

# MANDATORY VICTIM RESTITUTION ACT: A REPLACEMENT FOR VICTIMS' INTENTIONAL TORT CLAIMS FOR VIOLENT CRIMES IN NEW JERSEY

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## INTRODUCTION

Victims' involvement in the criminal justice system has changed vastly in the last fifty years. Victims' rights came into prominence with President Ronald Reagan's commission of the Task Force on Victims of Crime.<sup>1</sup> With the advent of that task force, a major change was made in the federal court system with the creation of the Victim and Witness Protection Act of 1982.<sup>2</sup> Before this act, restitution could only be ordered when the defendant was placed on probation, but afterwards courts could also order restitution from defendants who received imprisonment or fines.<sup>3</sup> Many state courts have adopted this process as well.<sup>4</sup> As time progressed, Congress recognized that even though courts had the ability to order restitution, restitution was only ordered in 20.2% of federal criminal cases.<sup>5</sup> Set on recognizing the costs that

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1. Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (April 27, 1982) (establishing the task force), *revoked by* Exec. Order No. 12,399, § 4, 48 Fed. Reg. 379 (Dec. 31, 1982) (revoking the order regarding task forces that completed their assignments); *see* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter VICTIMS OF CRIME REPORT], <http://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf>.

2. Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253-55 (codified at scattered sections of 18 U.S.C. and Fed. R. Crim. P. 31(c)(2), with restitution provisions at 18 U.S.C. § 3663 (2012)) (establishing mandatory restitution and other federally based resources for victims and witnesses before the conclusion of the task force); *see also* VICTIMS OF CRIME REPORT, *supra* note 1, at 37, 49 (recommending similar measures to those that had been established in the Victim and Witness Protection Act).

3. S. REP. NO. 97-532, at 30-33 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2536-38.

4. *See, e.g.*, CAL. PENAL CODE § 1203.1 (West 2016); N.J. STAT. ANN. § 2C:43-3 (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 1106 (West 2016); TEX. CODE CRIM. PROC. ANN. art. 42.037 (West 2015).

5. S. REP. NO. 104-179, at 13 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 926.

victims suffered from crimes, Congress enacted the Mandatory Victim Restitution Act of 1996 (MVRA), which made ordering restitution mandatory for a limited set of federal crimes.<sup>6</sup>

While the enactment of the MVRA appeared to be a step in the right direction for victims' rights, the MVRA only reaches crimes that are tried in federal court. In many states, the right to order restitution is still discretionary.<sup>7</sup> Without restitution, the victim is only left with a few options to recover their losses: victims' compensation funds, civil suits, or administrative or special court proceedings.<sup>8</sup> However, these options are difficult and costly, leaving victims without a solution to any financial struggles that result from the crime.<sup>9</sup>

This Note will explore whether incorporating a mandatory restitution scheme, like the federal scheme under the MVRA, could replace a victim's need in New Jersey to pursue intentional tort claims against a defendant to recover financial damages associated with the crime. Part I will look at the history of restitution and the enactment of the MVRA and analyze the language of the MVRA, including what damages are included in the restitution order. Part II will survey the current restitution scheme in New Jersey and analyze the current tort system in New Jersey, focusing on the damages victims can recover for the torts of battery and intentional infliction of emotional distress. Part III will compare the similarities of the MVRA and the intentional tort system in New Jersey, and conclude that a mandatory restitution scheme, like the MVRA, can replace the need for victims to pursue intentional tort claims arising out of violent crimes. Finally, Part IV will discuss the problems that surround a mandatory restitution scheme and address why these problems do not change the need for a mandatory restitution scheme in New Jersey.

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6. Pub. L. No. 104-132, 110 Stat. 1214 (codified at 18 U.S.C. §§ 3663A-3664 (2012)).

7. *See, e.g.*, N.J. STAT. ANN. § 2C:43-3 (West 2016) (providing that the court "may" order restitution under the statute); TEX. CODE CRIM. PROC. ANN. art. 42.037 (West 2015) (same). *But see* 18 PA. STAT. & CONS. STAT. ANN. § 1106 (West 2016) (providing that the court "shall" order restitution under the statute).

8. Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 820-22 (2010).

9. *See id.* at 875.

I. MANDATORY VICTIM RESTITUTION ACT: HISTORY AND ANALYSIS OF ITS LANGUAGE AND IMPACT

A. *Historical Background*

In the early history of the United States, the prosecution of defendants was done by the victims of the crimes, who conducted their own arrests and brought their cases against defendants in court.<sup>10</sup> If the victims proved their case, they would be awarded damages as a result of the successful prosecution.<sup>11</sup> However, as cities such as New York and Philadelphia grew in size and the economy expanded, it became much more difficult for victims to bring offenders to justice through private means.<sup>12</sup> This resulted in the creation of public prosecution offices to prosecute defendants.<sup>13</sup> As the prevalence of the public prosecution systems grew significantly after the Revolutionary War, the victims' role in the process and the damages they recovered decreased.<sup>14</sup>

In the 1970s and 1980s, a movement began which sought to recognize the rights of victims in the criminal justice system. In 1982, President Ronald Reagan commissioned a task force to look at the impact crime had on victims and ways to improve their rights.<sup>15</sup> In its final report, the task force recommended that Congress enact a law requiring courts to order defendants to pay restitution, unless the court provides sufficient reasoning for not ordering restitution.<sup>16</sup> At the time, victims' advocates appealed to the legislators to force defendants to pay restitution, which they argued would only cost defendants hundreds of dollars as opposed to thousands.<sup>17</sup> While the task force was working, Congress passed the Victim and Witness Protection Act of 1982.<sup>18</sup> Congress also followed the eventual proposal of the task force by mandating that judges order restitution, and if not, list the reasons

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10. VALIANT R.W. POLINY, A PUBLIC POLICY ANALYSIS OF THE EMERGING VICTIM'S RIGHTS MOVEMENT 122 (1994) (citing JAMES STARK & HOWARD GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS: COMPREHENSIVE AND UP-TO-DATE, A BASIC GUIDE TO VICTIM'S RIGHTS UNDER TODAY'S LAWS 20 (1985)).

11. *Id.* at 124.

12. *Id.* at 126.

13. *Id.* at 126–27.

14. *Id.* at 134–35, 134 n.171.

15. *Id.* at 157–58; *see also* Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (April 27, 1982).

16. VICTIMS OF CRIME REPORT, *supra* note 1, at 18.

17. S. REP. NO. 97-532, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2536.

18. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253–55 (codified as amended at 18 U.S.C. § 3663 (2012)).

why.<sup>19</sup> However, Congress recognized that ordering restitution might not be sufficient to cover victims' losses since many defendants would be unable to pay any restitution due to their own insolvency.<sup>20</sup>

Congress was correct. By 1994, only 20.2% of federal criminal convictions included any restitution orders.<sup>21</sup> As a result of the low percentage of restitution orders, some members of Congress decided that not enough was being done to recognize victims and improve the criminal justice system.<sup>22</sup> With courts only choosing to order restitution in 20.2% of federal criminal cases, Senator Don Nickles advanced legislation to make the ordering of restitution mandatory in the federal system.<sup>23</sup>

In its report on Senator Nickles' legislation, the House of Representatives noted that while victims had seen increased visibility in the criminal justice system, they were still being overlooked because courts were not forced to consider victims' financial struggles.<sup>24</sup> The Senate noted that requiring courts to order restitution also served to ensure that defendants recognize the losses their crimes caused and ensure defendants pay back those losses.<sup>25</sup> Passing in both the House of Representatives and the Senate, the MVRA was enacted in April 1996.<sup>26</sup>

#### *B. Evaluation of Damages Under the Mandatory Victim Restitution Act*

The MVRA defines a victim as "a person directly and proximately harmed as a result of the commission of an offense."<sup>27</sup> When the victim is under the age of eighteen, incompetent, incapacitated, or deceased, the legal guardian or representative of the victim's estate may become the "victim" under the MVRA.<sup>28</sup> For the court to be able to order restitution against a defendant during sentencing, the victim must have been harmed by a crime for which the defendant was convicted.<sup>29</sup> Other than those described above, two other categories of people can be

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19. S. REP. NO. 97-532, at 31.

20. *Id.* at 33.

21. S. REP. NO. 104-179, at 13 (1995), as reprinted in 1996 U.S.C.C.A.N. 924, 926.

22. *Id.* at 12-13.

23. *Id.*

24. H.R. REP. NO. 104-16, at 4-5 (1995).

25. S. REP. NO. 104-179, at 12.

26. Pub. L. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. §§ 3663A-3664 (2012)).

27. 18 U.S.C. § 3663A(a)(2).

28. *Id.*

29. *United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003) (citing *Hughey v. United States*, 495 U.S. 411, 413 (1990)).

considered victims. First, any person who was harmed by the scheme, conspiracy, or pattern of behavior of the defendant, but not directly harmed by the conduct of the defendant is a victim under the MVRA.<sup>30</sup> Second, a person who is named as a victim to receive restitution by both parties in a plea agreement meets the statutory definition.<sup>31</sup>

The concept of who is a victim, for most crimes, is straightforward. The person injured as a result of defendant's conduct is a victim. Deciding what constitutes "harm," however, has shaped the way different circuit courts define "victim" under the MVRA. The Eighth Circuit held that even though a bank customer was not physically harmed, he qualified as a victim because the defendant had pointed a sawed-off shotgun in the customer's face during the robbery.<sup>32</sup> The Eighth Circuit upheld the restitution order which included the bank customer's lost income as a result of providing statements, identifying suspects, and preparing for trial.<sup>33</sup> In order to determine whether a person who was harmed by the crime is a victim, the Ninth Circuit decided that the harm must not have occurred but for the conduct of the defendant, and the causal nexus between these two must not be too attenuated.<sup>34</sup> This determination is ultimately made by the court using fact-specific inquiries, coupled with a reasonableness standard.<sup>35</sup>

The MVRA was enacted to cover only limited types of crimes. Crimes of violence are the first classification of crimes covered by the MVRA.<sup>36</sup> A crime of violence is described in 18 U.S.C. § 16 as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

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30. 18 U.S.C. § 3663A(a)(2).

31. *Id.* § 3663A(a)(3).

32. *Moore v. United States*, 178 F.3d 994, 1001 (8th Cir. 1999). However, in another bank robbery case, the Eighth Circuit held that bank tellers working at the time of a robbery could not include the cost of their psychological treatment as a result of the robbery in the restitution order because they did not suffer any physical injuries. *United States v. Reichow*, 416 F.3d 802, 805–06 (8th Cir. 2005).

33. *Moore*, 178 F.3d at 1001.

34. *United States v. Gamma Tech Indus.*, 265 F.3d 917, 928 (9th Cir. 2001) (quoting *United States v. Vaknin*, 112 F.3d 579, 590 (1st Cir. 1997)).

35. *Vaknin*, 112 F.3d at 590.

36. 18 U.S.C. § 3663A(c)(1)(A)(i).

person or property of another may be used in the course of committing the offense.<sup>37</sup>

A few circuit courts have established a categorical approach to whether or not a crime is violent under the MVRA.<sup>38</sup> For example, the Eleventh Circuit held that the “elements and nature of the conviction,” rather than the specific facts, should be analyzed.<sup>39</sup>

Other than crimes of violence, the MVRA also covers any crime against property under the Crimes and Procedures title of the United States Code, along with section 416(a) of the Controlled Substance Act.<sup>40</sup> Also included are crimes relating to tampering with consumer products and theft of medical products.<sup>41</sup> As with crimes of violence, restitution is only ordered for these crimes when a victim is clearly identified and “has suffered a physical injury or pecuniary loss.”<sup>42</sup>

The purpose of the MVRA is to restore victims to the position they were in before the crime.<sup>43</sup> Section 3663A(b)(2) lists the types of harms that the defendant is responsible for paying through a restitution order when the victim suffers a bodily injury.<sup>44</sup> The first expenses mentioned are the “necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method

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37. *Id.* § 16. The constitutionality of this statute has come under fire by at least three circuits. See *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015); *Golicov v. Lynch*, No. 16-9530, 2016 WL 4988012, at \*5 (10th Cir. Sept. 19, 2016); *Shuti v. Lynch*, 828 F.3d 440, 451 (6th Cir. 2016). Relying on the decision of the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Tenth, Seventh, and Sixth Circuits declared § 16(b) unconstitutional under the vagueness doctrine. *Golikov*, 2016 WL 4988012, at \*5, \*8; *Shuti*, 828 F.3d at 451; *Vivas-Ceja*, 808 F.3d at 720, 723. In *Johnson*, the Supreme Court held that the language in the Armed Career Criminal Act of 1984, defining a violent felony as a crime that “involves conduct that presents a serious potential risk of physical injury to another,” was unconstitutional for vagueness. 135 S. Ct. at 2555 (quoting 18 U.S.C. 924(e)(2)(b)(ii)). Reasoning that the language used in § 16 is not materially different from the language struck down in *Johnson*, the Tenth, Seventh, and Sixth Circuits declared § 16 unconstitutional. *Golikov*, 2016 WL 4988012, at \*8; *Shuti*, 828 F.3d at 441; *Vivas-Ceja*, 808 F.3d at 723.

38. *United States v. Keelan*, 786 F.3d 865, 870–71 (11th Cir. 2015); *United States v. De La Fuente*, 353 F.3d 766, 770 (9th Cir. 2003).

39. *Keelan*, 786 F.3d at 870–71 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)).

40. 18 U.S.C. § 3663A(c)(1)(A)(ii). Section 416(a) of the Controlled Substance Act involves the use of property in the distribution or manufacturing of controlled substances. 21 U.S.C. § 856(a) (2012).

41. 18 U.S.C. § 3663A(c)(1)(A)(iii)–(iv) (referencing § 1365 for tampering with consumer products and § 670 for theft of medical goods).

42. *Id.* § 3663A(c)(1)(B).

43. *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006).

44. 18 U.S.C. § 3663A(b)(2).

of healing recognized by the law of the place of treatment.”<sup>45</sup> Any necessary physical or occupational rehabilitation or therapy is included.<sup>46</sup> Other than medical expenses, the MVRA also provides that defendants pay any income the victims lost due to the offense.<sup>47</sup>

Regardless of whether the offense was a crime of violence, defendants must also pay for “lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”<sup>48</sup> It is important to note that victims cannot recover costs of any professional services, such as counseling or therapy, without also suffering a physical injury.<sup>49</sup> Outside of payments for therapy or other psychological or psychiatric services, courts may not consider the emotional impact of the offense on the victims when ordering restitution.<sup>50</sup>

Beyond the expenses listed above, the MVRA has been interpreted to allow future lost income.<sup>51</sup> Section 3663(A)(b)(2)(C) provides that defendants must reimburse victims for lost income, which courts have interpreted to include both prior and future lost income.<sup>52</sup> However, future income and all other damages are limited to those damages which the court can readily determine.<sup>53</sup> If the court determines that the costs are too complex or based on speculation, it can refuse to order

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45. *Id.* § 3663A(b)(2)(A).

46. *Id.* § 3663A(b)(2)(B).

47. *Id.* § 3663A(b)(2)(C).

48. *Id.* § 3663A(b)(4).

49. See *United States v. Reichow*, 416 F.3d 802, 806 (8th Cir. 2005) (holding that bystanders for a bank robbery could not recover the cost of therapy as a result of the robbery because they did not suffer any physical injuries). *But see United States v. Breshers*, 684 F.3d 699, 702–03 (7th Cir. 2012) (arguing that when reviewing for plain error, § 3663A is ambiguous as to whether injury could also include mental injuries).

50. *United States v. Innarelli*, 524 F.3d 286, 294–95 (1st Cir. 2008).

51. See *United States v. Messina*, 806 F.3d 55, 67 (2d Cir. 2015); *United States v. Serawop*, 505 F.3d 1112, 1121 (10th Cir. 2007); *United States v. Cienfuegos*, 462 F.3d 1160, 1168–69 (9th Cir. 2006); *United States v. Oslund*, 453 F.3d 1048, 1062–63 (8th Cir. 2006). These cases, however, have only allowed future lost income to be awarded when the victim has been killed, although the rationale behind the granting of lost income for victims would also apply to lost income for victims who have not died. See *Messina*, 806 F.3d at 67 (“Further, the MVRA’s lost income provision applies to future income lost as a result of the offense of conviction.”); *Cienfuegos*, 462 F.3d at 1168–69 (stating that the determination of future lost income must be based on actual documents and proven by reliable methods). Further, none of the circuits have rejected future income from a restitution order if the victim is alive.

52. *Cienfuegos*, 462 F.3d at 1164.

53. 18 U.S.C. § 3663A(c)(3)(b).

restitution for those losses.<sup>54</sup> Along with those limitations, § 3664 provides procedures for the court to follow when ordering restitution.<sup>55</sup>

All information regarding the victims, their calculated losses, and the economic situation of the defendants is compiled by the probation officer and presented to the court in a presentencing report.<sup>56</sup> However, the attorney for the government is in charge of contacting the victims and determining which of the victims' losses are subject to restitution.<sup>57</sup> Likewise, the defendant must provide the relevant information regarding his or her financial situation for the probation officer to include in his or her report.<sup>58</sup> It is the duty of the probation officer to let each victim know the offense for which the defendant was convicted, the amounts subject to restitution, and the date and time of the sentencing hearing before submitting their report.<sup>59</sup> The probation officer must also collect additional information from the victim, including affidavits and costs to be included in the restitution order.<sup>60</sup> After reviewing the report, the court can accept its findings and order restitution, refer any issues to a magistrate judge for determination, or order that additional information, including live testimony, be provided.<sup>61</sup>

If an issue arises as to the amount of restitution ordered, the court must resolve the dispute by a preponderance of the evidence.<sup>62</sup> The burden of proving that a victim's costs belong in the restitution order falls on the attorney for the government.<sup>63</sup> While determining which amounts are applicable to restitution, the court cannot consider whether the defendant is able to pay the full amount or other economic circumstances.<sup>64</sup> Also, the court cannot consider whether the victim has received other forms of compensation, such as insurance payments, for the medical bills or other amounts that are applicable to the restitution order.<sup>65</sup> After the total restitution amount is determined, the court may consider the defendant's financial resources, current or projected income or earnings, and other financial obligations to determine the

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54. *Cienfuegos*, 462 F.3d at 1168.

55. *See* 18 U.S.C. § 3664.

56. *Id.* § 3664(a).

57. *Id.* § 3664(d)(1).

58. *Id.* § 3664(d)(3).

59. *Id.* § 3664(d)(2)(A)(i)–(ii), (iv).

60. *Id.* § 3664(d)(2)(A)(iii), (vi).

61. *Id.* § 3664(d)(4), (d)(6), (f).

62. *Id.* § 3664(e).

63. *Id.* For example, if a defendant challenges the amount of medical bills submitted by a victim, the government bears the burden of proving the amount is correct by a preponderance of the evidence.

64. *Id.* § 3664(f)(1)(A).

65. *Id.* § 3664(f)(1)(B).



payment schedule for the restitution order.<sup>66</sup> The court can order “a single, lump-sum payment, partial payments at specified intervals, in-kind payments,” nominal payments, or any combination of the above.<sup>67</sup>

If the restitution order includes amounts for which the victim has already received money, such as insurance payouts, the court can amend the order so the restitution is paid to the insurance company or another third party.<sup>68</sup> The restitution order can also be amended to subtract any money the victim recovers from the defendant in a subsequent federal or state proceeding.<sup>69</sup> The defendant is also precluded from denying any of the “essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding . . . brought by the victim.”<sup>70</sup> Any subsequent changes to the defendant’s financial situation that affect the defendant’s ability to pay must be reported to both the court and the attorney general.<sup>71</sup> If the defendant, while incarcerated, receives a substantial amount of money, such as an inheritance, that amount shall be used to cover any outstanding restitution orders.<sup>72</sup>

In order to discuss the mandatory restitution scheme under the MVRA and intentional torts in New Jersey more tangibly, the following factual pattern will be utilized to demonstrate how both impact the damages a particular victim could recover. A student (“Student”) was walking to his train after his last night class at Rutgers University, Camden. Out of an alleyway, a man (“Defendant”) approached Student and pulled out a gun. Defendant demanded that Student give him his wallet, phone, and book bag. Student tried to wrestle the gun away from Defendant. After a brief struggle, Defendant threw Student to the ground and shot Student in the leg. Defendant grabbed Student’s backpack and ran off, only to be apprehended down the block by a patrolling police officer. Student was taken to the hospital, and surgery was required to repair the damage to his leg. His backpack, with all its contents, was returned to him. Student decided to assist the Camden

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66. *Id.* § 3664(f)(2)(A)–(C) (referencing § 3572 for the imposition of a fine and related matters).

67. *Id.* § 3664(f)(3).

68. *Id.* § 3664(j)(1).

69. *Id.* § 3664(j)(2).

70. *Id.* § 3664(l).

71. *Id.* § 3664(k).

72. *Id.* § 3664(n). It is unclear from this language whether this extends to amounts received after release, which was an important goal for Congress through enacting the MVRA. *Mandatory Victim Restitution: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 7 (1995) [hereinafter *MVRA Hearing*] (statement of Honorable Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary).

prosecutors in their case against Defendant for aggravated assault and robbery.

Due to the surgery, Student remained in the hospital for two months. Student was forced to withdraw from school, although the school refunded his tuition costs except for a nonrefundable \$1500 deposit. Student had previously worked in the library during the school year to pay for his apartment. However, Student decided not to return to Camden due to the trauma of the event and lost his job at the library. He sought psychological counseling and moved back in with his parents in central New Jersey.

Defendant lived with his aunt and uncle and did not own any real property. The only notable asset that Defendant owned was an old 2000 Ford Explorer. Defendant was employed as a gas station attendant, but was fired a week before the incident. He did not go to college and dropped out of high school after the tenth grade.<sup>73</sup>

If Defendant is convicted in federal court, the court has to order that he pay restitution to Student under the MVRA. In this case, Student clearly meets the definition of victim under the MVRA because he was harmed directly and proximately as a result of Defendant's actions. Further, both robbery and aggravated assault would qualify as crimes of violence since both are felonies<sup>74</sup> and involve a substantial risk that Defendant will use physical force against a person when committing those crimes.

Under the MVRA and the cases that follow, the court has to order that Defendant pay restitution for the amount of the medical expenses suffered by Student as a result of the crime. Even if Student has insurance which covers the costs, Defendant would then have to pay the insurance company for those amounts. Any costs from subsequent physical rehabilitation required for recovery from surgery to regain full use of his leg would also be included in the restitution order. The cost of his sessions with the psychologist would be included. Since Student was unable to work at the library to pay for his apartment, the amount of wages he lost while he was in the hospital would also be included. However, the \$1500 that Student lost as a result of having to withdraw

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73. While this factual situation does not involve any federal crimes, for purposes of this Section, it should be assumed that the case takes place in federal court and the MVRA applies.

74. See N.J. STAT. ANN. § 2C:12-1(b)(2), (7), (9), (10) (West 2016) (classifying aggravated assault where the defendant causes bodily harm as an offense in the third degree); *Id.* § 2C:15-1(b)(12) (classifying robbery as a crime in the first or second degree); *Id.* § 2C:43-6(a) (stating that for crimes in the first degree, judges can sentence ten to twenty years; for crimes in the second degree, judges can sentence five to ten years; and for crimes in the third degree, judges can sentence three to five years).

from school would not be included in the restitution order since it does not fall under § 3663A(b).

## II. RESTITUTION AND INTENTIONAL TORTS IN NEW JERSEY

### A. *Restitution Under the New Jersey Constitution and Statutes*

Since this Note is aimed at determining whether a mandatory restitution scheme could replace a victim's need to bring intentional tort claims, a brief analysis of the current restitution scheme in New Jersey is necessary. Victims of crimes are given specific rights under the New Jersey Constitution.<sup>75</sup> While the New Jersey Constitution does not provide any rights to victims regarding restitution, it does define a "victim of a crime" as someone who has suffered physical or psychological injury, someone who suffered loss to personal or real property as the result of a crime, or any person involved in a motor vehicle accident where drugs or alcohol were involved.<sup>76</sup> However, only the criminal code of New Jersey addresses restitution.<sup>77</sup> A court can order restitution when a victim has suffered a loss and the defendant is able to pay that amount or would be able to pay if given a fair opportunity.<sup>78</sup> In determining whether a defendant can pay restitution, the court must take into account all of the circumstances surrounding the defendant's finances, including future earning potential.<sup>79</sup> However, the court cannot order more restitution than the defendant would be able to pay.<sup>80</sup> Similar to the MVRA, any amount recovered in a civil suit must be reduced from the restitution order.<sup>81</sup>

The largest difference between the restitution scheme in New Jersey and the MVRA is the discretion of the court when ordering restitution. The court must consider the defendant's ability to pay when deciding how much restitution to order, while the defendant's ability to pay only impacts the scheduling of payments under the MVRA. Another difference is the lack of clearly-defined categories of damages the victim can recover from the defendant. Section 2C:43-3 provides that restitution cannot exceed the victim's loss.<sup>82</sup> Loss is defined as "the amount of value separated from the victim or the amount of any

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75. N.J. CONST. art. 1, para. 22.

76. *Id.*

77. See N.J. STAT. ANN. §§ 2C:43-3, 2C:44-2 (West 2016).

78. *Id.* § 2C:44-2(b)(2).

79. *Id.* § 2C:44-2(c)(1)–(2).

80. *Id.* § 2C:44-2(c)(2).

81. *Id.* § 2C:44-2(f).

82. See *id.* § 2C:43-3.

payment owed to the victim and avoided or evaded and includes any reasonable and necessary expense incurred by the owner in recovering or replacing lost, stolen or damaged property.”<sup>83</sup> However, unlike the MVRA, New Jersey’s statutes do not enumerate the specific damages that victims can recover.<sup>84</sup>

Without specific categories of damages defining what costs can be covered under a restitution order in New Jersey, Student may be able to recover only those damages allowed under the MVRA or damages similar to those he could recover from a civil trial, except punitive damages.<sup>85</sup> However, the biggest problem with the restitution scheme in New Jersey is that Student might not be awarded any restitution at all. Since Defendant has a car, the court may find that he has assets that could be used toward restitution. But without a job or any other personal assets, it is unlikely that the court will order restitution for Student. In that case, Student would be left with either proceeding to a civil trial or not receiving any money at all.

### B. *New Jersey Intentional Tort Analyses*

The focus of this next section is the intentional tort claims that could be brought by victims of crimes against defendants who have been convicted of a violent crime in criminal court. In New Jersey, the intentional tort of battery is defined as the “unauthorized invasion of the plaintiff’s person.”<sup>86</sup> An offensive contact that rises to the level of battery is not limited to one person injuring another using only his or her own body.<sup>87</sup> Instead, a non-consensual touching using clothes, a car driven by the defendant, or any objects held in the hand of the defendant constitutes offensive contact.<sup>88</sup>

The Restatement (Second) of Torts defines battery as an action with the intent of causing a harmful or offensive contact with another person

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83. *Id.* § 2C:43-3(e).

84. Compare *id.* § 2C:43-3 (providing for, but regulating, restitution without enumerating the specific damages for which a victim can recover), with 18 U.S.C. § 3663A(b)(2) (2012) (providing for restitution for specific damages).

85. See *infra* Section II.B.

86. *Perna v. Prozzi*, 457 A.2d 431, 460 (N.J. 1983) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9 at 35 (4th ed. 1971)).

87. *Kelly v. County of Monmouth*, 883 A.2d 411, 415 (N.J. Super. Ct. App. Div. 2005) (describing battery as “a non-consensual touching of ‘the plaintiff’s clothing, or with a cane, a paper, or any other object held in the plaintiff’s hand, . . . [or] of the chair in which the plaintiff sits, the horse or the car the plaintiff rides or occupies, or the person against whom the plaintiff is leaning” (alteration in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39–40 (5th ed. 1984))).

88. *Id.*

that occurs directly or indirectly.<sup>89</sup> In order to establish liability, the harmful or offensive conduct must be the result of an action taken by the defendant.<sup>90</sup> The intent required for liability is that the defendant intended to contact the plaintiff harmfully or offensively and the plaintiff suffered bodily harm, regardless of the defendant's intent to cause the specific harms suffered by the plaintiff.<sup>91</sup> Bodily harm is defined as "any physical impairment of the condition of another's body, or physical pain or illness."<sup>92</sup>

Another common claim brought by victims in civil court is the intentional infliction of emotional distress (IIED). The New Jersey Supreme Court has recognized that plaintiffs can argue a claim of IIED in civil court.<sup>93</sup> In *Buckley v. Trenton Savings Fund Society*, the New Jersey Supreme Court laid out four elements for IIED.<sup>94</sup> First, a plaintiff must prove that the defendant's action was intentional and the defendant intended to cause emotional distress to the plaintiff.<sup>95</sup> Alternatively, a defendant who acted "recklessly in deliberate disregard of a high degree of probability that emotional distress will follow" is also liable.<sup>96</sup> Second, the defendant's conduct must be either outrageous or extreme, meaning the conduct was so atrocious or outside any bounds of decency that it was unworthy of tolerance in a civilized community.<sup>97</sup> Third, the defendant's conduct must be the proximate cause of the emotional distress felt by the defendant.<sup>98</sup> Proximate cause is described as a cause so closely linked that the law would be justified in imposing liability considering "logic, common sense, justice, policy, and precedent."<sup>99</sup> Last, the emotional distress must be so severe that no person would be able to bear the pain.<sup>100</sup> The emotional distress, when

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89. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (AM. LAW. INST. 1965). While the focus of this Note is New Jersey, the Restatement of Torts provides a summary of the common laws regarding torts and includes the basic principles generally accepted by states.

90. *Id.* § 14.

91. *Id.* §§ 16(1), 20(1).

92. *Id.* § 15.

93. 544 A.2d 857, 863–64 (N.J. 1988).

94. *Id.* at 863. See also RESTATEMENT (SECOND) OF TORTS § 46 (describing the requirements for IIED).

95. *Buckley*, 544 A.2d at 863.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Caputzal v. Lindsay Co.*, 222 A.2d 513, 517–518 (N.J. 1966) (quoting *Powers v. Standard Oil Co.*, 119 A. 273, 274 (N.J. 1923), *aff'd*, 121 A. 926 (N.J. 1923)).

100. *Buckley*, 544 A.2d at 863 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j).

intended toward the plaintiff, does not also need to result in physical harm in order to bring this claim.<sup>101</sup>

Once a victim decides that there is enough evidence to bring one of these claims, the victim institutes a lawsuit by filing a complaint against the defendant.<sup>102</sup> This includes hiring an attorney to represent the victim in court. Once the complaint is filed, the defendant can file an answer to the complaint, at which point the discovery process begins.<sup>103</sup> Discovery can be a very expensive phase for the victim depending on what claims the victim alleges, what defenses the defendant claims, and the extent of the complexity of the plaintiff's injuries. Generally, if the claim does not settle before trial, both sides will have litigation expenses to prepare for the trial, and a jury will ultimately make the decision of liability and decide what damages to award.<sup>104</sup>

While juries normally decide damages, judges are permitted to overturn that award if it is so excessive as to shock the conscience of the judge.<sup>105</sup> In battery or IIED claims, there are three major types of damages that plaintiffs can recover: compensatory, pain and suffering, and punitive.<sup>106</sup> When seeking compensatory damages, a plaintiff can recover costs that resulted from the injury, so as to make the plaintiff whole again.<sup>107</sup> As a result, this allows the defendant to look into the plaintiff's medical history and ask questions regarding the possibility of existing conditions that could have caused the injury instead.<sup>108</sup> If the jury finds that the defendant's actions caused the plaintiff's injuries, the jury can award an amount of medical costs that the plaintiff has paid

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101. *Id.* at 864.

102. *See* N.J. Ct. R. 4:2-2 ("A civil action is commenced by filing a complaint with the court.").

103. *See id.* R. 4:6-1 (providing rules governing the presentation of defenses and objections by pleading or motion).

104. *See id.* R. 4:35-1 (providing the rules governing a demand for jury trial); *id.* R. 4:42-7 (providing that damages respecting any continuing cause of action "shall be determined at the time of the trial").

105. *Sweeney v. Pruyne*, 338 A.2d 193, 193-94 (N.J. 1975) (per curiam) (citing *In Taweel v. Starn's Shoprite Supermarket*, 276 A.2d 861, 865 (N.J. 1971)).

106. *See Botta v. Brunner*, 138 A.2d 713, 718 (N.J. 1958) ("For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been 'fair and reasonable compensation.'"), *superseded by* N.J. Ct. R. 1:7-1(b); RESTATEMENT (SECOND) OF TORTS §§ 905-06, 908 (describing what compensatory and punitive damages can be recovered by plaintiffs).

107. *Ocasio v. Amtrak*, 690 A.2d 682, 691 (N.J. Super. Ct. App. Div. 1997) (citing *Caldwell v. Haynes*, 643 A.2d 564, 570 (N.J. 1994)).

108. *See id.* (citing *Paxton v. Misiuk*, 460, 170 A.2d 16, 20 (N.J. 1961)).

and lost income the plaintiff would have received had he not been injured.<sup>109</sup>

The second type of damages that plaintiffs can seek in intentional tort cases is pain and suffering. There is no specific formula given to juries to determine the amount of pain and suffering to award to the plaintiff, but the general standard is “fair and reasonable compensation.”<sup>110</sup> The parties are prohibited from suggesting certain amounts of money for pain and suffering, but they can ask the jury to consider the length of time that the plaintiff had undergone the pain and suffering.<sup>111</sup>

Plaintiffs may also recover future damages, including future medical costs, pain and suffering, and lost income.<sup>112</sup> The Supreme Court of New Jersey set forth a two-part test for determining whether a plaintiff can recover lost future income.<sup>113</sup> First, the plaintiff must demonstrate that there is a reasonable probability that, as a result of his or her injuries, plaintiff will not be able to earn as much income as he or she did before the injury.<sup>114</sup> Second, the plaintiff must demonstrate with facts and research the plaintiff’s lost earning capacity as a result of the injury.<sup>115</sup> Award of future damages is not limited to compensatory damages—juries can award future damages for pain and suffering as well.<sup>116</sup>

The third type of damages that plaintiffs can be awarded in intentional tort cases in New Jersey is punitive damages. The New Jersey Punitive Damages Act defines punitive damages as “exemplary damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future.”<sup>117</sup> In order for a plaintiff to seek an award of punitive damages, the plaintiff must include this request in his or her

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109. See, e.g., *Ruff v. Weintraub*, 519 A.2d 1384, 1386 (N.J. 1987).

110. *Brodsky v. Grinnell Haulers, Inc.*, 853 A.2d 940, 953 (N.J. 2004) (quoting *Botta*, 138 A.2d 713, 718 (N.J. 1958), *superseded by* N.J. Ct. R. 1:7-1(b)).

111. See *Botta*, 138 A.2d at 723–24 (stating that in closing statements, counsel may refer to unliquidated damages in time-based units, but cannot refer to a specific amount). For example, counsel would be able to suggest to the jury that the plaintiff has had to undergo three surgeries in two months and ask the jury to consider the pain the plaintiff suffered for those two months, without suggesting an exact amount.

112. See *Lesniak v. Cty. of Bergen*, 563 A.2d 795, 799 (N.J. 1989); *Coll v. Sherry*, 148 A.2d 481, 485–86 (N.J. 1959).

113. *Coll*, 148 A.2d at 487.

114. *Id.*

115. *Id.*

116. *Friedman v. C & S Car Serv.*, 527 A.2d 871, 875 (N.J. 1987).

117. N.J. STAT. ANN. § 2A:15-5.10 (West 2016).

complaint<sup>118</sup> and prove at trial that defendant acted with actual malice or with a “wanton and willful disregard of persons who foreseeably might be harmed.”<sup>119</sup> The defendant must prove this by clear-and-convincing evidence, while the other damages only need be proven by a preponderance of the evidence.<sup>120</sup>

In determining whether the plaintiff has met the clear-and-convincing standard for punitive damages, section 2A:15-5.12(b) provides four facts the jury may consider.<sup>121</sup> First, the jury can consider whether the defendant knew, at the time of the incident, that serious harm was likely to result from his or her conduct.<sup>122</sup> Second, the jury can consider whether the defendant was reckless in ignoring the likelihood that his or her conduct would cause serious harm to another.<sup>123</sup> Third, the jury can consider how the defendant acted when he or she knew that their conduct could cause serious harm to another.<sup>124</sup> Last, the jury can consider the length of time the defendant continued to act with this knowledge or any attempts by the defendant to conceal this information.<sup>125</sup> If the jury decides that punitive damages should be awarded to the plaintiff, the judge must evaluate the proposed amount of punitive damages to ensure the award is reasonable and justified under the circumstances.<sup>126</sup> The amount of punitive damages the jury can award is limited to five times the amount of compensatory damages awarded or \$350,000, whichever is greater.<sup>127</sup>

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118. *Id.* § 2A:15-5.11 (“An award of punitive damages must be specifically prayed for in the complaint.”).

119. *Id.* § 2A:15-5.12(a).

120. *Id.*; see also N.J.R.E. § 101(b)(1) (West 2016) (defining the various standards of proof under the New Jersey Rules of Evidence). The clear-and-convincing standard is defined as one that “leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” N.J. STAT. ANN. § 2A:15-5.10. The required proof is higher than the preponderance of the evidence standard, but lower than the beyond a reasonable doubt standard. *Id.*

121. *Id.* § 2A:15-5.12(b).

122. *Id.* § 2A:15-5.12(b)(1).

123. *Id.* § 2A:15-5.12(b)(2).

124. *Id.* § 2A:15-5.12(b)(3).

125. *Id.* § 2A:15-5.12(b)(4).

126. *Id.* § 2A:15-5.14(a). The purpose of punitive damages is to punish the defendant and deter the defendant from repeating his or her conduct. *Id.* Therefore, if an amount awarded is too high to accomplish these purposes, a judge may reduce or eliminate the award of punitive damages. *Id.*

127. *Id.* § 2A:15-5.14(b). The jury, however, is not allowed to know that a cap exists on the amount of damages they can award punitively before they decide. *Id.* § 2A:15-5.16.



Returning to our factual pattern,<sup>128</sup> Student could bring a claim of battery against Defendant. Defendant's firing of a bullet into Student's leg constitutes an "unauthorized invasion" of Student's person. The success of Student's IIED claim is unclear. One issue would be proving that Defendant had the intent to cause emotional distress to the student. Student could argue that even if that intent was not present, Defendant acted recklessly and with deliberate disregard to the high probability that shooting his leg and subsequently robbing him would lead to emotional distress.

Another issue is whether Defendant's conduct rises to the level of extreme or outrageous. Student could argue that the defendant had the opportunity to grab Student's bag without shooting him but instead chose to shoot him first. Student could also argue that the emotional distress was severe enough that he had to drop out of school due to his fear and anxiety after the event.

As for the causation issue, Defendant would be able to look into the emotional and psychological history of the student to determine if perhaps another incident contributed to the emotional distress of Student. If the history of Student demonstrated another cause for Student's emotional distress, the jury could either reduce the award or decide not to award any damages for the psychological counseling. This would also apply if Defendant looked into Student's medical history and found other medical problems that contributed to the need for surgery.

If Student succeeds in proving the battery and IIED claims, he could seek to recover all of his compensatory damages. This would include medical bills, rehabilitation costs, costs of psychological treatment, lost income, and the recovery of his tuition deposit, since plaintiffs can recover any damages necessary to put the plaintiff in the position they would have been had the incident not occurred. Perhaps any costs associated with the loss of his apartment and the effect on his earning capacity due to dropping out of school could be awarded. Student would also be awarded damages for pain and suffering, especially if the jury orders compensatory damages for the medical costs. Finally, Student could seek punitive damages. While ultimately a jury question, awarding punitive damages in this case would certainly be appropriate to deter Defendant from acting this way again and to punish him for harming another human.

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128. See discussion *supra* Section I.B.

### III. COMPARING THE NEW JERSEY INTENTIONAL TORTS DAMAGES WITH THE DAMAGES RECOVERABLE UNDER THE MVRA

After conducting an analysis of the types of damages Student could recover under the MVRA compared to the damages he could be awarded from an intentional tort claim in New Jersey, several similarities appear between the two schemes. First, many victims, such as Student, will be able to pursue both restitution and a civil trial if they are injured. Both require that the defendant be put on trial, which ensures restitution orders and damage awards have evidentiary and procedural protections.<sup>129</sup> If the defendant is convicted or found liable, both avenues will lead to an order awarding compensation for losses the victims have suffered.<sup>130</sup>

Second, the standard of proof under the MVRA and in civil trials is the same; both require that damages be proven by a preponderance of the evidence.<sup>131</sup> However, the plaintiff in a civil trial must prove all damages by this standard, while only damages that the defendant or the court challenges under the MVRA need to be proven by that standard.<sup>132</sup> As both processes require proof to the same standard, any dispute as to whether an amount should be included should, ideally, be decided the same way. For example, the defendant could challenge the cost of the psychological counseling. If the student was already in counseling before the incident and testimony from the psychologist indicated that the student did not mention anything about the incident in subsequent sessions after the incident, the damages could be excluded under both the MVRA and in a civil trial.

Third, the rationales behind mandating restitution under the MVRA and damages in a civil trial are the same. At the core of each is making victims whole again by attempting to return victims to the position they would have been in had the crime not occurred.<sup>133</sup> In accomplishing this goal, both the MVRA and civil trials for intentional

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129. See, e.g., *infra* note 131 and accompanying text.

130. See *supra* Sections I.B, II.B for a discussion regarding the damages the Student could recover.

131. See 18 U.S.C. § 3664(e) (2012) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence."); *Liberty Mut. Ins. Co. v. Land*, 892 A.2d 1240, 1243 (N.J. 2006) ("As a general rule, the preponderance of the evidence standard applies in civil actions." (citing *State v. Seven Thousand Dollars*, 642 A.2d 967, 974 (N.J. 1994))).

132. See N.J. STAT. ANN. § 2C:44-2(c)(2).

133. *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006); *Ocasio v. Amtrak*, 690 A.2d 682, 691 (N.J. Super. Ct. App. Div. 1997) (citing *Caldwell v. Haynes*, 643 A.2d 564, 570 (N.J. 1994)) (stating that damages resulting from tortious conduct by a defendant should be aimed at making the plaintiff whole again).

torts look at the damages suffered by the victim.<sup>134</sup> These damages are often referred to as compensatory damages, which are “[d]amages sufficient in amount to indemnify the injured person for the loss suffered.”<sup>135</sup> Therefore, victims, and the student, are able to recover almost all of the same compensatory damages under the MVRA and a civil trial.<sup>136</sup>

However, the biggest difference between the MVRA and a civil trial for intentional torts is the disparity in total damages the victim can recover. Under the MVRA, the victim is limited to recovering only compensatory damages for which the victim can demonstrate the actual cost.<sup>137</sup> In a civil trial for intentional torts, the victim is able to recover the same compensatory damages, but also damages for pain and suffering and, potentially, punitive damages.<sup>138</sup> The MVRA does not allow for any emotional impact to be considered by courts, so damages for pain and suffering cannot be recovered by victims.<sup>139</sup> Further, the other aspect of the sentencing in a criminal trial usually includes imprisonment, probation, or fines, which serve the same purpose as punitive damages. Restitution under the MVRA has been interpreted as a non-punitive process, prohibiting judges from using restitution as a punitive tool.<sup>140</sup>

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134. *Boccagna*, 450 F.3d at 115 (stating that the point of restitution is to restore a victim to the position he or she was in before the injury); *Ocasio*, 690 A.2d at 691 (stating that the award of compensatory damages in New Jersey operate to make the victim whole) (citing *Caldwell*, 643 A.2d at 691)).

135. *Compensatory Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Restatement (Second) of Torts also provides that plaintiffs in intentional tort cases can collect compensatory damages. RESTATEMENT (SECOND) OF TORTS § 903 (AM. LAW. INST. 1979); see also *id.* § 903 cmts. a, b. The Restatement defines compensatory damages as “damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.” *Id.* § 903. However, compensatory damages under the Restatement are split into nonpecuniary damages—such as bodily and emotional harm, *id.* § 905—and pecuniary damages—such as harm to property and earning capacity. *Id.* § 906.

136. See *supra* Sections I.B, II.B, for a discussion regarding damages Student can recover.

137. 18 U.S.C. § 3664(f)(1)(A) (2012).

138. See *supra* Section II.B.

139. *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir. 2008) (citing *United States v. Cornier-Ortiz*, 361 F.3d 29, 42 (1st Cir. 2004) (stating that the MVRA is intended to compensate victims for losses actually suffered because of the defendant's crime)).

140. *United States v. Stanfill El*, 714 F.3d 1150, 1153 (9th Cir. 2013) (holding that the imposition of restitution “did not qualify as additional punishment” (citing *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir. 1999))); *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008) (“Restitution under the MVRA is not a criminal punishment . . .”); *United States v. Reichow*, 416 F.3d 802, 807 (8th Cir. 2005) (holding that, separately from *ex post facto* violation, restitution is not a penalty); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) (“[R]estitution is not a criminal punishment.”). *But see* *Creel v.*

Another difference is the person or entity who decides which damages to order or award. Under the MVRA, the victim provides the amounts to the probation officer, and only if the defendant or judge challenges the cost does a hearing take place to decide their inclusion.<sup>141</sup> In civil trials, the decision of damages is left completely to the jury or trier-of-fact to decide based on the evidence provided by both sides.<sup>142</sup> This leads to less certainty in civil trials, but could also lead to damages being awarded that would not be considered under the MVRA. However, the power of discovery in civil trials could increase the defendant's ability to look into the victim's past and provide alternative sources for the losses the victim claims he or she suffered from the incident, thereby precluding those damages from recovery.<sup>143</sup>

The last major difference between the MVRA and a civil trial for intentional torts is the cost for the victim and the defendant. Under the MVRA, the victim only suffers the cost of having to travel to court and participate in the prosecution of the defendant.<sup>144</sup> The defendant must provide his own counsel or use the public defender, which would be free. In a civil trial, the victim and defendant would have to find representation. It is unlikely, however, that a victim will be able to find an attorney because an insolvent defendant will provide no immediate payment of damages, limiting the ability of the lawyer to be paid. Otherwise, both victim and defendant might participate pro se. Alternatively, both parties could agree to settle the case, which reduces the costs of going to trial. Depending on when the parties decide to settle the case, discovery may have already begun, which would increase the cost for both sides.

Considering these differences and similarities from the perspective of the victims, the MVRA, if implemented at the state level, would greatly contribute to the furtherance of victims' rights regarding restitution. One of the largest benefits of implementing the MVRA at

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Comm'r, 419 F.3d 1135, 1140 (11th Cir. 2005) (“[A]n order to pay restitution under [Section 3663] is a *criminal* penalty rather than a civil penalty.” (citing *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993))); *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002) (holding “restitution orders made pursuant to criminal convictions to be criminal penalties”).

141. 18 U.S.C. § 3664(d)(2)(A)(iii), (e).

142. *Mandia v. Applegate*, 708 A.2d 1211, 1217 (N.J. Super. Ct. App. Div. 1998) (“[A]n award of damages is left to the sound discretion of the trier of fact . . . .” (citing *Endress v. Brookdale Cmty. Coll.*, 364 A.2d 1080, 1097 (N.J. Super. Ct. App. Div. 1976))).

143. *Ocasio v. Amtrak*, 690 A.2d 682, 691 (N.J. Super. Ct. App. Div. 1997) (explaining the relevance of a victim's prior conditions regarding compensatory and nonpecuniary damages).

144. However, 18 U.S.C. § 3663A(b)(4) provides that victims can recover this amount through the restitution order.

the state level would be the costs the victim saves. Implementing the MVRA would decrease the need for victims to pursue a civil claim for intentional torts because they could receive compensatory damages, with the exception of emotional impact, under the MVRA.

Although victims have the ability to get damages for pain and suffering, as well as punitive damages in an intentional tort trial, a common problem for both restitution orders and civil trials is the defendant's insolvency.<sup>145</sup> While this problem will be addressed later in this Note, the combination of testifying at the criminal trial and receiving damages under the MVRA can save the victim from having to endure the emotional pain of going through discovery and possibly testifying again in the civil trial. Ordering damages at the sentencing hearing also acts as the criminal justice system's recognition of the victim's losses.

While the MVRA does not allow for recovery of damages for pain and suffering, it does allow for the victim to receive some damages that are difficult to calculate. For example, lost future income is very complex to calculate. However, courts have held that, as systems used to determine complex damages become available and more trustworthy, those damages can be awarded to victims.<sup>146</sup> Furthermore, the calculation of these amounts is approved by a judge and prevents lengthy explanations of the processes used to determine those damages to a jury. Since the MVRA still provides for recovery of complex damages, it ensures that the victim fully recovers the losses suffered.

From the victim's perspective, the implementation of the MVRA restitution scheme to the criminal justice system in New Jersey would help to alleviate those costs. However, a large and important aspect of

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145. See *infra* Section IV.A (discussing a defendant's insolvency); see also Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 736–37 (2012) (discussing the failure of many defendants to pay the damages awarded to plaintiffs in intentional tort cases due to insolvency issues); Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1691 (2009) (discussing how the MVRA is impractical because defendants are not able to pay the restitution orders).

146. *United States v. Cienfuegos*, 462 F.3d 1160, 1168–69 (9th Cir. 2006) (holding that the concepts and analysis involved in the calculation of future lost income are “well-developed in federal law”). The formulation for lost income was first discussed in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). First, the length of time a plaintiff would have worked along with a wage rate, known as the “lost stream of income,” must be determined. *Id.* at 533–34. After this is determined, the lost stream of income must account for individualized factors, such as promotions, and societal factors, such as productive growth within the industry. *Id.* at 536. Last, since the amount is for future income, the rate of discount, which accounts for the rates of inflation, must be based on the interest rate of “the best and safest investments.” *Id.* at 537 (quoting *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916)).

victims' rights is missing from the MVRA. While the goal of the MVRA was to provide recognition of victim's losses, the statute provides little about the victim's participation in the decision to seek restitution. While victims have the right to speak at the hearing,<sup>147</sup> it would make more sense to include a provision in the procedures of the MVRA to allow victims to waive their right to seek restitution. For example, Student in the factual pattern<sup>148</sup> might prefer not to seek any restitution. Perhaps the emotional stress of the trial or the idea of being reminded of the crime every time he receives a payment of restitution would only cause him further harm and pain. Logistically, the victim could refrain from providing any losses to the probation officer before the sentencing,<sup>149</sup> thereby creating no costs for the judge to consider when ordering restitution. But a direct provision in the procedures that allows for victims to decide whether to pursue restitution would increase the recognition of victims' decisions in the criminal justice system.

This right should not stop at the initial decision to request restitution. The victim should continue to stay informed of any changes in restitution and should be able to request the payments for restitution to stop at any point. A victim may decide after receiving some payments that he or she no longer wishes to receive them. If the criminal justice system is going to recognize the rights of victims of crime, the victim must remain at the forefront of the conversation regarding restitution. As part of inclusion in the process, the victim and the prosecutor should have a conference to discuss the rights of the victim under the MVRA. An explanation should be given that even if restitution is ordered for all of the victim's losses, the victim may not receive that money immediately, or at all. Keeping victims informed of the process, and of his or her rights within the process, will continue to solidify recognition of victims in the criminal justice system.

In addition to eliminating the need for victims to bring intentional tort claims, the MVRA will also impact the current restitution scheme in New Jersey, which brings the same benefits that victims of federal crimes have to the state level. By making restitution mandatory, victims in New Jersey can hope that they will be compensated more adequately through restitution than under the current scheme. Even if the amount of restitution does not increase, this creates a uniform criminal justice system that is focused on recognizing the losses that victims suffer and strives toward providing support for the victims of

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147. 18 U.S.C. § 3771(a)(4).

148. See discussion *supra* Section I.B.

149. 18 U.S.C. § 3664(d)(1).

crimes. By making restitution mandatory, it not only recognizes victims' losses, but it draws the attention of the courts, prosecutors, and defendants toward the victims of the crimes.

#### IV. ADDRESSING THE PROBLEMS WITH THE MVRA AND A MANDATORY RESTITUTION SCHEME

While there are several benefits associated with instituting a mandatory restitution scheme, many have also raised issues with the scheme. Most of the criticism is focused on the MVRA scheme. Some of these criticisms have been expressed since the MVRA was introduced as a bill. While any scheme within the criminal justice system will have drawbacks due to the balancing nature of the rights of the defendant against society, and specifically the victims, many of these problems can be addressed. There are four main arguments against a mandatory restitution scheme and the MVRA<sup>150</sup>: 1) defendants are insolvent;<sup>151</sup> 2) imposition of restitution results in the destruction of a defendant's rehabilitation;<sup>152</sup> 3) additional costs suffered by courts in enforcing restitution payments are too high;<sup>153</sup> and 4) victims are dissatisfied with the criminal justice system when they do not receive the full restitution ordered.<sup>154</sup>

##### A. Defendant's Insolvency

The most prevalent argument against the MVRA and its mandatory restitution scheme is the inability of defendants to pay any money

150. While there are only four criticisms discussed here, several other problems with the MVRA have been argued. One large problem revolves around whether restitution is a penalty or not, which has implications under the Sixth Amendment. For a more thorough discussion of this problem, see James Barta, Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463 (2014); James M. Bertucci, Note, *Apprendi-Land Opens Its Borders: Will the Supreme Court's Decision in Southern Union Co. v. United States Extend Apprendi's Reach to Restitution?*, 58 ST. LOUIS U. L.J. 565 (2014); see also cases cited *supra* note 135.

151. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1793 (2015); Dickman, *supra* note 145, at 1704.

152. Dickman, *supra* note 145, at 1704.

153. *MVRA Hearing*, *supra* note 72, 13–23 (statement of Judge Maryanne Trump Barry, Chairwoman, Committee on Criminal Law of the Judicial Conference of the U.S.); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 34–35 (2001) [hereinafter DEFICIENCIES IN COLLECTION PROCESSES], <http://www.gao.gov/new.items/d01664.pdf>; Dickman, *supra* note 145, at 1708–10.

154. Ruback, *supra* note 151, at 1797–98; Dickman, *supra* note 145, at 1698–99.

toward restitution. Proponents of this argument put forth the statistic that eighty-five percent of defendants are insolvent and unable to pay back any restitution.<sup>155</sup> While some defendants have the ability to earn money through prison work programs,<sup>156</sup> these options are not available to all inmates. Defendants might also have other financial obligations,<sup>157</sup> such as support for minors or other outstanding debts. Even when defendants get out of prison, they rarely make enough money to begin to pay restitution in addition to their other obligations.<sup>158</sup>

One response to this issue is that the problems they face when they get out of prison are simply part of deterrence. The restitution order encourages defendants not to engage in further crimes due the threat of increasing their financial burdens.<sup>159</sup> But a more practical response is that courts have discretion to structure a defendant's payment schedule so that defendant is not overwhelmed by payments.<sup>160</sup> While the most ideal outcome of the MVRA is that defendants always pay the full restitution they owe, the reality is that this will rarely occur. In 2014, the Annual Statistical Report for the Offices of the U.S. Attorneys recorded that defendants still owed almost \$70.5 billion in restitution to third parties—who are victims or other parties (such as victim's insurance companies) that are not the U.S. Government.<sup>161</sup> In that same year, only \$498 million was collected, and \$2.77 billion was deducted from the total criminal debt due to transfers, remands, presidential pardons, or the death of a defendant with an outstanding order.<sup>162</sup> This means that in 2014, the total debt owed to victims and

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155. *MVRA Hearing*, *supra* note 72, at 13 (statement of J. Maryanne Trump Barry, Chairwoman, Comm. on Criminal Law of the Judicial Conf. of the U.S.).

156. VICTIMS COMM. ON CRIMINAL JUSTICE SECTION AM. BAR ASS'N, *RESTITUTION FOR CRIME VICTIMS: A NATIONAL STRATEGY* 32–33 (2004) (explaining various prison work programs and their increasing prevalence).

157. Dickman, *supra* note 145, at 1707.

158. *Id.* at 1695 (discussing the economic difficulties that defendants face upon release).

159. Ruback, *supra* note 151, at 1791.

160. This is determined by the court when deciding the payment schedule. 18 U.S.C. § 3664(f)(1)(B)(2) (2012).

161. U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR THE U.S. ATTORNEYS, *United States Attorneys' Annual Statistical Report: Fiscal Year 2014*, at 32 tbl.8B (2014) [hereinafter *2014 Annual Statistical Report*], <http://www.justice.gov/sites/default/files/usao/pages/attachments/2015/03/23/14statrpt.pdf>.

162. *Id.*



third parties was reduced by 4.6%,<sup>163</sup> and only .07% was actually received by victims from defendants.<sup>164</sup>

The fact that victims will not receive the full amount due to the defendant's insolvency does not justify rejecting the mandatory restitution scheme. In fact, more money has been received by victims under the MVRA than when restitution was discretionary. In 1995, defendants owed \$2.1 billion in criminal debt to third parties (victims and other third-parties authorized under the VWPA), and defendants paid just over \$59.5 million.<sup>165</sup> Using the same numbers above from 2014, the trend demonstrates that while the total amount of debt has risen, victims received \$405.6 million more dollars as a result of the MVRA in 2014 compared to 1995.<sup>166</sup> Regardless of a defendant's ability to pay, making restitution mandatory for all crimes has resulted in an increase in the amount of restitution that victims receive. There is another argument that these restitution orders could actually increase crime rates and recidivism.<sup>167</sup> Defendants could be forced to commit further crimes in order to pay for the outstanding restitution orders.<sup>168</sup> However, under the MVRA, this should never happen. While judges are not allowed to order anything less than the full amount of restitution,<sup>169</sup> judges have great discretion in how much they require a defendant to pay each month or quarter, depending on the terms of the payment schedule.<sup>170</sup> Judges also have direct access to the assets of the defendant, and this information should influence the judge's decision

163. The total amount the debt was reduced was \$3.268 million (\$2.77 million + \$498 million). I calculated this percent by multiplying the amount the debt was reduced (\$3.268 million) by 100 and then dividing that number by the total debt (70.5 billion) to get 4.6%.

164. I calculated this percentage by multiplying the total debt paid to victims (\$489 million) and 100 and then dividing that number by the total debt (\$70.5 billion) to get .07%.

165. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR THE U.S. ATTORNEYS, *Statistical Report, United States Attorneys' Offices: Fiscal Year 1995*, at 58 tbl.12B (1996), [http://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL\\_REPORT\\_FISCAL\\_YEAR\\_1995.pdf](http://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1995.pdf).

166. To reach this number, I took the amount of the criminal debt paid by defendants in 1995 and used the Bureau of Labor Statistics in the Department of Labor's inflation calculator to determine how much the \$59.5 million received in 1995 would be worth in 2014. The adjusted amount was about \$92.4 million—\$498 million in 2014 minus \$92.4 million in 1995 equals \$405.6 million. The calculator can be found at [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

167. Dickman, *supra* note 145, at 1707.

168. *Id.* at 1707–08.

169. 18 U.S.C. § 3664(f)(1)(A) (2012) (“[T]he court shall order restitution . . . in the full amount . . .”).

170. *Id.* § 3664(f)(3).

when he decides the payment schedule.<sup>171</sup> The drafters of the MVRA recognized that defendants might not be able to pay all of the money back, which is why they allowed for nominal payments to be ordered.<sup>172</sup> Furthermore, the fact that victims receive fewer damages under the MVRA than from an intentional tort claim benefits the defendant. While this means less money for the victims, it makes the total amount ordered more manageable compared to the damages awarded in intentional tort cases. This ensures that the defendant only pays costs that are necessary to make the victim whole again without compensating for intangibles, such as emotional impact.<sup>173</sup> These costs are further supplemented by the growing victim's movement. The problem for victims with certain damages under the MVRA is that they require the victim to be able to pay for those services before they can be compensated through restitution.<sup>174</sup> But as the victims' rights movement has gained momentum, more services, such as counseling, are available to victims with little-to-no cost.<sup>175</sup> This reduces the amount of restitution a defendant has to pay while still ensuring that victims are getting the services they need.

### B. Destruction of Defendant's Ability to Rehabilitate

Another criticism of the MVRA is that the imposition of such large debts against the defendant after he or she is released from prison will inhibit a defendant's rehabilitation.<sup>176</sup> When defendants are released, they may be faced with financial obligations to their children or other

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171. *Id.* § 3664(d)(3).

172. *MVRA Hearing*, *supra* note 72, at 16 (statement of Honorable Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary); see 18 U.S.C. § 3664(f)(3)(B) (allowing for a restitution order requiring nominal payments).

173. S. REP. NO. 104-179, at 19, 21 (1995), as reprinted in 1996 U.S.C.C.A.N. 924, 932; Ruback, *supra* note 151, at 1794-95 (stating that a strong predictor for getting a restitution order under the discretionary scheme is the ability to calculate damages easily).

174. For example, in order for a victim to receive psychological counseling after the crime, the victim must either have insurance to cover the counseling or have the ability to pay for it. Since restitution orders only look at costs suffered by the victim that can be proven with a bill, victims might not get the services they need based on the restitution order alone. Ruback, *supra* note 151, at 1789 (describing the costs of protective devices, insurance costs, moving, and others as "indirect costs," as opposed to direct or tangible costs). Victims are often poor and unable to pay for these services themselves. *Id.*

175. See, e.g., N.J. VICTIMS OF CRIME COMP. OFFICE, *What If I Am in the Need of Mental Health Counseling Services?*, FREQUENTLY ASKED QUESTIONS, <http://www.nj.gov/oag/njvictims/faqs.html#q15> (outlining various mental health counseling services available in New Jersey and explaining how to utilize them) (last visited Aug. 16, 2016).

176. Dickman, *supra* note 145, at 1704.

family members.<sup>177</sup> Defendants might also have other debts, such as credit cards or mortgages, that they have to pay on top of their own living expenses.<sup>178</sup> In addition, defendants often face the stigma of a criminal conviction, as well as the difficulty of securing post-sentence employment.<sup>179</sup> All of these factors may leave many defendants too destitute to try to find a job that would allow them to begin to make significant payments toward the restitution order. Even if defendants find jobs, they have no incentive to pursue higher paying jobs because their money will go towards the restitution payments. This could lead to defendants taking lower-paying jobs that allow them to make the smallest payments on their restitution orders.

One counter-argument to this criticism is that the payments made by the defendant toward the restitution order act as a deterrent for defendants generally. When faced with the consequences of their crimes, recognition of the subsequent financial impact could help deter defendants from committing future crimes.<sup>180</sup> Every time the defendant makes a payment, the defendant is reminded of what he or she did and the impact his or her actions had on the victim. The human connection between the payment and the crime is made more salient by restitution, which could have a greater deterrent and rehabilitative effect than spending time in prison.

In his comment, Matthew Dickman argues that the financial burdens placed on the defendant as the result of the restitution order only increase recidivism and have a negative effect on the economy when the defendant is unable to pay the full restitution.<sup>181</sup> However, recidivism is not a new problem for defendants as a result of mandatory restitution.<sup>182</sup> Considering most states still employ a discretionary

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177. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, THE COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 1 (2007), [http://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying\\_debts\\_full\\_report.pdf?sfvrsn=2](http://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2).

178. *Id.* at 3 (declaring debts such as transportation and housing payments or consumer debt to be relevant to ordering restitution and important to its systemic improvement).

179. Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 232–33 (2006).

180. Ruback, *supra* note 151, at 1812; Dickman, *supra* note 145, at 1703 (“In one study of Pennsylvania offenders, researchers found that offenders who paid higher percentages of their restitution judgments were less likely to commit new offenses.” (citing CYNTHIA A. KEMPINEN, PA. COMM'N ON SENTENCING, PAYMENT OF RESTITUTION AND RECIDIVISM 3–4 (2002))).

181. Dickman, *supra* note 145, at 1705.

182. Heller, *supra* note 179, at 219–20 (discussing the many factors that contribute to recidivism).

restitution scheme,<sup>183</sup> the factors that contribute to recidivism are diverse. Instead of focusing on restitution as one more problem that would contribute to recidivism, more action needs to be taken to prevent recidivism by focusing on the other, more important factors. Improving defendants' ability to access resources for released prisoners with regard to their transition back into society can help lower recidivism rates.<sup>184</sup> Finally, the legislature could also take steps toward reducing the current stigma against defendants by changing required disclosures on employment applications.<sup>185</sup> These are only a few suggestions, but they illustrate that the existence of others factor contributing to recidivism. If solutions are implemented, the recidivism rates should lower despite the implementation of a mandatory restitution scheme.

Defendants do not have to worry about imprisonment for failing to pay restitution. The Supreme Court held that defendants could not be imprisoned as a result of failure to pay fines or restitution orders due to insolvency.<sup>186</sup> Analyzing the issue under both the Equal Protection and Due Process clauses of the Fourteenth Amendment, the Supreme Court stated that courts could not imprison defendants for failing to pay fines or restitution without looking at the reason for the defendant's failure to pay.<sup>187</sup> The decision removed the courts' ability to imprison defendants when defendants are unable to pay due to insufficient finances,<sup>188</sup> and provided that courts must consider whether defendants have made every reasonable effort to try and pay the fine before imposing imprisonment.<sup>189</sup> This decision helps take the pressure off of defendants to start paying back the restitution order immediately. It allows for defendants to spend time getting a job without another source of stress regarding finances, since courts have structured payment schedules according to what the defendant can actually pay.

### C. Costs to Courts with Mandatory Restitution

In a Senate Judiciary Committee hearing, Judge Barry raised issues with the MVRA and its cost on the court system.<sup>190</sup> Factors leading to this increased cost included the complexity of determining

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183. See, e.g., N.J. STAT. ANN. § 2C:44-2 (West 2016).

184. Heller, *supra* note 179, at 243-46.

185. *Id.* at 233, 246.

186. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

187. *Id.* at 666-69.

188. *Id.* at 668-69.

189. *Id.* at 672.

190. *MVRA Hearing*, *supra* note 72, 13-23 (statement of Judge Maryanne Trump Barry, Chairwoman, Committee on Criminal Law of the Judicial Conference of the U.S.).

what damages apply, tracking down defendants to enforce restitution orders, and hearings regarding non-payment or modification of the orders.<sup>191</sup> Issues revolving around the cost of enforcement plagued the MVRA system for years after it was invoked.<sup>192</sup> As a result of the enactment of the MVRA, the amount of criminal debt owed to third parties greatly increased.<sup>193</sup> The pressures and costs that Judge Barry cautioned would come with the enactment of the MVRA were an impediment to the success of the MVRA in its early years.<sup>194</sup> The U.S. Government Accountability Office (GAO) recognized that a change was needed in the collection process for debt.<sup>195</sup> The issue of implementing an efficient collection system plagued Congress long before the enactment of the MVRA.<sup>196</sup> In a 2001 report, the GAO determined that the different entities included in the criminal debt collection process—Financial Litigation Units in the ninety-four U.S. Attorneys' Office, investigative agencies, prosecuting attorneys, probation officers, Department of the Treasury, and Office of Management and Budget—were not working together properly to ensure the greatest amount of debt was collected from defendants.<sup>197</sup> The GAO twice recommended that the agencies involved in the collection of criminal debt form a task force to coordinate their efforts.<sup>198</sup> The Department of Justice, through the Attorney General, established a task force with the above named entities.<sup>199</sup> The new task force issued a report, which listed ways in which the offices have coordinated their efforts and laid out their future plans to coordinate and fix collection issues.<sup>200</sup> The task force helped

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191. *Id.* at 13–14.

192. DEFICIENCIES IN COLLECTION PROCESSES, *supra* note 153, at 70 (listing issues such as a lack of centralization and automation, a misuse of the available enforcement techniques, and simple misuse of available resources as issues that went unanswered for years despite being known).

193. *Id.*

194. *Criminal Fines and Restitution: Are Federal Offenders Compensating Victims?: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 4–9 (1999) (statement of Richard M. Stana, Associate Director of Administration of Justice Issues, United States General Accounting Office, Washington, D.C.).

195. DEFICIENCIES IN COLLECTION PROCESSES, *supra*, note 153, at 5–6.

196. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-86-02, AFTER THE CRIMINAL FINE ENFORCEMENT ACT OF 1984—SOME ISSUES STILL NEED TO BE RESOLVED i–ii (1985).

197. DEFICIENCIES IN COLLECTION PROCESSES, *supra* note 153, at 12–17.

198. *Id.* at 17; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 11–13 (2004).

199. U.S. Dep't of Justice, Activities of the Attorney General's Task Force on Improving the Collection of Criminal Debt pt. II (Aug. 31, 2005) [hereinafter Task Force], [http://www.justice.gov/archive/olp/pdf/083105\\_criminal\\_debt\\_tf\\_report.pdf](http://www.justice.gov/archive/olp/pdf/083105_criminal_debt_tf_report.pdf).

200. *Id.* pts. II–III.

draft legislation to improve the collection system, created a new accounting system aimed at streamlining the collection process, and improved ways to determine the assets of a defendant in order to track defendants and receive payments.<sup>201</sup> While this has resulted in an increase of the restitution recovered,<sup>202</sup> the process is far from perfect, with the outstanding criminal debt owed to third parties at \$70.5 billion.<sup>203</sup>

A recent study indicated, however, that steps could be taken to increase the amount of restitution received from defendants.<sup>204</sup> In this study, researchers sought to discover whether including information about how restitution could be paid and providing rationales for why defendants should pay restitution would increase the amount of restitution defendants paid.<sup>205</sup> To test this, the researchers sent monthly letters to delinquent defendants who had missed payments over a six-month period that included information about how much restitution was due, how to pay the outstanding restitution, and why the restitution was ordered.<sup>206</sup> After measuring the amounts of restitution paid after the last monthly letter was sent until a year after the experiment began, the researchers concluded that providing information to defendants about what they owed and how to pay it had a positive effect on increasing the amount of restitution paid over those who did not receive any information.<sup>207</sup> However, those who received letters regarding the rationales for why they should pay restitution paid less of their restitution than those who received no letter.<sup>208</sup> Another important result of the study showed that, for every dollar used to write and send the letters, \$6.44 in payment for restitution was received from defendants, demonstrating the low-cost-to-high-return result of this

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201. *Id.* pt. V.

202. See discussion of increase in restitution collected *supra* Section IV.A.

203. 2014 Annual Statistical Report, *supra* note 161, at 32 tbl.8B.

204. R. Barry Ruback et al., *Paying Restitution: Experimental Analysis of the Effects of Information and Rationale*, 13 CRIMINOLOGY & PUB. POL'Y 405, 429–30 (2014). This study looked at defendants in the Pennsylvania system, which has a mandatory restitution scheme very similar to the MVRA. *Id.* at 413; 18 PA. STAT. & CONS. STAT. ANN. § 1106 (West 2016). The average restitution owed by the participants was \$7260. Ruback et al., *supra*, at 418.

205. Ruback et al., *supra* note 204, at 411.

206. *Id.* at 412–14. The rationale for why restitution was ordered included “acknowledgment of harm, the taking of responsibility, and the increased likelihood of success when payments are made.” *Id.* at 414.

207. *Id.* at 424.

208. *Id.* The researchers concluded that using coercive measures, such as trying to guilt defendants into paying their restitution, were largely ineffective and had a negative effect on the likelihood that they would pay. *Id.* at 426.

experiment.<sup>209</sup> This study suggests that courts can take practical and cost-effective steps to reduce the expenses of collecting restitution.

While problems still exist for collection, this has not slowed support for the imposition of mandatory restitution. In 2004, the Victims Committee in the Criminal Justice Section of the American Bar Association released a report regarding the need for a national strategy to improve the collection of restitution for victims.<sup>210</sup> Many of the ideas put forth by the report revolved around a system very similar to the MVRA.<sup>211</sup> One suggestion was to assess all of the assets the defendant has at the time of conviction in order to prevent the defendant from hiding assets or gifting them to avoid restitution payments.<sup>212</sup> The report also suggested allowing courts to enforce the restitution by revoking probation, holding the defendant in contempt, incarcerating the defendant, or converting restitution into community service hours.<sup>213</sup> The report also mentions treating restitution like child support by using some of the tactics of the child support collection system, such as seizing tax returns, taking lottery winnings, and creating a centralized system to track payments owed throughout the states.<sup>214</sup> Some of these measures would help to ensure that victims get paid, while making the process more integrated and uniform across jurisdictions. This would create a streamlined process, which cuts down on costs for the court and criminal justice system.

Regarding the increased costs on the court system, as this Note has argued, the imposition of mandatory restitution would help save the cost of conducting intentional tort trials.<sup>215</sup> This also covers the cost of trying to enforce the civil judgment against the defendant if he or she is unable to pay.<sup>216</sup> Therefore, implementing mandatory restitution would save the courts the cost of conducting a civil trial along with saving the victim and defendant the costs of a civil trial.<sup>217</sup> After the new scheme is implemented, courts will adopt new procedures to accommodate the

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209. *Id.* at 423.

210. VICTIMS COMM. CRIMINAL JUSTICE SECTION AM. BAR ASS'N, *supra* note 156, at ii.

211. *E.g., id.* at 15 ("The offender's ability to pay should not determine whether the offender will be sentenced to restitution.").

212. *Id.* at 25–26.

213. *Id.* at 27–31.

214. *Id.* at 40–44.

215. *See supra* Part III.

216. *See Swedloff, supra* note 145, at 753 ("[B]ecause the government can seek restitution as a part of the criminal proceeding, it avoids the costs of a separate civil proceeding.").

217. *See supra* Part III.

increase in volume, which will reduce costs in the long term.<sup>218</sup> After the imposition of the MVRA, the courts and agencies involved with restitution have constantly worked to improve the system and create a process that is efficient and reduces costs.<sup>219</sup> Implementing a mandatory restitution scheme on the states would increase costs to the courts and criminal justice participants, but they would also benefit from the solutions created by those responsible for restitution at the federal level.

#### *D. Victim Dissatisfaction*

The final argument against the use of a mandatory restitution scheme is that victims will be dissatisfied because they have the expectation that they will receive the full restitution order. Since many defendants won't be able to pay the full restitution, victims will be discouraged by the restitution process and the criminal justice system. First, it is important to note that while studies have sought to explore victims' satisfaction with restitution, it is unrealistic to accept that these findings reflect the sentiment of every victim across the country. Victims often face difficult economic and emotional situations after the crime, and many victims suffer from the same insolvency problems that defendants face as well.<sup>220</sup> While many steps have been taken to improve the rights of victims, many victims are still left uninformed about the restitution process and do not understand why they are not receiving compensation immediately upon an order of restitution.<sup>221</sup>

One study surveyed victims regarding their experiences with restitution and their overall satisfaction with the process.<sup>222</sup> During this study, the researchers interviewed 198 victims of crimes by asking them questions regarding the victim's participation in the process, the

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218. S. REP. NO. 104-179, at 18 (1995), as reprinted in 1996 U.S.C.C.A.N. 924, 931. ("Additionally, the committee intends that its amendment streamlining the process for issuing and enforcing an order of restitution will have a salutary effect on the costs associated with victim restitution.").

219. *E.g.*, TASK FORCE, *supra* note 199, pts. V-VI (laying out the different goals and strategic plans of the different governmental agencies involved in the criminal debt system).

220. Ruback, *supra* note 151, at 1789.

221. *Id.* at 1798-99; Dickman, *supra* note 145, at 1698-701.

222. Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 750-51 (1992). One important note on this study is that it looked at a state-run restitution process, not the restitution process on the federal level. *Id.* at 750. At the time of the study, the MVRA had not been enacted yet. Matthew Dickman relied on this study to indicate that under a mandatory restitution scheme, it is not important to victims how much money is ordered, but rather how much money they receive. Dickman, *supra* note 145, at 1698.



awards ordered, and the amounts actually recovered by the victims.<sup>223</sup> The results show a strong correlation between victim satisfaction and the percentage of restitution received from the defendants.<sup>224</sup> However, this study does not establish that the MVRA and mandatory restitution fails to satisfy victims of crimes. The study also found that other information, such as whether the restitution order covered all of their losses and how informed the victims were, contributed to the victim's satisfaction with the restitution process.<sup>225</sup> Furthermore, logic follows that victims will be the most satisfied with a restitution program when the restitution is actually paid. That does not mean, however, that receiving a restitution award, even if it is not paid, does not have a positive effect on victims. Also, keeping victims informed of the process and including them in the criminal justice process could increase satisfaction.<sup>226</sup> While the effects of not keeping the victim fully informed of their rights regarding restitution can lead to dissatisfaction with the criminal justice process,<sup>227</sup> it is incumbent upon those involved in the criminal justice system to ensure that victims are fully informed. Allowing for victims to be informed of and included in the restitution process can increase victim satisfaction.<sup>228</sup> Important to this process is making sure that victims have realistic expectations of how much money they will receive from the defendant. This ensures that they are not dissatisfied while increasing the criminal justice system's inclusion of victims. While the mandatory restitution scheme may not lead to an immediate increase in the money received by victims, it does provide more recognition of the importance of the victim in the criminal justice system.

### CONCLUSION

While the advent of the Victim's Right Movement has led to many changes in the criminal justice system, the system still needs improvement to solidify victims' inclusion. The MVRA was a major step in the right direction, but this left many victims of crime at the state level without the financial support they need. One of the only options available to those victims is to bring an intentional tort claim against

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223. Davis et al., *supra* note 222, at 750–51.

224. *Id.* at 754–55 tbl.1.

225. *Id.*

226. *Id.* at 756 (“But our analysis also suggests that, with only minimal funds, victim satisfaction could be significantly enhanced if greater attention was given to victims by the programs that administer restitution.”).

227. Ruback, *supra* note 151, at 1798.

228. See discussion *supra* Part III.

the defendant. However, the victim must pay to bring those claims, and many victims do not have the money. Instead of forcing victims to pursue this option, New Jersey, and other states, need to adopt a mandatory restitution scheme similar to the MVRA to help victims. A mandatory victim restitution scheme would replace the need for victims to resort to intentional tort claims in New Jersey. While victims receive fewer damages through restitution, the smaller amounts make it easier for courts to order the restitution, making it more likely that the defendant will pay those amounts back. Victims also save the costs of having to bring intentional tort claims. Victims can still receive significant damages under the MVRA, such as lost future income and the costs associated with participating in the criminal trial. Most important to the success of this mandatory restitution scheme is keeping the victim involved in the process as much as possible. Fully informing the victim of their rights and the likelihood that they will receive restitution from the particular defendant contributes greatly to the satisfaction of the victim. Allowing the victim to have full control over whether to request restitution from the defendant also ensures that the victim is in control of the healing process after the crime. Without the support of the victim, as evidenced by the prior state of the criminal justice system, society as a whole suffers.