

## Article

# The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society

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Economic sanctions comprise six different types of legally-required transfers of money or other value from an offender to a crime victim or a governmental agency.<sup>1</sup> They are often one of several conditions of a criminal sentence,<sup>2</sup> and over the past twenty-five years they have become more frequently imposed—twenty-five percent of prisoners received economic sanctions in 1991, but by 2004 the percentage was sixty-six percent.<sup>3</sup> This trend toward increasing the use of economic sanctions is likely to continue, primarily because the costs of administering criminal justice have risen substantially. In major part, costs are high because there are so many people under correctional supervision, almost seven million at yearend 2012.<sup>4</sup> Corrections

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1. See MODEL PENAL CODE: SENTENCING § 6.04 A–D (Tentative Draft No. 3, Apr. 24, 2014).

2. See Sally T. Hillsman, *Fines and Day Fines*, in 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 49, 61 (Michael Tonry & Norval Morris eds., 1990). Typically, economic sanctions in the United States are additional penalties, rather than sole sanctions. *Id.* at 49.

3. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1769 (2010).

4. At yearend 2012, there were about 6.94 million offenders under adult correctional supervision in the United States: 3.94 million on probation (the most common criminal sentence), 1.48 million in prison, 0.74 million in jail,

alone account for about seven percent of state budgets.<sup>5</sup> Because of these rising costs and the absence of increasing revenues to cover them, jurisdictions are now more likely to make offenders pay for at least part of these costs, including the costs of supervision and incarceration.<sup>6</sup>

Related to the high use of incarceration is the increasing need for intermediate sanctions that are more severe than mere probation but less severe, and less expensive, than imprisonment.<sup>7</sup> Because probation accounts for about fifty-seven percent of individuals under correctional supervision,<sup>8</sup> the need for effective intermediate sanctions affects millions of offenders.

In addition to these concerns about offenders and the costs to society, there are also concerns about crime victims, particularly about increasing the likelihood that victims will receive restitution for their losses from the crime.<sup>9</sup> Every state now has a statute authorizing restitution, and twenty states have elevated restitution to a constitutional right.<sup>10</sup>

However, simply because these economic sanctions are imposed does not mean that they are collected. And, in fact, enormous amounts of the monies that are owed are unpaid. In

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and 0.85 million on parole. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

5. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), available at [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf).

6. See David E. Olson & Gerard F. Ramker, *Crime Does Not Pay, But Criminals May: Factors Influencing the Imposition and Collection of Probation Fees*, 22 JUSTICE SYS. J. 29, 30 (2001); Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1, A17.

7. See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99, 100 (Michael Tonry ed., 1996).

8. See GLAZE & HERBERMAN, *supra* note 4.

9. See OFFICE FOR VICTIMS OF CRIME, U.S. DEPT OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 357 (1998) [hereinafter NEW DIRECTIONS], available at [https://www.ncjrs.gov/ovc\\_archives/directions/pdftxt/direct.pdf](https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf); R. Barry Ruback, Gretchen R. Ruth & Jennifer N. Shaffer, *Assessing the Impact of Statutory Change: A Statewide Multilevel Analysis of Restitution Orders in Pennsylvania*, 51 CRIME & DELINQ. 318, 319 (2005); R. Barry Ruback & Jennifer N. Shaffer, *The Role of Victim-Related Factors in Victim Restitution: A Multi-Method Analysis of Restitution in Pennsylvania*, 29 LAW & HUM. BEHAV. 657, 658 (2005).

10. NEW DIRECTIONS, *supra* note 9, at 356; PEGGY M. TOBOLOWSKY, MARIO T. GABOURY, ARRICK L. JACKSON & ASHLEY G. BLACKBURN, CRIME VICTIM RIGHTS AND REMEDIES 157 (2d ed. 2010).

the federal system, for example, the Justice Department is seeking to recover ninety-seven billion dollars in fines, fees, and restitution.<sup>11</sup>

The primary criticism of monetary sanctions is that they “are inherently inequitable,”<sup>12</sup> in that they are unfair to many offenders who have little or no money but who face charges of hundreds or thousands of dollars, which they are unlikely to ever be able to pay. Aside from affecting their time under criminal justice supervision, these economic sanctions may adversely affect their ability to obtain employment, credit, and housing.<sup>13</sup> Moreover, in addition to having to deal with criminal charges, the mere fact that most offenders are poor is likely to adversely affect all of their important decisions because scarcity places extra cognitive demands that make rational decision making more difficult.<sup>14</sup>

This Article consists of six parts. Part I addresses the question of whether economic sanctions are needed as a sentencing option. Part II describes and differentiates the primary types of economic sanctions, which are sometimes simply lumped together as “fines,”<sup>15</sup> and considers these economic sanctions along dimensions of time (past orientation vs. future orientation) and target (offender vs. victim vs. society).

In Part III, I discuss practical problems of economic sanctions, the most important of which is determining an offender’s ability to pay. Other practical problems include determining economic sanctions when there are multiple types of sanctions, multiple victims, and multiple crimes and when offenders have few resources to make payments

In Part IV, I argue that rules regarding economic sanctions must depend on the type of economic sanction involved. Restitution to victims is the most defensible economic sanction because it can provide the tangible compensation and psychological equity that are preconditions for restorative justice. Restoring equity can be of benefit to victims, to offenders, and to society. Fines are not as defensible as restitution, but are more defensible than costs and fees, because they have poten-

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11. Michael Rothfeld & Brad Reagan, *Billions Going Unrecovered: Justice Department Doesn’t Expect To See Majority of \$97 Billion Criminals Owe*, WALL ST. J., Sept. 18, 2014, at C1.

12. Tamara Walsh, *Juvenile Economic Sanctions: A Logical Alternative?*, 13 CRIMINOLOGY & PUB. POL’Y 69, 71 (2014).

13. See Harris et al., *supra* note 3, at 1756.

14. See SENDHIL MULLAINATHAN & EL DAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

15. See Walsh, *supra* note 12, at 69.

tial value as intermediate sanctions in lieu of incarceration. Moreover, fines can be more directly tailored to the individual offender's behavior and circumstances. Costs and fees are the least defensible sanction, and I argue that they should be prohibited.

In Part IV, recognizing that the elimination of costs and fees is highly unlikely, I recommend three more realistic changes regarding restitution: (1) the number of costs and fees should be reduced, especially at the county level; (2) sanction amounts should be realistic; and (3) making payments should be easier. Finally, in Part VII, I mention two issues, guidelines and research on state variation that need to be addressed in the future.

### I. THE NEED FOR ECONOMIC SANCTIONS

The foundational question is whether there should even be economic sanctions. Economic sanctions have four advantages over both traditional probation and incarceration in jail or prison. First, economic sanctions use a metric that is understood by everyone, and especially by the legal system. The notion of using money as a means of resolving criminal problems goes back at least a thousand years.<sup>16</sup> In the Middle Ages, victims were entitled to compensation for injuries (adjusted for their rank in society), and by the twelfth century, the king was entitled to a fee for administering the system.<sup>17</sup> In contemporary America, the tort system involves money compensation for injuries. And, in the case of large numbers of victims caused by terrorism<sup>18</sup> and corporate malfeasance,<sup>19</sup> the legal system uses money to cover the harms suffered.

Second, economic sanctions provide flexibility in that they can be adjusted to an offender's specific circumstances, although they often are not.<sup>20</sup> Paying economic sanctions is a pun-

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16. The idea of restitution goes back almost four thousand years to the Code of Hammurabi. Daniel W. Van Ness, *Restorative Justice*, in *CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION* 7 (Burt Galaway & Joe Hudson eds., 1990).

17. See ANDREW R. KLEIN, *ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION* 153–54 (2d ed. 1997).

18. See, e.g., KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11*, at 37 (2005).

19. See, e.g., Jeff Bennett, *Kenneth Feinberg on GM Payouts: 'Fast Is Possible, Fair Isn't'*, WALL ST. J. L. BLOG (July 1, 2014, 3:47 PM), <http://blogs.wsj.com/law/2014/07/01/kenneth-feinberg-on-gm-payouts-fast-is-possible-fair-isnt>.

20. See SALLY T. HILLSMAN, BARRY MAHONEY, GEORGE F. COLE &

ishment for most offenders, especially the poor.<sup>21</sup> For wealthy offenders, the amounts could be increased, so that the adjusted punishment is approximately equivalent to what is experienced by those with fewer assets.

Third, economic sanctions can be used to serve different purposes, including helping the victim, restoring justice to society, and punishing the offender.<sup>22</sup>

Fourth, economic sanctions can be used to provide intermediate punishments. At the low end of punishment is traditional probation, which typically includes a number of conditions, such as reporting regularly to a probation officer, not leaving the county without permission, and not meeting with convicted felons.<sup>23</sup> These conditions, which can number as many as twenty-five, are often not enforced, as probation officers may have caseloads over a hundred and may lack the time to adequately supervise offenders.<sup>24</sup> In addition, because probationers often move, probation officers may not supervise the offenders, even if they had the time and resources, because they may not even know where probationers are.<sup>25</sup> Thus, probation alone is generally not very punitive.

At the other, more punitive, extreme, is incarceration in prison, and for less serious crimes, incarceration in jail. Currently, there are 6.94 million individuals under correctional supervision, approximately 1.5 million of whom are in prison.<sup>26</sup> Incarceration in prison is expensive and has major effects on inmates' social and physical lives, both in prison and subsequently after release.<sup>27</sup> And, although there may be some effect of incarceration on reducing recidivism, the results are clear that, beyond some point, there is no added deterrence benefit of additional time in prison.<sup>28</sup> Prison is disruptive of family life

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BERNARD AUCHTER, NAT'L INST. OF JUSTICE, FINES AS CRIMINAL SANCTIONS 4 (1987) [hereinafter HILLSMAN ET AL., FINES AS SANCTIONS], available at <https://www.ncjrs.gov/pdffiles1/Digitization/106773NCJRS.pdf>.

21. See *id.* at 5.

22. DANIEL MCGILLIS, NAT'L INST. OF JUSTICE, CRIME VICTIM RESTITUTION: AN ANALYSIS OF APPROACHES 5, 11 (1986).

23. See Joan Petersilia, *Probation in the United States*, in 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 149, 164 (Michael Tonry ed., 1997).

24. See *id.* at 150.

25. See *id.* at 169.

26. See GLAZE & HERBERMAN, *supra* note 4.

27. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 112–14 (2006).

28. See, e.g., PA. COMM'N ON SENTENCING, A STUDY ON THE USE AND IMPACT OF MANDATORY MINIMUM SENTENCES: EXECUTIVE SUMMARY & RECOMMENDATIONS 3 (2009), available at <http://www.conversations.psu.edu/>

and social networks, makes employment more difficult, and may reduce inmates' long-term health.<sup>29</sup> Incarceration is highly punitive and, particularly for those serving long sentences, may be counterproductive.

Because of dissatisfaction with the lack of supervision of probation and the harsh punitiveness of incarceration, there have been numerous calls for intermediate sanctions, which would give judges and probation officers additional tools to help offenders learn skills, gain employment, deal with substance abuse problems, and address social and behavioral problems.

Despite these advantages, it is important to recognize that economic sanctions also have disadvantages. First, economic sanctions automatically invoke factors associated with wealth and poverty, including race, class, education, job skills, and employment.<sup>30</sup> There is also the issue that convicted offenders, especially those who have been incarcerated, face structural impediments and interpersonal biases that make reintegration difficult.<sup>31</sup> Second, as discussed later, offenders' inability to pay limits the usefulness of economic sanctions. Third, the focus only on economic sanctions is too limiting, as incentives can be economic, social, or moral.<sup>32</sup> The focus on purely economic incentives ignores the fact that human behavior is also affected by people's desire to be seen by others in a positive light and to be treated and to treat others fairly.<sup>33</sup> By focusing only on economic incentives, economic sanctions can undermine social and moral sanctions.<sup>34</sup>

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docs/SpecRptHR12of2007ExecSum.pdf.

29. See Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 121–23 (2007).

30. See generally SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 2–4 (David B. Grusky ed., 3d ed. 2008) (discussing the “contours of inequality and exploring its causes”).

31. See Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002).

32. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 17 (rev. & expanded ed. 2006).

33. TOM R. TYLER, *WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS* 17, 38–40 (2011).

34. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1 (2000). In the study by Gneezy and Rustichini, the introduction of a small fine for parents who were late in picking up their children at a day care center increased the number of late pickups. *Id.* at 5–7. The authors interpreted their findings as indicating that parents were willing to pay the fine because the social opprobrium originally associated with late pickups had presumably been removed with the introduction of the fine. *Id.* at 13–14.

## II. TYPES OF ECONOMIC SANCTIONS

Depending on the jurisdiction, economic sanctions are sometimes referred to as monetary sanctions,<sup>35</sup> financial obligations,<sup>36</sup> or legal financial obligations.<sup>37</sup> The revised Model Penal Code includes provisions for six types of economic sanctions: (1) restitution, (2) fines, (3) costs, (4) fees, (5) assessments, and (6) asset forfeiture.<sup>38</sup>

As Ruback and Bergstrom argued, criminal sentencing involves two time perspectives (looking to the past and looking to the future) and three parties (the victim, the offender, and society).<sup>39</sup> Looking to the past involves factors about the crime (the type, seriousness, harm caused, and offender's culpability),<sup>40</sup>

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35. See ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, FUNDING THE STATE COURTS: ISSUES AND APPROACHES 50 (1996), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/financial/id/5>.

36. See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt As a Barrier to Reentry*, 41 J. POVERTY L. & POL'Y 187, 187 (2007).

37. See ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010), available at [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf).

38. MODEL PENAL CODE: SENTENCING § 6.04 A–D (Tentative Draft No. 3, Apr. 24, 2014). The Model Penal Code addresses asset forfeiture in § 6.04 C (Tentative Draft No. 3, Apr. 24, 2014). Forfeiture, which can be either criminal or civil, refers to the government seizure of property that is illegal contraband, was illegally obtained, was acquired with resources that were illegally obtained, or was used in an illegal activity. Asset forfeiture can constitute serious punishment and “all criminal justice systems seek to confiscate the proceeds of crime or otherwise order the forfeiture of property connected with its commission.” David Miers, *Offender and State Compensation for Victims of Crime: Two Decades of Development and Change*, 20 INT'L REV. VICTIMOLOGY 145, 154 (2014). Criminal justice forfeitures have recently come under severe criticism for violation of the law. See, e.g., Michael Sallah, Robert O'Harrow, Jr. & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize; What's Yours Is Theirs: A Homeowner Challenges Philadelphia's Abusive Civil Forfeiture Law>, WALL ST. J., (Sept. 3, 2014), <http://www.wsj.com/articles/whats-yours-is-theirs-1409702898>. I do not consider the issue here because there is so little social science evidence on point and because it is relevant to only certain kinds of crime (generally drug violations). Moreover, the alleged abuses associated with forfeiture often involve individuals who were not charged with, much less convicted of, criminal behavior. Sallah, O'Harrow & Rich, *supra*.

39. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUSTICE & BEHAV. 242, 245 (2006).

40. See 1 PANEL ON SENTENCING RESEARCH, NAT'L RESEARCH COUNCIL,

which are relevant to issues of blame, just deserts, and the restoration of equity.<sup>41</sup> Blame and just deserts relate primarily to the offender, whereas considerations of equity relate to restoring the victim and society to the condition they were in before the crime was committed.

Future-oriented sentencing is concerned with the likelihood that the offender will offend at some point, and thus judges are concerned with reducing crime through deterrence and rehabilitation. Deterrence-oriented sentences are effective if they involve a high penalty because a rational offender would believe that the benefits of any future crime would be less than the costs he or she would suffer if caught and punished. Rehabilitation-oriented sentences are effective if they induce the offender to believe that crime is wrong.

The relevance of these sanctions depends on the intended target. For the crime victim, restitution is the only relevant economic sanction. It is past-oriented, aimed at restoring the victim, with little or no consideration of punishing the offender. For the offender, fines and forfeitures are past-oriented economic sanctions, designed to punish the offender for prior behavior (with little or no consideration of reparation to a victim), and fees are future-oriented in the sense that they pay for ongoing supervision (e.g., probation) and monitoring (e.g., drug tests). For society, past-oriented economic sanctions are aimed at making the offender pay for the costs of prosecuting the offender and future-oriented sanctions are aimed at helping society deal with future problems (e.g., future victims through payments to the state's victim compensation fund) and helping to pay for continuing supervision.<sup>42</sup>

Beyond their primary goals, these sanctions also have secondary purposes. Restitution can help with offender rehabilitation. Fines, forfeitures, and fees can serve to deter as well as to punish. Costs can serve to punish as well as to restore equity with society. Restitution, fines, and costs and fees are addressed in greater detail below.

#### A. RESTITUTION

Restitution refers to a court-ordered payment by the offender to compensate the victim for tangible financial losses di-

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RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 9 (Alfred Blumstein, Jacqueline Cohen, Susan E. Martin & Michael H. Tonry eds., 1983).

41. See Philip Brickman, *Crime and Punishment in Sports and Society*, 33 J. SOC. ISSUES 140, 151–55 (1977).

42. See Ruback & Bergstrom, *supra* note 39, at 248–49.



rectly related to the crime.<sup>43</sup> In contrast to pure punishment, which to be effective at deterrence must be greater than the harm caused,<sup>44</sup> restitution is “exactly proportionate to the harm caused by the offense.”<sup>45</sup>

### 1. Rationale for Restitution

Going back to the Code of Hammurabi,<sup>46</sup> Biblical law,<sup>47</sup> and the Middle Ages,<sup>48</sup> victims’ injuries were to be compensated by specified amounts of money. Although victims were entitled to receive compensation in colonial America,<sup>49</sup> by the early nineteenth century, and for more than one hundred years, the concerns of victims were largely ignored.<sup>50</sup> Following passage of the Victim and Witness Protection Act in 1982, restitution was established at the federal level, and in 1996 became mandatory in almost all federal cases as a result of the Mandatory Victims Restitution Act.<sup>51</sup> All states have statutory provisions that permit restitution,<sup>52</sup> the justification for these laws being their restorative effects on victims or their rehabilitative effects on offenders.<sup>53</sup>

Nationally, restitution is imposed on 18% of convicted felons.<sup>54</sup> More specifically, other studies suggest that restitution was ordered in 29% of the cases of felony probationers in 32 counties<sup>55</sup> and in 63% of restitution-eligible cases in Pennsylva-

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43. *Id.* at 249. It is particularly important that victims receive restitution as quickly as possible. *See, e.g.*, KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 43 (2012).

44. *See* Brickman, *supra* note 41.

45. CHARLES DOYLE, CONG. RESEARCH SERV., RESTITUTION IN FEDERAL CRIMINAL CASES 4 (2007).

46. *See* Van Ness, *supra* note 16.

47. “If anyone sins and commits a breach of faith . . . through robbery, . . . [he shall] restore what he took by robbery . . . he shall restore it in full and shall add a fifth to it, and give it to him to whom it belongs.” *Leviticus* 6:1–5.

48. KLEIN, *supra* note 17.

49. *Id.* at 154.

50. *See* TOBOLOWSKY ET AL., *supra* note 10, at 153.

51. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009).

52. *See* TOBOLOWSKY ET AL., *supra* note 10, at 157.

53. *See* KLEIN, *supra* note 17, at 156–57.

54. MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, at 2004 tbl.1.9 (2007), *available at* <http://www.bjs.gov/content/pub/html/scscf04/tables/scs04109tab.cfm>.

55. MARK A. CUNNIFF & MARY K. SHILTON, BUREAU OF JUSTICE STATISTICS, VARIATIONS ON FELONY PROBATION: PERSONS UNDER SUPERVISION IN 32 URBAN AND SUBURBAN COUNTIES 34 (1991), *available at*

nia.<sup>56</sup> Typically, restitution is handled by victim-focused agencies affiliated with the district attorney's office (e.g., Victim/Witness Assistance Programs) or by offender-focused agencies (e.g., probation/parole supervision).<sup>57</sup> Generally, victims and victim advocates have viewed restitution programs as unsuccessful because: (a) judges are often reluctant to impose restitution on offenders who, they assume, cannot pay it; (b) even if restitution is imposed, the payment of restitution follows the payment of other court-ordered obligations (e.g., costs and fines); and (c) offenders often do not make restitution payments because it is not clear who is responsible for monitoring, collecting, disbursing, and enforcing restitution payments.<sup>58</sup>

Although restitution is now victim-oriented, historically, it was an offender-focused remedy<sup>59</sup> that was intended to promote the offender's rehabilitation rather than to compensate the victim.<sup>60</sup> Imposing, monitoring, and enforcing restitution orders is expensive, sometimes costing more money than is likely to be brought in. In the federal system, the cost of a single restitution order is \$2,000.<sup>61</sup>

I am discussing restitution first because it demonstrates the importance I think should be placed on victims. The criminal justice system is focused on offenders rather than victims.<sup>62</sup> By making restitution mandatory, my emphasis is on victims rather than offenders.<sup>63</sup> The problems usually faced by offenders are also faced by victims—they are disproportionately poor, unemployed, unskilled, and racial/ethnic minorities. Victims suffer both direct costs, such as lost or damaged property, medical expenses, lost wages, mental health counseling, and drug/alcohol treatment, and indirect costs, such as purchasing protection devices, paying increased insurance costs, moving,

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<https://www.ncjrs.gov/pdffiles1/Digitization/131580NCJRS.pdf>.

56. Ruback & Shaffer, *supra* note 9, at 659.

57. See Ruback & Bergstrom, *supra* note 39, at 250.

58. NEW DIRECTIONS, *supra* note 9, at 358.

59. Dickman, *supra* note 51, at 1702.

60. See *id.* at 1702–03 (discussing U.S. Supreme Court decisions that address justifications for restitution).

61. *Id.* at 1708.

62. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, VICTIMS OF CRIME IN AMERICA, at ii (1982), available at <http://www.ovc.gov/publications/presdntstskforcprpt/87299.pdf>.

63. Professor Bruce Benson takes this emphasis on victims' rights to restitution to an extreme, arguing that the criminal justice system should be privatized so that the emphasis is on victim restitution rather than offender punishment. Bruce L. Benson, *Decriminalisation, Restitution and Privatisation: The Path to Reduced Violence and Theft*, 21 GRIFFITH L. REV. 448 (2012).

and avoiding certain neighborhoods.<sup>64</sup> Tangible losses can cause direct tangible harms (e.g., a stolen car), indirect tangible harms (e.g., losing a job because of a lack of transportation), and intangible harms (e.g., stress from financial worries). Receiving restitution can address not only issues of tangible harms, but an order of restitution alone can also have some “placebo value” because it gives victims the impression that their concerns are being taken into account.<sup>65</sup> The largest intangible cost is generally pain and suffering,<sup>66</sup> although there are also intangible costs relating to reduced quality of life and fear of crime. The most recent estimates of victims’ tangible and intangible losses are \$19,000 for robbery with injury, \$24,000 for an assault with injury, and \$87,000 for rape.<sup>67</sup>

In addition to the harms of physical injury (and the resulting medical and hospital charges), lost wages, and property damage and loss, victims often suffer from the same sort of credit, employment, and housing problems facing offenders, which is not surprising because many victims are, have been, or will be offenders.<sup>68</sup> Victims also suffer increased chances of revictimization<sup>69</sup> through links between drug and alcohol use, depression, and criminal offending.<sup>70</sup>

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64. See DEAN G. KILPATRICK, DAVID BEATTY & SUSAN SMITH HOWLEY, NAT’L INST. OF JUSTICE, *THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE?* 8–9 (1998), available at <http://www.cvaactionalliance.com/wordpress/wp-content/uploads/2010/03/RightsOfCrimeVictimsLegalProtection.pdf>.

65. See Anthony Walsh, *Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases*, 77 J. CRIM. L. & CRIMINOLOGY 1126, 1139–41 (1986).

66. See, e.g., LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP’T OF JUSTICE, *SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME 1* (2013), available at <http://www.bjs.gov/content/pub/pdf/sivc.pdf> (noting that about sixty-eight percent of victims of serious violent crime experience socioemotional problems as a result of the crime); NAT’L CTR. FOR VICTIMS OF CRIME, *MAKING RESTITUTION REAL: FIVE CASE STUDIES ON IMPROVING RESTITUTION COLLECTION 3–4* (2011) [hereinafter *MAKING RESTITUTION REAL*], available at <http://csgjusticecenter.org/wp-content/uploads/2011/11/2011-Natl-Center-for-Victims-of-Crime-report.pdf>.

67. MARK A. COHEN, *THE COSTS OF CRIME AND JUSTICE* 42–43 (2005).

68. Cf. Robert J. Sampson & Janet L. Lauritsen, *Deviant Lifestyles, Proximity to Crime, and the Offender-Victim Link in Personal Violence*, 27 J. RES. CRIME & DELINQ. 110, 113–14 (1990); JENNIFER N. SHAFFER & R. BARRY RUBACK, U.S. DEP’T OF JUSTICE, *VIOLENT VICTIMIZATION AS A RISK FACTOR FOR VIOLENT OFFENDING AMONG JUVENILES 1–2* (2002), available at <https://www.ncjrs.gov/pdffiles1/ojdp/195737.pdf>.

69. See Maureen Outlaw, Barry Ruback & Chester Britt, *Repeat and Multiple Victimization: The Role of Individual and Contextual Factors*, 17 VIOLENCE & VICTIMS 187, 195–201 (2002).

70. R. Barry Ruback, Valerie A. Clark & Cody Warner, *Why Are Crime*

Restitution addresses the tangible needs of victims by reimbursing them for the tangible costs incurred from the crime, although restitution is not ordered in every case where it could be imposed<sup>71</sup> and restitution orders generally do not cover the full costs of the harm suffered by victims.<sup>72</sup> It legitimizes victims' socioemotional needs by indicating, in an official and public manner, that their victimization was wrong and should be repaired.<sup>73</sup> Restitution may also address victims' emotional needs by holding offenders responsible for, and forcing them to acknowledge, the harms they caused.<sup>74</sup> Restitution cannot be ordered for pain and suffering,<sup>75</sup> but it can cover medical bills, mental health counseling, replacement of lost or stolen property, and funeral expenses.<sup>76</sup>

Aside from addressing the needs of victims, many scholars and practitioners alike support restitution because it forces offenders to confront the harms they caused victims, makes them responsible for correcting those harms, and gives them a sense of accomplishment when they have paid the restitution.<sup>77</sup> Consistent with that notion, there is some suggestion in research that victims prefer restitution from the offender over compensation from the state because restitution means that the offender must acknowledge the harm that was inflicted.<sup>78</sup> If those goals are met, paying restitution is associated with lower rates

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*Victims at Risk of Being Victimized Again? Substance Use, Depression, and Offending As Mediators of the Victimization-Revictimization Link*, 29 J. INTERPERSONAL VIOLENCE 157, 160–62 (2014).

71. As in the United States, restitution is generally not imposed in the United Kingdom, occurring in less than one-third of burglary cases and less than half of criminal damages cases. Miers, *supra* note 38, at 150.

72. *Id.* at 148.

73. *Cf.* MAKING RESTITUTION REAL, *supra* note 66, at 4.

74. See Tyler G. Okimoto & Tom R. Tyler, *Is Compensation Enough? Relational Concerns in Responding to Unintended Inequity*, 10 GROUP PROCESSES & INTERGROUP REL. 399, 401 (2007).

75. For damages that are more difficult to quantify, like pain and suffering, civil court options are available. See NAT'L CTR. FOR VICTIMS OF CRIME, RESTITUTION (2004), available at <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution>.

76. See NEW DIRECTIONS, *supra* note 9, at 355.

77. MCGILLIS, *supra* note 22, at 13–19.

78. Miers, *supra* note 38, at 148 (citing Gordon Bazemore, *Crime Victims, Restorative Justice and the Juvenile Court: Exploring Victim Needs and Involvement in the Response to Youth Crime*, 6 INT'L REV. VICTIMOLOGY 295 (1999); Daniela Bolivar, *Conceptualizing Victims' 'Restoration' in Restorative Justice*, 17 INT'L REV. VICTIMOLOGY 237 (2010); Jonathan Doak & David O'Mahony, *The Vengeful Victim? Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing*, 13 INT'L REV. VICTIMOLOGY 157 (2006).

of recidivism for both adult offenders<sup>79</sup> and juvenile offenders.<sup>80</sup> Unfortunately, analyses of recidivism generally look only at gross categories of interventions (e.g., probation, intensive probation, jail, prison) rather than at specific types of sanctions, such as economic sanctions.<sup>81</sup> There are only a few studies examining the relationship between the payment of restitution and recidivism, and their value is limited by relatively small sample sizes and potential problems of omitted variable bias and reverse causality.<sup>82</sup>

Unaddressed by restitution, but illustrative of the fact that crime has many repercussions for victims, are the indirect harms to the community caused by the links between poverty and crime. Poor communities suffer broken windows that cannot be repaired because of the expense, and there have been claims that broken windows lead to crime,<sup>83</sup> although the research is not definitive.<sup>84</sup> Moreover, communities that have high rates of crime are those where people who are able to will move out, leaving only those who, because they are too poor, who cannot leave the community.<sup>85</sup> High rates of mobility into

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79. Joe Heinz, Burt Galaway & Joe Hudson, *Restitution or Parole: A Follow-Up Study of Adult Offenders*, 50 SOC. SERV. REV. 148, 152–54 (1976); Maureen C. Outlaw & R. Barry Ruback, *Predictors and Outcomes of Victim Restitution Orders*, 16 JUSTICE Q. 847, 850–52 (1999).

80. David P. Farrington & Brandon C. Welsh, *Randomized Experiments in Criminology: What Have We Learned in the Last Two Decades?* 1 J. EXPERIMENTAL CRIMINOLOGY 9, 29–30 (2005); Stacy Hoskins Haynes, Alison C. Cares & R. Barry Ruback, *Juvenile Economic Sanctions: An Analysis of Their Imposition, Payment, and Effect on Recidivism*, 13 CRIMINOLOGY & PUB. POLY 31, 51–52 (2014); Anne L. Schneider, *Restitution and Recidivism Rates of Juvenile Offenders: Results from Four Experimental Studies*, 24 CRIMINOLOGY 533, 549–51 (1986).

81. Joshua C. Cochran, Daniel P. Mears & William D. Bales, *Assessing the Effectiveness of Correctional Sanctions*, 30 J. QUANTITATIVE CRIMINOLOGY 317, 318 (2014).

82. See, e.g., Outlaw & Ruback, *supra* note 79, at 861–63.

83. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1, 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>.

84. See, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 308–42 (1998); Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q., 319, 336–37 (2004).

85. See R. BARRY RUBACK & MARTIE P. THOMPSON, SOCIAL AND PSYCHOLOGICAL CONSEQUENCES OF VIOLENT VICTIMIZATION 168–69 (2001); see also Laura Dugan, *The Effect of Criminal Victimization on a Household's Moving Decision*, 37 CRIMINOLOGY 903, 922–24 (1999) (noting an increase in a household's probability of moving “after any of its members are victimized”).

and out of the community undermine community cohesion, and this social disorganization can lead to crime.<sup>86</sup>

## 2. Current Status of Restitution in the States

States differ in their support of victims' rights regarding restitution. An examination of the laws concerning restitution for all fifty states and the District of Columbia, using the VictimLaw searchable database maintained by the Office for Victims of Crime,<sup>87</sup> indicates that twenty states give victims a constitutional right to restitution.<sup>88</sup> Thirty-three states make restitution mandatory (e.g., using "shall" rather than "may"), but three of those states (Connecticut, Idaho, and North Dakota) introduce qualifications to mandatory restitution.<sup>89</sup> Six states prohibit judges from considering the defendant's ability to pay when imposing restitution, thus making restitution dependent on the victim's actual losses rather than on the defendant's present and future assets and wages—symbolically placing the victim's interests above those of the defendant.<sup>90</sup> Twenty-three states explicitly indicate that judges can consider the defendant's financial resources, in some cases stating that the judge must consider the impact of paying restitution on the defendant and the defendant's dependents.<sup>91</sup> Twenty-one states do not have a law that addresses the issue of whether the judge is to consider the defendant's ability to pay, meaning that the judge can consider the defendant's ability to pay.<sup>92</sup>

Even among the states that have mandatory restitution statutes, there is inconsistency in that some states require restitution only for violent crimes whereas others require restitu-

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86. Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774, 799–800 (1989).

87. Office of Justice Programs, VICTIMLAW, <https://www.victimlaw.org/victimlaw/start.do> (follow "Search by topic"; select "Right to restitution"; select "Court authority to order restitution"; select "Federal" and "State and Territories"; select "States and regulatory provisions"; select "Select all"; then search for results). The laws listed in the database are current as of 2011.

88. TOBOLOWSKY ET AL., *supra* note 10, at 157. VictimLaw gives the number as 18, but I agree with Tobolowsky and my own reading of the constitutions of Montana and Virginia. See VICTIMLAW, *supra* note 87.

89. See VICTIMLAW, *supra* note 87; cf. TOBOLOWSKY ET AL., *supra* note 10, at 157.

90. See VICTIMLAW, *supra* note 87; cf. TOBOLOWSKY ET AL., *supra* note 10, at 157–58.

91. See VICTIMLAW, *supra* note 87.

92. See *id.*

tion only for property crimes.<sup>93</sup> There are also differences among the states in terms of who can receive restitution. In some states, only the victim can receive restitution, but in other states, family members and victims' estates, as well as agencies that provide assistance to victims (e.g., victim service agencies, compensation programs), can receive restitution.<sup>94</sup> Further differences among states arise in terms of whether indirect victims (e.g., insurance companies) and local governments are entitled to restitution.<sup>95</sup> In some states, incarcerated offenders must pay restitution, whereas in others offenders must be on probation or parole.<sup>96</sup> States also differ in terms of whether juveniles are obligated to pay restitution.<sup>97</sup>

Most defendants have few financial resources, meaning that it is unlikely victims will receive the restitution they are owed or that state and local governments will receive the fines, fees, and costs that were imposed.<sup>98</sup> Eleven states require that restitution be paid before other economic sanctions, meaning that, if any payments are made, the victim, rather than the state or local government, will receive it.<sup>99</sup> Fourteen states have laws that automatically convert restitution orders into civil judgments, and eight states have a law whereby a restitution order permits the seizure of assets or property or the attachment of wages.<sup>100</sup>

### 3. Imposition and Payment of Restitution

The Office for Victims of Crime has recommended mandatory restitution.<sup>101</sup> This requirement of mandatory restitution is easier to defend for some victims than others. In particular, some judges are reluctant to require restitution for businesses and especially insurance companies.<sup>102</sup> The ABA Victims Committee also recommended that "[t]he offender's ability to pay should not determine whether the offender will be sentenced to restitution,"<sup>103</sup> although the court can consider ability to pay "in

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93. NEW DIRECTIONS, *supra* note 9, at 356–57.

94. *Id.* at 357.

95. KLEIN, *supra* note 17, at 170.

96. NEW DIRECTIONS, *supra* note 9, at 357.

97. *Id.*

98. *See* Ruback & Bergstrom, *supra* note 39, at 243, 264.

99. *See* VICTIMLAW, *supra* note 87.

100. *Id.*

101. NEW DIRECTIONS, *supra* note 9, at 364.

102. Ruback & Shaffer, *supra* note 9, at 664.

103. Victims Comm., *Restitution for Crime Victims: A National Strategy*, 2004 A.B.A. SEC. CRIM. JUSTICE 15.

fashioning the mode and schedule of payment.”<sup>104</sup> Under federal law and the law of many states, however, the court must consider the defendant’s financial resources.<sup>105</sup>

Case factors and offender characteristics are the best predictors of whether restitution will be imposed.<sup>106</sup> Beyond that, one of the strongest predictors of receiving an order of restitution is the ease with which damages can be quantified.<sup>107</sup> Rationally, longer criminal records should be related to larger amounts of economic sanctions because offenders who have committed crimes despite having been punished before should be punished more and require more deterrence. However, there is evidence that offenders with longer criminal records are likely to receive significantly lower economic sanctions, even controlling for whether the offender was sentenced to a term of incarceration.<sup>108</sup> It seems that judges believe offenders with longer records are less likely to pay any economic sanctions imposed, and therefore, judges simply do not impose them. The finding that individuals who were sentenced to prison were significantly less likely to have mandatory economic sanctions imposed is consistent with the finding of Harris et al., who used national data from the Bureau of Justice Statistics and found that probationers and misdemeanants were more likely than prisoners to have economic sanctions imposed.<sup>109</sup>

Typically, when an offender makes a payment (to the clerk of courts or the probation office), some money is forwarded to the victim, depending on legal and jurisdictional practical factors such as whether restitution is paid before other economic sanctions and how restitution is divided among multiple victims. For example, a study found that in one county in Pennsylvania, victims from older convictions were paid first, but in another county, payments were evenly divided across all vic-

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104. *Id.* at 17.

105. *Id.* at 16.

106. See Outlaw & Ruback, *supra* note 79, at 849–50; cf. R. Barry Ruback, Jennifer N. Shaffer & Melissa A. Logue, *The Imposition and Effects of Restitution in Four Pennsylvania Counties: Effects of Size of County and Specialized Collection Units*, 50 CRIME & DELINQ. 168, 171–74 (2004).

107. OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, ORDERING RESTITUTION TO THE CRIME VICTIM 5 (2002), available at [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin6/ncj189189.pdf](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin6/ncj189189.pdf); Outlaw & Ruback, *supra* note 79, at 857; Ruback, Shaffer & Logue, *supra* note 106, at 182.

108. See R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 768–70 (2011).

109. Harris et al., *supra* note 3, at 1769–71.



tims, regardless of when the conviction occurred.<sup>110</sup> The study also found that in most counties, individual victims were paid before business victims, state victims, or insurance companies.<sup>111</sup> Although Pennsylvania law requires that the first fifty percent of all offender payments be applied to restitution and that other economic sanctions (e.g., fines, fees, costs) be paid after that, some counties required that one hundred percent of payments be applied to restitution until it is paid in full.<sup>112</sup> At the other extreme, one county, counter to the law, required that supervision fees and DUI course instructors be paid before restitution.<sup>113</sup> Aside from policy disagreements, judges might not

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110. R. BARRY RUBACK, ALISON C. CARES & STACY N. HOSKINS, EVALUATION OF BEST PRACTICES IN RESTITUTION AND VICTIM COMPENSATION ORDERS AND PAYMENTS 119–20 (2006) [hereinafter RUBACK ET AL., EVALUATION], available at <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/special-reports/act-37-of-2007-economic-sanctions/special-report-evaluation-of-best-practices-in-restitution-and-victim-compensation-orders-and-payments/view>.

111. With regard to the type of victim for which restitution is appropriate, judges' responses were consistent with the statute, in that individuals and businesses were ranked higher than the Victim Compensation Board and insurance companies were ranked very low. See *id.* at 158, 170, 187. Indeed, some judges were not willing to order restitution for insurance companies. See *id.* at 153, 178. In general, however, the ranking of victims was consistent with the remarks of one judge who said,

Although I order restitution in every case where it is claimed, I believe it is far more important that an individual, rather than a corporate entity, is made whole. Such losses are a part of doing business. For insurance companies, I do not see an insured getting a rebate because a defendant reimbursed the company.

R. BARRY RUBACK, RESTITUTION IN PENNSYLVANIA: A MULTIMETHOD INVESTIGATION 58 (2002) [hereinafter RUBACK, RESTITUTION IN PENNSYLVANIA]. "There was also an indication that judges found some system-related enforcement difficulties to be problematic, although not as problematic as offender problems." Ruback & Shaffer, *supra* note 9, at 664. Restitution also was not imposed at higher rates due to disagreements over the statute.

Although judges, prosecutors, and probation officers all agreed that the primary goal of restitution is victim compensation, they also said that it serves both to rehabilitate and punish the offender. Given that punishment is not supposed to be a goal of restitution but that decision makers believe that in fact it is, they may be inclined to avoid imposing restitution in order to avoid punishing the offender further. Consistent with this explanation for why restitution was not imposed in all situations where it might have been, one judge wrote the following on his survey: "Many judges give stiff sentences in lieu of restitution, less stiff sentences if restitution is ordered. This practice is incompatible to the given situation and dissatisfies the victims and breaks down the reasons for restitution and its effective collection."

RUBACK, RESTITUTION IN PENNSYLVANIA, *supra* at 57.

112. RUBACK ET AL., EVALUATION, *supra* note 110, at 119.

113. See *id.* at 168–69. If the offender made a large payment, fifty percent

impose restitution in all cases because of practical limitations on the system's ability to collect it. Or, as one judge from a large city put it:

I hear only major crimes where 90+% of the time the offenders are indigent. You can't get blood out of a stone. When you have rapes, aggravated assaults, gun-point robberies [by] those with no skills [and] who have never held a job, what good is restitution? They will be in jail for five to ten years and have no assets. It's the exception, not the rule, in the major cases in a large city.<sup>114</sup>

For offenders who do not make restitution payments, courts can extend probation, revoke probation, hold them in contempt, and, if there is no showing of inability to pay, incarcerate.<sup>115</sup> However, data suggests that judges only infrequently put offenders in jail for nonpayment of restitution and even more rarely when that nonpayment is the only violation of probation.<sup>116</sup>

Studies repeatedly find that victims do not receive full restitution for their losses because it is not imposed; and if imposed, the imposed amounts either do not cover victims' losses or, even if imposed in full, are not paid.<sup>117</sup> In one study, only 43% of victims said that the amount of restitution ordered covered their losses,<sup>118</sup> and another study reported that only 18% of victims believed the court took their estimation of losses into account when setting the restitution amount.<sup>119</sup> Vermont's Restitution Unit has an overall collection rate of only 24%.<sup>120</sup> A study of six Pennsylvania counties found that two to four years after conviction, the average percentage of restitution paid ranged from 34% to 74%,<sup>121</sup> and a survey of victims in two of

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was applied to restitution; because DUI courses are expensive (i.e., \$250 or more) and supervision fees are about \$35 a month, large payments were uncommon. In non-DUI cases, the county was in compliance with the law. See generally *id.* app. F at 167–76.

114. RUBACK, RESTITUTION IN PENNSYLVANIA, *supra* note 111, at 58.

115. Victims Comm., *supra* note 103, at 27–34.

116. R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 CRIMINOLOGY & PUB. POL'Y 569, 574–75 (2011) [hereinafter Ruback, *Abolition*].

117. Cf. Victims Comm., *supra* note 103, at 1–3. The Committee suggested that restitution payments could be increased if more aggressive tactics were adopted, “including income garnishments, property liens, intercepting income tax refunds, reporting debts to credit agencies, ‘booting’ cars, suspension of driving and other licenses and ‘most wanted’ lists.” *Id.* at 3.

118. Robert C. Davis, Barbara Smith & Susan Hillenbrand, *Restitution: The Victim's Viewpoint*, 15 JUSTICE SYS. J. 746, 754 tbl. 1 (1992).

119. RUBACK ET AL., EVALUATION, *supra* note 110, at 213 tbl.K-1.

120. MAKING RESTITUTION REAL, *supra* note 66, at 42.

121. RUBACK ET AL., EVALUATION, *supra* note 110, at 45.

those six counties found that only 24% had received full restitution, 28% had received partial restitution, and 48% had received no restitution.<sup>122</sup> Finally, even if the restitution is paid, victims are not likely to receive it when they most need it. One study found that only 37% of victims were satisfied with the timeliness of restitution.<sup>123</sup>

Victims are generally not kept informed about the restitution process,<sup>124</sup> and they generally do not understand the process.<sup>125</sup> Moreover, there is a real concern that “[f]or many victims restitution becomes a hollow promise” because it is unlikely to be paid.<sup>126</sup> And, if victims are dissatisfied with the restitution process, they may experience it within a second victimization and be less likely to cooperate with the criminal justice system in the future.<sup>127</sup>

Rather than think of restitution as a penalty, it is possible to consider it as a restorative justice procedure. Restorative justice practices assume that the justice process is about repairing the harm from a crime in a way that balances the needs of the victim, the community, and the offender.<sup>128</sup> Restorative justice includes both a formal process, administered by the government and focused on accountability and reparation, and an informal process, administered by the community, which treats the victim with respect and attempts to reintegrate the offender into the community.<sup>129</sup>

Research suggests that rates of restitution payment may be higher in restorative justice programs than traditional criminal justice programs, although the research is limited by selection bias problems (e.g., only some subgroups of offenders and

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122. R. Barry Ruback, Alison C. Cares & Stacy N. Hoskins, *Crime Victims' Perceptions of Restitution: The Importance of Payment and Understanding*, 23 VIOLENCE & VICTIMS 697, 704 (2008) [hereinafter Ruback et al., *Perceptions*].

123. Davis et al., *supra* note 118, at 752.

124. *See id.* at 752 (finding that only nineteen percent of victims in the study believed they were well-informed about restitution); *see also* Ruback et al., *Perceptions*, *supra* note 122, at 705 (making a similar finding regarding a lack of information).

125. Davis et al., *supra* note 118, at 705 (finding that on a seven-point scale of how well victims understood the restitution process, the mean was below the midpoint).

126. *Id.* at 746.

127. Ruback, et al., *Perceptions*, *supra* note 122, at 708.

128. Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQ. 296, 302 (1995); Van Ness, *supra* note 1646, at 9.

129. Van Ness, *supra* note 16, at 12.

victims can participate in the program).<sup>130</sup> Victims may benefit from these programs because they receive informational support (i.e., they learn of the rights and services available to victims), emotional support (i.e., the harms they suffered are acknowledged, and they have an opportunity to be heard), and tangible support (i.e., restitution). Thus, from a victim's perspective, restorative justice programs may be better than restitution alone.<sup>131</sup>

The Restitution in Pennsylvania Task Force made several suggestions about how to ensure that victims are awarded restitution and that offenders pay the amounts ordered.<sup>132</sup> To make it easier for judges to understand the law and to issue restitution orders, the Task Force suggested that the state clarify and standardize policies regarding the imposition of restitution.<sup>133</sup> In addition, the Task Force suggested that there be the possibility of sanctions for nonpayment of restitution.<sup>134</sup> The Task Force also recommended that victims be provided with more information about what restitution is and how it is imposed, collected, and distributed, and that, to make it easier to locate victims, a web-based system be established so that victims could update their contact information relating to the restitution order.<sup>135</sup>

A recent experiment suggests that there can be cost-effective ways for probation officers to induce offenders to pay the restitution they owe.<sup>136</sup> The study suggests that informing

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130. Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 137 (2005).

131. See generally Haynes et al., *supra* note 80.

132. PA. OFFICE OF THE VICTIM ADVOCATE, RESTITUTION IN PENNSYLVANIA TASK FORCE FINAL REPORT, (Feb. 2013), [http://www.center-school.org/Restitution/pdf/Restitution\\_Taskforce\\_Full\\_Report.pdf](http://www.center-school.org/Restitution/pdf/Restitution_Taskforce_Full_Report.pdf).

133. *Id.* at 7–8.

134. The Task Force suggested such actions as suspending state driver's licenses for offenders who do not pay, mandating Clerks of Court to file civil judgments when a case balance exceeds \$1,000, increasing means to collect restitution by directly taking money from the offender (e.g., attaching wages and/or attaching IRS refunds), and inducing the offender to pay through threats to restrict travel, limit eligibility for public assistance, and file contempt of court proceedings. *Id.* at 35.

135. *Id.* at 8–9.

136. R. Barry Ruback, Andrew Gladfelter & Brendan Lantz, *Paying Restitution: Experimental Analysis of the Effects of Information and Rationale*, 13 CRIMINOLOGY & PUB. POL'Y 405 (2014). In the experiment, "offenders were randomly assigned to one of four conditions in a 2 x 2 between-subjects design in which, over a six-month period, three-quarters of the offenders received monthly letters that contained (a) information or no information about the economic sanctions they had paid and what they still owed (Information manipulation) and (b) a statement or no statement about reasons for paying resti-

offenders on a regular basis about how much restitution they have paid and how much they still owe can lead them to pay more restitution and to make more monthly payments—effects that were interpreted as being due primarily to a change in internal motivation—consistent with the rationale for restorative justice.<sup>137</sup> Although the question of the generalizability of the procedure remains open, the results of this experiment suggest that, at relatively little cost (because information about payments was gathered from individuals' court dockets publicly available on the web), governments can increase restitution payments, benefiting victims, society, and perhaps the offenders themselves.

## B. FINES

Fines are monetary penalties for crime. Nationally, they are imposed on thirty-three percent of convicted felons.<sup>138</sup> Fines can be used as the sole sanction or in combination with other sanctions, from treatment to incarceration.<sup>139</sup> In some jurisdictions, fines are used as prosecution diversion devices, such that charges are dismissed when the fines are paid.<sup>140</sup> Fines can also be targeted to support specific purposes. For example, most fines in the federal system are deposited in the Crime Victims Fund, ninety percent of which is sent to the states for victim compensation and assistance.<sup>141</sup>

In contrast to the assumption of the Model Penal Code,<sup>142</sup> many scholars believe economic sanctions have strengths, that is, have some penological value. First, there is some evidence

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tution (Rationale manipulation). The remaining offenders did not receive a letter." Over a one-year period (the six months of letters and a six-month follow-up period), "offenders who had received letters containing information . . . paid significantly more money and made significantly more monthly payments than did offenders in the other three experimental conditions. A cost-effectiveness analysis indicated that for every dollar spent on the experimental manipulation, about \$6.44 in restitution was received." *Id.* at 405.

137. Ruback, Gladfelter, and Lantz reasoned that "if it were fear of being monitored that led to the increased payments, then the absence of monitoring (i.e., no letters for six months) should have reduced that fear, meaning that payments should have been reduced[, and t]hey were not." *Id.* at 406.

138. DUROSE, *supra* note 54.

139. Hillsman, *supra* note 2, at 61–62.

140. Tonry & Lynch, *supra* note 7, at 128 (discussing the use of fines as prosecution diversion devices in Europe).

141. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-99-70, FEDERAL COURTS: DIFFERENCES EXIST IN ORDERING FINES AND RESTITUTION 1 (1999). In Pennsylvania, fines are also used to support a Crime Victim Compensation Fund. 18 PA. CONS. STAT. § 11.1101(b)(1) (2014).

142. See generally MODEL PENAL CODE (2014).

that, compared with incarceration, fines are about as effective at deterring future crime<sup>143</sup> but are substantially cheaper because the state does not have to pay for housing.<sup>144</sup> Moreover, fines can avoid some of the stigma and secondary effects of incarceration, such as loss of employment and unsupported dependents, who would otherwise have to rely on public assistance.<sup>145</sup> Second, compared with simple probation, fines are more punitive and thus can serve as intermediate sanctions between probation and prison.<sup>146</sup> Third, fines can be flexible, in that they can be adjusted to the facts of the case and the circumstances of the offender.<sup>147</sup> Moreover, they can be used alone, with incarceration, with probation, or with both incarceration and probation.<sup>148</sup> Fourth, evaluating the success of fines is relatively easy and straightforward, and is usually determined by an offender's level of payment.

Fines have been criticized for not being rehabilitative,<sup>149</sup> but the alternative—short periods of incarceration—is also non-rehabilitative.<sup>150</sup> Doing away with fines makes incarceration more likely since there would be fewer intermediate sanctions available.<sup>151</sup>

In the United States, many people oppose the use of fines because they cannot be enforced against the poor<sup>152</sup> and have little impact on the wealthy.<sup>153</sup> Fines with absolute maximums

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143. Margaret A. Gordon & Daniel Glaser, *The Use and Effects of Financial Penalties in Municipal Courts*, 29 CRIMINOLOGY 651, 672 (1991).

144. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 157 (1990) (analyzing the costs of incarceration).

145. Gordon & Glaser, *supra* note 143, at 651–52.

146. *See supra* notes 23–29 and accompanying text.

147. HILLSMAN ET AL., FINES AS SANCTIONS, *supra* note 20, at 2.

148. Hillsman, *supra* note 2, at 61–62.

149. *E.g.*, Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 519 (2011).

150. Pat O'Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL'Y 547, 548–49 (2011) (“Fines and short-term imprisonment thus *both* seemed to be noncorrectional punishments, and fines were less disruptive and possibly less criminogenic.”).

151. *Id.* at 550; *see also* Ruback, *Abolition*, *supra* note 116, at 577 (“[O]ne goal we might want to have [if fines were to be abolished] is to increase the number of intermediate sanctions.”).

152. *See* *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that judges cannot impose incarceration as a penalty for nonpayment unless there is a hearing that determines that the defendant has the ability to pay, but willfully refuses to do so).

153. Hillsman, *supra* note 2, at 53–54. In contrast, in Europe, fines are the legally presumptive penalty, constituting, for example, eighty to ninety per-

can become ineffective if legislatures do not regularly update them to adjust for inflation.<sup>154</sup> Fines that have a statutorily defined and predetermined amount are regressive and do not meet the goals of individualized justice. Thus, fines in the United States tend to be used primarily in courts of limited jurisdiction, particularly traffic courts.<sup>155</sup> Fines are also used in lower courts for minor offenses, such as shoplifting, especially for first-time offenders who have enough money to pay the fine.<sup>156</sup> In the United States, fines are used in forty-two percent of courts of general jurisdiction and eighty-six percent of cases in courts of limited jurisdiction.<sup>157</sup>

For each jurisdiction there is usually a “going rate” for fines, that is, what is typically imposed for a particular offense.<sup>158</sup> Because judges tend to use this going rate for fines, they do not adjust the seriousness of the penalty to the particular defendant.<sup>159</sup> And, because this going rate is usually low (in order to accommodate the poorest offenders), for wealthy offenders, fines often have little punitive value.<sup>160</sup> Rather than make adjustments at initial sentencing, judges tend to make adjustments to fines at the back end, when they often excuse

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cent of all sentences in Germany and Sweden. Tonry & Lynch, *supra* note 7, at 128; FED. MINISTRY OF THE INTERIOR & FED. MINISTRY OF JUSTICE, FIRST PERIODICAL REPORT ON CRIME AND CRIME CONTROL IN GERMANY 33 (2001). Criminal fines were imposed in about eighty percent of cases in England and Wales in 1989. DAVID MOXON, MIKE SUTTON & CAROL HEDDERMAN, UNIT FINES: EXPERIMENTS IN FOUR COURTS 1 (1990). One type of fine commonly used in Europe is the day fine, which is based on the severity of the crime and the offender’s ability to pay (typically, the offender’s daily income). Hillsman, *supra* note 2, at 76. A second type of fine common in Europe is a method to divert the offender from criminal justice processing. Tonry & Lynch, *supra* note 7, at 128. If the defendant agrees to pay the fine (typically, the amount that would have been imposed had the defendant been convicted), charges are conditionally dismissed. *Id.*

154. See Robert W. Gillespie, *Criminal Fines: Do They Pay?*, 13 JUST. SYS. J. 365, 370 (1988–89) (discussing the impact of changes to the maximum fine imposed in drug cases).

155. SALLY T. HILLSMAN, JOYCE L. SICHEL & BARRY MAHONEY, FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 2 (1984).

156. HILLSMAN ET AL., FINES AS SANCTIONS, *supra* note 20, at 2–3.

157. David Weisburd, Tomer Einat & Matt Kowalski, *The Miracle of the Cells: An Experimental Study of Interventions To Increase Payment of Court-Ordered Financial Obligations*, 7 CRIMINOLOGY & PUB. POL’Y 9, 12 (2008).

158. Sally T. Hillsman & Judith A. Greene, *The Use of Fines As an Intermediate Sanction*, in SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS 123, 127 (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992).

159. Hillsman, *supra* note 2, at 63.

160. *Id.*

the remaining unpaid portion or simply let the probation period expire without enforcing the fine.

In the late eighteenth century, there was a shift away from fines because imprisonment's effect on liberty was seen as a fairer punishment.<sup>161</sup> A second reason was that imprisonment was the likely result for individuals who defaulted on their fines.<sup>162</sup> Although Bentham argued for fines that took into account the offender's wealth, European countries in the nineteenth century generally opposed the notion because of a reluctance to thoroughly investigate the offender's assets and a concern that punishment should be equal.<sup>163</sup>

Most countries use fines, which, according to Bentham, have several clear advantages: "they were cheap to administer, produced revenues, could be completely undone in the event of a wrongful conviction being established, could be graduated infinitely to match the magnitude of the wrong, could be matched to the means of the offender . . . and could be used to provide victim compensation."<sup>164</sup>

Fines are the legally presumptive penalty in many European countries and thus are much more common there.<sup>165</sup> In Germany, for example, eighty percent of convicted offenders are ordered to pay a fine,<sup>166</sup> and fines are imposed in about eighty percent of criminal cases in England and Wales.<sup>167</sup> Many of these fines in Europe are day fines, which are based on the severity of the crime and the offender's ability to pay (typically, the offender's daily income).<sup>168</sup> Fines in Europe are usually the sole sanction, whereas in the United States they are additional penalties.<sup>169</sup>

In the short term, improving knowledge about assets and income to inform the imposition of fines is a good idea. Judges, prosecuting attorneys, probation officers, and victims will have better ideas about the capability of the offender to pay the re-

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161. Patricia Faraldo-Cabana, *Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account*, 3 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 3, 4 (2014).

162. *Id.* at 5.

163. *Id.* at 6.

164. O'Malley, *supra* note 150, at 550.

165. Tonry & Lynch, *supra* note 7, at 128 (finding that fines are the presumptive penalty in Germany, Sweden, and the Netherlands).

166. FED. MINISTRY OF THE INTERIOR & FED. MINISTRY OF JUSTICE, *supra* note 153, at 33.

167. MOXON ET AL., *supra* note 153, at 1.

168. Hillsman, *supra* note 2, at 75–76.

169. *Id.* at 49–50.



quired costs. The knowledge might also help offenders, for whom the information might be useful for managing their money.

### C. COSTS AND FEES

Costs and fees refer to court-imposed orders to reimburse the jurisdiction (local, county, or state) for the administrative cost of operating the criminal justice system. One way that the terms “costs” and “fees” have been differentiated is that costs describe blanket charges for program admission or participation, whereas fees refer to specific, individual charges for services.<sup>170</sup> In Pennsylvania, for example, there are costs for the court-processing expenses associated with a court diversion program<sup>171</sup> and a fee to pay for DNA analysis.<sup>172</sup> In other jurisdictions, costs are backward-looking charges for the costs of prosecution, whereas fees are forward-looking charges for future expenses (e.g., probation supervision).<sup>173</sup> However, the terms are often used interchangeably, and that is how they are used in the Model Penal Code and this Article.

Supervision fees, which are the most common type of special condition on probation,<sup>174</sup> help defray the costs of preparing presentence reports and supervising probationers. In some jurisdictions, probation departments are self-supported by these supervision fees.<sup>175</sup> Such fees are also a necessity in jurisdictions where correctional budgets do not cover the costs of supervision.<sup>176</sup> Special services, such as electronic monitoring, require additional fees.<sup>177</sup>

There are a large number of costs and fees imposed, and most economic sanctions in the United States are fees.<sup>178</sup> In Pennsylvania, for example, each year there are about 2.8 million economic sanctions from more than 2,600 different categories imposed across all offenders, most of which are costs and fees.<sup>179</sup> There is significant variation between counties both in

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170. Ruback & Bergstrom, *supra* note 39, at 253.

171. *Id.* at 253–54.

172. *Id.*

173. *See supra* note 39 and accompanying text.

174. THOMAS P. BONCZAR, BUREAU JUSTICE STATISTICS, CHARACTERISTICS OF ADULTS ON PROBATION, 1995, at 6 (1997).

175. Olson & Ramker, *supra* note 6, at 30.

176. *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 171–73 (1997) (discussing the inadequacies in probation funding).

177. Ruback & Bergstrom, *supra* note 39, at 254.

178. O'Malley, *supra* note 150, at 548.

179. Ruback & Clark, *supra* note 108, at 770.

the number of different types of economic sanctions imposed (and the resulting complexity of the system of economic sanctions), and in the average and median amounts of economic sanctions imposed per case. In general, counties with larger populations and higher percentages of citizens in urban areas impose more, and a greater variety of, economic sanctions.

Aside from county-level differences, there are also significant offender-level differences. Most importantly, there are differences between individual offenders based on conviction offense. In Pennsylvania, DUI offenders have much higher economic sanctions imposed than drug, person, and property offenders because they are likely to pay fees in order both to regain their driver's license and, if they had been admitted to a diversionary program, to avoid the stigma of a criminal record.<sup>180</sup> But, in general, fees are likely counterproductive—what O'Malley calls “economically irrational”—because they cost more to implement than the money that is brought in.<sup>181</sup> Moreover, the use of fees can interfere with other economic sanctions. “Fees cannot substitute for imprisonment, but fines can; fees, unlike fines, are a comparatively recent invention; and one reason why so many Americans are imprisoned is because fines are used so infrequently.”<sup>182</sup>

In this Part, I reviewed three major types of economic sanctions: restitution, fines, and costs and fees. Although each type can serve multiple purposes, restitution is aimed primarily at restoring the victim, fines are aimed primarily at punishing the offender, and costs and fees are aimed primarily at covering some of the expenses of the criminal justice system. Conceptually, these three types of sanctions are relatively clear, but practical issues can make implementation difficult.

### III. PRACTICAL PROBLEMS AND QUESTIONS

The prior Part defined and discussed economic sanctions in the abstract. This Part focuses on problems of implementation. Three practical problems are discussed: determining the offender's ability to pay; assessing the tradeoffs between the three types of economic sanctions; and, especially for restitution, deciding on the order for payment across and within cases.

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180. *Id.* at 767.

181. O'Malley, *supra* note 150, at 551.

182. *Id.* at 548.

## A. ABILITY TO PAY

Economic sanctions, despite the advantages discussed earlier, have several downsides, the primary one being that many offenders have limited assets and incomes and may not be able to pay completely the economic sanctions that are ordered.<sup>183</sup> Thus, when setting the amount of economic sanctions, judges may need to consider the offender's ability to pay so that the amount set will be realistic in terms of what the offender will actually pay and the payment schedule that is set is more likely to be adhered to. Moreover, if the offender perceives the economic sanctions as so high as to be impossible to pay, he or she is likely to perceive the system as unfair and illegitimate, and, as a result, to simply give up attempting to pay.<sup>184</sup>

In contrast, the primary reason not to consider the offender's ability to pay when setting the amount of economic sanctions is that a failure to impose the economic sanction means that the system considers the offender's (and the offender's family's) needs to be greater than those of the victim or society. Specifically with reference to restitution, not to impose the money devalues the victim and victims generally, perhaps increasing the victim's psychological distress and making the victim less likely to cooperate with the criminal justice system in the future. Second, looking at the defendant's ability to pay gives the defendant the impression that he or she can get around the system. Third, the defendant may at some point gain the money to pay the restitution (e.g., through inheritance, winning the lottery, tax refund, or recovery in a lawsuit), and unless the sanction was imposed, recovery is essentially impossible. There are also issues of hidden income, especially illegal income.

One of the basic issues relating to economic sanctions is how a court determines an offender's ability to pay. Most courts do not have a written plan for how such a determination should be made.<sup>185</sup> Courts in Europe can use actual earnings as the ba-

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183. See Harris et al., *supra* note 3, at 1786 (describing offenders' inability to pay legal debt quickly enough to avoid long term liability).

184. See *id.* at 1780 ("The fact that legal debt often grew despite regular payments led some [offenders] to feel so frustrated they eventually stopped paying.").

185. For example, the city of Montgomery, Alabama was ordered to "submit a plan detailing how it intends to assess a debtor's ability to pay, and what alternatives to jail, such as community service, it will provide the indigent." Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, NEW YORKER, June 23, 2014, at 48, 61. A settlement between the city of Montgomery and the Southern Poverty Law Cen-

sis for imposing economic sanctions, but many governments there have access to more information about people than the United States government (e.g., income and tax records).<sup>186</sup> Accurately determining the ability to pay requires that kind of detailed information—tax records, links to the IRS and state agencies, listings of all bank accounts, and property owned by relatives, to detect property that could have been transferred to avoid payment—that judges in the United States currently do not have available to them.<sup>187</sup> Linking imposed economic sanctions to ability to pay will require more detailed, and expensive, presentence investigations and the legal authority for probation officers to find out detailed information about salaries and all assets, including assets that are jointly held.

In Europe, courts have access to virtually all information about assets and income. In the United States, by contrast, courts do not have that information. Maricopa County (Phoenix) has a full survey that probationers must complete.<sup>188</sup> Although “ability to pay” on its face seems straightforward, in implementation it can be problematic because offenders’ work can be irregular and their monetary obligations (e.g., child support, formal or informal loans) can change, thus necessitating continual monitoring.<sup>189</sup>

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ter was announced on August 26, 2014 and is awaiting final approval from the U.S. District Court for the Middle District of Alabama Northern Division. *SPLC Lawsuit Closes Debtors’ Prison in Alabama Capital*, S. POVERTY L. CNTR. (Aug. 26, 2014), <http://www.splcenter.org/get-informed/news/splc-lawsuit-closes-debtors-prison-in-alabama-capital>. That courts are unable to know offenders’ ability to pay is also problematic in the United Kingdom, such that judges are unable to accurately set fines and restitution. Miers, *supra* note 38, at 147 (citing MINISTRY OF JUSTICE, PUNISHMENT AND REFORM: EFFECTIVE COMMUNITY SENTENCES, 2012, Cm. 8469 (U.K.)).

186. See Hillsman, *supra* note 2, at 80 (explaining that Swedish courts have “access to income and tax records”).

187. Ruback, *Abolition*, *supra* note 116, at 576–77.

188. Maricopa County Adult Probation Department, Payment Ability Evaluation, available at [https://www.victimsofcrime.org/docs/restitution-toolkit/d3\\_payment-ability-eval-worksheet.pdf](https://www.victimsofcrime.org/docs/restitution-toolkit/d3_payment-ability-eval-worksheet.pdf). The Maricopa County survey is a detailed eight-page form that asks for information about (a) eleven types of assets for the offender and for the offender’s spouse, (b) twenty-three sources of income for the offender and for the offender’s spouse and (c) sixty-four different monthly expenses. *Id.* There is also a self-employed income supplement. *Id.* Verification is required for all of the information. In Maricopa County, offenders are required to complete the form only if they have been delinquent in payments. See RACHEL L. MCLEAN & MICHAEL D. THOMPSON, REPAYING DEBTS 36 (2007), available at [https://www.prisonlegalnews.org/media/publications/bja\\_repaying\\_debts\\_guide\\_2006.pdf](https://www.prisonlegalnews.org/media/publications/bja_repaying_debts_guide_2006.pdf) (explaining that the form must be completed when a payment is 30 days delinquent).

189. Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL’Y 555, 564–65 (2011).

Inability to pay debt is a problem that goes beyond criminal sanctions, as there are real problems today with student debt, consumer debt,<sup>190</sup> and child support.<sup>191</sup> Given these multiple debts faced by the general population, and especially by offenders facing economic and other criminal justice sanctions, there is a need to address these problems in a more integrated fashion.<sup>192</sup>

For offenders, making payments of economic sanctions requires both ability and motivation. Regarding ability, offenders everywhere argue that they are not able to make payments. For example, in two surveys in Pennsylvania, Ruback and colleagues found that offenders report that it would be very difficult for them to make payments.<sup>193</sup> Similarly, Harris et al.'s interviews with offenders indicate that economic sanctions strain offenders' ability to meet other needs.<sup>194</sup>

However, offenders' claims may need to be discounted somewhat. The National Center for State Courts conducted a survey of forty courts to determine what practices might work to increase economic sanction collections.<sup>195</sup> Although many judges and court managers said they believed that offenders did not have the ability to pay fines and fees, the report also found that "experienced collectors consistently assert that all but a very few defendants have greater resources for meeting their obligations than might be immediately apparent."<sup>196</sup> Similarly, Weisburd et al. found that offenders will make payments if they are threatened with probation revocation for nonpay-

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190. See Jessica Silver-Greenberg, *Welcome to Debtors' Prison*, 2011 Edition, WALL ST. J. (Mar. 17, 2011), <http://www.wsj.com/articles/SB10001424052748704396504576204553811636610> (calling attention to the practice of arresting and jailing consumer debtors for failure to pay).

191. See *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (involving a South Carolina man jailed for failure to pay child support).

192. See BANNON ET AL., *supra* note 36, at 32–33 (outlining a number of recommendations to address the extreme costs of "aggressive collection practices").

193. R. Barry Ruback et al., *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 FED. PROBATION 26, 28 (2006).

194. Beckett & Harris, *supra* note 149, at 523; Alexes Harris et al., *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 237 (2011); Harris et al., *Drawing Blood*, *supra* note 3, at 1786–87.

195. TOBIN, *supra* note 35, at 49.

196. *Id.* at 55 (quoting JOHN MATTHIAS ET AL., CURRENT PRACTICES IN COLLECTING FINES AND FEES IN STATE COURTS: A HANDBOOK OF COLLECTION ISSUES AND SOLUTIONS 2 (1995), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/financial/id/91>).

ment, what the authors called the miracle of the cells.<sup>197</sup> Threats can work if they are real, that is, if the threat is followed with action. But such coercion is expensive, and likely to be more expensive than the money returned by the behavior. And, there is evidence that at least some offenders who have not paid restitution will pay if reminded that they owe the money. An experimental study of 767 probationers who were delinquent in paying the restitution they owed found that probationers who were sent information monthly for six months about how much restitution they had paid and how much they still owed paid significantly more than did individuals who did not receive such information.<sup>198</sup> Because payments continued even after the letters stopped, the authors concluded that individuals had internalized the need to make payments.<sup>199</sup>

Although payment may be possible for many offenders, there is a real problem with obtaining payment from unemployed individuals who have no assets and are in danger of losing their possessions (e.g., car, home). Also problematic are individuals who realistically can be employed at jobs that are not much above minimum wage but would still have problems with paying expenses as well as criminal justice costs, fees, and fines. The most problematic are individuals who are not employable for a given reason, such as the mentally ill, a group that constitutes about ten-to-fifteen percent of individuals in the criminal justice system.<sup>200</sup> The ability of offenders to pay assessed economic sanctions may also depend, beyond their own income and assets, on community characteristics that are related to offender reentry, such as social service organizations (e.g., employment assistance, drug and alcohol treatment), commercial establishments, manufacturing employment opportunities, and unemployment rates.<sup>201</sup>

The offender's ability to pay is the ultimate real-world limitation on economic sanctions, in that imposition can have only symbolic value if payment is impossible. The issue, though, is that in the United States, determining ability to pay is not straightforward.

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197. Weisburd et al., *supra* note 157, at 12.

198. Ruback et al., *supra* note 136, at 421.

199. *Id.* at 425.

200. See Matthew W. Epperson et al., *Envisioning the Next Generation of Behavioral Health and Criminal Justice Interventions*, 37 INT'L J.L. & PSYCHIATRY 427, 428 (2014) (noting several studies estimating the prevalence of mentally ill persons in the criminal justice system).

201. Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. SOC. 411, 420–21 (2014).

Ability to pay concerns not only the question of whether economic sanctions should be imposed but also, if they cannot all be imposed (and paid), which ones and in what amounts should be imposed. This question is of tradeoffs among the different types of economic sanctions.

#### B. TRADEOFFS

Imposing fines and costs and fees means that restitution is less likely to be paid. Studies in Pennsylvania, using both state-level data<sup>202</sup> and data from four counties<sup>203</sup> suggest that the imposition of restitution is negatively related to the imposition of fines. Similarly, in a study of economic sanctions in Philadelphia, Ruback found that the imposition of fines was negatively related to the imposition of restitution.<sup>204</sup> On the other hand, there could be a positive relationship between economic sanctions, a pattern suggesting that judges might believe that if offenders can pay one type of sanction, they can pay them all. In four counties in Pennsylvania, Ruback et al. found that the imposition of costs was positively related to the imposition of fines.<sup>205</sup> Similarly, in Philadelphia, Ruback found that the imposition of costs was positively related to the imposition of both restitution and fines.<sup>206</sup> In their analysis of probation fees in Illinois, Olson and Ramker<sup>207</sup> found, consistent with the negative relationship hypothesis, that probationers ordered to pay both fines and probation fees had lower average monthly fees than probationers ordered to pay only fees. However, they also found, consistent with the positive relationship hypothesis, that probation fees were more likely to be imposed and more likely to be paid if fines were also imposed.<sup>208</sup>

There is only limited research on the payment of economic sanctions, given offenders' generally inadequate ability to pay all of the sanctions that are imposed. However, it is obvious that there is a zero-sum issue about how offenders paying toward some sanctions may mean they are not paying toward others. Moreover, aside from this issue of tradeoffs between

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202. Ruback et al., *supra* note 9.

203. Ruback et al., *supra* note 106, at 178–79.

204. R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution*, 68 FED. PROBATION 21, 25 (2004) [hereinafter Ruback, *Imposition*].

205. Ruback et al., *supra* note 106, at 179.

206. Ruback, *Imposition*, *supra* note 204, at 25.

207. Olson & Ramker, *supra* note 6, at 40.

208. *Id.* at 40, 43.

types of economic sanctions, there are also questions about tradeoffs between cases and between victims.

### C. MULTIPLE CASES AND VICTIMS

One of the issues regarding the imposition of restitution when multiple crimes are involved is which victims should receive restitution. In some states, victims can be “read-in” to a plea agreement, whereas in other states victims can be included in a restitution order only if the defendant pleads guilty to the offense involving the particular victims.<sup>209</sup>

Restitution can be problematic because for a single crime, there can be multiple victims. Which victim should have precedence? There is further complication when an offender has multiple judicial proceedings across time, each proceeding having multiple crimes, and each crime having multiple victims.<sup>210</sup>

Economic sanctions can be difficult to apply because judges often do not have accurate information about offenders’ ability to pay. Relatedly, because offenders generally cannot pay all that they owe, the imposition of economic sanctions calls for policy judgments about which type of economic sanction should be given precedence. The next section examines principles that can serve as the basis for making these policy judgments.

## IV. RULES FOR ECONOMIC SANCTIONS

A problem in the setting of economic sanctions is whether they are imposed consistently and fairly. Some research indicates that they are imposed differently with respect to location (rural versus urban areas),<sup>211</sup> type of crime,<sup>212</sup> and offender characteristics.<sup>213</sup> These differences suggest a need for greater uniformity in the imposition of economic sanctions.

I suggest that the use of economic sanctions should be governed by three principles: (1) concern for victims, (2) concern for offenders, and (3) concern for society. Victims are innocent sufferers who face both tangible and intangible losses. Offenders convicted of crimes face a number of challenges, particularly if they are incarcerated as part of their sentence. The imposition

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209. Victims Comm., *supra* note 103, at 11–12.

210. This question about determining the primacy of cases and of victims within cases is beyond the scope of this article.

211. Olson & Ramker, *supra* note 6, at 43; Ruback et al., *supra* note 9, at 333.

212. Gordon & Glaser, *supra* note 143, at 672.

213. See Ruback & Shaffer, *supra* note 9, at 662 (noting several offender characteristics judges claimed to consider when ordering restitution).



of economic sanctions can be burdensome and may make it more difficult for offenders to avoid recidivism, particularly when offenders have other expenses (e.g., child support, alimony, housing, food, transportation). Society's concerns with restoring victims and fairly punishing offenders also include acknowledging governmental responsibilities.

Table 1 summarizes the positive and negative effects of the three types of economic sanctions—restitution, fines, and costs and fees—on victims, on offenders, and on society.

#### A. RESTITUTION

For victims, restitution provides an institutionalized means by which they can be compensated for their tangible losses. Court-imposed restitution also gives victims notice that society recognizes the harm they have suffered.

For offenders, restitution can make them recognize the harm they have caused, can teach them responsibility by making them pay for that harm, and can serve as both a punishment and deterrent.<sup>214</sup> Although offenders perceive restitution as somewhat unfair, they still perceive it as more fair than other economic sanctions.<sup>215</sup>

Some studies have reported that the process of making amends for one's actions is what makes restitution effective.<sup>216</sup> That is, offenders who recognize the reparative benefits of restitution have lower recidivism rates. These studies suggest that restitution may be effective because it emphasizes the benefits to the victim and allows offenders to take responsibility for their actions without stigmatizing them.<sup>217</sup> Likewise, research has indicated that successful completion of a restitution order is generally one of the strongest predictors of lowered recidivism.<sup>218</sup>

Studies of juveniles have shown that although formal restitution (i.e., as a condition of probation or assigned through

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214. MCGILLIS, *supra* note 22, at 13.

215. Ruback et al., *supra* note 193, at 30.

216. See Patricia Van Voorhis, *Restitution Outcome and Probationers' Assessments of Restitution: The Effects of Moral Development*, 12 CRIM. JUST. & BEHAV. 259, 279 (1985) ("Offenders who were rated as orienting to reparation as the most salient concern were significantly more likely to complete restitution successfully.")

217. *Id.* at 282.

218. Laurie Ervin & Anne Schneider, *Explaining the Effects of Restitution on Offenders: Results from a National Experiment in Juvenile Courts*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 183, 189 (Burt Galaway & Joe Hudson eds., 1978).

court) may be less effective than more informal restitution arrangements (i.e., residential programs or court diversion), it is still more effective than straight probation or incarceration.<sup>219</sup> Studies have shown that reoffense rates for restitution cases increase monotonically with the degree of court control.<sup>220</sup> In contrast, a study of juveniles in Utah found positive effects for restitution regardless of whether juveniles were processed formally or informally, although the effect was more dramatic among the informally-processed group.<sup>221</sup> In general, studies examining the effectiveness of restitution among juveniles have shown that juveniles who pay restitution have lower rearrest rates than juveniles who receive other sanctions.<sup>222</sup>

Research on the use of restitution with adults is limited but shows similar trends. In one study, adults in the Minnesota Restitution Center who had to pay restitution had lower recidivism rates than a group of incarcerated offenders.<sup>223</sup> Likewise, another study, which performed a two-year follow-up of adult parolees, found that those randomly assigned to the Minnesota Restitution Center had fewer new court commitments than those on standard parole.<sup>224</sup>

Finally, for society, restitution promotes the idea of restorative justice, by which the victims are compensated for their losses and offenders can be reintegrated into society. The problem, though, is that the payment of restitution interferes with the payment of economic sanctions that go to the state (primarily fines) and that go to the local jurisdiction (primarily costs and fees).

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219. See M.S. Rowley, *Recidivism of Juvenile Offenders in a Diversion Restitution Program (Compared to a Matched Group of Offenders Processed Through Court)*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION *supra* note 218, at 217, 223 (observing that a study of offenders in a formal restitution program compared to those not participating in restitution "indicated a clear difference . . . for both incidence and severity of subsequent offending").

220. Peter R. Schneider et al., *Juvenile Restitution As a Sole Sanction or Condition of Probation: An Empirical Analysis*, 19 J. RES. IN CRIME & DELINQ. 47, 59 (1982).

221. JEFFREY A. BUTTS & HOWARD N. SNYDER, RESTITUTION AND JUVENILE RECIDIVISM 4 (1992).

222. See, e.g., Schneider, *supra* note 80, at 549-50 (concluding that restitution reduces recidivism for juvenile offenders).

223. Joe Heinz et al., *Restitution or Parole: A Follow-up Study of Adult Offenders*, 50 SOC. SERV. REV. 148, 155 (1976).

224. Joe Hudson & Steven Chesney, *Research on Restitution: A Review and Assessment*, in OFFENDER RESTITUTION IN THEORY AND ACTION 131, 139 (Burt Galaway & Joe Hudson eds., 1978).

## B. FINES

For victims, fines have no benefits but do have costs in that monies directed at paying fines interfere with the payment of restitution. For offenders, fines can serve goals of deterrence and punishment, and they can be used as intermediate punishments. For society, fines can be used for general governmental purposes, or they can be directed to specific purposes, such as the victim compensation fund. From the viewpoint of society, money used to pay fines may be money that is not being directed to victim restitution or to costs and fees.

## C. COSTS AND FEES

For victims, costs and fees have no benefits, but do have costs in that monies directed at paying fines interfere with the payment of restitution, since payment of restitution orders typically follows other financial obligations (e.g., costs, fines).<sup>225</sup>

For offenders, costs and fees can serve goals of deterrence and punishment. However, offenders often perceive costs and fees as unfair.<sup>226</sup> Costs and fees can also greatly interfere with an offender's ability to function in society, particularly when there are surcharges (e.g., interest) on amounts that remain unpaid.<sup>227</sup> For some offenders, the amounts of these costs and fees, especially continuing ones like supervision fees, are so high that they can never be paid off, which is the situation with the private probation companies in the South.<sup>228</sup>

For society, costs and fees can cover some of the costs of the criminal justice system, but they transfer governmental duties to offenders. Moreover, because these costs and fees are likely to go primarily to criminal justice administrators in local jurisdictions, they interfere with the payment of restitution (meaning victims are less likely to receive compensation) and fines (meaning that the state is less likely to receive funds). In addition, costs and fees are the responsibility of government, and the Model Penal Code correctly notes that costs and fees for re-

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225. OFFICE FOR VICTIMS OF CRIME, *supra* note 9, at 357–58 (noting that “restitution orders often are not first in the priority of court ordered payments”).

226. See Ruback et al., *supra* note 193, at 30 (“[O]ffenders did not perceive the amounts of the economic sanctions or the procedures used to determine them to be very fair.”).

227. See Beckett & Harris, *supra* note 149, at 518 (observing that, due to surcharges and interest, legal debt often grows over time despite regular payments).

228. See discussion *infra* Part V.B.2.

imbursing the criminal justice system cause a conflict of interest in the courts and agencies that impose, collect, and use these monies.<sup>229</sup> Moreover, costs and fees are of little or no benefit to society, although private corporations seem to profit from the arrangement.

The threat of incarceration for nonpayment of fees works only if the threat is real. That is, courts must be willing to incarcerate individuals for nonpayment, as Weisburd et al. found in their study.<sup>230</sup> The costs of this enforcement are borne by society.<sup>231</sup>

Probation revocation for failure to pay economic sanctions alone is probably relatively uncommon. Felony probationers may have more than one violation and may have more than one disciplinary hearing.<sup>232</sup> Most often, judges are reluctant to incarcerate individuals for nonpayment because they are aware of the monetary and social costs of incarceration.<sup>233</sup> Wheeler et al. found that in only seven percent of felonies and three percent of misdemeanors, judges revoked probation for nonpayment or failure to report.<sup>234</sup> Another study found that twelve percent of probation revocations resulted at least in part from a failure to pay court-ordered financial obligations.<sup>235</sup> In sum, the failure to pay economic sanctions is often simply one of several reasons why an individual might face probation revocation.

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229. Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1760–66 (2015).

230. Weisburd et al., *supra* note 157, at 30.

231. The Brennan Center study indicated there is a cost of \$130 per prisoner per day for incarcerations in California. BANNON ET AL., *supra* note 36, at 25. Even when private companies are involved, government bears the costs of enforcement. See HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 53 (2014), available at <http://www.hrw.org/print/reports/2014/02/05/profitting-probation> (explaining that governments still bear the cost of housing offenders when probation companies use incarceration to collect on debts).

232. BONCZAR, *supra* note 174, at 10 tbl.12.

233. See Ruback, *Imposition*, *supra* note 204, at 21 (observing that "there are pressures for alternatives to prison, because of the high cost of incarceration"); Gerald R. Wheeler et al., *Economic Sanctions in Criminal Justice: Dilemma for Human Service?*, 14 JUST. SYS. J. 63, 74–75 (1990) (presenting data that "showed a strong pattern of judicial tolerance for non-compliance").

234. Gerald R. Wheeler et al., *The Effects of Probation Service Fees on Case Management Strategy and Sanctions*, 17 J. CRIM. JUST. 15, 22 (1989).

235. ROBYN L. COHEN, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 3 (1995).

Economic sanctions can be useful as penalties for defendants who are wealthy,<sup>236</sup> and these sanctions may be of greater benefit to society and the criminal justice system if applied to those who committed economic crimes like stock fraud and money laundering. The Model Penal Code also takes this approach, arguing that for offenders with the means to pay economic sanctions, “financial penalties would remain an important part of the sentencing armamentarium.”<sup>237</sup> But it may be useful to greatly reduce economic sanctions for the poor because they are not likely to be cost effective.<sup>238</sup>

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236. See Dickman, *supra* note 51, at 1711 (observing that, while many offenders are poor, there are some who “have the financial means to compensate victims” but that “restitution orders are not being adequately enforced against affluent offenders”).

237. AM. LAW INST., MODEL PENAL CODE: SENTENCING: COUNCIL DRAFT NO. 4, at xviii (2013).

238. Dickman, *supra* note 51, at 1694–96.

**Table 1. Type and Effects (Positive and Negative) of Economic Sanctions**

	<u>Type of Economic Sanction</u>		
	<u>Restitution</u>	<u>Fines</u>	<u>Fees/Costs</u>
<u>Effects of the Economic Sanction on:</u>			
VICTIMS			
Positive	Compensation for losses Acknowledges the harm	---	---
Negative	---	Interferes with the payment of restitution	Interferes with the payment of restitution
OFFENDERS			
Positive	Teaches responsibility Rehabilitative Punishment Deterrence	Deterrence Punishment Can be used as an intermediate punishment	Deterrence Punishment
Negative	Perceived as (somewhat) unfair	Perceived as unfair	Perceived as unfair Perpetuates poverty
SOCIETY			
Positive	Compensates the victim Promotes restorative justice	Funds can be used for general or specific purposes	Covers some of the costs of the criminal justice system
Negative	Interferes with the payment of fines and costs/fees	Interferes with the payment of restitution and costs/fees	Interferes with the payment of restitution and fines Transfers governmental duties to offenders

## V. CONCLUSIONS

This overview of the effects of the three different types of economic sanctions leads to three conclusions: (1) restitution should be mandatory; (2) costs and fees should not be imposed; and (3) judges should be able to impose fines, based on the offender's ability to pay.

### A. RESTITUTION SHOULD BE MANDATORY

Restitution should be mandatory because it is good for victims, good for offenders, and good for society, and the fact that restitution is not mandatory may reflect subtle victim blaming.<sup>239</sup> The need to focus on victims is based on the fact that vic-

239. The difficulty victims face in getting compensation from the state may also reflect a subtle bias against victims. See ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* (1986).

tims, not governments, bear the greatest costs of crime.<sup>240</sup> Although it has been argued in the United Kingdom that reducing the costs of crime to victims is not a concern of the government,<sup>241</sup> the fact that victim restitution is authorized in every state, including twenty that include it in the state constitution, suggests that the costs victims endure are of concern to state and local governments in the United States. Most of the economic losses victims suffer are not covered by insurance or, in the United States, recompensed by government.<sup>242</sup> In other countries, victims' losses are covered by the state, which compensates the losses because of the violation of its duty to protect citizens or because of a social welfare rationale.<sup>243</sup>

Restitution is qualitatively different from other types of economic sanctions in that the funds go to the victim rather than to a state agency. The amount of restitution awarded depends on the victim impact statement that the victim files with, depending on the jurisdiction, the victim/witness agency or the prosecutor.<sup>244</sup> Amounts are for documented losses (e.g., the value of vandalized property) and out-of-pocket expenses (e.g., medical costs) directly related to the crime.<sup>245</sup> Restitution is arguably good for offenders because it teaches them responsibility. And, restitution is good for society because of the symbolic value attached to treating victims fairly and to emphasizing the importance of restoring the victim to the status quo before the crime.

If victim restitution is not made mandatory, then there is a need to ensure that the state assumes the responsibility under one or more of three rationales:

The philosophical basis for these programs varies from a legal tort theory, whereby the state is seen to have failed to protect its citizens adequately, to a humanitarian rationale through which all citizens should receive assistance for their compelling needs, to a by-products theory that recognizes victim satisfaction as a benefit to the criminal

In most jurisdictions, victims' requests for restitution can

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240. Lawrence W. Sherman & Heather Strang, *Restorative Justice As Evidence-Based Sentencing*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 215, 228 (Joan Petersilia & Kevin R. Reitz eds., 2012).

241. *Id.*

242. Victim compensation covers only a tiny fraction of crimes, because victims are often unaware of the state funding and, even if they were aware, there are so many qualifying conditions that most victims would not be entitled to receive any state funding.

243. See Robert Elias, *Alienating the Victim: Compensation and Victim Attitudes*, 40 J. SOC. ISSUES 103, 106 (1984).

244. MCGILLIS, *supra* note 22.

245. NEW DIRECTIONS, *supra* note 9.

be part of a more general process of victim allocation at sentencing, in which the victim describes the impact of the crime. The primary purposes of victim participation in sentencing are to increase victim satisfaction with sentencing and criminal justice, to make the determination of crime seriousness more accurate, and to make both criminal justice professionals and the offender more aware of the actual effects of the crime.<sup>247</sup> Although victim participation may accomplish these goals, it has also been criticized because it could lead to inconsistent sentencing (e.g., because of differential participation by victims or differential persuasiveness of victims),<sup>248</sup> to overly harsh sentences, and to a violation of the decorum of the courtroom.<sup>249</sup>

In contrast to victim allocation in general, restitution is a relatively straightforward process that involves less discretion on the part of the judge. Providing restitution to victims could be explicitly part of a more general process of restorative justice, by which there can be reconciliation between the offender and the victim, the victim's losses are restored, and the offender is returned to the community. In this way, restitution could play a role in promoting rehabilitation.

But even if restitution is not paid, there are important symbolic aspects to the imposition of restitution. In a survey of Pennsylvania judges, one judge wrote that, "Many judges in my county feel criminals are not capable of paying restitution. My experience has been they will pay if they face jail."<sup>250</sup> Even so, it was much more common for judges to indicate that they had no real expectation that the restitution would be paid. For example, another judge said, "This court expends significant resources, including regularly scheduled collection court proceedings, to collect limited amounts of ordered restitution due to low income levels and poverty. Nevertheless, even collection of small amounts reinforces the restorative nature of the judicial system and the need to reinforce accountability to offenders."<sup>251</sup>

This recognition that much of the imposed restitution will not be paid suggests that a judge's purpose in ordering it is primarily symbolic. The fact that restitution was made manda-

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247. Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, in 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 347 (Michael Tonry ed., 2009).

248. Julian V. Roberts, *Crime Victims, Sentencing, and Release from Prison*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, *supra* note 240, at 104, 107–11.

249. Roberts, *supra* note 247.

250. RUBACK, RESTITUTION IN PENNSYLVANIA, *supra* note 110.

251. *Id.*



tory is similar to other victims' rights actions taken by state legislatures, such as victim compensation and victim impact statements, which many believe are more aimed at giving the appearance of concern for victims rather than actually improving their condition.<sup>252</sup>

## B. COSTS AND FEES SHOULD NOT BE IMPOSED

Offenders should not have to pay costs and fees. Thus, I agree with the "categorical abolitionist position" taken by the Model Penal Code.<sup>253</sup> This issue is real, in that convicted offenders are often called on to pay for the costs of criminal justice. Most clearly, a National Public Radio report in 2014 by Joseph Shapiro reported that forty-three states allow a charge for a public defender, forty-one states charge for jail, and forty-four states charge for probation.<sup>254</sup>

### 1. The Activities Covered by Costs and Fees Are Inherently Governmental Responsibilities

The argument against imposing costs and fees on convicted offenders is based on the distinction between general taxes, on the one hand, and benefit taxes and user fees on the other.<sup>255</sup> General taxes are government levies on income, consumption, property, or wealth and are used to support general public services.<sup>256</sup> Income taxes, corporate taxes, and sales taxes are examples of general taxes.

In contrast, "benefit taxes and user fees constitute mandatory or voluntary levies imposed on persons deriving particular

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252. Elias, *supra* note 243; Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 453 (1990).

253. Reitz, *supra* note 229, at 1760. In the report by the Brennan Center for Justice entitled *Criminal Justice Debt: A Barrier to Reentry*, authors Bannon, Nagrecha, and Diller argued that the problem is user fees, which are explicitly intended to raise revenue. BANNON ET AL., *supra* note 36, at 4. Legislators do not give much thought to the consequences of raising the amounts for old fees or creating new fees. *Id.* The analysis conducted by the authors examined laws and policies in the fifteen states with the largest prison populations. This excellent study recommended that fees be discontinued, particularly fees that impose additional costs on the indigent, such as payment plan fees, late fees, collection fees, and interest. The report also recommended that fees for legal representation by a public defender be eliminated. *See id.* at 32–33.

254. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

255. *See* David Duff, *Benefit Taxes and User Fees in Theory and Practice*, 54 U. TORONTO L.J. 391 (2004).

256. *Id.* at 391.

benefits from specific categories of publicly provided goods and services.”<sup>257</sup> Benefit taxes and user fees differ in the extent to which the benefit goes to a group or an individual. Benefit taxes are “compulsory levies applied to individuals (or institutions such as corporations) who are assumed to benefit as a group from certain government services.”<sup>258</sup> Taxes on gasoline and diesel fuel are benefit taxes because the drivers paying these taxes are members of the group of vehicle owners who benefit from the use of government-owned roads and highways.<sup>259</sup>

User fees are amounts “levied on consumers of government goods or services in relation to their consumption.”<sup>260</sup> With user fees, the amount of special benefits delivered to an individual can be identified, along with the financing paid by the individual. To the extent that charges for water, sewage, and waste disposal are related to the consumption of the service, these charges are user fees.<sup>261</sup> “The designation of user fees can also be applied to charges for the use of public transit or public recreational facilities, tuition fees for higher education, road or bridge tolls, resource royalties, and various kinds of environmental taxes.”<sup>262</sup> Under these definitions, the costs and fees imposed on convicted offenders are user fees.

Benefit taxes and user fees have both advantages and disadvantages. As an advantage, they increase economic efficiency, because they cause resources to go to the most highly valued uses.<sup>263</sup> They also increase the accountability of the public sector because they are more responsive to the public’s demand for goods and services, and they are more fair, since taxpayers pay only for those goods and services that they use.<sup>264</sup> Benefit taxes and user fees are criticized, however, because they may be more

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257. *Id.* at 393.

258. Richard M. Bird & Thomas Tsiopoulos, *User Charges for Public Services: Potentials and Problems*, 45 CAN. TAX J. 25, 38–39 (1997).

259. *See* Duff, *supra* note 255, at 394.

260. Bird & Tsiopoulos, *supra* note 258, at 39. The Government Accountability Office describes federal user fees and charges as being “generally related to some voluntary transaction or request for government goods or services beyond what is normally available to the public such as fees for national park entrance, patent applications, and customs inspections. . . . [W]ell-designed user fees can reduce the burden on taxpayers to finance those portions of activities that provide benefits to identifiable users.” GOV’T ACCOUNTABILITY OFFICE, 2012 ANNUAL REPORT 278 (2012), *available at* <http://www.gao.gov/assets/590/588818.pdf>.

261. Duff, *supra* note 255, at 394.

262. *Id.*

263. *Id.* at 395.

264. *Id.* at 395–96.

burdensome on the poor than on the wealthy, they undermine the entire notion of publicly provided goods and services, and budgetary flexibility is undermined if the revenues are earmarked for specific purposes.<sup>265</sup> David Duff argues that benefit taxes and user fees are appropriate for some purposes (e.g., transportation, water, sewage, waste disposal), inappropriate for others (social services, public housing), and, in between, appropriate if access is granted on the basis of right or need (e.g., health care, education).<sup>266</sup>

According to Duff, most publicly provided goods provide both general benefits and specific benefits.<sup>267</sup> For example, a public park provides spaces for interactions for everyone and recreation for individuals.<sup>268</sup> Similarly, public health interventions can reduce the impact of epidemics, benefiting both the general welfare and the health of individuals.<sup>269</sup> Public and individual benefits also accompany publicly funded education, transportation, and waste disposal programs.<sup>270</sup>

Although it would be possible to fund these publicly provided services through a benefits tax or user fee, there are four reasons why charging such fees is not appropriate. First, when the good or service is fundamentally public, charging fees to individual users changes the nature of the good or service.<sup>271</sup> Thus, police protection, a public service, is fundamentally changed to an individual service when individuals are charged for their level of protection. Second, when benefits are distributed by right, need, or merit, benefit taxes and user fees are inappropriate.<sup>272</sup> For example, if primary education is seen as a right of citizenship, then it would be wrong to charge students.<sup>273</sup> Third, when the purpose of the public expenditure is to redistribute resources, as with welfare payments, it makes no sense to charge individual beneficiaries.<sup>274</sup> Finally, if the benefits tax or user fee is regressive (i.e., has a disproportionate impact on the poor), the charge is probably unfair and inappropriate unless there are some ways to offset the effect.<sup>275</sup>

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265. *Id.* at 396.

266. *Id.* at 447.

267. *Id.* at 411.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 412.

272. *Id.*

273. *Id.*

274. *Id.* at 413.

275. *Id.*

According to Duff's analysis, it is economically inefficient to charge the cost to the user when there are public benefits, as there are with public education.<sup>276</sup> There is a continuum between pure public goods and pure private goods, which mirrors the continuum between public funding and charging specific users.<sup>277</sup> In both Canada and the United States, user fees and benefit taxes are more likely to be used at the local level rather than the state or national level,<sup>278</sup> a fact that is explainable because federal level expenditures are primarily social assistance and national defense (a pure public good).<sup>279</sup>

Duff argues that education (primary and secondary) and health services benefit both the general public and individuals.<sup>280</sup> Moreover, because basic education is a right and health care is a need, he argues that a user fee approach based on ability and willingness to pay would undermine the public benefits.<sup>281</sup> Duff argues that the protection of persons and property is not a proper subject for benefit taxes and user fees because of the more general public benefits.<sup>282</sup>

Duff argues that even if benefit taxes and user fees are appropriately imposed, the amount of the charges must still be appropriate—"an economically sensible amount."<sup>283</sup> Duff speaks in terms of the marginal cost of production, such that rates should match the short-run marginal cost of producing the good or service,<sup>284</sup> although there must also be a consideration of general benefits, uncompensated costs to third parties, and the possible need for more complicated pricing arrangements when there are declining marginal costs or substantial fixed costs.<sup>285</sup> Opportunity costs must also be considered.

The government should not be contracting out inherently governmental functions. The question, though, is what makes a function fundamentally public rather than private. Professor Martha Minow suggests that the answer depends on traditional practices, symbolism, and political theories about the role of government.<sup>286</sup> For example, because criminal prosecution has

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276. *Id.* at 416.

277. Bird & Tsiopoulos, *supra* note 258, at 39–40.

278. Duff, *supra* note 255, at 420–21.

279. *Id.* at 423.

280. *Id.* at 426.

281. *Id.*

282. *Id.* at 427.

283. *Id.* at 429.

284. *Id.* at 414.

285. *Id.* at 417–18.

286. Martha Minow, *Public and Private Partnerships: Accounting for the*

been handled primarily by the government for the past 200 years and because it has symbolism as a public action for the good of the community and private victims, it is unlikely that it would be contracted out to a private actor. The danger with private actors, especially for-profit groups, is that “the appearance of private motives in a public domain can undermine respect for government and even generate doubt whether the government is sincerely pursuing public purposes.”<sup>287</sup>

One of the arguments for privatizing governmental functions is to reduce the size of government. Actually, of course, governmental functions have merely been outsourced,<sup>288</sup> creating a government by proxy.<sup>289</sup> Four arguments have been made in favor of privatization: (a) increasing quality and effectiveness; (b) creating competition and incentives for improvement; (c) increasing pluralism, that is, giving groups the opportunity to participate and self-govern; and (d) creating new knowledge and infrastructure.<sup>290</sup>

DiIulio argues that efficiency is not the only criterion for “deciding who should make public policy, who should administer public policy, and who should fund public policy.”<sup>291</sup> According to DiIulio, it is difficult to separate making and administering public policy, since so much discretion is generally involved in translating policy into action. Although DiIulio suggests that “[i]t is easier to separate finance from administration than it is to separate policymaking from administration,” funding decisions still involve policy determinations.<sup>292</sup>

If there is to be contracting out of governmental functions, the key is public accountability,<sup>293</sup> which, following Hirschman,<sup>294</sup> means that governments “retain the option to exit relationships with private entities, the means to express disagreements with the ways in which the private entities proceed, and the capacity to remain with the private entity as a vote of confidence.”<sup>295</sup> Government accountability comes through contracts

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*New Religion*, 116 HARV. L. REV. 1229, 1234 (2003).

287. *Id.* at 1234.

288. *Id.* at 1240.

289. See John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271 (2003).

290. Minow, *supra* note 286, at 1242–46.

291. DiIulio, *supra* note 289, at 1283.

292. *Id.*

293. Minow, *supra* note 286, at 1259.

294. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

295. Minow, *supra* note 286, at 1266.

that specify terms and enforcement, are consistent with the constitutional obligations of government, and require the reporting of information needed to assess compliance.<sup>296</sup>

In terms of costs and fees in the criminal justice system, these costs have been imposed because there is no one to argue against them. Offenders generally do not have the right to vote, and, even if they do, they have little influence over criminal justice policy.<sup>297</sup>

Governments are charging defendants with costs that are the business of government. Moreover, when states charge defendants for an attorney to defend them, these charges amount to a fee for exercising a constitutional right. Such charges are an abdication of governmental responsibility, in the same way that devolving the collection and monitoring of these charges to private businesses is an improper delegation of duty.

## 2. If a Government Imposes Costs and Fees, Then the Government, Not Private Businesses, Should Collect and Monitor the Payment of Those Charges

In recent years, private corporations have begun operating criminal justice services that had previously been performed by the government. Because they have a pecuniary interest in the behavior of the offenders they deal with, specifically wanting the offenders to continue making payments on the original owed amounts and on any additional fees, penalties, and surcharges that may have accrued, the field has become known as “poverty capitalism”<sup>298</sup> and an “offender-funded” probation industry.<sup>299</sup>

There are two reasons why local governments contract out this work to private companies.<sup>300</sup> First, these contracts reduce the costs of government and therefore the need to increase taxes to pay for the covered services.<sup>301</sup> Second, because these added costs are borne by offenders, they amount to an additional punishment beyond what had traditionally been imposed on

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296. *Id.* at 1267–68.

297. *Id.*

298. Thomas B. Edsall, *The Expanding World of Poverty Capitalism*, N.Y. TIMES (Aug. 26, 2014), <http://www.nytimes.com/2014/08/27/opinion/thomas-edsall-the-expanding-world-of-poverty-capitalism.html>. Another example of poverty capitalism high phone rates and money transfer fees charged to prison inmates. See Stephanie Clifford & Jessica Silver-Greenberg, *In Prisons, Sky-High Phone Rates and Money Transfer Fees*, N.Y. TIMES, June 26, 2014.

299. HUMAN RIGHTS WATCH, *supra* note 231, at 2.

300. *Id.* at 15–16.

301. *Id.*

convicted offenders.<sup>302</sup>

According to a Human Rights Watch report, companies that supervise offender-funded probation have an incentive for offenders not to pay off the amounts they owe: “[T]he longer it takes offenders to pay off their debts, the longer they remain on probation and the more they pay in supervision fees.”<sup>303</sup>

That local governments need the money provided by fines and fees became apparent in response to concerns about police stops of motorists after the shooting of Michael Brown in Ferguson, Missouri in August 2014. Slightly more than twenty percent of the city’s \$12.75 million budget came from municipal court fines,<sup>304</sup> and more than a third of the general revenues in one nearby town came from court fines and fees.<sup>305</sup>

One of the primary criticisms of private companies being involved in the criminal justice system is that they are profiting from the misfortunes of victims and offenders.<sup>306</sup> Moreover, their focus on profit may cause them to want offenders not to succeed, so that they can make more money.<sup>307</sup> DiIulio believes that profit per se is not the factor that precludes the privatization of criminal justice functions; rather, the legally-sanctioned control over crime and punishment are inherently public because criminal justice actors act on behalf of the public.<sup>308</sup> Indeed, criminal justice is one of the central functions of government.<sup>309</sup>

Just as DiIulio believes that government can be successful at managing prisons,<sup>310</sup> there is also reason to believe that probation officers can do a better job, not only of supervising offenders, but of inducing offenders to pay the economic sanctions they owe. Some evidence suggests that when specialized collections agencies are involved in the collection of costs and fees, the amount of money recovered is actually less than when pro-

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302. *Id.* at 22; see also Beckett & Harris, *supra* note 149, at 517.

303. HUMAN RIGHTS WATCH, *supra* note 231, at 3.

304. Edsall, *supra* note 298.

305. Campbell Robertson & Joseph Goldstein, *In Aftermath of Missouri Protests, Skepticism About the Prospects for Change*, N.Y. TIMES, Aug. 27, 2014, at A1.

306. John J. DiIulio, Jr., *What’s Wrong with Private Prisons*, 92 PUB. INT. 66, 71 (1988) [hereinafter DiIulio, *Private Prisons*].

307. See HUMAN RIGHTS WATCH, *supra* note 231, at 3.

308. DiIulio, *Private Prisons*, *supra* note 306, at 79.

309. *Id.* at 81 (quoting John Locke). *But see* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 52–54 (1990).

310. DiIulio, *Private Prisons*, *supra* note 306, at 77.

bation officers are supervising the procedure.<sup>311</sup>

One of the real problems with private probation companies is what is called “pay only” probation, which refers to individuals who are on probation not because of a threat to public safety or need for supervision, but only because they owe fees.<sup>312</sup> Private probation agencies generally deal with offenders “whose offenses are often too minor to merit jail time.”<sup>313</sup> The Human Rights Watch report indicates that although the private probation companies account for the fees due to the court, they do not report on the amount of fees paid to the company itself.<sup>314</sup>

The Human Rights Watch report argues that pay-only probation is discriminatory for three reasons: (1) offenders have to pay supervision fees only if they do not pay the total amount of their fines immediately; (2) the fees are regressive because poorer probationers pay a larger percentage of their payments in fees than do individuals who can afford to make larger payments and because poorer probationers have to stay on probation for a longer period of time because they make smaller payments; and (3) poorer individuals pay absolutely more in fees because they are on probation longer.<sup>315</sup>

For the companies that Human Rights Watch observed, offenders could not pay off their debts to the court before their debt to the private probation company because the companies ensured that the two debts were paid down simultaneously.<sup>316</sup> There is a hidden cost to the public for these fees, in that the real threat for nonpayment is jail-time, a cost borne by the public, and one that might be greater than the amount of money owed to the court.<sup>317</sup> The Human Rights Watch report found that courts often not only did not supervise the private probation agencies but also “delegate[d] a range of coercive powers to

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311. Ruback & Shaffer, *supra* note 9, at 676; Ruback, Shaffer & Logue, *supra* note 106, at 183. As with non-criminal-justice debts, debtors may learn that they can get away without paying their debts. See Jake Halpern, *The Debt Getters*, N.Y. TIMES MAG., Aug. 17, 2014, at 26, 39. A recent experiment suggests that there can be cost-effective ways for probation officers to induce offenders to pay the restitution they owe. In the study, about half of offenders who were delinquent in payment paid something after receiving notice of non-payment. Ruback, Gladfelter & Lantz, *supra* note 136, at 420, 424–25.

312. HUMAN RIGHTS WATCH, *supra* note 231, at 25.

313. Stillman, *supra* note 185, at 50.

314. HUMAN RIGHTS WATCH, *supra* note 231, at 66.

314. *Id.*

315. *Id.* at 27.

316. *Id.* at 51.

317. *Id.* at 53.



their probation companies.”<sup>318</sup>

The Human Rights Watch report concluded that courts do little to determine whether offenders are actually able to pay their fines and fees.<sup>319</sup> Moreover, the private probation companies have a direct interest in making sure that courts do not decide that an offender is not able to pay the debt.<sup>320</sup> The report couched the argument in terms of human rights issues.<sup>321</sup> Given the public nature of the functions covered by costs and fees, they should not be imposed on offenders. Moreover, given the risks associated with privatizing their collection, if they are imposed, they should be collected by government agencies.

### C. JUDGES SHOULD HAVE DISCRETION TO IMPOSE FINES BASED ON THE DEFENDANT’S ABILITY TO PAY

Judge should have the ability to impose fines, particularly if these fines are used in lieu of incarceration. Judges should be able to impose these fines based on the defendant’s ability to pay and the impact of these fines on the defendant’s family and dependents. Regarding fines, the Model Penal Code suggests that, because there is little “punitive ‘value’” to economic sanctions, “economic sanctions other than victim restitution may not be made formal ‘conditions’ of probation or postrelease supervision—meaning that nonpayment cannot be a basis for sentence revocation.”<sup>322</sup>

With respect to fines, I think it is too early to know whether fines can be useful for deterrence and rehabilitation.<sup>323</sup> However, given the generally successful use of fines in Europe<sup>324</sup> and the need for some type of intermediate sanction short of incarceration, judges should have the option to impose fines, particularly for offenders whose crimes are linked to economic offenses.

The key point is that fines should be imposed based on ability to pay. Most writers today advocate imposing financial obligations that are based on the offender’s ability to pay.

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318. *Id.* at 59.

319. *Id.* at 39.

320. *Id.* at 68.

321. *See id.* at 71.

322. Reitz, *supra* note 229, at 1766.

323. There are few studies that have investigated the question. One of the few is *The Use and Effects of Financial Penalties in Municipal Courts*, Gordon & Glaser, *supra* note 143. The study is limited by the fact that it examines economic sanctions in a municipal court rather than a court that handled more serious criminal offenses.

324. *See Hillsman, supra* note 2, at 77–79.

McLean and Thompson suggested capping amounts at twenty percent of an offender's income and creating realistic payment plans.<sup>325</sup> Dickman suggested removing the mandatory amounts beyond the offender's ability to pay.<sup>326</sup>

## VI. MORE REALISTIC SUGGESTIONS

My suggestion of completely eliminating costs and fees is unlikely to be implemented. Thus, I suggest some modifications short of that dramatic change.<sup>327</sup>

### A. REDUCE THE NUMBER OF COSTS AND FEES, ESPECIALLY AT THE COUNTY LEVEL

In our research in Pennsylvania, we have found that most of the different economic sanctions (ninety percent of 2629 different sanctions) relate to county-level user costs and fees.<sup>328</sup> These fees are primarily aimed at generating funds for the county rather than punishing, deterring, or rehabilitating offenders.<sup>329</sup> A reduction in the number of such fees would reduce the economic burden on offenders.

The fact that there are more than 2600 different economic sanctions in Pennsylvania is confusing not only to offenders, who do not know how much they owe, how much their monthly payments should be, and where the money they pay goes,<sup>330</sup> but also to judges, prosecutors, and probation officers. Conversations with court employees suggest that no one in the court system understands all of the economic sanctions or the order in which they are supposed to be paid,<sup>331</sup> despite regulations established by the Supreme Court of Pennsylvania and promulgated by the Court Administrator of Pennsylvania.<sup>332</sup> If clarity is one goal of the legal system, then economic sanctions in Pennsylvania do not meet this standard.

Moreover, this variety of sanctions is unfair to individuals

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325. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., *REPAYING DEBTS 22-23* (2007), available at [http://www.csgjusticecenter.org/wp-content/uploads/2012/12/repaying\\_debts\\_full\\_report-2.pdf](http://www.csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_full_report-2.pdf).

326. Dickman, *supra* note 51, at 1707.

327. These suggestions come from Ruback, *Abolition*, *supra* note 116.

328. Ruback & Clark, *supra* note 108, at 761.

329. Ruback & Bergstrom, *supra* note 39, at 253-55.

330. Ruback, Hoskins, Cares & Feldmeyer, *supra* note 193, at 31.

331. RUBACK ET AL., *EVALUATION*, *supra* note 110, at 125.

332. See 42 PA. CONS. STAT. § 3502 (2015) (authorizing promulgation of regulations for collection of fees and costs).

in counties that have a larger number of economic sanctions, most of which are county costs and fees. These costs and fees are imposed to shift the financial burden from the public to offenders, and counties with more of these costs and fees place more of the burden on offenders. Unfairness can occur when similar offenders in two different counties face different amounts of costs and fees solely because one county imposes a greater number of costs and fees.

One possible solution to the problem of so many different types of economic sanctions is simply to reduce the number of county costs and fees.<sup>333</sup> The large number of possible county-level economic sanctions explains most of the variation between counties, and essentially the system as it presently stands rewards counties that are more creative in creating new costs and fees. As long as the imposed costs and fees are consistent across counties, one could claim that they are uniform and therefore fair.

However, costs and fees that are unique to a county raise a different question. How fair is it to an offender if the burden of paying for the costs of criminal justice is shifted to offenders only if the county is poor and therefore cannot afford to pay? Or, is it fair if the county has a large population of citizens who generally oppose government and is therefore more likely than populations in other counties to favor user fees? Although one could argue that counties should be able to impose whatever fees they wish, it would be difficult to defend these sanctions in terms of fairness to offenders. That is, it would be difficult to argue that offenders who live in certain counties should have to pay higher costs and fees merely because of where they live, not because of their actual offense.

#### B. MAKE PAYMENTS EASIER

The National Center for State Courts recommended that collection of economic sanctions is likely to be improved if courts make payments more convenient, for example through

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333. Recently, there have been calls for the abolition of these fees for three reasons: (1) they lack a clear penological rationale, (2) they raise questions of fairness because they make sentences too severe, they reflect class bias, they reflect disparity, and they have a large impact on families, and (3) they are not cost-effective. Beckett & Harris, *supra* note 149, at 519–28. Based on their analysis of fees in the fifteen states with the largest prison populations, BANNON ET AL., *supra* note 36, at 32, have called for lawmakers to consider the total debt burden on offenders before adding new fees or increasing fee amounts. They also have suggested that indigent offenders should not have to pay these fees. *Id.*

credit-card payments, installment plans, incentive plans that reduce amounts for those who comply with payment plans, community service, and day fines based on income levels.<sup>334</sup> The notion behind the day-fine concept was that offenders should be able to afford necessities less “the amount that serves to satisfy pleasures, whatever these may be, such as wine, spirits and tobacco,”<sup>335</sup> a concept that is also embodied in the Model Penal Code’s notion of “reasonable living expenses.”<sup>336</sup>

Questions remain concerning the degree to which offenders should be allowed flexibility in payment. Events that make it difficult or impossible for the offender to pay (e.g., illness, losing a job) are probably more likely among offenders than the general public, thus suggesting that offenders should be allowed flexibility. Other questions relate to whether there should be garnishment of wages, welfare payments, and tax refunds.

### C. PRIORITIZE THE FINANCIAL OBLIGATIONS

Much of the objection to the current system of economic sanctions is that the local and state governments get paid before others, particularly children due support and victims owed restitution. Currently, there are often no clear priorities for the collection of legal financial obligations.<sup>337</sup> Levingston and Turetsky suggested that child support and victim restitution should take precedence over fines, fees, and surcharges.<sup>338</sup> It would also be useful to have groups that collect legal financial obligations share information, so that all of the agencies and courts to which the offender owes money are aware of the total amounts of money that are owed and the payment schedules that have been imposed.<sup>339</sup>

Also, as mentioned earlier, a single offender is likely to have multiple victims, either from the same offense or from multiple offenses, including victims whose victimizations were not included in the plea agreement.<sup>340</sup> Guidelines might be helpful for handling such cases, or the issue could be handled with a

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334. TOBIN, *supra* note 35, at 56.

335. Faraldo-Cabana, *supra* note 161, at 10 (quoting Raffaele Garafalo).

336. MODEL PENAL CODE: SENTENCING, § 6.04(2) (D.D. No. 4, 2012).

337. MCLEAN & THOMPSON, *supra* note 325, at 17.

338. Levingston & Turetsky, *supra* note 36, at 187–97.

339. MCLEAN & THOMPSON, *supra* note 325, at 21–22; *see also* PA. OFFICE OF THE VICTIM ADVOCATE, *supra* note 132, at 36.

340. *Supra* text accompanying note 209.

single payment plan across cases.<sup>341</sup> But at the very least a list of all of these victims and the amounts owed to them should be made known to the sentencing court.

## VII. FUTURE ISSUES

There are two issues that will need to be discussed in the future. First, assuming there is variation between counties in the imposition of economic sanctions, there may be a need for economic sanction guidelines within a state. Second, there is a need for further investigations of the extent of, and effects of, variation between states.

### A. SHOULD THERE BE STATE-WIDE GUIDELINES?

A rational system would also be one that understands the cost effectiveness of the sanctions and determines that the costs are defensible. There are administrative costs for handling economic sanctions, and it would be important to know how much it costs state courts to process a seven dollar payment for state costs, including staff time for recording the amount, computer processing time (for those counties with computerized record keeping), and monitoring of paper records (for those counties without computer records of amounts owed and payments made). These costs are especially problematic because many economic sanctions involve relatively small amounts of money. Our analyses indicated that three-quarters of all economic sanctions imposed were for less than fifty dollars.<sup>342</sup> Whether and how much this is a problem depends on the costs involved in imposing these sanctions, monitoring offenders to ensure that the sanctions are paid, and intervening (e.g., by issuing warnings, revoking probation) if they are not paid. Moreover, if the amounts are not paid, warnings need to be given and probation officers need to make judgments about whether probation should be revoked. For parolees who have not made payments, decisions must be made about whether parole should be revoked for a technical violation (failure to make payments).

Three changes are needed if we are to increase the likelihood that offenders will pay the economic sanctions imposed on them. First, judges need better information about an offender's salary and assets. Now, even with presentence reports, judges have little information about how much an offender would be

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341. See PA. OFFICE OF THE VICTIM ADVOCATE, *supra* note 132, at 37.

342. Ruback & Clark, *supra* note 108, at 761 tbl.2.

able to pay.<sup>343</sup> Second, the amounts imposed should be geared toward an offender's salary and net worth, as is true with the day fine concept as it is used in Europe. Third, there needs to be some system to allow people without funds to pay, either through community service for those who are on probation or through prison salary for those who are incarcerated in a state prison. The usual calculus is that one day in jail is equal to one day of fines, which is equal to eight hours of work.<sup>344</sup>

One option, currently embodied in the recommendations of the Pennsylvania Commission on Sentencing for drug fines, is to use community service hours as the starting point for the proposed fine.<sup>345</sup> These recommendations, limited to the lowest levels of offense seriousness (Level 1 and Level 2 of the sentencing guidelines), use community service hours as the starting point for the proposed fine, the rationale being that community service can be ordered without consideration of the offender's ability to pay.<sup>346</sup> Although a system of community service would allow offenders who are without resources to pay the economic sanctions imposed on them, such a system requires that the county has the agencies and opportunities for the community service and the staff to run the programs (e.g., to supervise trash pickup). Such programs require an initial and continuing outlay of county resources.

I have argued that a structure is needed for economic sanctions in order to increase fairness through uniformity, proportionality, certainty, and clarity. Bringing about a structure requires development of the issues outlined in this Article. But before concluding, I also want to indicate some of the likely problems that will need to be addressed. First, if a guideline system is developed for economic sanctions, alone or as a package with incarceration and other sentencing alternatives, there

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343. See Hillsman, *supra* note 2, at 91.

344. See, e.g., *id.* at 81 (describing the values set in the West German day-fine system).

345. 204 PA. CODE § 303.14 (2015).

346. See 38 Pa. Bull. 4971 (Sept. 6, 2008) ("The proposal links the number of hours of community service recommended to the existing guideline recommendations, so that those offenders with more serious offenses or more extensive criminal history are recommended for more hours of community service. At Level 1, which targets the least serious offenders, the current sentence recommendation is exclusively a Restorative Sanction (RS) sentence; for these cells, the community service recommendation is 25-50 hours. At Level 2, where the sentence recommendation contains a range that includes RS and a minimum period of confinement, the number of hours of community service is increased by increments of 25 hours (such as, RS-1 = 50-75 hours; RS-2 = 75-100 hours).").

is the likelihood that, as with current guideline systems, prosecutors will still have most of the power and will thus be able to avoid the guidelines if they wish.

Second, if an economic sanction is not imposed, for example as part of a plea agreement, there is no one who will be able to complain. Victims, particularly of crimes that have been bargained away, may not know of the plea and thus would be unlikely to complain. If state fines were not imposed, the state would need some sort of continuing monitoring system to discover the omission. By contrast, county costs and fees, if not imposed, would be likely to elicit complaints, as the county staff needed for monitoring the imposition and payment of these sanctions have both the ability and motivation to do so.

#### B. NEED FOR RESEARCH

As indicated earlier in connection with restitution, there is variation among the states in the nature of economic sanctions. Because of this variation, more work needs to be conducted on the actual practice of how economic sanctions are imposed and monitored. For example, research conducted in Washington state may not be representative of the problem nationally because of the uniqueness of the law in Washington (e.g., the garnishment of a spouse's wages to pay legal financial obligations).<sup>347</sup> At the other extreme, Pennsylvania, the state whose economic sanctions I have investigated, may also be different from other states. In Pennsylvania, judges in some counties use a back-end adjustment to economic sanctions that are unpaid. That is, they reduce or waive the economic sanctions if the offender is complying with the conditions of supervision or "is making a good-faith effort to repay the debt."<sup>348</sup> Moreover, Pennsylvania does not charge interest on unpaid economic sanctions.<sup>349</sup> Unlike some other states, Pennsylvania does not allow conversion of criminal financial obligations to civil debt.<sup>350</sup> And, finally, unlike thirteen of the fifteen states with the largest prison populations, Pennsylvania does not have a public defender fee.<sup>351</sup>

Policy questions are partly deontological and partly utilitarian. That is, there may be some part of a question that is

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347. Beckett & Harris, *supra* note 149, at 518.

348. BANNON ET AL., *supra* note 36, at 40 n.55.

349. *Id.* at 45 n.89.

350. *See id.* at 27, 56 n.187 (omitting Pennsylvania from list of states exercising this practice).

351. *Id.* at 12.

answerable in an absolute sense of right and wrong and some part that can be answered only with knowledge of the effectiveness of the policy. Within-state and between-state differences in economic sanctions raise questions of fairness and equal treatment that may be addressable by the law. But questions about these policies concerning economic sanctions are also in need of better information about how they actually work.

### CONCLUSION

In this Article, I have argued that victim restitution should be mandatory, fines should be discretionary, and costs and fees should be prohibited. Three themes governed this argument about the imposition of economic sanctions. First, the law and courts should be concerned about victims. They are innocent of wrongdoing but face losses that are tangible and intangible, and direct and indirect. Moreover, they are especially vulnerable in that they are likely to be victimized again. Because victimization is a predictor of offending, concern about crime victims might reduce the commission of crime.

Second, the law and courts should be concerned about offenders. The criminal justice system should help offenders reintegrate into society and should not burden them by imposing extra fees or surcharges that directly support the criminal justice system, imposing fees as restitution, or imposing sanctions that are not equally imposed on all (e.g., different costs and fees in different counties). Moreover, the use of economic sanctions should be structured so as to help offenders learn responsibility.

Third, the law and courts should be concerned about the community. The use of economic sanctions should be cost effective. Moreover, their use should reflect concern about future victim cooperation and reducing future victimizations.

Part of what makes a system fair is that (a) it is understood by everyone, both those who administer it and those on whom it is imposed and (b) it is transparent, so that third parties (including victims) can easily determine whether it has been imposed and enforced. The guidelines need to be understandable to four groups: decision makers in the criminal justice system, offenders, victims, and the general public. The individuals who make decisions about economic sanctions—judges, prosecutors, probation officers, and court clerks—need to understand them and to be able to explain them to others. Offenders need to understand the way economic sanctions work for purposes of rehabilitation and deterrence. They need to un-



derstand that there is a link between their criminal behavior and their economic payment. Thus, they need to know how much they owe, where the money goes (e.g., the state, the county), and for what purposes. Victims also need to understand the system, so that they have a better idea about the punishment that offenders are undergoing and the likelihood that they will receive restitution. Finally, it is important that the system be understood by the general public, both to maintain some deterrent effect and to engender respect for the law.