may not order in-kind payments to the victim without victim consent, but in practice, it is not clear that a victim may initiate this process.[71] Second, the mechanism may not effectively absolve the defendant of her liability. It is not clear that a sentencing court would permit the conversion of monetary restitution into nominal services. A court that required a demonstration that the value of services equated to the value of the monetary order would strip the mechanism of its effectiveness as a tool for settlement.

This demonstrates the more fundamental issue with using § 3664(f) as a settlement tool. The provision requires the acquiescence of the sentencing judge to settlement because it is left to the judge to structure the restitution order under this provision. The judge then retains a veto on the agreement. While judicial oversight may carry other benefits,[72] it limits the ability of victims to effectuate a settlement agreement.

b. *Section 3664(g)*

The enforcement scheme's most robust grant of victim discretion is in § 3664(g). The first subchapter of that provision provides that "[n]o victim shall be required to participate in any phase of a restitution order."[73] The grant of discretion afforded by § 3664(g)(1) is broad, and courts generally agree that a victim can utilize this provision to forgo accepting restitution payments altogether.[74] In effect, the provision allows victims to waive restitution.

However, whether waiving restitution absolves the defendant from having to pay the outstanding order is disputed. That is because § 3664(g)(2)

Hearing on S. 173 Before the S. Comm. on the Judiciary, 104th Cong. 17 (1995) (statements of Sen. Biden and J. Maryanne Barry) (emphasis added).

71 *But see supra* discussion accompanying note 70.

72 *See infra* Part III.

73 § 3664(g)(1).

74 *See e.g.*, United States v. Speakman, 594 F.3d 1165, 1175 (10th Cir. 2010) ("[C]ourts are not required to order restitution if the victim declines the restitution . . . ."); *see also* United States v. Johnson, 378 F.3d 230, 244-45 (2d Cir. 2004) (interpreting § 3664(g) to read that "a victim need not accept restitution and . . . may assign his interest in restitution to the Crime Victims Fund").

provides that "[a] victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund . . . without in any way impairing the obligation of the defendant to make such payments."[75] This provision has precipitated a circuit split as to whether such waiver permits a court to transfer *sua sponte* the outstanding restitution obligation to the Crime Victims Fund (CVF).[76] If a court may, or even must, assign the restitution to the CVF, then the provision is not a useful tool for settlement because it would not allow a victim to absolve the defendant's outstanding restitution obligation. As that is a necessary condition to effectuate settlement, a victim's ability to settle an outstanding order using this mechanism turns on how a court resolves this question.

i. No *Sua Sponte* Transfer

A minority of courts have held that *sua sponte* transfer is inconsistent with the MVRA. In *United States v. Speakman*, the Tenth Circuit held that when a victim waives a restitution order, the waiver absolves the defendant from paying restitution because a court cannot on its own assign the payment to the CVF.[77] The Tenth Circuit reasoned that restitution is only mandatory when ordered to the victim or the victim's estate. The court interpreted § 3664(g)(2) to permit restitution be made to the CVF only if the "*victim* 'assign[s] the victim's interest in restitution payments to the Crime Victims Fund.'"[78] Further, the *Speakman* court noted that the Senate considered and rejected a broader version of § 3664(g)(1), which, quoting a Senate Report, would have provided:

> No victim shall be required to participate in any phase of a restitution order. If a victim declines to receive restitution made mandatory by this title, *the court shall order that the victim's share of any restitution owed be deposited in the Crime Victims Fund in the Treasury.*[79]

This version of the statue would have required a sentencing court to assign outstanding restitution to the CVF even when a victim waived her right to restitution. The Tenth Circuit reasoned that the Senate's rejection of this language supported the conclusion that only a victim may assign an outstanding restitution order to the CVF.

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75 § 3664(g)(2).

76 *See infra* subsections II.B.2.b.i–ii.

77 594 F.3d at 1175.

78 *Id.* (quoting § 3664(g)(2)) (alteration in original).

79 *Id.* (quoting S. REP. NO. 104-179, at 6 (1995) (alteration in opinion)).

Under a *Speakman* interpretation, a victim could exercise discretion to absolve the defendant from paying an outstanding restitution order.[80] A victim could either agree to waive the entirety of the restitution for some guaranteed consideration or agree to waive restitution once an agreed upon amount of restitution had been paid, which would have the effect of settling restitution. Either way, such a reading makes § 3664(g)(1) a viable tool for settlement.

ii. *Sua Sponte* Transfer

A majority of circuits reject the *Speakman* approach. The leading case to this effect is the Second Circuit's opinion in *United States v. Johnson*.[81] The *Johnson* court started from the position that the language of § 3663A obligates a sentencing court to order restitution, "[n]otwithstanding any other provision of law."[82] Therefore, the *Johnson* court reasoned, neither § 3664(g)(1) nor (g)(2) can reasonably be interpreted as carving out an exception to the mandatory nature of § 3663A.[83] Without some evidence in the text or history of the legislation to supersede the plain language of § 3663A that restitution is mandatory, the court held that the defendants' arguments against *sua sponte* transfer must be rejected. The *Johnson* court further concluded that although § 3664(g)(2) authorizes victims to make such an assignment, it does not preclude the court from doing so.

Other circuits have followed in *Johnson*'s footsteps.[84] Moreover, there is reason to believe that those circuits that classify restitution as primarily criminal will also follow the decision in *Johnson*.[85]

Although the *Johnson* interpretation does not prevent victims from waiving restitution, it does curtail the effectiveness of § 3664(g)(1) mechanisms as a settlement tool. Under *Johnson*, when a victim waives restitution, then a sentencing court must assign the outstanding obligation to the CVF. Therefore, the *Johnson* approach prevents a victim from absolving the defendant's outstanding obligation, which makes settlement impossible. Absent the

80 In addition to the Tenth Circuit, the Seventh Circuit also endorses this reading of §§ 3664 (g)(1)–(2). United States v. Pawilinski, 374 F.3d 536, 539-50 (7th Cir. 2004).

81 378 F.3d 230, 244-45 (2d Cir. 2004).

82 *Id*.

83 *Id*.

84 The First and Ninth Circuits have also held that waiving restitution does not absolve the defendant's obligation. *See* United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006); United States v. Hankins, 858 F.3d 1273, 1277 (9th Cir. 2017).

85 *See, e.g.*, United States v. Brandner, No. 3:13-CR-00103-SLG, 2016 WL 4644463, at *4 (D. Alaska Sept. 6, 2016) ("The Court finds the Second Circuit's approach to be more consonant both with the statutory text and structure and with the Ninth Circuit's general approach to restitution, and adopts and applies that approach here.").

Supreme Court resolving this split or Congress amending the statute, the use of § 3664(g)(1) as a tool for settlement will depend on where a victim lives.[86]

c. *Section 3664 (m)(1)(B)*

Section 3664(m) is the mechanism that is most conducive to victim settlement because it grants broad discretion to victims and that discretion may be exercised to absolve a defendant of an outstanding restitution order.

Section 3664(m) governs the collection of restitution orders. It provides two means by which a restitution order may be enforced. First, the government may enforce restitution orders in the same way it would collect fines under 18 U.S.C § 227(c).[87] Second, a victim may enforce a restitution order by means of an abstract judgment in the form of "a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State."[88]

The victim-enforcement mechanisms of § 3664(m)(1)(B) can be used to settle an outstanding restitution order. While the statute places some limitations on a victim's ability to enforce a restitution order across state lines, it does not eliminate victim discretion altogether. Once a victim "register[s], record[s], docket[s], or index[es] such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district

86 The *Johnson* court's reasoning is nonetheless flawed. The *Johnson* court correctly states that § 3663A expressly prohibits interpretation of "any other provision of law" to create an exception to the obligations imposed on sentencing courts. But that obligation is only to "order" restitution be made to the victim. It is not an obligation that the restitution order be administered and enforced exactly the way in which the order was issued. Several of the statute's enforcement provisions make clear that once a court has ordered restitution be made to the victim, then the victims and the court may structure or change the order. Most obviously, § 3664(g)(2) allows a victim to direct restitution to the CVF.

The *Johnson* court's interpretation conflates lack of judicial discretion in ordering restitution with a lack of subsequent court and victim discretion in administering that restitution order. In doing so, the *Johnson* court renders most of § 3664 moot. That is contrary to the clear legislative intent in creating a means by which to administer restitution in a uniform manner. A more appropriate interpretation would make the assignment of restitution to the CVF a function of a victim's choice—that is, a court may (or may not) assign restitution depending on what the victim wishes. Unfortunately, neither the *Speakman* nor the *Johnson* court adopts such a victim-centric approach.

87 18 U.S.C. § 3664(m) (2012).

88 § 3664(m)(1)(B). It is worth highlighting the final language of the statute. In the version approved by both the House and Senate Judiciary Committees, the relevant section reads that a victim may enforce the order "in the same manner as a judgment in a civil action." S. REP. NO. 104-179, at 7 (1995); H.R. REP. NO. 104-16, at 8 (1996). However, by the time of its passage, the law was amended to read as it does now. The Senate Judiciary Committee approved the pre-amendment bill on April 17, 1996 and the House Judiciary Committee approved it on April 18, 1996. The final post-amendment bill was passed by both houses on April 24, 1996. It is not clear from the legislative history why the amendment was made.

court is located," she has discretion to act upon that lien "in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State."[89] This provision provides victims a broad grant of discretion regarding when and how to enforce a restitution order.

A victim may exercise that discretion to absolve a defendant's obligation by assigning the lien to the defendant. Doing so would absolve the defendant's obligation because, in general, a party may not have a lien on his or her own property. "A lien is extinguished if it and the ownership of the property become vested in one person."[90] The extinguishment of the lien would absolve the defendant's outstanding restitution order.

Section 3664(m) thus provides a useful settlement tool. After a victim "register[ed], record[ed], docket[ed], or index[ed] such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located," the victim could then assign that lien to the defendant in exchange for consideration. The lien would merge with the defendant's estate and absolve her of outstanding liability.[91] The victim and defendant would memorialize that bargain in a contract to effectuate that agreement.[92]

* * *

To settle an outstanding restitution order, a victim must (i) have discretion to effectuate a settlement and (ii) that discretion must be able to absolve a defendant of her restitution order. Section 3664 provides victims with an opportunity to participate in the administration and enforcement of restitution orders. Through the mechanisms described, that opportunity to participate can be exercised to absolve defendants of an outstanding restitution order. Under the existing restitution scheme, victims may exercise discretion to settle outstanding restitution orders. In other words, the MVRA provides victims with the opportunity and "the authority to settle, release, satisfy, or otherwise modify a restitution judgment."[93]

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89 § 3664(m)(1)(B).

90 51 AM. JUR. 2D *Liens* § 64 (2018).

91 *See id.* ("The 'merger doctrine' provides that when a greater and lesser estate coincide and meet in one and the same person without any intermediate estate, the lesser is merged into the greater; when the holder of a lien acquires the estate of the lienor, the lien interest is merged in the fee and the lien is extinguished.").

92 Because the lien assignment and contract would turn on state law, the ability of victims to take advantage of this mechanism would vary according to the contours of individual state contract and property law. However, that is true regardless of what the mechanism is being used for—that is, whether being used to settle a restitution payment as described here or being used to collect the lien in the full amount.

93 United States v. Hankins, 858 F.3d 1273, 1277 (9th Cir. 2017).

III. VICTIM CONTROL

Recognizing that the MVRA permits victims to settle outstanding restitution orders raises two questions. First, why does the MVRA permit such discretion? And second, why would victims exercise that discretion? This Part explores the history of the victims' rights movement, the enacting intent of the MVRA, and the experience of victims with the federal restitution scheme to provide answers.

A. *Ensuring Victim Participation*

Providing a victim the opportunity to participate in the administration and enforcement of restitution orders is consistent with the goals of the victim rights' movements and the enacting intent of the MVRA.

Although the modern victims' rights movement consists of a heterogeneous group of scholars, advocates, and entities, a central tenet of the movement is that victim participation in the criminal justice system should be enhanced.[94] As one leading scholar on the victims' rights movement observed: "The movement, in short, seeks to create a third model of criminal procedure—one focusing not on prosecuting cases in the system or protecting the civil rights of criminal defendants but rather guarantee victims the right to participate in the process."[95]

The MVRA's enforcement mechanisms effectuate that goal. As previously noted, the provisions of § 3664 provide victims with the right, but not the obligation, to participate in the administration and enforcement of restitution orders. Settlement carries the goal of enhanced victim participation into the administration and enforcement of restitution orders.

Section 3664's alignment with the victims' rights movement is no coincidence. Congress drafted the MVRA to vindicate victims' rights. In explaining the need for the statute, the House Report stated:

> There has been significant progress over the last 15 years in addressing the needs of crime victims. Their voices are no longer missing from the national debate concerning criminal justice. In spite of this progress, however, additional reforms are needed. Under existing law, crime victims' rights are still too often overlooked.[96]

The Senate Report echoed that purpose in declaring that it was "essential that the criminal justice system recognize the impact that crime has on the victim."[97]

Moreover, lawmakers understood that MVRA promoted the participatory goal of the victims' rights movement. Then-Senator Joe Biden made this

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94 *See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 19-40 (2d ed. 1999).

95 *Id*. at 5.

96 H.R. REP. NO. 104-16, at 4 (1995).

97 S. REP. NO. 104-179, at 18 (1995).

point explicitly when he described victims as "forgotten" by the system and emphasized that "compassion and humanity dictate that we now try to restore to the victim the rights, the respect, and the protection they deserve."[98] The provisions of § 3664 that provide victims a right to participate in the restitution process reflect this enacting intent.

In sum, the ability of victims to settle restitution orders is consistent with the goal of bolstering victim participation in the criminal justice system that animates both the victims' rights movement and the MVRA.

B. *Forgoing Restitution Payments*

Recall that the MVRA requires a sentencing judge to order restitution to the victim in the full amount of the victim's loss. If a victim does not settle an outstanding restitution order, then she is entitled to that sum of money. By definition, settlement entails forgoing at least some of that entitlement. Nonetheless, there are several circumstances that might motivate a victim to choose settlement.

1. Harmful Restitution

The MVRA defines a victim as anyone "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[99] The MVRA requires judges to order restitution in the full amount to all victims, with no exceptions. But there are circumstances where a victim may not actually benefit, and, in fact, may be harmed by the restitution order. The most obvious example is situations in which a victim and defendant jointly hold property.

A roughly illustrative case is *United States v. Speakman*.[100] In *Speakman*, the district court ordered the defendant, Mr. Speakman, to pay nearly $200,000 to Mrs. Speakman, his wife, after he fraudulently transferred assets from an account held by Mrs. Speakman's to a jointly held account.[101] Mrs. Speakman specifically disclaimed her interest in receiving the money, stating that she "would not want to receive any restitution obtained at the expense of any other victim," and that restitution "could set up a situation where [Mr. Speakman] might pursue [her] with empty promises."[102]

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98 *Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 4 (1995).

99 18 U.S.C. § 3663A(a)(2) (2012).

100 594 F.3d 1165 (10th Cir. 2012).

101 *Id.* at 1167-68. Mr. Speakman had power of attorney over the account held by Mrs. Speakman to sell and buy securities, but he did not have authority to transfer assets out of the account, which is precisely what he did. *Id.* at 1167.

102 *Id.* at 1169.

In any case, restitution would not have done much good for Mrs. Speakman. Even if Mr. Speakman had the requisite assets to meet the restitution obligation, forcing him to transfer those assets to his wife would be redundant, as any such assets were mutually held.[103] Moreover, Mr. Speakman probably did not have the requisite assets. If this were the case, then Mrs. Speakman would have even greater incentives to settle the outstanding order. That is because onerous penalties accompany an outstanding restitution order.[104] Mrs. Speakman may have tried to settle the restitution order to avoid those secondary effects that could do her and her family real harm.[105]

As the *Speakman* case illustrates, some victims may be much better off by settling restitution and relieving defendants of their obligation to pay.[106]

2. Illusory Restitution

Victims who do not hold mutual property assets with defendants would probably prefer to receive the restitution order in full. But even these victims may choose to settle because of the disparity between the amount victims are owed in restitution and the amount victims can be expected to be paid.

At the end of fiscal year 2015, there was $77 billion in uncollected federal victim restitution.[107] There are several reasons for this. First, nearly eighty-five percent of criminal defendants are indigent at the time of their arrest.[108] Such defendants may not have the assets to pay restitution following conviction. In addition, restitution follows a conviction, which could include imprisonment. Defendants in jail have limited means to earn money to pay restitution. Even after release from custody, a criminal conviction is a costly barrier for future employment opportunities, which may diminish a defendant's

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103 *Id.* at 1168-70.

104 *See infra* Section IV.B.

105 Victims in such circumstances cannot avoid these consequences merely by refusing to enforce the order because the MVRA requires the government to enforce the order in the absence of victim enforcement. *See* § 3664(m)(1)(B) ("[A]t the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgement . . . . ").

Speakman is only roughly illustrative because the appellate record suggests that there were other, secondary motivations for Mrs. Speakman's decision—the possibility that unfulfilled payments would subject her to further emotional abuse. *See infra* subsection III.B.2 (discussing the emotional harm that may accompany unpaid restitution).

106 Other examples could include other family members or business partners with mutual assets.

107 U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2015 tbl.8C (2015). Note that this does not include the amount of uncollected state restitution.

108 *See* U.S. GEN. ACCOUNTING OFF., GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 105, 110 (2001).

ability to pay restitution.[109] Taken together, these factors reduce defendants' ability to make restitution payments.

Other factors may also affect recovery. First, restitution runs to anyone proximately harmed by a crime, which can lead to attenuated causation chains that dramatically inflate the total amount of restitution owed.[110] Professor Courtney Lollar has documented several examples where such attenuated chains of causation leave the defendant paying for victims' losses that are only tangentially related to the crime.[111] Second, anecdotal evidence suggests that, when faced with restitution orders that seem insurmountable, defendants are less willing to make the effort required to compensate victims.[112] Defense attorney James Felman made this point to Congress during hearings on the MVRA: "Among the costs of ordering a defendant to pay what everyone recognizes he or she cannot is that there is little incentive for the defendant to try."[113] In fact, despite making restitution orders mandatory, the MVRA has not resulted in victims receiving appreciably more restitution.[114]

Faced with such a low probability of recovering restitution in full, victims may opt to settle for several reasons. First, victims may be motivated by dissatisfaction with the restitution process. Studies indicate that victim dissatisfaction correlates with the percentage of restitution orders that go unpaid.[115] Neither the "actual dollars awarded nor payment time" have "an impact on victim satisfaction with the restitution process."[116] It could be that unpaid restitution orders create a "false hope" among victims.[117] Dissatisfied victims may settle to achieve finality and closure with the restitution process.

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109 *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003) ("The finding that ex-offenders are only one half to one third as likely as nonoffenders to be considered by employers suggests that a criminal record indeed presents a major barrier to employment").

110 *See e.g.*, United States v. Chalupnik, 514 F.3d 748, 750 (8th Cir. 2008) (vacating the district court's restitution order, which required the defendant pay even though the victim suffered no financial loss).

111 *See* Courtney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 94-95 (2014).

112 *See* Dickman, *supra* note 46, at 1697.

113 *Id.* at 1696 (quoting Felman's testimony).

114 Mandatory restitution has led to a fall in recovery rate and only a "marginal" increase in total restitution paid to victims. *See* Letter from Clarence A. Lee, Assoc. Dir., Admin. Office of the U.S. Courts, to Gary T. Engel, Dir. of Fin. Mgmt. & Assurance, U.S. Gen. Accounting Office (June 6, 2001), *in* U.S. GEN. ACCOUNTING OFF., *supra* note 108, at 105 ("[T]he Mandatory Victims Restitution Act has resulted in a large surge in criminal debt, but it has not resulted in any appreciable increase in compensation to the victims of crime, in most cases, because of the defendants' inability to pay.").

115 *See e.g.*, Robert C. Davies et. al, *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 753 (1992) (finding the percentage of the award actually paid by the offender accounts for a significant percentage of victim satisfaction).

116 *Id.*

117 *See* PEGGY TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 174-75 (2d ed. 2010) (summarizing several studies showing that unpaid restitution impedes victims' psychological recovery from crime and reduces their satisfaction with the criminal justice system).

Victims may see this as preferable to holding out hope that a defendant will be able to pay the amount in full one day.

Second, a victim may settle to maximize her net recovery. Most restitution orders are less than $5,000.[118] The cost associated with delayed payment or enforcing that order may be more than the amount recovered, thus settlement may be preferable to incurring the cost of collection. A victim may take a fraction of the total owed for an up-front payment.

Finally, a victim may be willing to settle a restitution order to maximize her share of a defendant's limited resources. For example, when there are multiple victims to which the defendant owes restitution but only limited ability to meet those obligations, a victim may be willing to settle to secure her share. Although it is unclear how often such a situation arises, it could create a potential race to the courthouse to effectuate settlement.[119]

This is not an exhaustive list of the reasons a victim may choose to settle an outstanding restitution order. The choice to settle will turn on specific factual circumstances. The individual or institutional nature of the victim, the total number of victims, the size of the restitution order, and the defendant's financial position may all contribute to a victim's willingness to settle an outstanding restitution order. Nonetheless, the above discussion demonstrates that at least some segment of the victim population may choose to forgo recovering restitution and settle an outstanding order.

IV. IMPLICATIONS OF VICTIM CONTROL

Recognizing that victims may settle restitution orders brings into focus concerning implications of victim control. First, victims may be harassed or even coerced into settling outstanding restitution orders by a defendant. Second, victims may trigger a race to the courthouse in which some victims try to collect restitution at the expense of others. Third, victims may engage in collusive bargaining with defendants. This Part explores each of these concerns in greater depth.

A. *Harassment and Coercion*

Victim harassment or coercion is a salient concern because a defendant's interests are served by a victim's decision to settle an outstanding restitution order. Most obviously, a victim that chooses to settle restitution reduces a defendant's outstanding liability. Moreover, the penalties that accompany an outstanding restitution order can be onerous. If a defendant fails to pay a

118 Dickman, *supra* note 46, at 1708.

119 *See infra* Section IV.B.

restitution order, a court may revoke probation or supervised release, force the defendant to sell property to satisfy the order, or even imprison the defendant.[120] Designed to pressure defendants to satisfy restitution orders, the consequences of unpaid restitution may push defendants to pressure victims to settle. That pressure could turn into harassment or coercion.

That said, the potential that pressure will lead to coerced settlements is mitigated by other provisions that protect victims. Statutes such as the Crime Victims' Rights Act provides victims protection from unwanted contact with defendants, which could prevent harassing solicitations to negotiate.[121] States also provide similar protection for victims.[122]

For those victims willing to engage with defendants, several factors would protect against coerced settlements. First, a victim pressured to accept an unwanted settlement can simply walk away secure in the knowledge that no entitlement is given up.[123] The default of no settlement is that the restitution order stands.[124]

Second, § 3664's enforcement mechanisms provide a check on coerced settlement. For example, a victim using § 3664(f) or § 3664(g) to settle a restitution order must return to the sentencing court to effectuate the settlement.[125] The need to return to court may deter defendants from harassing victims. In addition, the sentencing court may proactively screen out coerced settlements.[126]

Contract law provides another check on coerced settlements because it requires mutual consent, valid consideration, and holds as invalid contracts that are a byproduct of duress, undue influence, or misrepresentation.[127] A

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120 Section 3613A specifically provides that a court may:

> revoke probation or a term of supervised release, modify the terms or conditions of probation or a term of supervised release, resentence a defendant pursuant to section 3614, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution.

18 U.S.C. § 3613A (2012).

121 *See* 18 U.S.C. § 3771 (2012) ("A crime victim has . . . the right to be reasonably protected from the accused.").

122 *See, e.g.*, OKLA. CONST. art. II, § 34 ("The victim . . . of a crime has the right to know the location of the defendant following an arrest"); 18 PA. CONS. STAT. § 11.101 (2016) (establishing the Crime Victims Act in recognition of the importance of victim protection and cooperation).

123 Such a victim need not even take steps to enforce the order because the MVRA allows the government to do that on her behalf. *See* § 3664(m)(1)(A)(i).

124 Relatedly, this puts a victim willing to negotiate with a defendant in a strong bargaining position because the restitution order will necessarily be greater than any proposed settlement.

125 *See supra* Part II.

126 Note that victims using § 3664(m)(1)(B) to settle do not need to return to the sentencing court. Nonetheless, they must enter a valid contract to effectuate the release of the judgment lien.

127 RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71, 164, 175, 177 (AM. LAW INST. 1981).

defendant coerced into an unwanted settlement would have the ability to seek redress in state court to invalidate the settlement agreement. Although not fool-proof, such provisions would militate against coerced settlements.

B. *Race to the Courthouse*

Another concern is raised when multiple victims seek to maximize their recovery from a defendant's limited assets. This may trigger a race to the courthouse to settle with a defendant. For a stylized example, suppose a defendant owes two victims $5,000 each, but the defendant has only $4,000 in assets. Each victim may try and settle to maximize her individual recovery. Recall that under § 3664(m)(1)(B), victims could effectuate settlement outside the view of the sentencing court.

The case of *United States v. Perry* demonstrates that this scenario is not entirely speculative.[128] In *Perry*, a defendant convicted of securities fraud was ordered to pay restitution totaling $715,078.40 to a host of victims.[129] The district court ordered Perry to make payments to the clerk so that money could be forwarded to victims *pro rata*.[130] However, one victim, a ninety-one-year-old woman, took advantage of § 3664(m)(1)(B) to obtain a state judgment lien on Perry's property from an Ohio state court.[131] When Perry tried to liquidate his assets and turn over the money to the clerk, the lien prevented the execution of the sale. In response, the district court vacated the state lien and allowed the sale.[132]

On appeal to the Sixth Circuit, the appellees, other victims to whom restitution was owed by the defendant, argued that the district court's order was appropriate because absent such action, a race to the courthouse would ensue.[133] The Sixth Circuit dismissed the appellees concern:

> [T]he 'race to the courthouse' is a far-fetched concern. District courts have discretion to issue all sorts of orders that would interfere with the race to the courthouse: pure *pro rata* distribution, distribution to the neediest victims first, distribution to the most seriously injured first, *pro rata* within classes of victims, and so forth.[134]

According to the Sixth Circuit, a district court has the flexibility in the initial order to protect victims against being deprived of their fair share.

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128 360 F.3d 519, 539 (6th Cir. 2004).
129 *Id.* at 521.
130 *Id.*
131 *Id.* at 522.
132 *Id.*
133 *Id.* at 538.
134 *Id.*

Although a federal district court is limited in its ability to vacate a lien that conflicts with a *pro rata* order, victims may challenge the lien in state court.[135]

The Sixth Circuit's reasoning in *Perry* applies to settlement of restitution orders as well. A district court that anticipated such a problem and *ex ante* ordered restitution be distributed *pro rata* could limit the incentives to start a race. That said, the structure of § 3664(m)(1)(B) places the burden on victims to enforce compliance with the federal court's order. As was the case in *Perry*, a state court may issue a lien that conflicts with the *pro rata* distribution, but other victims will have ample room to challenge such a lien in state court. The race to the courthouse is a real, but manageable, effect of settlement.

C. *Collusion*

Victim settlement also creates the possibility that victims and defendants collude in reaching a settlement.[136] The concern is that victims may forgo their entitlement to restitution for questionable or even problematic reasons.

The *Dougherty* case highlights this concern. Recall that Dougherty was convicted of defrauding both the U.S. government and the Local 98 by engaging in fraudulent accounting to avoid contributing to the Local 98's retirement fund. Dougherty covered up the scheme by bribing union officials. Then, Dougherty and those same union officials attempted to settle the outstanding restitution order for a fraction of the total amount. The attempted settlement raises concerns about collusion. First, union officials who negotiate settlement on behalf of their members face serious principal–agency problems. Second, there is a concern that Dougherty and Local 98 may have an ongoing business relationship, which would raise concerns about arm's-length bargaining. The record shows no proof of actual collusion, but the facts raise the specter of it.

The problem is that collusive settlement negotiations would be particularly difficult for sentencing courts to police. There is limited room for a court to police such agreements *ex ante* without limiting victim discretion altogether. Further, § 3664(m)(1)(B) provides a mechanism to settle restitution outside the view of the sentencing court, so there is limited ability to police agreements reached through that mechanism *ex post*.[137]

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135 *Id.* at 538. Note that the Sixth Circuit did acknowledge that it could "conceive of cases in which the availability or function of state lien law creates problems." *Id.* at 539 n. 13.

136 Of course, any settlement requires the victim to forfeit entitlement to some sum of money for a benefit that may (or may not) comport with a strict welfare-maximizing rationale. Note that I do not attempt to define best interest in a welfare-maximizing manner. Instead, I evaluate only the effectuation of victim choice.

137 As noted, victims settling using §§ 3664 (f)(3) or (g)(1) must go through the sentencing court, which allows for some review of potentially collusive settlement. *See supra* Part II.

Nonetheless, while victim discretion opens the door to the possibility of collusive conduct, it is not clear how often such discretion will be put to abusive effect. Query how often the interests of victims and defendants will align such that the possibility of collusion is even available.

More fundamentally, the ability to enter into collusive agreement is a direct function of the discretion afforded to victims. The potential for collusive settlements may be the cost of the victim-centric focus of the criminal justice system that the MVRA expressly contemplates. That is, by valuing victims' interests, a more victim-centric criminal justice system must incorporate those views in the administration of justice even at the expense of other goals, such as maximizing the punitive effect of a sentence.

V. POLICY RECOMMENDATIONS

So far, this Comment has undertaken a largely descriptive analysis in determining whether the MVRA permits victims to settle outstanding restitution orders. It concludes with a more normative focus. First, this Part analyzes the informational and procedural barriers to victim settlement. It then discusses whether such barriers should be lowered. Determining that there is an argument in favor of lowering those barriers, this Part concludes with policy recommendations for Congress and the courts.

A. *Information and Procedural Barriers*

While the MVRA's enforcement provisions contemplate the ability of a victim to settle an outstanding restitution order, victims face substantial informational and procedural barriers to settlement.[138] That is, a victim interested in settling an outstanding restitution order may not be aware of the available procedural mechanisms or, alternatively, may not have the legal sophistication to take advantage of those mechanisms. Although it is difficult to determine the impact of such informational and procedural barriers, it is likely that those barriers are high.

A victim willing to settle an outstanding restitution order must know that settlement is a possibility, but it is far from clear that most victims or their legal representatives are aware that settlement is possible. For that matter, it

138 Specifically, by "informational barriers" I refer to characteristics of the MVRA enforcement scheme that limit victims' knowledge about the ability to settle orders. By "procedural barriers," I refer to characteristics of the MVRA enforcement scheme that increase the number or complexity of steps needed to effectuate settlement.

is not clear that sentencing judges are fully aware of how the MVRA's provisions permit settlement.[139]

Although it is difficult to prove lack of knowledge, several factors suggest informational barriers are high. First, the MVRA does not explicitly authorize settlement. There is no "this is how one settles an outstanding restitution order" clause, so a willing victim must take a close look at the MVRA to recognize the possibility. Second, there is not much case law or academic work on the subject. This Comment is the first to explicitly address restitution and settlement, and there are very few published opinions dealing with the question. Finally, even if some victims have taken advantage of the MVRA enforcement provisions in the manner outlined here, there may be very little record of it. The most effective settlement mechanism, § 3664(m)(1)(B), entails private activity outside the view of a sentencing court. The provisions that require petitioning a sentencing court may not generate a published or written opinion. Therefore, even a close observer of court opinions will be provided little notice that settlement is an option. Taken together, this suggests victims and their legal representatives face informational barriers to settlement.

As for procedural barriers, a knowing and willing victim must still jump through several hoops to effectuate a settlement.[140] It takes more than a victim assenting to a settlement agreement.[141] Rather, a victim must take affirmative steps to give the settlement legal force. Even then, it is not clear that a district or state court will recognize the settlement. Based on this Comment's research, the mechanisms outlined above are largely untested. Where a victim has tried to take advantage of the MVRA enforcement scheme to effectively settle an outstanding restitution order, namely through the waiver provision of Section 3664(g)(1), several courts have rejected the invocation of such mechanisms.[142] Procedural barriers seem to limit settlement for all but the most enterprising victims.

In sum, informational and procedural barriers likely prevent those victims interested in settling from doing so.

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139 Judge Maryanne Barry seemed to recognize that the MVRA permitted settlement of some sort during a hearing before the Senate Judiciary Committee. *See supra* note 70.

140 *See supra* Part II.

141 Therefore, to revisit the initial *Dougherty* case, unless Local 98 takes steps to initiate settlement through the MVRA's enforcement provisions, the district court should reject the petition to settle restitution. Under the MVRA's enforcement scheme, it is the victim, not the defendant, that must take affirmative steps to effectuate settlement.

142 *See e.g.*, United States v. Johnson, 378 F.3d 230, 245 (2d Cir. 2014) (concluding that a defendant's victim "may not veto," in the event of a settlement, "the obligation of the District Court to impose" an order of restitution).

B. *Lowering Barriers to Settlement*

Before turning to recommendations for lowering informational and procedural barriers, it is necessary to address the predicate normative question of whether such barriers ought to be lowered.

The case for lowering informational barriers is clearer to make. The MVRA was enacted with the intent of incorporating victims and victims' choices in the administration and enforcement of restitution orders. As this Comment has established, the mechanisms to effectuate settlement already exist. Lowering informational barriers would merely make victims more aware of how to use those mechanisms to effectuate their choices. While lowering informational barriers may also make defendants more aware of settlement and thus more likely to pressure victims, there are means to protect victims from defendants if need be.[143] Because victims should be aware of the rights granted to them by Congress, informational barriers ought to be lowered.

Lowering procedural barriers poses a more difficult question given the need to balance greater victim discretion with victim protection from unwanted settlement. On the one hand, complex procedural barriers to settlement limit victims' discretion over their participation in the administration of restitution orders by cabining the choices available to victims. This sits uncomfortably with the MVRA's goal of increasing victim participation in the restitution process. On the other hand, high procedural barriers protect against potentially coerced settlements by placing checks on victim settlement. Given this balancing, it is not implausible to argue that Congress got it right by enacting high barriers to settlement and thus erring on the side of protecting victims.

But, there are reasons to be skeptical that Congress struck the proper balance. First, Congress enacted the MVRA based on an assumption that all victims' interests would be vindicated by receiving full restitution.[144] But there is not an insignificant number of victims who may prefer to settle.[145] This indicates that Congress may not have considered the rich diversity of victim experiences covered by the MVRA. Second, courts' interpretation of the MVRA indicates that insufficient weight is given to victim participation. Instead, courts conflate the lack of judicial discretion with a lack of victim discretion. For example, the *Johnson* court's interpretation of the MVRA renders much of Section 3664 moot, which forecloses victims' ability to

143 *See supra* Part IV.

144 *See* Dickman, *supra* note 46, at 1691 (noting that Congress passed the MVRA believing it would enhance victim satisfaction by improving victim compensation).

145 *See supra* Part III.

participate in the enforcement of restitution orders.[146] Crucially, the limit on victim participation would apply whether that participation is related to settlement or not. This suggests that the lack of a simple procedural mechanism to settle an outstanding restitution order undermines victims' ability to meaningfully participate in the enforcement of restitution orders. Taken together, this suggests that lower procedural barriers to settlement may be appropriate to effectuate the full scope of victims' choices.

C. *Recommendations*

This Comment concludes with policy recommendations that would lower informational and procedural barriers to settlement and thus more fully vindicate victims' interest.

1. Congress

Critics of the MVRA have called on Congress to take dramatic steps in restructuring the federal restitution scheme.[147] While such legislative reform may be preferable, the focus of this Comment is both narrower and more practical. Instead of wholesale reform, Congress should amend § 3664 to make a victim's right to settle outstanding restitution orders explicit and procedurally less complex.

Although Congress could achieve this through several different means, the most straightforward would be to amend § 3664(m)(1)(B). Recall that this section details a victim's ability to enforce restitution orders. Congress should add language to the effect that the ability to enforce a restitution order also entails the ability to settle a restitution order. For example, Congress could amend the section to read: "A victim may enforce or dispose the restitution order in the same manner as a judgment in a civil action."[148] This would signal to both judges and victims that settlement is permissible, which would lower informational barriers. In addition, it would make clear that § 3664(m)(1)(B) is a permissible mechanism to settle restitution, which would have the effect of lowering procedural barriers.

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146 *See* discussion accompanying *supra* note 86.

147 *See* Dickman, *supra* note 46, at 1710 ("The failure of the MVRA to further victims' interests or promote offender rehabilitation mandates a change in federal restitution policy.").

148 The proposed language builds on the original version of § 3664(m)(1)(B), which provided that "the victim may enforce the restitution order in the same manner as a judgment in a civil action." S. REP. NO. 104-179, at 7 (1995).

2. Judiciary

Obviously, sentencing judges do not have the same latitude as Congress to amend the MVRA. Nonetheless, sentencing judges should leverage their role in the restitution process to lower informational and, to the degree possible under current law, procedural barriers.

Sentencing judges have the greatest ability to address current informational barriers to settlement. As noted, it is unclear whether victims are aware of the procedural mechanisms available to settle restitution awards. Sentencing judges could bridge that gap. Probation officers are already required to provide victims with information related to the restitution order.[149] Specifically, the MVRA requires probation officers to provide notice of "the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B)."[150] Sentencing judges should instruct probation officers to inform victims of the full scope of § 3664(m)(1)(B), namely the ability to use such a mechanism to settle outstanding restitution orders. Such notice would lower informational barriers to settlement.

Sentencing judges have much less latitude to lower procedural barriers to settlement. But even here, there are affirmative steps sentencing judges can take to empower victims to settle. Recall that, while § 3664(f) can be used to settle outstanding restitution orders, it requires the acquiescence of the sentencing judge because it is left to the judge to structure the restitution order.[151] Recognizing the full scope of victim discretion in the MVRA, sentencing judges should be flexible in allowing victims to take advantage of the 3664(f)(3) provision to settle restitution orders. This would make settlement less procedurally onerous on victims without betraying the text or intent of the statute.

CONCLUSION

The MVRA generates millions of dollars of unpaid restitution every year. For a not insignificant portion of the victim community, settling an outstanding restitution order would vindicate their individual interests. The MVRA enforcement scheme creates mechanisms for victims to participate in the enforcement of outstanding restitution orders. Those provisions can be leveraged by victims to settle an outstanding restitution order. Although informational and procedural barriers to achieving settlement are high (and should be lowered), this Comment provides a blueprint for victims and their

149 *See* § 3664(d)(2)(A).

150 *Id.*

151 *See supra* Part II.

representatives to take advantage of the provisions provided by the MVRA to achieve settlement.