

# IN *BOOKER*'S SHADOW: RESTITUTION FORCES A SECOND DEBATE ON HONESTY IN SENTENCING

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## INTRODUCTION

[W]e call in a jury of the people to decide all controverted matters of fact, because to that investigation they are entirely competent, leaving thus as little as possible, merely the law of the case, to the decision of the judges. And true it is that the people, especially when moderately instructed, are the only safe, because the only honest, depositories of the public rights, and should therefore be introduced into the administration of them in every function to which they are sufficient.<sup>1</sup>

In 1823, Thomas Jefferson expressed these thoughts to Adamantios Coray, a Greek patriot, who had written to Jefferson requesting advice about a national government for newly liberated Greece.<sup>2</sup> In his response letter to Coray, Jefferson emphasized the significance of a constitution and specifically recognized the importance of a jury, as compared to the limited role of the judiciary.<sup>3</sup> Sadly, the jury protections described by Jefferson have been eroded. Today, persons accused of crimes are not afforded the safeguard intended by our forefathers.

This Article analyzes the United States Supreme Court's landmark decision in *United States v. Booker*,<sup>4</sup> which held that the United States Sentencing Guidelines ("Federal Guidelines") violated the Sixth Amendment's guarantees of trial by jury and proof of guilt beyond a reasonable doubt.<sup>5</sup> *Booker* is examined in an effort to determine whether its underlying principles require the conclusion that the Mandatory Victims Restitution Act of 1996 ("MVRA"),<sup>6</sup>

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1. Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), in *The Thomas Jefferson Papers Series 1, General Correspondence, 1651-1827* (on file with the Library of Congress in the Thomas Jefferson Papers).

2. *Id.*

3. *Id.*

4. 543 U.S. 220 (2005).

5. *See id.* at 243-44; *see also* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

6. Congress passed the MVRA in 1996 as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §§ 202 and 204, 110 Stat. 1214 (codified at 18 U.S.C. § 3663A-3664). The Federal Guidelines also contain a provision addressing restitution, but the Guidelines refer back to 18 U.S.C. §§ 3663-3664. *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.1 (2004) [hereinafter USSG].

which governs restitution for federal crimes, also breaches the Sixth Amendment. The MVRA expressly requires that judges, rather than juries, decide issues of restitution.<sup>7</sup> The MVRA also grants judges broad post-conviction discretion that often results in orders of restitution that are much harsher than a defendant could have reasonably predicted from the indictment, the evidence presented at trial, or the defendant's admission of guilt during the plea colloquy.<sup>8</sup>

Federal prosecutors and defenders eagerly awaited the January 2005 decision in *Booker*, with a mixture of anticipation and trepidation. *Booker* was expected by some to dramatically change the entire system of charging and sentencing criminal defendants in the federal courts.<sup>9</sup> Legal scholars predicted that if the Court ruled that the Federal Guidelines violated the Sixth Amendment, then every fact with any bearing on a defendant's potential sentence might need to be charged in the indictment and later presented to a petit jury for consideration.<sup>10</sup> This anticipated procedure would be far different from the process already in use under which a jury determined whether or not a defendant had committed certain statutorily-defined aspects of a crime (or the defendant admitted those portions in a plea) and then (in a subsequent hearing after the court conducted a separate pre-sentence investigation),<sup>11</sup> the sentencing judge made additional findings by a preponderance-of-the-evidence standard.<sup>12</sup>

In preparation for the Court's ruling in *Booker*, the Department of Justice ("DOJ" or "the Department") implemented policy changes that altered the way crimes were to be charged, indicted, and pursued through sentencing.<sup>13</sup> As part of this new policy, line prosecutors were told to include a section of "Special Findings" in every indictment to spell out any fact that under the Federal Guidelines could result in a sentencing enhancement.<sup>14</sup> The indictment with the

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7. See 18 U.S.C. § 3664(e) (2000).

8. See generally *id.*

9. See Jason Amala & Jason Lavrine, *An Exceptional Case: How Washington Should Amend Its Procedure for Imposing an Exceptional Sentence in Response to Blakely v. Washington*, 28 SEATTLE U. L. REV. 1121, 1122 (2005) (discussing how legislators, judges, prosecutors, and defense attorneys scrambled to find a solution to the Supreme Court's pre-*Booker* decision in *Blakely v. Washington*).

10. See, e.g., Carmen D. Hernandez, Fanfan and Blakely Decisions Could Cause Major Changes, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS NEWS (Champion), Dec. 2004, at 6, available at <http://www.nacdl.org/public.nsf/freeform/championmag?OpenDocument> (follow "Search All Public Articles . . ." hyperlink and search for "Cause Major Changes").

11. Although on behalf of the court, the presentence investigation is conducted by the United States Probation Office.

12. Sometimes a court's additional findings greatly increased a defendant's period of incarceration and amount of restitution; occasionally, the findings decreased the sentence.

13. See Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors (July 2, 2004), available at <http://www.usdoj.gov/dag/readingroom/blakely.htm>.

14. This instruction to line prosecutors was derived from Mr. Comey's Memo of July 2, 2004. See *id.* The author of this Article received this instruction as a line prosecutor in the Northern District of Georgia.

Special Findings section was then presented to a federal grand jury, and the grand jury decided whether or not there was probable cause to believe that the defendant had committed the substantive offense and whether the Special Findings applied to the defendant.

It turns out *Booker* was not the process-altering decision most federal criminal lawyers anticipated. Although it did hold that the Sixth Amendment applies to the Federal Guidelines, it was a two-part majority decision. The second part proposed a “remedy” for the invalid nature of the Guidelines and, thereby, avoided any monumental transformation in the way federal criminal cases needed to be charged, tried, and sentenced.<sup>15</sup> After *Booker*, the Department immediately returned to its old charging and sentencing practices. As a practical matter, *Booker* altered very little in the sentencing process. Perhaps the post-*Booker* mantra in the U.S. Attorney’s Office, Northern District of Georgia, captures it best; after *Booker*, “nothing has changed.”<sup>16</sup>

The *Booker* decision spoke to sentencing enhancements that increase a defendant’s period of incarceration pursuant to the Federal Guidelines and the Sentencing Reform Act of 1984 (“SRA”),<sup>17</sup> which spawned the Guidelines. The Court was not presented with, and did not reach, the issue of restitution, which is governed by the MVRA. Therefore, the Supreme Court did not decide whether the process for determining restitution pursuant to the MVRA also violates the Sixth Amendment.

This Article employs a *Booker*-type analysis to show that the MVRA violates the Sixth Amendment and that the circuit courts are misapplying the principles of *Booker* in concluding that the MVRA remains unaffected by that decision. The Article ultimately urges Congress to remedy the constitutional weaknesses in the MVRA and encourages the Department to lead the way in securing honesty in charging and sentencing by returning to its pre-*Booker* policies. Finally, this Article concludes that the federal sentencing courts and appellate courts can help preserve defendants’ Sixth Amendment rights by strictly adhering to the principles established in the 1990 decision, *Hughey v. United States*.<sup>18</sup> In *Hughey*, the Supreme Court held that a defendant may only be ordered to make restitution for losses proximately resulting from the offenses for which he is convicted, not for additional losses.<sup>19</sup>

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15. Professor Paul Kirgis recently described the *Booker* decision as one “containing a fundamental internal inconsistency.” See Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 900 (2005). Professor Kirgis concluded, “As a matter of logic, . . . [*Booker*] simultaneously confers and negates the right to a jury decision on sentencing facts.” *Id.* at 925.

16. In the days after *Booker*, federal prosecutors received much guidance from the Department of Justice in Washington, D.C., and internally from the management teams in the U.S. Attorney’s Offices. This mantra originated from such meetings in the Northern District of Georgia, several of which the author attended.

17. See 18 U.S.C. § 3551 (2000); 28 U.S.C. § 991 (2000).

18. 495 U.S. 411 (1990).

19. *Id.* at 417.

Part I of this Article reviews the Sixth Amendment and the ideals underlying it and briefly looks at the Supreme Court's holding in Part One of *United States v. Booker*.<sup>20</sup> Part II examines the MVRA and explores the unfair surprise and accompanying lack of honesty in sentencing that defendants often experience as a result of judges deciding issues of fact in support of restitution orders, as required by the MVRA. Part II also considers whether the restitution process mandated by the MVRA violates Rule 11 of the Federal Rules of Criminal Procedure. Part III analyzes *Booker* and its forerunners, *Apprendi v. New Jersey*<sup>21</sup> and *Blakely v. Washington*,<sup>22</sup> and focuses on how these cases impact the MVRA. Part III also considers whether or not restitution is an "element" of a criminal offense, concludes that restitution probably is, and questions why federal appellate courts are, nevertheless, refusing to apply the Sixth Amendment to restitution. Finally, Part III discusses the fact that the appellate courts have uniformly held that the MVRA is immune from the Sixth Amendment and exposes significant flaws in the reasoning supporting that conclusion. The flaws analyzed include the appellate courts' incorrect assumptions regarding the "statutory maximum" within the MVRA and the legal consequences of the unbounded discretion granted judges under the MVRA to find facts in support of orders of restitution. Part IV urges Congress, the Department of Justice, and the federal courts to encourage honesty in sentencing, which will, in turn, preserve defendants' Sixth Amendment rights.

#### I. THE SIXTH AMENDMENT AND THE DECISION IN *UNITED STATES V. BOOKER*

##### A. *The Sixth Amendment*

The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."<sup>23</sup> The Supreme Court has repeatedly interpreted the Sixth Amendment to confer a constitutional right to: 1) have a jury trial on all elements of a crime<sup>24</sup> and 2) be proven guilty beyond a reasonable doubt.<sup>25</sup>

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20. 543 U.S. 220 (2005).

21. 530 U.S. 466 (2000).

22. 542 U.S. 296 (2004).

23. See U.S. CONST. amend. VI.

24. See *Booker*, 543 U.S. at 230 (noting that the "[Federal] Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged" (citation omitted)); see also *Jones v. United States*, 526 U.S. 227, 232 (1999) ("[E]lements [of a crime] must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."); *In re Winship*, 397 U.S. 358, 361 (1970) (noting that the government "must convince the trier [of fact] of all the essential elements of guilt" (citation omitted)).

25. See *Booker*, 543 U.S. at 230 ("[T]he Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt.'" (quoting *In re Winship*, 397 U.S. at 364)); see also *Apprendi*, 530 U.S. at 478 (noting that "well founded is the . . . right to have

1. *The Jury Requirement.*—The constitutional mandate that a jury, not a judge, determine that an accused is guilty of each element of a crime is designed to “guarantee[] that the jury [will] . . . stand between the individual and the power of the government.”<sup>26</sup> “The Framers of the Constitution understood the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases.”<sup>27</sup> The Supreme Court has declared repeatedly that “trial by jury has been understood to require that ‘the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.’”<sup>28</sup>

2. *The Burden of Proof.*—The proof-beyond-a-reasonable-doubt standard of guilt is also a vital protection guaranteed by the Sixth Amendment<sup>29</sup> that “safeguards [citizens] from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”<sup>30</sup> As the Supreme Court acknowledged decades ago, the heightened standard plays a “vital role in our criminal procedure.”<sup>31</sup> It protects the interests of the accused, which are of “immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”<sup>32</sup> This standard also “command[s] the respect and confidence of the community in applications of the criminal law.”<sup>33</sup> Such a standard gives “every

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the jury verdict based on proof beyond a reasonable doubt”); *In re Winship*, 397 U.S. at 362 (“[I]t has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”).

26. *Booker*, 543 U.S. at 237.

27. *See id.* at 238-39 (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also Blakely*, 542 U.S. at 308 (“[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust [the] government to mark out the role of the jury.”).

28. *Apprendi*, 530 U.S. at 477 (alteration in original) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)); *see also Blakely*, 542 U.S. at 301 (noting that the “truth of every accusation” should be confirmed by the unanimous suffrage of twelve and that “an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the . . . law” (citation omitted)). The Supreme Court also declared that a defendant should be able to “discern from the statute of indictment what maximum punishment conviction under that statute could bring.” *Apprendi*, 530 U.S. at 483 n.10.

29. “Proof beyond a reasonable doubt . . . is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.” ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL, General Instruction 3, at 8 (2003). Furthermore, it is “the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.” *In re Winship*, 397 U.S. at 361 (citing C. MCCORMICK, EVIDENCE § 321, at 681-82 (1954)).

30. *In re Winship*, 397 U.S. at 362 (citing *Davis v. United States*, 160 U.S. 469, 488 (1895)).

31. *Id.* at 363.

32. *Id.*

33. *Id.* at 364.

individual going about his ordinary affairs . . . confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”<sup>34</sup> These interpretations of the Sixth Amendment laid the foundation for Part One of the U.S. Supreme Court’s decision in *Booker*.

*B. The Decision in United States v. Booker*

In January, 2005, the Supreme Court issued a landmark Sixth Amendment decision, *United States v. Booker*.<sup>35</sup> The *Booker* decision includes a two-part majority opinion,<sup>36</sup> holding first that the Sixth Amendment applies to the Federal Guidelines,<sup>37</sup> and, second, that the portions of the federal sentencing statute that made the Federal Guidelines mandatory “must be severed and excised.”<sup>38</sup> The Court in *Booker* excised two portions of the sentencing statute after determining that those two provisions, which made the Federal Guidelines mandatory, caused the Guidelines as a whole to violate the Sixth Amendment.<sup>39</sup>

The *Booker* decision considered whether the Sixth Amendment applied to the Federal Guidelines. It did not address restitution or the Sixth Amendment’s impact on the Mandatory Victims Restitution Act, which governs restitution.<sup>40</sup>

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34. *Id.*

35. 543 U.S. 220 (2005). The case comprised two separate criminal appeals that the Court addressed in one opinion after certiorari was granted in each. *Id.* at 229. The defendants were Freddie J. Booker and Ducan Fanfan. In Booker’s case, the jury had found Booker guilty of possession with intent to distribute at least fifty grams of cocaine base, enough to authorize a sentence of between 210 and 262 months of incarceration pursuant to the Federal Guidelines. *Id.* at 227. In the case of Fanfan, the jury had found that he possessed, with intent to distribute, at least 500 grams of cocaine, enough cocaine to support a sentence for seventy-eight months of incarceration pursuant to the Federal Guidelines. *Id.* at 228. In each case, at the subsequent sentencing hearing, the sentencing judge found that the defendant had possessed more drugs than that determined by the jury. *See id.* at 227-28.

36. Justice Stevens wrote Part One in which Justices Scalia, Souter, Thomas, and Ginsburg joined. *See id.* at 225. Part Two of the majority opinion was written by Justice Breyer, in which Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Ginsburg joined. *Id.* at 244.

37. *See id.* at 226-27.

38. *Id.* at 245.

39. *See id.* at 245-46 (finding 18 U.S.C. § 3553(b)(1) (2000) “incompatible with today’s constitutional holding” and excising § 3742(3) as well).

40. *See United States v. Wilson*, 350 F. Supp. 2d 910, 928-29 (D. Utah 2005) (noting that *Booker* focused on the Sentencing Reform Act of 1984, not the MVRA, which was enacted separately in 1996, and commenting that *Booker* did not answer whether the MVRA is unconstitutional although the MVRA “requires judicial fact-finding beyond that authorized by the Sixth Amendment”).

## II. THE MVRA AND THE LACK OF HONESTY IN SENTENCING

A. *The MVRA and Current Process*

The Mandatory Victims Restitution Act, or MVRA, governs restitution in federal sentencing.<sup>41</sup> It provides the ground rules for imposing restitution and mandates restitution for certain crimes.<sup>42</sup> It also provides that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.”<sup>43</sup> Pursuant to the MVRA, after a defendant pleads guilty or is found guilty of a crime, a federal probation officer prepares a pre-sentence report (“PSR”), which includes information about the victims of the defendant’s crimes and the amount of restitution purportedly owed to the victims.<sup>44</sup> Often the prosecutor or the victim supplies the probation officer with this information.<sup>45</sup> Once compiled, the information in the PSR is distributed to the federal prosecutor and to the defendant’s lawyer.<sup>46</sup> Frequently, the PSR contains information and facts unknown to either the prosecutor or defense counsel, so the lawyers are given an opportunity to object to the findings in the report.<sup>47</sup> After objections are registered, a sentencing hearing is held during which the judge makes findings about how much restitution the defendant owes.<sup>48</sup> The sentencing court then orders the defendant to pay “restitution to each victim

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41. See generally 18 U.S.C. §§ 3663, 3663A(a)(1), 3664. Congress passed the MVRA in 1996 as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996, Pub. L. No. 104-132, §§ 202 and 204, 110 Stat. 1214 (codified at 18 U.S.C. § 3663A).

42. See 18 U.S.C. § 3663A (providing that notwithstanding other provisions of law, a court sentencing a defendant shall order restitution); see also *United States v. Schulte*, 264 F.3d 656, 661 (6th Cir. 2001) (explaining that the MVRA amended the earlier restitution statute, the Victim and Witness Protection Act, and added Section 3663A, which requires restitution for certain crimes). In passing the new restitution provisions, the Senate Committee indicated its desire “that courts order full restitution to all identifiable victims of covered offenses.” *Id.* at 661 n.2 (quoting S. Rep. No. 104-179 (1996), at 12, reprinted in 1996 U.S.C.C.A.N. 924, 931).

43. 18 U.S.C. § 3664(e).

44. See FED. R. CRIM. P. 32(c)(1)(B) (explaining that a probation officer must generally conduct a presentence investigation and submit the accompanying report to the court before the court imposes a sentence and that the report must contain “sufficient information for the court to order restitution”); see also 18 U.S.C. § 3664(a) (explaining that the probation officer is to include in the presentence report “information sufficient for the court to exercise its discretion in fashioning a restitution order”).

45. See 18 U.S.C. § 3664(d)(1) (explaining that “the attorney for the Government, after consulting . . . with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution” and that the probation officer shall provide certain notice to the victims to allow them an opportunity to submit information concerning the amount of their losses).

46. See *id.* § 3664(b); see also FED. R. CRIM. P. 32(e).

47. See FED. R. CRIM. P. 32(f).

48. See 18 U.S.C. § 3664; see also FED. R. CRIM. P. 32(i).

in the full amount of each victim's losses . . . without consideration of the economic circumstances of the defendant."<sup>49</sup> This amount of restitution is included in the defendant's Judgment and Commitment order ("J&C") as part of the resolution of the criminal case against the defendant.<sup>50</sup> Often, the sentencing judge makes the defendant's payment of restitution a term of the defendant's post-incarceration supervised release.<sup>51</sup> If the defendant fails to pay his restitution in compliance with the J&C, the defendant's supervised release is revoked, and the defendant is returned to prison.<sup>52</sup> This standard process for determining restitution has far-reaching ramifications for defendants. Under this process, sentencing courts have ordered defendants to pay restitution in amounts far greater than the indictment or the defendant's admissions of guilt could have forecasted.

### *B. The Lack of Honesty in Sentencing*

The MVRA mandates that a judge, not a jury, determine all facts relating to a defendant's restitution, applying a preponderance of the evidence standard.<sup>53</sup> In other words, the MVRA grants judges broad discretion to fashion each restitution order. Due to the broad discretion granted sentencing judges, defendants are routinely ordered to pay restitution well in excess of any amount that a defendant could have reasonably predicted from the charging document.

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49. See 18 U.S.C. § 3664(f)(1)(A).

50. See *id.* § 3664(o); see also *id.* § 3556 (explaining that when imposing sentence on a defendant, the court "shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663"). Of course, an appeal often is taken from the J&C. On appeal, criminal restitution orders receive varying levels of review depending on the type of appeal. See *United States v. Wasielek*, 139 F. App'x 187, 193 n.10 (11th Cir.) (unpublished decision) ("We review the validity of a restitution order for abuse of discretion." (quoting *United States v. Alas*, 196 F.3d 1250, 1251 (11th Cir. 1999))), *cert. denied*, 126 S. Ct. 600 (2005); *United States v. Wooten*, 377 F.3d 1134, 1143 (10th Cir. 2004) (noting that courts review the legality of restitution orders de novo); *United States v. Stouffer*, 986 F.2d 916, 928 (5th Cir. 1993) (noting that because challenge to restitution was one to "the legality of the award under the Victim and Witness Protection Act of 1982[,] the review was de novo"); *United States v. Jackson*, 982 F.2d 1279, 1281 (9th Cir. 1992) (noting that the "legality" of a sentence is reviewed de novo but that "an order complying with the statutory framework for ordering restitution is reviewed for an abuse of discretion").

51. After a defendant serves the entire period of incarceration ordered by the sentencing judge, he is often freed from physical confinement on "supervised release," which is essentially a type of probation. While on supervised release, the defendant may have numerous conditions placed on his freedom.

52. See generally 18 U.S.C. § 3583 (explaining supervised release after imprisonment); see also *id.* § 3583(d) (authorizing a sentencing court to include as a term of supervised release any discretionary condition of probation in section 3563(b)); *id.* § 3563(b)(2) (providing that the court may require as a condition of a sentence that the defendant make restitution to a victim under title 18, section 3556).

53. *Id.* § 3664(e).



Defendants are sometimes ordered to make restitution to “victims” who were omitted from the indictment and never mentioned during the defendant’s change of plea hearing and, occasionally, to persons identified for the first time weeks after the defendant’s conviction.<sup>54</sup>

In the pre-*Booker* decision, *United States v. Dickerson*,<sup>55</sup> the Eleventh Circuit approved a restitution order requiring a defendant to pay restitution for conduct that was beyond the statute of limitations period.<sup>56</sup> In the post-*Booker* decision, *United States v. Rand*,<sup>57</sup> the Seventh Circuit approved an order requiring a defendant to pay restitution to victims never mentioned in the indictment and for amounts never reasonably contemplated by the defendant.<sup>58</sup> Both cases exemplify the inequities and the constitutional frailties of the MVRA.

1. *United States v. Dickerson*.—In *Dickerson*, the Eleventh Circuit held that a criminal defendant convicted of fraud must pay restitution to the victim of his fraud in the full amount of the victim’s loss, even though the defendant committed part of the crime and, correspondingly, the victim suffered some of the loss, at a time beyond the applicable statute of limitations and years before the defendant was charged or convicted.<sup>59</sup> The Social Security Administration discovered in June 1998, that defendant Dickerson had been receiving disability benefits to which he was not legally entitled.<sup>60</sup> Four years later, in 2002, a federal grand jury indicted Dickerson for wire fraud and Social Security fraud.<sup>61</sup>

Dickerson pled guilty without a plea agreement to all counts of the indictment, including thirty-six counts of wire fraud and one count of Social Security fraud.<sup>62</sup> Although he admitted his fraudulent conduct, Dickerson

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54. It might be argued that the guilty defendant is in the *best* position to know who the victims are and how much loss they suffered. This idea, of course, presumes the guilt of a defendant when everyone is presumed to be innocent until proven guilty by the government beyond a reasonable doubt.

55. 370 F.3d 1330 (11th Cir.), *cert. denied*, 543 U.S. 937 (2004).

56. *Id.* at 1343.

57. 403 F.3d 489 (7th Cir. 2005).

58. *Id.* at 493.

59. *Dickerson*, 370 F.3d at 1342-43. *Dickerson* answered an issue of first impression in the Eleventh Circuit. *See id.* at 1340 n.15. *Dickerson* could have been more narrowly (and more appropriately) decided on the basis urged by the government—that Dickerson’s crime was an “ongoing scheme to defraud,” that began in 1996 and was continuous. *Id.* at 1336. The Eleventh Circuit’s decision was not so narrow. *Id.* at 1342 (holding “that where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant’s conduct in the course of the scheme, even where such losses were caused by conduct outside of the statute of limitations”).

60. *Id.* at 1332. Dickerson was not eligible for benefits because he was able to work and fully employed. *Id.* Dickerson had started receiving benefits in August 1996 but was continually employed beginning in September 1996. *Id.* at 1332 n.2.

61. *Id.* at 1332-33.

62. *Id.* at 1333-34.

maintained that the sentencing court could not order him to pay restitution for Social Security benefits he received, albeit through fraud, before July of 1997, the date corresponding to the applicable five-year statute of limitations for such crimes.<sup>63</sup> Dickerson contended that “even if he had received those benefits criminally, such conduct was beyond the statute of limitations and therefore not subject to restitution.”<sup>64</sup> He argued that he owed restitution only for the “total sum of the benefits he received within the statute of limitations” for which he was indicted and to which he had admitted guilt.<sup>65</sup>

The government conceded that the five-year statute of limitations prevented it from *charging* Dickerson “for wire fraud occurring before July 1997[,]”<sup>66</sup> but nevertheless argued that the defendant was accountable in restitution for his criminal conduct that was more than five years old.<sup>67</sup> The sentencing court agreed with the government and without explanation, ordered Dickerson to pay restitution for periods both inside and outside the five-year time limit.<sup>68</sup> Dickerson appealed.

On appeal, neither party disputed that the MVRA<sup>69</sup> obligated the district court to order restitution for all losses resulting from the wire fraud to which Dickerson had pled guilty.<sup>70</sup> But Dickerson maintained that he could not be required to pay restitution for losses the Social Security Administration had failed for years to uncover and that the government was barred from prosecuting because the conduct was too far in the past.<sup>71</sup>

The defendant rested his arguments against the expanded restitution on the Supreme Court’s 1990 decision in *Hughey v. United States*.<sup>72</sup> In *Hughey*, the

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63. *Id.* at 1334. As the court in *Dickerson* noted, the pertinent statute of limitations in 18 U.S.C. § 3282 stated, in pertinent part: “[E]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.” *Dickerson*, 370 F.3d at 1333 n.4 (quoting 18 U.S.C. § 3282).

64. *Dickerson*, 370 F.3d at 1334.

65. *Id.*

66. *Id.* at 1333.

67. *Id.* In fairness to the government, the prosecutor announced during the plea hearing that at sentencing the government would be seeking restitution in the “full amount of the loss incurred by the Social Security Administration” and not just the loss occurring within the statute of limitations period with which the defendant had been charged in the indictment. Brief of Appellee at 3-4, *Dickerson*, 370 F.3d 1330 (No. 02-16559). Often, however, the issue of the amount of restitution is not even broached until after the PSR is prepared.

68. *Dickerson*, 370 F.3d at 1334.

69. See 18 U.S.C. § 3663A (2000) (making it mandatory that a court order a defendant to make restitution to the victims of fraud or deceit and for other specified crimes).

70. *Dickerson*, 370 F.3d at 1336.

71. *Id.*

72. 495 U.S. 411 (1990). In *Hughey*, a defendant pled guilty to one count of credit card fraud in exchange for the government’s agreement to dismiss three counts of theft and two other counts of credit card fraud. *Id.* at 413-14. The Victim and Witness Protection Act of 1982 (“VWPA”),

issue was whether it was legally appropriate for a sentencing court to order a defendant to make restitution for losses resulting from offenses dismissed as part of a plea bargain.<sup>73</sup> The Supreme Court said it was not proper.<sup>74</sup> The Court then reversed the sentencing court's decision to require the defendant to make restitution for losses beyond those related to the one count of credit card fraud to which the defendant had pled guilty.<sup>75</sup>

Despite the similarities, the Eleventh Circuit refused to apply *Hughey*'s reasoning to the restitution issue it faced in *Dickerson*.<sup>76</sup> The Eleventh Circuit read *Hughey* narrowly to mean that "a criminal defendant cannot be compelled to pay restitution for conduct committed outside of the *scheme, conspiracy, or pattern* of criminal behavior underlying the offense of conviction."<sup>77</sup> The court concluded, "If a district court may consider relevant conduct occurring outside of the statute of limitations in determining the offense level . . . we fail to see what precludes it from considering such conduct in fashioning a restitution order."<sup>78</sup>

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Pub. L. No. 97-291, 96 Stat. 1248 (1982), was at issue in *Hughey*. The VWP was a victim restitution provision that preceded the MVRA. After *Hughey*, Congress amended the VWP to broaden the meaning of "victim." See Pub. L. No. 101-647, § 2509, 104 Stat. 4789; 18 U.S.C. § 3663(a)(2) (defining victim of "an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, [to be] any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern"). That statutory change has necessarily led courts to liberalize the reach of restitution orders.

73. See *Hughey*, 495 U.S. at 412-13. *Hughey* was indicted for multiple offenses but was convicted of only one. *Id.* at 413-14.

74. *Id.* at 413.

75. *Id.* at 422.

76. The *Hughey* decision rested on the Court's statutory construction of the VWP; it did not rest on constitutional grounds. *Hughey* also dealt with the VWP, not the MVRA. Therefore, *Hughey* unquestionably did not bind the Eleventh Circuit.

77. *United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir.), *cert. denied*, 543 U.S. 937 (2004) (emphasis added).

78. *Id.* at 1342. The court in *Dickerson* was correct that before *Blakely* and *Booker*, courts routinely considered conduct outside the indictment, conduct for which the defendant had been acquitted, and even time-barred conduct, in rendering sentences. See, e.g., *United States v. Lawrence*, 189 F.3d 838, 844 (9th Cir. 1999) (approving the sentencing court's reliance on conduct for which a defendant was not convicted, reasoning that such "sentencing does not result in punishment for any offense other than the one of which the defendant was convicted[;] [r]ather, the defendant is punished . . . for the fact that the present offense was carried out in a manner which warrants increased punishment"); *United States v. Welsand*, 23 F.3d 205, 207 (8th Cir. 1994) (holding that when a defendant is convicted of a "scheme" which thrives over years, a sentencing court can order the defendant to pay restitution for periods outside the statute of limitations); *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994) (holding that "conduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct" for sentencing); *United States v. Wishniefsky*, 7 F.3d 254, 256-57 (D.C. Cir. 1993) (approving of a district court's consideration of conduct occurring beyond the statute of limitations for which a

*Dickerson* reveals that pursuant to the MVRA, even time-barred conduct, which the government is legally prohibited from presenting to a jury, may be injected into the case at sentencing when the judge is the sole decision-maker.

2. *United States v. Rand*.—The Seventh Circuit’s decision in *United States v. Rand* also illustrates the surprise that defendants sometimes face as a result of post-conviction, judge-determined decisions regarding restitution. In *Rand*, the defendant pled guilty to one count of conspiracy in violation of 18 U.S.C. § 371.<sup>79</sup> “[H]e specifically admitted to several acts of fraud involving the identity information of five individual victims.”<sup>80</sup> The defendant had been indicted in a seven-count indictment but pled guilty to only Count One in exchange for the government’s agreement to dismiss the remaining six counts.<sup>81</sup> *Rand* admitted participating in a fraud scheme with his co-conspirators to steal personal information from employees of a Gary, Indiana public school system.<sup>82</sup> Count One specifically listed four street addresses used in the scheme and “described the general nature of the conspiracy” this way:

It was part of the conspiracy that the defendants: (1) obtained the names and social security numbers of employees of the Gary Community School Corporation, Gary, Indiana, in order to establish credit in the employees’ names without their knowledge, authority and permission . . . [and] (2) obtained credit cards in the employees’ names in order to purchase merchandise for the defendants’ own personal

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defendant was not charged); *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992) (noting that conduct that comprises an offense for which a defendant has been acquitted may be used at sentencing as a basis to enhance a sentence). But see *United States v. Silkowski*, 32 F.3d 682, 684, 690 (2d Cir. 1994) (remanding the issue of restitution in a case of theft of public funds (in violation of 18 U.S.C. § 641), noting that the case did not involve a plea to a “continuing offense” and holding that the offense of conviction was “circumscribed by the five year statute of limitations” such that “conduct committed within the offense of conviction is only that conduct going back five years from the date of the information and waiver of indictment”); *United States v. Streebing*, 987 F.2d 368, 376 (6th Cir. 1993) (limiting restitution to the loss caused by the mailing that constituted the mail fraud for which the defendant was convicted and denying restitution for other acts committed in the scheme, which were not in furtherance of the mail fraud for which the defendant was convicted).

79. See *United States v. Rand*, 403 F.3d 489, 491 (7th Cir. 2005). Section 371 states in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

See 18 U.S.C.A. § 371 (West 2005).

80. See *Rand*, 403 F.3d at 492.

81. *Id.* at 491-92.

82. *Id.* at 491.

purposes and benefit.<sup>83</sup>

After Rand's plea of guilty was accepted by the district court, a pre-sentence investigation was conducted and a report prepared.<sup>84</sup> The PSR indicated that the conspiracy involved not four, but nine different street addresses; that Rand had committed twenty-five incidents of identity theft not mentioned in the indictment; and that based on these additional factual findings, Rand was responsible to his victims for \$90,744.30 in restitution.<sup>85</sup> Rand objected to the PSR, arguing that he was responsible "only for the specific fraudulent acts he affirmatively admitted in his guilty plea, which gave rise to losses totaling just \$12,594.90."<sup>86</sup> The sentencing court rejected both the findings in the PSR and the defendant's argument.<sup>87</sup> The court decided that Rand owed \$57,431.67, covering "losses resulting from acts of fraud explicitly listed in the . . . indictment," plus \$7241.76 in losses, which were not.<sup>88</sup>

Rand appealed, asserting that the restitution order "was impermissible since it included damages relating to individual identity theft victims whom Rand did not affirmatively identify in his guilty plea, who were not identified specifically in the original indictment or who were not employees of the Gary, Indiana public school system."<sup>89</sup> The Seventh Circuit rejected the defendant's challenge and affirmed the order of the district court.<sup>90</sup> The court acknowledged that conduct underlying restitution must be articulated in the indictment or plea agreement, but said that "specific victims need not be."<sup>91</sup> The court reasoned further, "[A]ny individual 'directly harmed' by Rand's 'criminal conduct in the course of the [fraud] scheme, conspiracy, or pattern' is *presumptively* included in the restitution calculus."<sup>92</sup> The Seventh Circuit concluded:

Rand's attempts to limit the scope of his liability by listing in his plea agreement acts relating to only a few individual victims is thus unavailing. Rand may not evade the clear import of the MVRA and leave his victims in the proverbial lurch simply by artful pleading. Having pleaded guilty to conspiracy, he may not then pick and choose the victims for which he will be held responsible.<sup>93</sup>

In short, the Seventh Circuit was content to allow the sentencing court to make

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83. *Id.* at 492.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 493.

90. *Id.* at 495-96.

91. *Id.* at 494.

92. *Id.* at 495 (emphasis added) (second bracket in original) (quoting 18 U.S.C. § 3663A(a)(2) (2000)).

93. *Id.*

findings of fact about the identity of the defendant's victims and the amount of the victims' losses, even though the defendant could not have predicted such findings from the indictment or from the facts he admitted during his plea hearing.

*Dickerson* and *Rand* are just two samples of the hazards of restitution that plague defendants at the "back end" or sentencing phase of the trial-level criminal process.<sup>94</sup> In effect, the MVRA allows federal district court judges broad discretion to determine restitution in an amount totally unexpected by a defendant, in a manner that circumvents any bargain reached by a defendant during plea negotiations, and even in an amount that undermines a statute of limitations, which would otherwise totally bar prosecution of a crime. Arguably, neither judge nor jury should weigh time-barred conduct or make findings extraneous to the facts charged in an indictment or admitted by a defendant during a plea. At a minimum, a defendant should have the protection of a jury of his peers as guaranteed by the Sixth Amendment to weigh these issues, not a judge, a single person armed with information neither proved beyond a reasonable doubt nor admitted by the defendant.

3. *The Restitution Process Defies Rule 11 of the Federal Rules of Criminal Procedure.*—"Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea."<sup>95</sup> More specifically, Rule 11(b)(1)(K) mandates that the district court "inform the defendant of, and determine that the defendant understands," certain rights, including "the court's authority to order restitution."<sup>96</sup> It is the contention of this Article that Rule 11

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94. See also *United States v. Benjamin*, 125 F. App'x 438, 442 (3d Cir. 2005) (unpublished) (holding that the district court did not abuse its discretion when ordering defendant to make restitution for computers he obtained and sold as part of a fraud scheme even though the computers were not charged in the indictment); *United States v. Wasielek*, 139 F. App'x 187, 190, 194 (11th Cir.) (unpublished) (rejecting argument that sentencing court erred in ordering the defendant to pay restitution for twenty-five stolen all-terrain vehicles, although indictment identified only twelve vehicles and the defendant did not admit involvement with those additional vehicles), *cert. denied*, 126 S. Ct. 600 (2005); *United States v. Coffee*, 110 Fed. App'x 654, 656 (6th Cir. 2004) (unpublished) (rejecting defendant's argument that restitution was improper even though determined after the defendant's plea, noting that "[r]estitution is not confined to harm caused by the particular offense of conviction[]" in a fraud scheme), *cert. denied*, 125 S. Ct. 978 (2005); *United States v. Portillo*, 363 F.3d 1161, 1165 n.2 (11th Cir.) (rejecting the defendant's argument that names of victims had to appear in indictment before they could be awarded restitution and noting that four of the victims were specifically named in the pre-sentence report), *cert. denied*, 125 S. Ct. 448 (2004); *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996) (noting that restitution is "not necessarily fixed by the description given in the corresponding charge itself" and affirming an award that reflected the jury's implicit finding of a scheme to defraud); *United States v. Jackson*, 982 F.2d 1279, 1282-83 (9th Cir. 1992) (affirming an order of restitution made pursuant to the VWPA for an amount not charged in the count of indictment to which the defendant pled guilty).

95. See *McCarthy v. United States*, 394 U.S. 459, 464 (1969).

96. See FED. R. CRIM. P. 11(b)(1)(K); see also *United States v. Showerman*, 68 F.3d 1524,

is breached in cases like *Dickerson* and *Rand*<sup>97</sup> when a court fails to advise a defendant in a real and practical way during the plea hearing of the maximum amount of restitution the defendant faces at sentencing. The federal courts of appeal seem to agree that Rule 11 is breached when a sentencing court fails altogether to advise a defendant about the possibility of restitution, but they are split on whether such an omission that defies Rule 11 should have any real consequences. Most circuits find that when a district court violates Rule 11 by failing to mention restitution at the change of plea hearing, the omission is merely a harmless error.<sup>98</sup> Furthermore, not one court appears to deem it a violation of Rule 11 when a defendant pleads guilty expecting one maximum amount of restitution only to find that amount burgeon at sentencing when the court takes into account other conduct and other victims uncovered by the pre-sentence investigation. Nevertheless, it is fiction to say that in such instances a defendant pleads guilty with any true comprehension of the consequences of that plea on the amount of restitution he will be expected to pay. Thus, at a minimum, the MVR A-mandated process often causes a violation of the spirit and purpose of Rule 11. Such violations are particularly troubling considering that once a plea is accepted by the district court judge, it can rarely be withdrawn.<sup>99</sup>

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1527 (2d Cir. 1995) (“[A]t bottom, the colloquy required by Rule 11 is meant to ensure that the defendant is aware of the consequences of his plea.” (alteration in original and citation omitted)).

97. See discussion *supra* Part II.B.1-2.

98. See, e.g., *United States v. Glinsey*, 209 F.3d 386, 394-95 (5th Cir. 2000) (explaining that Rule 11 requires a district court to “inform the defendant . . . , when applicable, that the court may also order the defendant to make restitution to any victim of the offense,” but refusing to allow a defendant to withdraw his plea, even though neither the plea agreement nor change of plea colloquy mentioned restitution; finding that reducing the restitution to the maximum amount of available fine protected defendant’s substantial rights (quoting FED. R. CRIM. P. 11(c)(1))); *United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir. 2000) (noting that even when a defendant is not warned of the potential for restitution, the arguable error is harmless if restitution is less than a possible fine of which the defendant was warned); *United States v. Russo*, No. 98-3245, 2000 WL 14298, at \*3-4 (10th Cir. Jan. 10, 2000) (unpublished) (applying a harmless error review to a defendant’s Rule 11 challenge based on the district court’s failure to advise on restitution); *United States v. Morrison*, No. 95-1459, 1997 WL 636623, at \*2-3 (6th Cir. Oct. 10, 1997) (unpublished) (noting that Rule 11 required district court to advise a defendant, “when applicable, that the court may also order restitution to any victim of the offense[.]” but finding that the trial judge’s omission was “harmless” error); *United States v. McCarty*, 99 F.3d 383, 386-87 (11th Cir. 1996) (acknowledging that failure of district court to discuss restitution at plea colloquy violated Rule 11, but applying harmless error analysis to find that it did not mean that defendant should be able to withdraw plea); *United States v. Fox*, 941 F.2d 480, 484-85 (7th Cir. 1991) (holding that it is harmless error when district court fails to apprise defendant of restitution but informs defendant of possible fine in excess of amount of restitution ultimately ordered). But see *United States v. Showerman*, 68 F.3d 1524, 1528 (2d Cir. 1995) (holding that Rule 11 was violated in a case where plea agreement mentioned possibility of restitution, but that failure to mention possibility of restitution at a plea hearing was not a harmless error).

99. Generally, once a defendant enters a plea of guilty, he or she may not withdraw that plea

### III. *BOOKER'S PRINCIPLES EXTEND TO THE MVRA*

Although the decision in *Booker* did not address the Mandatory Victims Restitution Act, Part One of the majority's decision, coupled with the Supreme Court's reasoning from its earlier decisions in *Apprendi v. New Jersey*<sup>100</sup> and *Blakely v. Washington*,<sup>101</sup> strongly suggests that the MVRA violates the Sixth<sup>102</sup> Amendment.<sup>103</sup>

#### *A. Restitution—Element or Sentencing Factor?*

All members of the Supreme Court agree that the government “must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of [a criminal] offense.”<sup>104</sup> What constitutes an “element,” however, is less clear. Historically, the Court distinguished between “elements” that must be presented

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based on a subsequent change of heart. See FED. R. CRIM. P. 11(c)(3)(B) (explaining “that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request[]” of the defendant, even when unopposed by the government); see also *United States v. Davis*, 410 F.3d 1122, 1125 (9th Cir.) (noting that “[a]fter a defendant is sentenced . . . a plea may be set aside only on direct appeal or collateral attack[]” (internal citation and quotation omitted)), *amended and superseded by* 428 F.3d 802 (9th Cir. 2005); *United States v. George*, 403 F.3d 470, 472 (7th Cir.) (noting that “[a]ctual innocence might supply a ‘fair and just reason’ [sufficient] to withdraw a guilty plea” before sentencing (citation omitted)), *cert. denied*, 126 S. Ct. 636 (2005).

100. 530 U.S. 466 (2000).

101. 542 U.S. 296 (2004).

102. The Supreme Court has not decided whether or not the government violates a defendant's Fifth Amendment right to presentment by failing to include sentencing enhancements in the indictment. See *Apprendi*, 530 U.S. at 477 n.3. Therefore, this Article does not directly address whether or not restitution must be presented to a grand jury and/or charged in an indictment to comply with the Fifth Amendment. The Article does urge inclusion of restitution in the charging document, nevertheless.

103. Part Two of *Booker*, in which the Court constructed a “remedy” for the portions of the Guidelines the Court thought made the Guidelines as a whole invalid, does not help predict whether the Court would find that the MVRA violates the Sixth Amendment because Part Two of *Booker* deals only with remedying the invalid portions of the Guidelines. The wording and structure of the Guidelines share little in common with the language, purpose, and structure of the MVRA. Therefore, Part Two of the *Booker* decision will only be addressed in this Article to the extent that it provides some insight into how the Supreme Court might remedy the constitutional infirmity in the MVRA.

104. *Apprendi*, 530 U.S. at 527 (O'Connor, J., dissenting); see also *In re Winship*, 397 U.S. 358, 361 (1970).



to a jury,<sup>105</sup> and a mere “sentencing consideration” that need not be.<sup>106</sup> Where the line falls between an element and a sentencing consideration is anything but obvious. Even the legislature’s “characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question.”<sup>107</sup>

Starting with *Apprendi*, a majority of the Supreme Court adopted a legal rule for sentencing that appears to equate an “element” of an offense with any factor that may increase a defendant’s *punishment* beyond what the defendant’s own admissions or the jury’s verdict would predict.<sup>108</sup> In *Apprendi*, the Court said that the inquiry is not an inquiry of form, “but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”<sup>109</sup> The Court also announced the following rule: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>110</sup>

In *Blakely* and again in the first part of *Booker*, the Supreme Court re-

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105. See *Apprendi*, 530 U.S. at 477 (finding that a criminal defendant is entitled to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt” (brackets in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))).

106. See *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). As the majority in *Apprendi* noted, in the years surrounding the Nation’s founding, the “distinction between an ‘element’ . . . and a ‘sentencing factor’ was unknown.” See *Apprendi*, 530 U.S. at 478. Indictments generally contained all the facts and circumstances of a defendant’s crime such that the defendant could tell what judgment would result if he were convicted. *Id.* In other words, “the substantive criminal law tended to be sanction-specific.” *Id.* at 479. “The judge was meant simply to impose that sentence” prescribed for the offense charged and proven. *Id.* Therefore, the evaluation of what did and did not constitute an element was inconsequential. Before *Apprendi*, in *McMillan*, the Supreme Court distinguished between “elements” of a crime and “sentencing factors,” suggesting that while a jury must determine all elements, determination of sentencing factors would be left to the discretion of the sentencing judge. See *McMillan*, 477 U.S. at 86, 93. According to the Court in *Apprendi*, the majority in *McMillan* created a “constitutionally novel and elusive distinction between ‘elements’ and ‘sentencing factors.’” *Apprendi*, 530 U.S. at 494.

107. See *United States v. Booker*, 543 U.S. 220, 231 (2005) (quoting *Ring v. Arizona*, 536 U.S. 584, 605 (2002)); see also *Ring*, 536 U.S. at 602 (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”).

108. See *Apprendi*, 530 U.S. at 527 (O’Connor, J., dissenting) (emphasis added) (acknowledging that the government must charge in the indictment and prove at trial beyond a reasonable doubt all elements of an offense, but noting that the issue in *Apprendi* “concerns the distinct question of when a fact that bears on a defendant’s punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element”).

109. *Id.* at 494 (majority opinion).

110. *Id.* at 490. Throughout this Article, the rule will generally be called the “rule in *Apprendi*.”

affirmed the rule announced in *Apprendi*.<sup>111</sup> In fact, the *Blakely* decision refined or, more accurately, expanded the rule in *Apprendi* by rejecting the notion that the statutory maximum for purposes of the Sixth Amendment is the maximum penalty in the statute containing the substantive crime charged.<sup>112</sup> In *Blakely*, the government argued that the sentencing court had not violated the rule in *Apprendi* because the court sentenced the defendant to fifty-three months of incarceration, which was less than the statutory maximum for a class B felony, the type of felony committed by the defendant.<sup>113</sup> The Supreme Court rejected that argument, declaring that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”<sup>114</sup>

If the rule in *Apprendi* applies to the MVRA, then the MVRA violates the Sixth Amendment because the MVRA requires a sentencing judge to impose restitution based on the judge’s own factual findings, not on facts reflected solely in a jury verdict or admitted by a defendant. In turn, the rule applies to the MVRA if restitution constitutes an element of an offense or is part of a defendant’s “punishment” for an offense. As emphasized in *Booker*, “[I]f [the government] makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found . . . beyond a reasonable doubt.”<sup>115</sup> “When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.”<sup>116</sup> In short, if restitution is punishment, under the reasoning of *Apprendi*, *Blakely*, and *Booker*, a defendant is entitled to have a jury decide it by the heightened standard of proof guaranteed by the Sixth Amendment.

### *B. Restitution Is Criminal Punishment*

1. *The Supreme Court Has Not Decided, but the MVRA Says “Penalty.”*—The Supreme Court has never specifically decided if restitution is part of a defendant’s criminal “punishment,”<sup>117</sup> but the MVRA suggests that it is.<sup>118</sup> The

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111. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); see *Booker*, 543 U.S. at 244 (“reaffirm[ing]” the rule announced in *Apprendi*).

112. See *Blakely*, 542 U.S. at 302-05.

113. *Id.* at 303.

114. *Id.*

115. *Booker*, 543 U.S. at 231 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

116. *Blakely*, 542 U.S. at 304 (internal citation omitted).

117. The Supreme Court has, in a Chapter 7 bankruptcy context, associated restitution with punishment. See *Kelly v. Robinson*, 479 U.S. 36, 52 (1986); discussion *infra* notes 123-26; see also *Jones v. United States*, 526 U.S. 227, 235 (1999) (finding in the context of reviewing the federal carjacking statute that serious bodily harm to a victim is an “element” of the crime of carjacking).

118. For a recent and more thorough discussion of the punitive and non-punitive nature of restitution, see Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil*

MVRA, which governs restitution, is codified in 18 U.S.C. §§ 3663-3664.<sup>119</sup> Section 3663 addresses restitution generally,<sup>120</sup> and section 3663A mandates restitution for specified offenses.<sup>121</sup> In both sections, Congress used the word “penalty” to refer to restitution that may, in some cases, and must, in others, be imposed upon a defendant when her crime directly and proximately causes a victim to suffer a monetary loss. Section 3663 and Section 3663A say that restitution is available “in addition to . . . any other penalty authorized by law.”<sup>122</sup> The obvious implication of Congress’s word choice is that restitution is punishment to be included in a defendant’s sentence and accompanying J&C, along with incarceration, a fine, and other penalties that the law allows.<sup>123</sup>

Although the Supreme Court has not decided if restitution is punishment, the conclusion that restitution is a penalty or “punishment” is consistent with the Supreme Court’s description of restitution in another context. In *Kelly v. Robinson*,<sup>124</sup> the Supreme Court held that a bankruptcy debtor cannot discharge her criminal restitution obligations in Chapter 7 bankruptcy proceedings, explaining:

Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused.

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*Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005).

119. The Federal Guidelines also contain a provision addressing restitution, but the Guidelines refer back to 18 U.S.C. §§ 3663-3664 (2000). See USSG, *supra* note 6, § 5E1.1.

120. Section 3663 provides that when sentencing a defendant, a court *may* order restitution. See 18 U.S.C. § 3663(a)(1)(A) (“The court, when sentencing a defendant convicted of an offense under this title . . . other than an offense described in section 3663A(c), may order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . .”).

121. 18 U.S.C. § 3663(a)(1).

122. See *id.* § 3663A(a)(1)(A) (“The court, when sentencing a defendant convicted of an offense under this title . . . other than an offense described in section 3663A(c), may order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . .”); see also *id.* § 3663A(a)(1) (“Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense.”).

123. Typically, the starting point for construing a statutory provision is to examine the language of the statute. See *Kelly v. Robinson*, 479 U.S. 36, 43-44 (1986). But see *United States v. Newman*, 144 F.3d 531, 540 (7th Cir. 1998) (rejecting the idea that the VWPA or the MVRA is punitive in nature just because those statutes use the term “penalty” and concluding that neither “expressly characterizes restitution as a criminal or civil penalty”).

124. 479 U.S. 36 (1986).

Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.<sup>125</sup>

2. *The Appellate Courts Are Split.*—“Whether restitution is criminal punishment . . . [is] by no means [a] settled question[] in [lower federal] courts across the country.”<sup>126</sup> A majority of the federal courts of appeals, including the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits, have held that restitution is punishment.<sup>127</sup> Two circuits, the Seventh and Tenth, have

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125. *Id.* at 49 n.10 (citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 (1984)). *Kelly* contains additional language suggesting that restitution is punishment, see 479 U.S. at 52; however, the state restitution provision at the heart of that case was different than the provisions in the MVRA. *Id.* at 52-53. The Connecticut restitution statute at issue “provide[d] for a flexible remedy tailored to the defendant’s situation.” *Id.* at 53. The Connecticut statute did not mandate restitution like the MVRA. Thus, *Kelly* is, at best, a limited predictor of how the Supreme Court would view restitution under the MVRA. Nevertheless, even Justice Marshall’s dissent in *Kelly* seemed to acknowledge that restitution constitutes punishment of the defendant. See *id.* at 55 (Marshall, J., dissenting) (remarking that “[r]estitution is not simply a punishment that incidentally compensates the victim” and that “compensation is an essential element of a restitution scheme”). The Supreme Court’s ruling in *Hughey v. United States*, 495 U.S. 411 (1990), is also consistent with the idea that restitution is punishment. There, the Court held that it was improper under an earlier restitution statute for a sentencing court to order a defendant to pay restitution for offenses that were dismissed as part of a plea bargain. *Id.* at 422. The Supreme Court expressed concern about ensuring that the amount of restitution is confined to the loss caused by the conduct underlying the offense of conviction. *Id.* at 416. If the focus of restitution was solely compensation and not punishment, then the Court should have been less concerned with defining the limits of restitution in a way that restricted it to the proximate results of the criminal conduct and more concerned with reimbursing victims.

126. *United States v. Garcia-Castillo*, 127 F. App’x 385, 391 n.4 (10th Cir.) (unpublished), cert. denied, 125 S. Ct. 2951 (2005).

127. See *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004) (noting that “restitution under the MVRA is . . . criminal [punishment]”); *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002) (“[R]estitution is a criminal ‘penalty.’” (quoting *United States v. Williams*, 128 F.3d 1239, 1240 (8th Cir. 1997))); *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002) (“We consider restitution orders made pursuant to criminal convictions to be criminal penalties.”); *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (“[R]estitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause[;] . . . [w]e see no reason why we should not find that this is also true under the MVRA.”); *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999) (“The nature of restitution is penal and not compensatory.”); *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987) (finding that criminal restitution is “fundamentally ‘penal’ in nature”); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) (“Restitution undoubtedly serves traditional purposes of punishment.”); see also *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (finding that restitution under the MVRA is a penalty); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (finding in the context of a criminal defendant’s Ex Post Facto Clause challenge that the wording of the MVRA compelled a holding that restitution is punishment); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) (finding that when

decided to the contrary.<sup>128</sup> The Eighth Circuit has, in a move of utter inconsistency, held that restitution under the MVRA is punishment for purposes of the ex post facto clause of the Constitution but is not punishment for purposes of *Booker*.<sup>129</sup>

Whether expressly or implicitly, the circuits that recognize restitution as punishment acknowledge the punitive impact of restitution on a defendant. A defendant cannot escape an order of restitution by entering into a contract with victims in which the victims absolve the defendant from liability;<sup>130</sup> the imposition of restitution does not bar a subsequent civil action by a victim against a defendant;<sup>131</sup> and a defendant may be ordered to pay restitution even if all the proceeds of his crime have been forfeited to the government.<sup>132</sup> In addition, under the Federal Sentencing Guidelines, the amount of the victims' losses for purposes

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Congress enacted the Victim and Witness Protection Act of 1982, it "made restitution under the Act a criminal penalty"). Several of the circuit courts that have ruled that restitution is punishment did so long before *Booker*, on the way to deciding that the Seventh Amendment does not give a defendant a jury trial on the issue of restitution. See, e.g., *Brown*, 744 F.2d at 909 (finding that because restitution is a matter of punishment, a defendant is not entitled to the requirements of a civil adjudication); see also *Keith*, 754 F.2d at 1392 (same).

128. See *Garcia-Castillo*, 127 F. App'x at 390 ("Restitution ordered under the VWPA and MVRA . . . is not criminal punishment."); *United States v. George*, 403 F.3d 470, 473 (7th Cir.) (finding that restitution "is not a criminal punishment but instead is a civil remedy administered for convenience by courts that have entered criminal convictions"), *cert. denied*, 126 S. Ct. 636 (2005). As pointed out in Kleinhaus, *supra* note 118, at 2752, the Seventh Circuit viewed "restitution as a civil remedy in the context of the Ex Post Facto Clause . . . and as a criminal remedy in the context of a Seventh Amendment challenge."

129. See *United States v. Agboola*, 417 F.3d 860, 870 (8th Cir. 2005) (stating without analysis that "restitution is essentially a civil remedy included with a criminal judgment" so that *Booker* does not apply (internal quotation marks omitted) (quoting *United States v. Rand*, 403 F.3d 489, 495 n.3 (7th Cir. 2005))); *United States v. Reichow*, 416 F.3d 802, 807 (8th Cir.) (distinguishing *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997), in which the Eighth Circuit held that a restitution order under the MVRA is a criminal penalty for purposes of an ex post facto violation), *cert. denied*, 126 S. Ct. 784 (2005). But see *United States v. Ross*, 279 F.3d 600, 609-10 (8th Cir. 2002) (noting that restitution is punishment but avoiding a decision on whether the *Apprendi* rule applied to orders of restitution).

130. See *United States v. Twitty*, 107 F.3d 1482, 1493 n.12 (11th Cir. 1997); see also *United States v. Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001) (noting that "a private settlement between a criminal wrongdoer and his victim . . . does not preclude a district court from imposing a restitution order for the same underlying wrong").

131. *Keith*, 754 F.2d at 1391. Restitution also "tracks 'the recovery to which [the victim] would have been entitled in a civil suit against the criminal.'" *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (alteration in original) (quoting *United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999)). Of course, in such a civil suit, the defendant would be entitled to a jury determination. See generally Kirgis, *supra* note 15 (discussing how civil litigants are now provided more protection under the Seventh Amendment than criminal defendants are under the Sixth).

132. See, e.g., *United States v. Leon-Delfis*, 203 F.3d 103, 115-116 (1st Cir. 2000).

of restitution is often the same amount of “loss” on which the defendant’s incarceration is based.<sup>133</sup> A defendant is obligated to pay interest on restitution<sup>134</sup> and an additional penalty if the restitution becomes delinquent.<sup>135</sup> The United States may collect restitution by imposing a lien on the defendant’s property, garnishing a defendant’s wages, executing a lien on her vehicles, or by any other means that may be used to enforce a judgment under federal or state law.<sup>136</sup> Most compelling, however, is the fact that when a defendant fails to pay restitution ordered by her judgment and commitment order, the failure can result in additional prison time.<sup>137</sup> Whether or not restitution serves a penal function or a dual punishment and compensation role, its effect from the defendant’s viewpoint is certainly penal. As the Eleventh Circuit has recognized, restitution is a “criminal penalty meant to have strong deterrent and rehabilitative effect.”<sup>138</sup> And according to the Second Circuit, restitution is not a civil remedy

simply because it also achieves some of the purposes of a civil judgment. Restitution undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some offenders less likely to be imposed than restitution. Restoring the victim’s property also serves the legitimate penal purpose of vindicating society’s interest in peaceful retribution. Finally, restitution can be a useful step toward

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133. See, e.g., *United States v. Rana*, 129 F. App’x 890, 894 (5th Cir.) (vacating and remanding case after *Booker* “because the district court, and not the jury, determined the amount of restitution and loss, which was then used to calculate [the defendant]’s sentence”), *cert. denied*, 126 S. Ct. 390 (2005); see also *United States v. McDaniel*, 398 F.3d 540, 548 (6th Cir. 2005) (finding that the defendants’ Sixth Amendment rights were violated “because the district court relied on judge-found facts to impose a [four-point] sentencing enhancement” for loss amount, after determining that loss was more than \$10,000 but less than \$30,000). But see *United States v. Antonakopoulos*, 399 F.3d 68, 83 (1st Cir. 2005) (distinguishing an order of restitution as “a separate calculation from the calculation of loss”). The problem is not how the losses are calculated but that the result is often the same.

134. See 18 U.S.C. § 3612(f) (2000).

135. See *id.* § 3612(g).

136. See *id.* § 3613(a).

137. See *id.* §§ 3583, 3613A(a)(1), 3614(a) (noting that “if a defendant knowingly fails to pay . . . restitution[,]” the defendant may be re-sentenced to any sentence which might originally have been imposed); see also USSG, *supra* note 6, Chapter 7, Pt. A(2)(b) (explaining that supervised release is a “form of post-imprisonment supervision created by the Sentencing Reform Act . . . [and] imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing”). Supervised release may be revoked and a defendant returned to incarceration. *Id.*; see also *id.* § 7B1.1 (classifying supervised release violations); *id.* § 7B1.3 (explaining that some violations require a court to revoke supervised release and others allow it).

138. See *United States v. Twitty*, 107 F.3d 1482, 1493 n.12 (11th Cir. 1997) (internal quotation marks omitted) (quoting *United States v. Hairston*, 888 F.3d 1349, 1355 (11th Cir. 1989)).

rehabilitation.<sup>139</sup>

Those circuits that hold that restitution is not punishment have essentially concluded that the MVRA (and/or its predecessor, the VWPA) is not punitive but, rather, designed only “to ensure that victims . . . are made whole for their losses.”<sup>140</sup> For example, the Seventh Circuit declared:

Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions. It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense.<sup>141</sup>

These courts have also focused on the administrative ease with which restitution can be tacked onto a judgment and commitment order, calling it “a civil remedy administered for convenience by courts.”<sup>142</sup>

The conclusion of the minority not only contradicts the rule in most circuits, but also ignores the plain language of the MVRA and the common-sense, practical impact of restitution on defendants. The minority focuses on the victim-aspect of restitution, ignoring the defendant-aspects.<sup>143</sup> As one district court judge recently noted when analyzing whether a defendant is entitled to have a jury find the amount of restitution beyond a reasonable doubt, “[I]ndeed, there is an element of sophistry in stating that something imposed as part of a sentence in a criminal case is in fact not punishment for the crime.”<sup>144</sup> This sentiment is particularly true when one considers that if the court finds by a preponderance of the evidence that a defendant has failed to pay restitution imposed as a condition of supervised release, the court can revoke a defendant's liberty and return the defendant to prison.<sup>145</sup>

While conceding that the issue is far from resolved, this Article presumes that restitution is part of a defendant's criminal punishment. The rest of this Article

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139. See *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984).

140. *United States v. Garcia-Castillo*, 127 F. App'x 385, 390 (10th Cir.) (quoting *United States v. Nichols*, 169 F.3d 1255, 1279 (10th Cir. 1999)), *cert. denied*, 125 S. Ct. 2951 (2005); see also *United States v. George*, 403 F.3d 470, 473 (7th Cir.) (finding that restitution “is not a criminal punishment but instead a civil remedy administered for convenience by courts that have entered criminal convictions”), *cert. denied*, 126 S. Ct. 636 (2005); *United States v. Rand*, 403 F.3d 489, 495 n.3 (7th Cir. 2005) (finding that because “restitution is essentially ‘[a] civil remedy included with a criminal judgment,’ the facts underlying a restitution order need not be established beyond a reasonable doubt” (quoting *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000))).

141. *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (internal citation omitted).

142. *George*, 403 F.3d at 473.

143. See *Newman*, 144 F.3d at 541 (finding that the “primary purpose of restitution is to compensate the victim of crime rather than to affect the criminal in some way”).

144. See *United States v. Einstman*, 325 F. Supp. 2d 373, 382 (S.D.N.Y. 2004).

145. See generally 18 U.S.C. § 3583(e) (2000) (governing the options for a court to modify, extend, or revoke supervision); USSG, *supra* note 6, § 7B1.1.

depends on this premise.

*C. Even Though Restitution Is Punishment, the Courts  
Do Not Apply the Sixth Amendment*

Presuming that restitution is criminal punishment, it might seem a foregone conclusion that the protections of the Sixth Amendment apply to decisions about restitution and, correspondingly, to the MVRA, which governs it.<sup>146</sup> Certainly, if restitution is punishment, and facts affecting punishment require a jury finding, then it would seem to follow that restitution determinations require a jury assessment. But the federal appellate courts have not made the issue so simple.

*1. The Federal Appellate Court Decisions Say That the Sixth Amendment Does Not Apply to Restitution.*—The Supreme Court has yet to decide whether *Booker* requires that a jury decide facts supporting an order of restitution and, in conjunction with that issue, whether the MVRA violates the Sixth Amendment because it defies such a process.<sup>147</sup> As of February 15, 2006, all of the circuits to specifically reach the issue (the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth), have held that the Sixth Amendment does not guarantee a defendant a jury trial or a beyond-a-reasonable-doubt review on issues of restitution.<sup>148</sup>

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146. This was the conclusion quickly reached in Kleinhaus, *supra* note 118, at 2763-64. *See also* United States v. Holland, 380 F. Supp. 2d 1264, 1278 (N.D. Ala. 2005) (finding that because in the Eleventh Circuit an order of restitution is punishment, restitution orders cannot be entered unless “a jury finds that the [g]overnment has met its burden of proving . . . that the defendant’s conduct caused the victim’s loss”).

147. As of February 15, 2006, the First, Second, Eleventh, and D.C. Circuits have yet to directly address this issue. Other circuit courts were also slow to reach the issue. In several cases decided within the first year after *Booker*, the Eleventh Circuit skirted the Sixth Amendment issue, usually because the defendant failed to object in the district court; thus, the court applied a “plain error” standard and found that “[b]ecause neither the Supreme Court nor this Court has addressed whether *Booker* applied to restitution, any error cannot be plain.” *See* United States v. Vernier, No. 03-10021-CR-SH, 2005 WL 2496118 (11th Cir. Oct. 11, 2005) (unpublished); United States v. King, 414 F.3d 1329, 1330-31 (11th Cir. 2005) (unpublished); United States v. Desoto, No. 04-12307, 2005 WL 901878 (11th Cir. Apr. 19, 2005) (unpublished). Although the Sixth Circuit had previously held that the rule in *Apprendi* did not invalidate the MVRA, in April, following *Booker*, the Sixth Circuit expressed “no opinion” on whether *Booker* invalidates the MVRA. *See* United States v. McDaniel, 398 F.3d 540, 554 n.12 (6th Cir. 2005). One district court from within the First Circuit ruled that the reasoning of *Booker* and the Sixth Amendment do apply to the MVRA. *See* United States v. Mueffelman, 400 F. Supp. 2d 368 (D. Mass. 2005).

148. *See* United States v. Leahy, No. 03-4490, 2006 WL 335806, at \*1 (3d Cir. Feb. 15, 2006) (en banc) (concluding that restitution is not “the type of criminal punishment that evokes Sixth Amendment protection under *Booker*”); United States v. Garza, 429 F.3d 165 (5th Cir. 2005) (adopting, without any independent legal analysis, the rule from the Sixth Circuit and other “sister Circuits” that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment), *cert. denied*, 74 U.S.L.W. 3486 (U.S. Feb. 27, 2006) (No. 05-8843); United States



In addition to the many circuits that have specifically rejected the application of *Blakely* and/or *Booker* to the MVRA, three circuits (the Third, Sixth, and Ninth) rejected application of the Sixth Amendment to restitution before *Booker*.<sup>149</sup> All three circuits have subsequently decided that the *Booker* decision does not change their earlier analyses.<sup>150</sup> The Third and the Ninth Circuits previously analyzed only the VWP, so the courts' analysis of the MVRA should arguably be different. Unlike the MVRA, under the earlier VWP, restitution was not mandatory, and the sentencing court was required to consider the financial condition of the defendant when deciding whether or not to impose

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v. Nichols, No. 04-4060, 2005 WL 2224829, at \*4 (4th Cir. Sept. 14, 2005) (unpublished) (holding that *Booker*, *Blakely*, and *Apprendi* do not affect the manner in which restitution is ordered); United States v. Sosebee, 419 F.3d 451, 461-62 (6th Cir.) (acknowledging that in the Sixth Circuit restitution constitutes punishment but, nevertheless, concluding that restitution is unaffected by the Supreme Court's ruling in *Apprendi* and *Booker*, reasoning that the restitution statutes contain no statutory maximum), *cert. denied*, 126 S. Ct. 843 (2005); United States v. Rattler, 139 F. App'x 534, 536 (4th Cir. 2005) (unpublished) (rejecting the defendant's restitution argument based on the Sixth Amendment and *Blakely*, holding that "there is no statutory maximum for restitution," and that neither the Sixth Amendment nor *Booker* apply to restitution); United States v. Rand, 403 F.3d 489, 495 n.3 (7th Cir. 2005) (finding that "restitution is essentially '[a] civil remedy included with a criminal judgment,'" not entitled to a beyond a reasonable doubt standard and, therefore, *Apprendi* and *Booker* do not apply (quoting United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000))); *see also* United States v. Agboola, 417 F.3d 860, 870 (8th Cir. 2005); United States v. Smith, No. 04-30161, 2005 WL 1793340, at \*1 (9th Cir. Jul. 28, 2005) (unpublished) (holding, without analysis, that "*Booker* . . . does not affect restitution orders"); United States v. Pree, 408 F.3d 855, 875 (7th Cir. 2005) (holding that "the contention that *Booker* requires juries to assess restitution is misguided[;] that there is no 'statutory maximum' for restitution; [and that restitution] is not a criminal punishment"); United States v. Garcia-Castillo, 127 F. App'x 385, 391 (10th Cir.) (unpublished) (finding that restitution ordered under the VWP and MVRA is not criminal punishment so *Blakely* and *Booker* do not apply), *cert. denied*, 125 S. Ct. 2951 (2005).

149. *See* United States v. DeGeorge, 380 F.3d 1203, 1221 (9th Cir. 2004) (rejecting without analysis the idea that the holding in *Blakely* applies to the VWP, citing United States v. Baker, 25 F.3d 1452, 1456 (9th Cir. 1994), pre-*Apprendi* precedent that restitution determinations are not handled in the same manner as sentencing determinations under the USSG); United States v. Syme, 276 F.3d 131, 136 (3d Cir. 2002) (rejecting a defendant's argument based on *Apprendi* that a restitution order issued under the VWP violated his Sixth Amendment rights, finding that the statute "contains no maximum penalty"); United States v. Bearden, 274 F.3d 1031, 1042 (6th Cir. 2001) (holding that *Apprendi* does not require a finding that the Sixth Amendment invalidates the MVRA, using the maximum fine as the relevant statutory maximum); *cf.* United States v. Ross, 279 F.3d 600, 609-10 (8th Cir. 2002) (noting that restitution is punishment and that restitution has no prescribed maximum, but avoiding a decision on whether *Apprendi* applies to restitution orders).

150. *See, e.g.*, United States v. Leahy, No. 03-4490, 2006 WL 335806 (3d Cir. Feb. 15, 2006); United States v. Sosebee, 419 F.3d 451, 461 (6th Cir. 2005) ("Given existing Sixth Circuit precedent and recent decisions of the other circuits on this issue, we now conclude that *Booker* does not apply to restitution."); United States v. Smith, 2005 WL 1793340, at \*1 (9th Cir. Jul. 28, 2005).

151. *See* DeGeorge, 380 F.3d at 1221; Syme, 276 F.3d at 136.

restitution.<sup>152</sup> But the Third, Sixth, and Ninth Circuits' post-*Booker* decisions show that the courts are not concerned with such distinctions.<sup>153</sup>

Perhaps it was predictable that the Seventh and Tenth Circuits would be quick to reject the idea that the Sixth Amendment applies to and invalidates at least parts of the MVRA. Both circuits had already decided that restitution is compensation to a victim, not punishment to a defendant.<sup>154</sup> As discussed earlier, if restitution is not punishment, then the rule in *Apprendi* does not apply. More surprisingly though, the Third, Fifth, Sixth, and Ninth Circuits, which recognize restitution as punishment, have also held that the Sixth Amendment is inapplicable to restitution.<sup>155</sup> And the Eighth Circuit, with no appreciable analysis, decided that in this context, restitution orders are civil remedies, not criminal punishment as the court had held in the ex post facto context.<sup>156</sup> Furthermore, the Seventh Circuit did not base its conclusion solely on the premise that restitution is not punishment. It went further. It held that the MVRA has no "statutory maximum" and concluded that the rule in *Apprendi* only applies when a factual determination exceeds a statutory maximum.<sup>157</sup> Based on this reasoning, the Seventh Circuit decided that the Sixth Amendment could not apply to the

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152. The MVRA has mandatory portions giving judges no choice but to order restitution and is unconcerned with a defendant's ability to pay. Thus, under the reasoning of *Booker*, which is directed at freeing judges' discretion from the mandatory nature of the Guidelines, this distinction is legally significant.

153. See *Leahy*, 2006 WL 335806, at \*5 (concluding quickly that "the distinction between the permissive language of the VWPA and the mandatory language of the MVRA is immaterial" (internal citation omitted)); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005) (citing *DeGeorge*, 380 F.3d at 1221, for the idea that restitution is unaffected by *Booker*, without discussing the differences between the VWPA and the MVRA); see also *Sosebee*, 419 F.3d at 458-59, 461 (reviewing an order of restitution issued pursuant to the VWPA, but holding generally that *Booker* does not apply to restitution).

154. See *United States v. Pree*, 408 F.3d 855, 875 (7th Cir. 2005); see also *United States v. Rand*, 403 F.3d 489, 495 n.3 (7th Cir. 2005) ("Since restitution is essentially '[a] civil remedy included with a criminal judgment,' the facts underlying a restitution order need not be established beyond a reasonable doubt and thus are not governed by *Apprendi*, *Booker* and the other recent jurisprudence addressing sentencing issues." (quoting *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000))); *United States v. Garcia-Castillo*, 127 F. App'x 385, 387 (10th Cir.), cert. denied, 126 S. Ct. 2951 (2005); *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998).

155. See *supra* note 148.

156. See *United States v. Agboola*, 417 F.3d 860, 870 (8th Cir. 2005).

157. See *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005) (rejecting as "misguided" a defendant's contention that *Booker* requires juries to assess restitution, explaining that there is no statutory maximum for restitution); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005) (ruling that restitution orders do not come within the rule in *Apprendi* because there is no prescribed statutory maximum); see also *United States v. Flaschberger*, 408 F.3d 941, 943 (7th Cir.) (same), cert. denied, 126 S. Ct. 596 (2005). Other courts have since adopted this reasoning. See, e.g., *United States v. Rattler*, 139 F. App'x 534, 536 (4th Cir. 2005) (unpublished); *Sosebee*, 419 F.3d at 461.

MVRA.<sup>158</sup> The Fourth, Fifth, and Sixth Circuits, which recognize the penal nature of restitution, have adopted the Seventh Circuit's conclusion with little or no meaningful analysis of their own.<sup>159</sup>

2. *The Appellate Decisions Rest on Flawed Assumptions.*—Neither Supreme Court precedent nor sound legal reasoning can sustain the conclusion that the MVRA contains no statutory maximum for purposes of *Apprendi/Booker* and the Sixth Amendment. The conclusion is flawed because it rejects the plain announcement from the Supreme Court that the “statutory maximum” for purposes of *Apprendi* does not mean the maximum embodied in the substantive statute but, rather, “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”<sup>160</sup> The appellate courts' conclusion also ignores the obvious cap or “statutory maximum” for restitution in every case. That maximum is “the full amount of each victim's losses.”<sup>161</sup> Finally, the conclusion that the Sixth Amendment does not reach the MVRA overlooks the mandatory nature of the MVRA for certain crimes.<sup>162</sup> As demonstrated by *Booker*, the mandatory nature of a sentencing statute can present constitutional weaknesses.

While the Seventh Circuit's pre-*Blakely* decisions probably just underestimated the reach of the rule in *Apprendi*, the Seventh Circuit's legal analysis after *Booker* is simply unsound. The only logical, albeit unspoken, rationale for the Seventh Circuit's holding that *Booker* does not apply to the MVRA is that to do so would be impractical, which is the same worry expressed by Justice Breyer in his dissent in *Apprendi*.<sup>163</sup> That concern about impracticality

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158. *George*, 403 F.3d at 473; *Swanson*, 394 F.3d at 526.

159. *See Rattler*, 139 F. App'x at 536 (“We conclude that Rattler's restitution argument fails. Because there is no statutory maximum for restitution, the Sixth Amendment and *Booker* do not apply to restitution ordered by the sentencing court.” (citing *Flaschberger*, 408 F.3d at 943)); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (rejecting *Booker*'s application to the MVRA and citing the decisions in the Sixth, Seventh, Eighth, and Ninth Circuits), *cert. denied*, 74 U.S.L.W. 3486 (U.S. Feb. 27, 2006) (No. 05-8843); *Sosebee*, 419 F.3d at 461 (rejecting *Booker*'s application upon a finding that restitution statutes lack a statutory maximum).

160. *United States v. Booker*, 543 U.S. 220, 228 (2005); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

161. *See* 18 U.S.C. § 3664(f)(1)(A) (2000).

162. *See id.* § 3663A(a)(1) (“Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court *shall* order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense.” (emphasis added)); *see also United States v. Szarwark*, 168 F.3d 993, 997 (7th Cir. 1999) (“Under the MVRA, restitution is mandatory rather than discretionary for defendants convicted of certain offenses,” and district courts “are no longer permitted to consider a defendant's financial circumstances when determining the amount of restitution to be paid.”).

163. In his dissent in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Justice Breyer stated the following:

[The rule announced by the majority] would seem to promote a procedural ideal—that of juries, not judges, determining the existence of those facts upon which increased

presumably led Justice Breyer to author Part Two of the majority decision in *Booker*, which undermined the holding in Part One.

a. *The “statutory maximum” fiction.*—The Seventh Circuit’s erroneous conclusion that the Sixth Amendment does not apply to restitution,<sup>164</sup> because the MVRA has no statutory maximum, appears to have its genesis in pre-*Booker* precedent in that circuit, which held that the rule in *Apprendi* does not apply to the Federal Guidelines and is “limited to situations in which findings affect statutory maximum punishment.”<sup>165</sup> In *United States v. Behrman*, the Seventh Circuit rejected a defendant’s post-*Apprendi* argument that “unless a jury finds the essential facts [to support such restitution] beyond a reasonable doubt,” the imposition of restitution in any amount is too much.<sup>166</sup> The court in *Behrman* said that the defendant’s reliance on *Apprendi* “depend[ed] on a misunderstanding of that case. [The defendant] treats it as fundamentally changing the law of criminal sentencing, so that every fact affecting punishment must be treated as an ‘element of the offense,’ with all that implies in criminal law.”<sup>167</sup> The Seventh Circuit construed the holding in *Apprendi* as limited to “situations in which findings affect statutory maximum punishment.”<sup>168</sup>

In hindsight, after *Blakely* and *Booker*, it is clear that the Seventh Circuit’s myopic view of *Apprendi*’s rule was wrong. The rule in *Apprendi* applies to the Federal Guidelines and, logically, applies equally to restitution ordered pursuant to the MVRA. At a minimum, *Blakely* and *Booker* show that the defendant’s post-*Apprendi* argument in *Behrman* was right—every fact affecting punishment is the equivalent of an element of the offense “with all that implies.”<sup>169</sup>

Even though *Blakely* and *Booker* highlighted the errors in the Seventh Circuit’s *Behrman* decision, the Seventh Circuit has adhered to its flawed reasoning anyway. In fact, the court is building onto its “house of cards.” In *United States v. George*,<sup>170</sup> the Seventh Circuit added to its misguided holding when it said, “There is no ‘statutory maximum’ for restitution, . . . so the sixth amendment does not apply. We have accordingly held that *Apprendi* . . . does not affect restitution, and that conclusion is equally true for *Booker*.”<sup>171</sup> The Seventh Circuit did not explain why its reasoning from before *Booker* applies equally to

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punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises.

*Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting). “[J]udges, rather than juries, traditionally have determined the presence or absence of such sentence-affecting facts . . . it is important to realize that the reason is not a theoretical one, but a practical one.” *Id.* at 556.

164. This view was also subsequently adopted by the Fourth, Fifth, and Sixth Circuits. *See supra* note 159.

165. *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000).

166. *Id.* at 1053.

167. *Id.* at 1053-54.

168. *Id.* at 1054.

169. *Id.*

170. 403 F.3d 470 (7th Cir.), *cert. denied*, 126 S. Ct. 636 (2005).

171. *Id.* at 473 (internal citations omitted).

cases after *Booker*. In short, the Seventh Circuit continues to misunderstand the Supreme Court's application of the Sixth Amendment and, therefore, still construes the Sixth Amendment to apply only when a sentencing court exceeds a *statutory* maximum, not any time that a defendant's punishment is increased above that approved by a jury's findings.

*b. The MVRA has limits.*—Applying its flawed legal analysis, which requires a search for the statutory maximum amount of restitution that a court can impose, the Seventh Circuit recently decided that restitution pursuant to the MVRA cannot exceed the *Apprendi* statutory maximum because the MVRA has no limit. The Seventh Circuit overlooks the obvious limit in every restitution matter. Although the MVRA does not provide a dollar cap on the amount of restitution a judge may order, it authorizes restitution only “in the full amount of each victim's losses.”<sup>172</sup> In other words, the statutory maximum for purposes of the rule in *Apprendi* is the amount of loss to the victims from a defendant's crimes, no more and no less. Federal courts “possess no inherent authority to order restitution, and may do so only as explicitly empowered by statute.”<sup>173</sup> Without the statutory authorization in the MVRA, a sentencing judge would have no power to order a defendant to pay restitution.<sup>174</sup> The MVRA does not authorize courts to direct defendants to pay more than the amount of loss resulting directly and proximately from the offense of conviction and does not permit courts to order defendants to pay restitution to anyone other than the victims of defendant's crimes (unless the defendant consents to such additional restitution).<sup>175</sup> When a judge orders restitution in any amount above the amount of the victims' losses reflected in the jury's verdict or admitted by the defendant, she violates the rule in *Apprendi* and *Booker*.

Thus, the only way to constitutionally determine the identity of victims and the amount of the victims' losses, unless the defendant admits those facts, is to let a jury decide these issues. The jury trial guarantee of the Sixth Amendment is vitiated if a judge is permitted to impose on a defendant punishment or restitution in a range which is “not solely based on ‘facts reflected in the jury verdict or admitted by the defendant.’”<sup>176</sup> “[T]he relevant ‘statutory maximum’

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172. 18 U.S.C. § 3664(f)(1)(A) (2000). The Eighth Circuit has recognized that even if statutes authorizing restitution have no prescribed minimum, “the full amount of restitution authorized by statute has its ‘outer limits’ which [are] determin[ed] by ‘look[ing] to the scope of the indictment,’ which in turn ‘defines the scope of the criminal scheme for restitution purposes.’” *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002) (third bracket in original) (quoting *United States v. Ramirez*, 196 F.3d 895, 900 (8th Cir. 1999)).

173. *United States v. Rand*, 403 F.3d 489, 493 (7th Cir. 2005) (quoting *United States v. Randle*, 324 F.3d 550, 555 (7th Cir. 2003)).

174. *Id.*

175. See 18 U.S.C. § 3663(a)(1)(A) (2000) (authorizing restitution “to any victim”); *id.* § 3663(a)(2) (defining “victim” as a “person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”).

176. See *United States v. Booker*, 543 U.S. 220, 232 (2005) (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>177</sup>

c. *Unlimited judicial discretion is unconstitutional.*—If the Fourth, Fifth, Sixth, and Seventh Circuits are correct that the MVRA has no “statutory maximum,” that conclusion proves too much to protect the MVRA from unconstitutionality. Assuming there is no statutory maximum on restitution, then there is no limit on the sentencing judges’ discretion. It is only when a judge “exercises his discretion . . . *within a defined range*,”<sup>178</sup> that a defendant “has no right to a jury.”<sup>179</sup> Totally unfettered judicial discretion has never been constitutionally approved.<sup>180</sup> Unbounded discretion in the hands of the government is exactly what the Sixth Amendment is designed to protect against.<sup>181</sup> The Sixth Amendment ensures that the jury stands between a defendant and his government. That barrier is compromised when a judge has unlimited discretion to impose any amount of criminal punishment on a defendant.

The tension between the discretion lodged in a sentencing judge to impose an appropriate penalty on a defendant<sup>182</sup> and the defendant’s constitutional right to have a jury of twelve find each fact that constitutes the crime with which the

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177. *Blakely*, 542 U.S. at 303 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)). The holding of *Hughey* (albeit addressed to the VWPA, not MVRA) underscores the point that a sentencing judge is limited in the amount of restitution she may order. There, the Court expressly held that a sentencing court is not authorized to order a defendant to make restitution for losses resulting from offenses dismissed as part of a plea bargain. *See United States v. Hughey*, 495 U.S. 411, 412-13 (1990).

178. *Booker*, 543 U.S. at 233 (emphasis added).

179. *Id.*

180. Like the Federal Guidelines, the MVRA, “was intended to eliminate much of the discretion judges previously had in waiving restitution for certain types of crimes.” *Federal Courts: Differences Exist in Ordering Fines and Restitution: Before the Subcomm. on Crime, H. Comm. on the Judiciary 5* (1999) (statement of Richard M. Stana, Associate Director, Administration of Justice Issues, General Government Division, U.S. General Accounting Office), available at <http://www.gao.gov/archive/1999/gg99095t.pdf>. Interestingly, while restitution supposedly became mandatory pursuant to the MVRA, a study by the United States General Accounting Office, which was presented to a subcommittee of the House of Representatives in May of 1999, showed that the percentage of offenders ordered to pay restitution ranged greatly, from three percent to forty-nine percent, depending on which judicial district a defendant was sentenced in. *See id.*

181. *See Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting that the Court’s recognition of judges’ broad discretion in sentencing “has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature”).

182. *See Witte v. United States*, 515 U.S. 389, 398 (indicating that as a general proposition, “a sentencing judge ‘may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come’” (quoting *Nichols v. United States*, 511 U.S. 738, 747 (1994))).

defendant is charged, is resolved by the “consistent *limitation on judges’ discretion* to operate within the limits of the legal penalties provided[.]”<sup>183</sup> A sentencing court is not free to impose any sentence it chooses. Such unlimited discretion “exceed[s] the judicial estimation of the proper role of the judge[.]” and becomes “a ‘tail which wags the dog of the substantive offense.’”<sup>184</sup> Given the mandatory nature of the MVRA, unlimited discretion to impose any amount of restitution presents the same type of Sixth Amendment problems presented in *Booker*. Applying the reasoning of *Booker*, such unfettered discretion violates the Sixth Amendment.

For all of these reasons, the Seventh Circuit and the other federal courts that rely on a similar reasoning are wrong to reject application of the Sixth Amendment to the MVRA.

#### IV. A CONSTITUTIONAL AND EFFECTIVE SOLUTION FOR THE RESTITUTION PROCESS

If Part Two of the majority’s opinion in *Booker*, the “remedy” portion, is any indication, even if the Supreme Court finds that the MVRA violates the Sixth Amendment, the Court might “remedy” that constitutional invalidity by striking only portions, like 18 U.S.C. § 3664(e),<sup>185</sup> that make the MVRA mandatory, to avoid the presumed impracticality that might result if defendants were truly afforded the guarantees of the Sixth Amendment.<sup>186</sup> Striking portions of the MVRA would not be a real remedy; it would be a partial patch on the sentencing process like the one the Court fashioned for the Federal Guidelines in *Booker*. As Professor Paul F. Kirgis recently put it, “the Supreme Court in *Booker* missed a critical opportunity to redress the constriction of the criminal defendant’s right to have a jury decide those facts that lead to the deprivation of the defendant’s liberty.”<sup>187</sup> The fact that the MVRA conflicts with the Sixth Amendment shows that there is more wrong with the sentencing process than the invalid nature of the Federal Guidelines exposed in *Booker* and that the “remedy” crafted in Part Two of *Booker* is an ineffective one. It also underscores the need for revisions to the sentencing system to deal with the real problem—a lack of honesty in sentencing.

##### A. Congress Must Act

The real and permanent fix to the way defendants are sentenced rests with Congress. This Article does not propose a solution to the entire sentencing

183. *Apprendi*, 530 U.S. at 482 (emphasis added).

184. *See Blakely v. Washington*, 542 U.S. 296, 307 (2004) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

185. *See, e.g.*, 18 U.S.C. § 3664(e) (2000) (“Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.”).

186. *See United States v. Booker*, 543 U.S. 220, 245-46 (2005) (excising 18 U.S.C. §§ 3553(b)(1) and 3742(e) to strike out the mandatory nature of the Federal Guidelines).

187. *See Kirgis, supra* note 15, at 904.

scheme. It focuses on the MVRA and what Congress should do to make it comply with the Sixth Amendment. Congress should not only strike those portions of the MVRA that directly conflict with a defendant's right to trial by jury and proof beyond a reasonable doubt,<sup>188</sup> but also affirmatively enact provisions clarifying that defendants have such rights. Congress might look at the forfeiture provisions in the Federal Rules of Criminal Procedure ("Rules") when fashioning such a fix. In this regard, Congress should provide for a jury determination of restitution, upon either the defendant's or the government's request, much like Rule 32.2(a)(4) allows in the context of forfeiture.<sup>189</sup> As part of its legislative fix, Congress should also require that restitution be charged in the indictment or information, so that from the beginning of every federal prosecution the defendant is forewarned that the government is seeking restitution.<sup>190</sup> For instance, Rule 7(c)(2) provides that a judgment of forfeiture may not be entered in a criminal proceeding "unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture[.]"<sup>191</sup> Similarly, Rule 32.2(a) requires that an indictment or information contain notice that the government will seek forfeiture in a criminal case.<sup>192</sup> Congress should adopt similar statutory provisions for restitution. Congress need not adopt all of the provisions applicable to forfeiture; in fact, the forfeiture procedures fall well short of affording all the rights guaranteed defendants by the Sixth Amendment.<sup>193</sup>

The intense need for congressional action is demonstrated by the post-*Booker* restitution decisions in which the courts have strained (through illogical analysis or, in some cases, no analysis) to limit the reach of *Booker*.<sup>194</sup> As compared to victims' rights, the constitutional rights of the accused are not popular. Thus, Congress may be just as unwilling as the federal courts of appeals have been to preserve the Sixth Amendment rights of defendants. Even if Congress does act to correct the current system of imposing restitution and thereby ensures

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188. See, e.g., 18 U.S.C. § 3664(e) (calling for any dispute as to the amount or type of restitution to be resolved by the court by a preponderance of evidence); *id.* § 3664(f)(1)(A) (requiring the court to order restitution to each victim in the full amount of the victims' loss as determined by the court without consideration of the economic circumstances of the defendant).

189. See FED. R. CRIM. P. 32.2(a)(4) ("Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.").

190. This suggestion is offered with the recognition that the issue of *Booker*'s impact on the holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is still unknown, and *Booker* does not necessarily require such pleading.

191. See FED. R. CRIM. P. 7(c)(2).

192. See FED. R. CRIM. P. 32.2(a).

193. See, e.g., FED. R. CRIM. P. 32.2(b)(1) (indicating that the court must determine what property is subject to forfeiture); FED. R. CRIM. P. 32.2(e)(3) (indicating that there is no right to a jury trial under Rule 32.2(e)).

194. See, e.g., *United States v. Sosebee*, 419 F.3d 461 (6th Cir. 2005); *United States v. Rattler*, 139 F. App'x 534 (4th Cir. 2005); *United States v. George*, 403 F.3d 470 (7th Cir. 2005).



defendants a right to trial by jury and a heightened standard of proof, such a remedy will undoubtedly take time. In the meanwhile, a partial solution rests with the Department of Justice, the agency responsible for charging and prosecuting federal crimes, and with the courts that impose sentences.<sup>195</sup>

*B. DOJ's Pre-Booker Policies Are Important Components in a Real Solution*

On July 2, 2004, eight days after the Supreme Court issued its decision in *Blakely v. Washington*, the Deputy Attorney General, United States Department of Justice, sent a memorandum to all federal prosecutors, outlining new legal positions and policies in the wake of that decision.<sup>196</sup> The prosecutors were instructed to “follow certain protective procedures in order to safeguard against the possibility of a changed legal landscape as a result of future court decisions.”<sup>197</sup> With regard to charging cases, prosecutors were told to include in indictments “all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules).”<sup>198</sup> In other words, in an effort to preempt the anticipated effects of *Booker*, prosecutors were instructed to change the way they charged, indicted, tried, and pursued sentencing of defendants to guard against the fact that the Sixth Amendment might require a jury to find all facts that supported sentencing enhancements. With regard to pleas, prosecutors were instructed to seek plea agreements “that contain waivers of all rights under *Blakely*.”<sup>199</sup>

The practical result of the DOJ's change in policy was that from the beginning of every criminal case, there was complete candor in prosecution. Along with the change in the way crimes were charged, there was a corresponding change in the way crimes were indicted. A grand jury decided not only whether there was probable cause for the substantive “elements” of the crime, but also whether there was probable cause to support each ingredient that might increase a defendant's punishment at sentencing. Once arraigned on the indictment, the defendant was on full notice of what the government expected to prove at trial and the severity of the sentence the government would seek.<sup>200</sup>

In response to the change in the way the DOJ was charging cases, many

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195. Justice Stevens favored such a solution in his dissent in *Booker*. See *United States v. Booker*, 543 U.S. 220, 277 (2005) (Stevens, J., dissenting). Other legal scholars approve of it too. See, e.g., Kleinhaus, *supra* note 118, at 2765.

196. See Memorandum from James Comey, *supra* note 13.

197. *Id.*

198. *Id.*

199. *Id.*

200. In his dissent to Part Two of *Booker*, Justice Stevens advocated for the DOJ's policy change. In this regard, he said, “I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt.” *Booker*, 543 U.S. at 284-85 (Stevens, J., dissenting). After *Booker*, the DOJ returned to its old way of charging and sentencing crimes. See *supra* note 16.

district court judges adapted, too. During change of plea hearings, district courts routinely inquired about possible sentencing enhancements and the amount of restitution owed by the defendant.<sup>201</sup> Consequently, the government and defendants were forced to talk about these issues long before the sentencing hearing. Likewise, many district court judges bifurcated trials, asking the jury to address the statutory elements of the crime first and then, if the defendant was found guilty, to deliberate further on any potential sentencing enhancements.

Contrary to the many cries of doom that some predicted might cripple the criminal justice system if the Sixth Amendment was deemed to apply to sentencing issues, the system worked.<sup>202</sup> About as many defendants seemed to plead guilty. Almost as many pled guilty pursuant to a negotiated plea agreement. Most still agreed to waive their appeal rights, often including a waiver of the right to have sentencing enhancements determined by a jury by a beyond-a-reasonable-doubt standard. The biggest by-product of the DOJ's post-*Blakely* change in policy appeared to be the increased fairness of process. When defendants entered pleas, which they do in an extremely high percentage of all cases,<sup>203</sup> they did so voluntarily, knowing the potential punishment they faced, as Rule 11 expects. In all, the system fashioned by the DOJ in the post-*Blakely*, pre-*Booker*, era was probably slightly more time-consuming for both prosecutors and courts, and marginally more expensive, but it was a method that worked, and it ensured defendants the rights they are guaranteed by the Constitution. As the majority said in Part One of *Booker*,

[I]n some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.<sup>204</sup>

Any perceived increase in burden on federal prosecutors to identify victims

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201. As noted by Justice Stevens in *Booker*, “45% of federal sentences involve no enhancements.” *Booker*, 543 U.S. at 275 (Stevens, J., dissenting).

202. This conclusion rests primarily on the author's own observations as a prosecutor in the Northern District of Georgia. Although there are formal statistics compiled by the United States Sentencing Commission to compare pre-*Booker* and post-*Booker* statistics on the number of guilty pleas, sentencing departures, and similar information, the author was unable to locate any post-*Blakely*, pre-*Booker* statistics.

203. See *Booker*, 543 U.S. at 277 (Stevens, J., dissenting) (noting that plea agreements led to 97.1% of all federal cases sentenced under the Guidelines in Fiscal Year 2002). The post-*Booker* data compiled by the United States Sentencing Commission issued July 14, 2005, shows that 94.3% of all cases and 93.4% of all fraud cases (which often require restitution) were still resulting in a plea of guilty after *Booker*. See United States Sentencing Commission Special Post-*Booker* Coding Project, Cases Sentenced Subsequent to *U.S. v. Booker* (Data Extraction as of June 6, 2005) 43, 46 (July 14, 2005), available at [www.ussc.gov/blkely/postbooker\\_060605extract.pdf](http://www.ussc.gov/blkely/postbooker_060605extract.pdf).

204. See *Booker*, 543 U.S. at 244.

of a defendant's crime early and include that information within the indictment is now mitigated by the fact that prosecutors have to spend the time and effort to locate and contact victims anyway. Effective October 30, 2004, per the Justice for All Act, employees of the Department are required to make their best efforts to identify victims early in a prosecution to afford victims various rights, including the right to be present for public court proceedings and to be heard at plea hearings and sentencing hearings.<sup>205</sup> Because prosecutors are now obligated to make their best efforts to identify victims from the very beginning of every prosecution, the added burden of calculating restitution (at least in general terms) early and including it in the indictment is not overly burdensome.

Why should the Department take the lead in candor in charging and sentencing even after *Booker*, when so little has changed? As the Department of Justice emphasizes to every young prosecutor,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>206</sup>

Pursuing honesty in sentencing is simply the right thing to do. It gives a defendant fair warning, protects the interests of victims, and still allows a culpable defendant to be held accountable for all of his criminal acts. In short, it promotes all the laudable principles underlying the Sixth Amendment, and the Department of Justice should lead the way by insisting on it.

### *C. The Lower Courts' Participation in the Solution*

The Supreme Court declared in *Hughey v. United States* that a defendant should be ordered to pay restitution only for loss amounts proximately resulting from offenses for which the defendant is convicted.<sup>207</sup> The concept seems so

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205. See Pub. L. No. 108-405, Title I, § 101, 118 Stat. 2260 (codified at 18 U.S.C. § 3771).

206. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

207. See *United States v. Hughey*, 495 U.S. 411, 412 (1990). The holding in *Hughey* rested on the Court's statutory interpretation of the VWPA, not on constitutional grounds. See also *United States v. Reichow*, 416 F.3d 802, 805 (8th Cir. 2005) (noting that the VWPA and MVRA are similar and that *Hughey* requires that the loss be caused by specific conduct that is the basis of the offense of conviction).

basic; yet, it has not been strictly applied.<sup>208</sup> By applying the holding in *Hughey* to the MVRA, courts can preserve the Sixth Amendment. In ninety-four to ninety-seven percent of cases, (the ones that result in a plea of guilty), the courts can adhere to the *Hughey* rule by exploring restitution thoroughly at the change of plea hearing. In the few cases that proceed to trial, courts can use a special verdict form and/or a bifurcated jury process to have the jury identify how much restitution to order and to whom.<sup>209</sup> In these ways, courts can ensure that defendants are held accountable only for restitution proximately and directly resulting from the crime of conviction, unless additional losses are conceded by the defendant.

Since *Apprendi*, whether consciously or not, at least some federal courts have more readily enveloped the idea expressed by *Hughey* that there are limits on orders of restitution.<sup>210</sup> Even the Seventh Circuit, which has whole-heartedly

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208. This criticism does not ignore the fact that after *Hughey* the definition of “victim” was legislatively broadened. The criticism is directed at the fact that restitution has also reached conduct outside the statute of limitations and other incidental losses.

209. As illustrated by Professor Kirgis in his discussion of jury decision-making in civil cases, juries are accustomed and fully equipped to make difficult factual determinations. See Kirgis, *supra* note 15, at 935-42.

210. See *United States v. Sosebee*, 419 F.3d 451, 459 (6th Cir. 2005) (recognizing that the Supreme Court’s decision in *Hughey* “establishes the outer limits of a restitution order” and generally prohibits a court from considering acts for which a defendant was not convicted). Furthermore, in *United States v. Flaschberger*, 408 F.3d 941 (7th Cir. 2005), the court remanded the sentencing court’s decision on restitution for recalculation because the district court ordered the defendant

to repay the whole sum . . . received between 1994 and 2001. Yet the only crime of which [the defendant] stands convicted is a scheme that, according to the indictment, spanned just three fiscal years: 1998-99, 1999-2000, and 2000-01. Unless a defendant agrees to pay more . . . restitution is limited to the crime of conviction.

*Id.* at 943 (citing 18 U.S.C. § 3663A(a) and *Hughey*, 495 U.S. 411); see also *United States v. Inman*, 411 F.3d 591, 596 (5th Cir. 2005) (finding plain error and remanding for correction of an order of restitution pursuant to the MVRA that “was based, in part, on transactions that were not alleged in the indictment and occurred over two years before the specified temporal scope of the indictment”); *United States v. Fogg*, 409 F.3d 1022, 1028 (8th Cir. 2005) (explaining that unless a charged offense includes a “scheme, conspiracy, or pattern of criminal activity as an element” that any restitution order may “only cover losses from the specific offense for which the defendant was indicted and convicted”); *United States v. Ramsey*, 130 F. App’x 821, 822 (7th Cir. 2005) (unpublished) (reversing district court’s order to the extent it required a defendant convicted of two counts of using fraudulent cashier’s checks with intent to deceive to pay restitution that exceeded the sum of cashier’s checks involved in the only two counts (out of fourteen counts in the indictment) to which the defendant pled guilty, noting “the district court was empowered to order restitution only for the losses caused by the offenses of conviction because [the defendant]’s offense does not included as an element a ‘scheme, conspiracy, or pattern,’ and he did not agree to pay more as part of a plea agreement” (quoting 18 U.S.C. § 3553A(a))); *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002) (“[T]he full amount of restitution authorized by statute has its ‘outer

rejected the application of *Booker* to restitution, recently reiterated that “restitution orders are subject to certain important strictures. The most basic of these is the requirement that there be a ‘direct nexus between the offense of conviction and the loss being remedied.’”<sup>211</sup> The court also noted that “a restitution award is authorized only with respect to that loss caused by ‘the specific conduct that is the basis of the offense of conviction,’”<sup>212</sup> and declared that “where a defendant enters a guilty plea, ‘[e]xamination of the conduct constituting the commission of a crime only involves consideration of the conduct to which the defendant pled guilty and nothing else.’”<sup>213</sup> The Seventh Circuit has even said that “‘relevant conduct’ . . . may not serve as the basis of a restitution award unless it is also ‘charged conduct’ or covered in a plea agreement.”<sup>214</sup> By strictly applying the rule announced in *Hughey*, courts can help protect a defendant’s Sixth Amendment rights by enforcing a policy of honesty in sentencing.

#### CONCLUSION

The Supreme Court’s January 2005 decision in *Booker* should induce Congress to enact legislation to remedy the constitutional invalidity of the MVRA and encourage the Department of Justice to revisit how restitution is charged, indicted, negotiated in plea agreements, proven at trial, and presented at sentencing hearings. The *Booker* decision is also a reminder to lower federal courts to adhere to the rule announced by the Supreme Court in *Hughey v. United States*, which limits the reach of orders of restitution. Congress, DOJ, and the federal courts should insist on candor in charging and sentencing to remedy the restitution roulette<sup>215</sup> that has generally accompanied a defendant through the federal sentencing process, a process which violates the Sixth Amendment and defies Rule 11 of the Federal Rules of Criminal Procedure. Restitution has been treated by sentencing courts as a post-conviction “afterthought.” Because the

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limits,’ which we determine by ‘look[ing] to the scope of the indictment,’ which in turn ‘defines the scope of the criminal scheme for restitution purposes.’” (brackets in original) (quoting *United States v. Ramirez*, 196 F.3d 895, 900 (8th Cir. 1999))). *But see* *United States v. Benjamin*, 125 F. App’x 438, 442 (3d Cir. 2005) (stating that post-*Hughey* amendment to WPA enabled district court to order restitution regardless of whether or not criminal conduct was charged in indictment).

211. *United States v. Rand*, 403 F.3d 489, 493 (7th Cir. 2005) (quoting *United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003)).

212. *Id.* (quoting *Hughey*, 495 U.S. at 413).

213. *Id.* at 494 (brackets in original) (citing *Randle*, 324 F.3d at 556). Unfortunately, while the Seventh Circuit has begun to articulate the proper limits of restitution, as Part II of this Article shows, the circuit is still not adequately adhering to these principles.

214. *Id.* at 494 (quoting *United States v. Scott*, 250 F.3d 550, 553 (7th Cir. 2001)).

215. The Oxford American College Dictionary defines roulette as “a gambling game in which a ball is dropped onto a revolving wheel . . . with numbered compartments, the players betting on the number at which the ball comes to rest.” THE OXFORD AMERICAN COLLEGE DICTIONARY 1181 (2002).

courts have treated restitution as a secondary matter, defendants have routinely pled guilty with no understanding of what they might face in restitution. Sentencing judges have ordered defendants to pay restitution to victims not identified in the indictment or information and in amounts not alleged in such charging documents. The Eleventh Circuit has even ordered a defendant to pay restitution for conduct that occurred beyond the statute of limitations.<sup>216</sup> These practices are analogous to those sentencing practices the majority condemned in *Blakely v. Washington*, “in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon.”<sup>217</sup> At a constitutional minimum, a defendant has a right to know the maximum sentence he faces, whether incarceration or restitution, when he goes to trial to defend himself and/or when he enters a plea under Rule 11 of the Federal Rules of Criminal Procedure. Restitution, like other forms of punishment, should never be arbitrary or unpredictable.

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216. See *United States v. Dickerson*, 370 F.3d 1330 (11th Cir. 2004); discussion *supra* Part I.

217. Of course, the majority in *Blakely* was referring to a defendant’s period of incarceration, not an amount of restitution. See *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004).