# CRIMINAL RESTITUTION IMPROVEMENT ACT OF 2006

## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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JUNE 13, 2006

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# CRIMINAL RESTITUTION IMPROVEMENT ACT OF 2006

**TUESDAY, JUNE 13, 2006**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to call, at 9:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. We welcome you to this important hearing before the Subcommittee on Crime, Terrorism, and Homeland Security to examine the Criminal Restitution Improvement Act of 2006 introduced by the distinguished gentleman from Ohio, our colleague and Member, Mr. Chabot.

As a strong proponent of victims rights, I'm troubled by recent reports indicating that a large percentage of restitution is uncollected. Restitution, it seems to me, plays a critical role in the deterrence and rehabilitation of offenders by encouraging them to compensate their victims; yet restitution remains one of the most under-enforced victims rights within the criminal justice system.

Crime victims suffer not only physical and emotional trauma, but financial loss as well. The Justice Department estimates the tangible cost of crime, including medical expenses, lost wages and victim assistance, to be approximately $105 billion a year; unfortunately, most of this is not collected.

Between 1996 and 2002, the amount of outstanding criminal debt more than quadrupled, from roughly 6 billion to almost $25 billion. The Criminal Restitution Improvement Act before us today enhances the Federal restitution system by providing additional tools to the Government, probation department, and the courts to assist with collection of outstanding restitution.

I commend Mr. Chabot—and I think he'll be with us subsequently—for his dedication to crime victims and his hard work on this legislation. And I note for the record that the Justice Department has indicated its support for this legislation.

I look forward to hearing from our witnesses today. And now I'm pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of this Subcommittee, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I'm pleased to join you in convening the hearing on the Criminal Restitution Improvement Act of 2006. We need to see, however, if this bill will actually increase restitution, as the name implies.

Restitution is already mandated in most instances of victim loss in Federal criminal cases. As the GAO reported in its 2001 study on the issue, the Mandatory Victims Restitution Act of 1996, requiring the court to order full restitution to each victim in the full amount of each victim's losses without regard of the offender's economic situation, has not resulted in significantly more restitution being collected, but only in a dramatic increase in the balance of reported uncollected criminal debt. The fact is the vast majority of criminal defendants are indigent, requiring the appointment of a public defender to represent them.

At the same time, the GAO report indicated that even in the few cases where the defendant does have some assets, it is difficult to collect restitution noting that, quote, "criminal defendants may be incarcerated or deported, with little earning capacity." They often spend money on attorneys who are paid up front. Their assets, acquired through criminal activity, may be seized by the Government prior to conviction; thus, by the time fines and restitution are assessed, offenders may have no assets left for making payments and restitution.

If the vast majority of offenders are broke when they come to prison, going out and trying to find a job with a felony conviction is not likely to improve their ability to have money to meet their own needs to survive, and the survival of their dependents, and pay restitution.

Everyone is in favor of more victim restitution; however, tying it to the false hope of squeezing more restitution out of destitute prisoners is not likely to result in the collection of more restitution, but only increasing the frustration of victims, offenders, and the criminal justice system in general.

There is an old English saying that you can't squeeze blood out of a turnip. Mandating restitution in even more cases where it makes no sense, and insisting on collection efforts possibly for the life of the offender upon his or her release, will not result in more restitution being collected but only in more frustration, additional unproductive costs, financial or otherwise, for all involved.

It certainly has been my observation that restitution works best when it is an alternative to incarceration and the loss of employment and assets that accompany such incarceration. Even more dramatically but realistically, placing more emphasis on mandating restitution where it makes no sense than the system already does may actually result in more failures of offenders to succeed upon their return, which we know will likely result in more victimizations.

As you know, Mr. Chairman, our counsels are working diligently on developing a comprehensive prisoner reentry program to reduce the tragic reality that more than two-thirds of the released offenders end up back in prison within 3 years of release. Clearly mandating more restitution where it doesn't make any sense will even make that effort more difficult.

Ironically, one program that does allow a modicum of restitution to be paid by prisoners, about $3 million a year, the Federal Prison Industries Program, is under siege in the Judiciary Committee in Congress, and it's been substantially reduced in terms of the num-

ber of inmates participating, and could be eliminated if some have their way.

We're all in favor of victim restitution actually being paid to victims; however, I do not believe, Mr. Chairman, that we should condition the payment of more victim restitution on the false hope of mandating more of it from a destitute group of offenders at the cost of more frustration and unproductive effort for all concerned. Instead, I believe we should bite the bullet, establish a victims restitution fund from Federal appropriations, and that way victim restitution is neither dependent upon the vagaries of the offender's ability to pay or the Government's collection efforts.

We should then refocus the Federal victim restitution collection efforts on areas where it will have more impact, such as going after the assets of white collar offenders who profit handsomely from their crimes and have a means of paying. In a rare instance where money can be collected from restitution that has been paid to victims, the additional collections can also be paid to him or her.

I look forward to the testimony of our witnesses, and on the issue of more mandating victim restitution and working with you, Mr. Chairman, on developing ways where we can actually ensure more restitution rather than creating false hope that may be provided by this bill.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman from Virginia.

Mr. COBLE. We normally restrict opening statements to the Chairman and the Ranking Member, but the primary sponsor of this bill has requested time to briefly give an opening statement. And I recognize the distinguished gentleman from Ohio, Mr. Chabot. But meanwhile, we have been joined as well by the distinguished gentleman from Massachusetts, Mr. Delahunt. Good to have you here, Bill.

Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

I want to thank you, Mr. Chairman, for holding this hearing on this important issue. The treatment of crime victims is an area that I felt for a long time deserves more attention and, unfortunately, is too often overlooked in the criminal justice system.

I want to also say that I agree with one of the things that the Ranking Member mentioned about Federal prison industries. I think that it is an area that is under some assault right now, and I think we have to be very careful in how we move forward with that, because putting prisoners to work, I think, is good for them, it's good for the public, it's good for maintaining control at the prisons. And any effort which would undermine that, I think, would be a mistake. We find that rates of recidivism, for example, are improved when prisoners have a skill, because most of these folks are going to be coming out someday. So I want to thank the distinguished Member who didn't hear what I said, but I commended him on his——

Mr. SCOTT. I was listening.

Mr. CHABOT. I was saying something nice about you.

Mr. SCOTT. I heard about prison industries.

Mr. CHABOT. So—thank you.

And secondly, last year a number of us worked on the Justice for All Act, and I was very pleased that that particular piece of legislation did pass and that we were able to include in there protections for crime victims.

And I had originally been working for years on trying to pass a restitutional amendment for victims rights, but this bill, although it was statutory, I think does go in the right direction and it provides crime victims with what in essence is a bill of rights to truly provide crime victims with dignity and respect during an established and enforceable set of rights.

This year I'd like to continue the progress that Congress has made, and on the 10th anniversary of the Federal Mandatory Victims Restitution Act of 1996, I want to increase the collective efforts and enact policies to help law enforcement make victims whole.

This week, I plan to introduce the Restitution Improvement Act of 2006, the hallmark of the bill being that restitution will be mandatory for all offenses with an identifiable victim suffering a pecuniary loss. Additional highlights include awarding restitution for all identifiable persons or entities, awarding attorneys fees associated with the collection of restitution, enhanced notification by probation officers of victims loss, and informing victims of the provisions in the presentence report that assess the ability of the defendant to pay restitution, that prohibit early termination of supervised release when a defendant has an outstanding restitution balance, and would allow for the extension of the supervised release for the limited purposes of collecting restitution, would require that restitution is due immediately instead of automatically establishing a payment plan.

Defendants are jointly and severally liable for the total amount of victims loss. It would allow the Government to seek restitution from the defendant above the payment schedule when the Government discovers unreported assets.

And finally, it amends the Son of Sam law, the law that prohibits criminals from profiting from their crime. So it would withstand further judicial review in accordance with the Schuster case.

Restoring crime victims to the position they were in as much as possible before the crime—otherwise known as restitution—is beneficial to both the victim and to the offender. Studies have shown that criminals who paid a higher percentage of their ordered restitution have lower recidivism rates. Most importantly, the loss crime victims experience must be publicly recognized by our criminal justice system. This recognition helps victims heal emotionally. Financially these victims are owed compensation to move forward with their life. For example, at the Federal level, some of the most prevalent fraud cases involve the elderly, and it's essential that we recover restitution for some of society's most vulnerable citizens, our elderly, who oftentimes have lost a lifetime worth of savings.

The way crime victims are treated within the criminal justice system is of paramount importance. This legislation will help to decrease the $40 billion criminal debt balance that is owed to victims. So $40 billion has been ordered to be made in restitution which has gone unpaid, and it will improve the approximately 87 percent of

restitution that currently goes uncollected every year. So 87 percent goes uncollected.

I look forward to hearing from our panel of witnesses, and want to publicly recognize and thank Daniel Levey, who is representing the Parents of Murdered Children, who happen to be headquartered in my district in Cincinnati, and I had the opportunity to tour that recently. So thank you, and thank all the witnesses.

Mr. COBLE. Mr. Chabot, since Mr. Scott was listening, I'm pleased that you were not slandering his good name earlier——

Mr. CHABOT. Not today.

Mr. COBLE. You said good things about him.

Gentlemen, it is the practice of the Subcommittee to swear in all witnesses appearing before it. So if you will also please stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative.

We have three distinguished witnesses with us today. Our first witness, Mr. Douglas Beloof, is Executive Director of the National Crime Victim Law Institute at Lewis and Clark College. Professor Beloof has written the only case book on the subject of crime victim law, entitled "Victims in Criminal Procedure," which won a national award for writing in Victimology and the Law. He has served as a prosecutor and a criminal defense attorney, as well as practiced torte law as a plaintiff's and defense attorney, and has written amicus briefs to appellate courts nationwide.

Professor Beloof received his undergraduate degree from the University of California at Berkeley, and his JD from the Northwestern School of Law at Lewis and Clark College. And that's in Portland, is it not, Professor?

Mr. BELOOF. Yes, sir.

Mr. COBLE. Our second witness is Daniel Levey, President of the National Organization of Parents of Murdered Children. Mr. Levey has been a tireless advocate for victims rights, having experienced firsthand the suffering of victims' families after the senseless murder of his brother in November 1996. He is on the Board of Directors of the National Organization For Victim Assistance, is a founding member of the Arizona Voice for Crime Victims, and actively participates in numerous other victims rights associations. Additionally, Mr. Levey serves as Adviser to the Governor for Victims and as an administrator with the Arizona Department of Corrections Office of Victims Services.

Mr. Levey holds a bachelor's degree in administration of justice from the Arizona State University and a master's degree in educational leadership from Northern Arizona University—at Flagstaff, I presume, Mr. Levey.

Our third witness is Mr. James Felman, partner at Kynes, Markman & Felman, P.A. Mr. Felman currently cochairs the American Bar Association's Committee on Correction and Sentencing, and served as President of the Tampa Bay Chapter of the Federal Bar Association. He is also a member of the Sentencing Initiative of the Constitution Project. Mr. Felman is the author of various numerous publications on the issue of sentencing. He received a bach-

elor's degree in history from Wake Forest University, and both a master's in philosophy and a JD from Duke University. Glad to see the North Carolina connection, Mr. Felman.

Gentlemen, we operate under the 5-minute rule, as you all have previously been told. So when you see the amber light appear before you in the panel on your table, that is your warning to prepare to wrap it up. When the red light appears, of course, the 5 minutes have elapsed. So if you can confine your statements to on or about 5 minutes, it will be appreciated.

And, Mr. Beloof, we will start with you.

**TESTIMONY OF DOUGLAS BELOOF, DIRECTOR, NATIONAL CRIME VICTIM LAW INSTITUTE, LEWIS AND CLARK LAW SCHOOL**

Mr. BELOOF. Thank you for the opportunity to testify, Mr. Chair and honorable Committee Members. I'm here to testify in support of the Criminal Restitution Improvements Act of 2006, which cleans up and improves the Crime Victims Restitution Act of 1996.

My name is Doug Beloof, I'm a law professor, and I direct the National Crime Victim Law Institute, which is a national law organization founded to support crime victim lawyers around the country.

Mandatory restitution and procedures that maximize the potential for collection of restitution are among the most critical laws for crime victims. Of course, receiving some recompense for the victim's loss resulting from the criminal harm is important and should not be understated. It would, however, be shortsighted to view this as the only purpose of restitution. More than any other condition of sentencing, restitution comes the closest to being personal to the victim. It is also of great significance for the victim to have the judge presiding over the sentence acknowledge, as the representative of the Government, that the victim has in fact been financially harmed and to have the convict who intentionally inflicted the harm be held in judgment for the full amount of restitution.

For victims, this is a critical affirmation, a moment when the criminal justice system stands by the victim. In mandatory and full restitution, the message is sent to the victim that the victim's loss is officially recognized and that responsibility for that loss is squarely placed where it belongs: on the convict.

To be sure, it is improbable that many or maybe even most victims of crime will receive full and complete restitution from their offender. However, this point should not detract from the other important functions of full and mandatory restitution or from the effort to obtain that full and complete restitution from the offender.

The ordering of full and mandatory restitution also serves important penalogical functions. For the first time, the defendant is confronted with the reality of the financial devastation he has wrought. Less than mandatory and full restitution sends the message that crimes can be committed for pennies on the dollar. When a judge orders restitution, the message to the offender and to the victim—or when a judge orders reduced restitution—excuse me—the message to the offender and the victim is that the court does not care enough about the victim's harm to acknowledge the full extent of the defendant's responsibility.

Moreover, in standing by the victim after the conviction of the defendant by ordering full and complete restitution, it is important, to the extent practically possible, that mandatory restitution laws are drafted to facilitate the ordering and collection of comprehensive restitution. This maximizes the possibility of recovery. For these and other reasons, I strongly support the Criminal Restitution Improvements Act of 2006.

The central judicial objection to the original legislation underlying this bill, the Crime Victim Restitution Act of 1996, was the fear that the sky would fall upon the judiciary because that legislation would transform Federal courts into collection agencies. Of course, experience after the bill's enactment has shown that the sky has not fallen. Federal courts have not been overwhelmed with restitution matters. Nevertheless, the present act laudably seeks to reduce the restitution burden upon the courts by facilitating the collection of restitution by executive and administrative agencies.

The judicial conference testimony in 1995 was concerned that the length and complicated nature of assessing the harm, such as mail fraud schemes which can involve multitudes of victims, would be difficult for the courts to meet. The present act seeks to mitigate that judicial concern significantly. If there are substantial practical problems in ordering restitution, under this improvement act the courts are only required to order restitution to the best of their ability.

Misdemeanor case disposition by the court can potentially be streamlined as legislation provides that restitution may be ordered in lieu of any other penalty.

Moreover, as communications between various Government agencies are improved under the act, ultimately these improved communications will facilitate the court's restitution tasks.

To be sure, the provisions that supervised release ends only after restitution obligations are met would have the potential to increase the supervision responsibilities of courts, except that the bill dramatically limits the function of that ongoing supervision simply to compliance with the restitution order. It is fitting and proper to hold defendants accountable in this way, nor does it impose an impossible burden upon them.

Mr. COBLE. If you will suspend just a moment. The panel on your table is malfunctioning. So what I may do, folks, I may just tap when the amber light—but you can go ahead and wrap up, Mr. Beloof.

Mr. BELOOF. Thank you, sir, very much.

The Supreme Court has held that incarceration is not available for sanctioning failure to pay if the reason for nonpayment is indigence. Thus, defendants are sheltered from failure to meet payment schedules where it is impractical to do so.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Beloof.

[The prepared statement of Mr. Beloof follows:]

PREPARED STATEMENT OF PROFESSOR DOUGLAS E. BELOOF

Mr. Chair and Honorable Committee Members,

Thank you for the opportunity to testify in support of the "Criminal Restitution Improvements Act of 2006." My name is Douglas E. Beloof. I am a law professor

at Lewis & Clark Law School and the Director of the National Crime Victim Law Institute.

Mandatory restitution and procedures that maximize the potential for collection of restitution are among the most critical laws for crime victims. Of course, receiving some recompense for the victims' losses resulting from the criminal harm is important. However, it would be shortsighted to view this as the only purpose of restitution. More than any other condition of sentencing, restitution comes closest to being personal to the victim. It is also of great significance for a victim to have the judge presiding over the sentencing acknowledge that the victim has in fact been financially harmed and to have the convict who inflicted the harm be held in judgment for the full amount of restitution.

For victims, this order is a critical affirmation—a moment when the criminal justice system stands by the victim. In mandatory and full restitution, the message is sent to the victim that the victim's loss is officially recognized and that responsibility for that loss is squarely placed where it belongs. To be sure, it is improbable that many or even most victims of crime will receive full restitution from their offender. However, this point should not detract from these other important functions of full and mandatory restitution.

The ordering of full and mandatory restitution serves an important penological function as well. For the first time, the defendant is confronted with the reality of the financial devastation he has wrought. Less than mandatory and full restitution sends the message that crimes can be committed for pennies on the dollar. When a judge orders reduced restitution, the message to the offender (and the victim) is that the court does not care enough about the victims' harm to acknowledge the full extent of the defendant's responsibility.

Moreover, in standing by the victim after the conviction of the defendant by ordering full and complete restitution, it is important that, to the extent practically possible, mandatory restitution laws are drafted to facilitate the ordering and collection of comprehensive restitution. This maximizes the possibility of some recovery.

For these, and other, reasons I strongly support the "Criminal Restitution Improvements Act of 2006."

The central judicial objection to the original legislation underlying this bill (The "Crime Victim Restitution Act of 1995") was the fear that the sky would fall in on the judiciary because that legislation would "transform federal courts into 'collection agencies.'" Judicial Conference of the United States, Statement of Judge Marianne Trump Barry, Committee on the Judiciary, United States Senate on S. 173 The Crime Victims Restitution Act of 1995. November 8, 1995, at page 10. (hereinafter Judicial Conference Testimony). Of course, experience after the bill's enactment has shown that the sky has not fallen. Federal Courts have not been overwhelmed with restitution matters. Nevertheless, the present Act laudably seeks to reduce the restitution burden upon the courts, by facilitating the collection of restitution by executive and administrative agencies.

The Judicial Conference testimony in 1995 was concerned that "the length and complicated nature of assessing the harm, such as mail fraud schemes, which can involve multitudes of victims, can be staggering, and quantifying the emotional damage or loss will be extraordinarily difficult." Judicial Conference Testimony, at Page 9. The present Act mitigates that concern significantly. If there are substantial practical problems in ordering restitution, under the Improvement act courts are only require to order restitution "to the best of their ability." 3663(E).

Misdemeanor case disposition can potentially be streamlined by the Courts as the legislation provides that "restitution may be ordered in lieu of any other penalty."

Communications between various government agencies are improved under the act. "The prosecutor must provide the probation officer with any information regarding restitution. Sec. 3664(C). In turn the Probation officer is more succinctly directed to include restitution in the pre-sentence report. Ultimately, these improved communications will facilitate the Courts' restitution tasks.

To be sure, the provisions that supervised release ends only after restitution obligations are met would have the potential to considerably increase the supervision responsibilities of the Courts, except that the bill dramatically limits the function of that ongoing supervision to compliance with the restitution order. Sec. 3664(m) & Section. 4. It is fitting and proper to hold defendants accountable in this way. Nor does it impose some impossible burden upon them. The Supreme Court has held that incarceration is not available for sanctioning failure to pay if the reason for non-payment is indigence. Thus, defendants are sheltered from failure to meet payment schedules where it is impractical to do so. Moreover, such ongoing responsibility of the defendant brings restitution procedures into conformity with the intent of Congress expressed in prohibiting the discharge of criminal restitution in bankruptcy courts. In essence, this Act achieves similar public policy goals.

The Courts fears that mandatory restitution would overwhelm the Courts has never been realized. The modest changes to the mandatory restitution law included in this Restitution Improvement Act, improve, rather than diminish the efficiency of the earlier Act.

Moreover, to prioritize concerns that the collection process may overburden government, is a mis-prioritization of fundamental values. The only other alternative to government responsibility would be to place the burden of obtaining a judgment of restitution and collection of restitution upon the victim. This is an unacceptable alternative. Congress recently passed by overwhelming votes the "Crime Victims Rights Act." 18 U.S.C. 3771. A fundamental principle of providing victims' rights is that, to the extent possible, victims should not be harmed by either government processes or the failure of government to provide process. This Act, the Restitution Improvement Act of 2006, like the Crime Victims' Restitution Act of 1995, embodies the proper prioritization of values. The Act continues in the tradition of the 1995 Act by correctly prioritizing victims of crime and de-prioritizing government inconvenience and accommodations to the criminal convict who intentionally inflicted the loss.

The Act also increases the scope of restitution by providing for mandatory restitution for all federal offenses. This is a particularly important improvement. On the one hand, to grant a victim of crime "A" restitution, while, on the other hand denying restitution to the victim of crime "B," is simply untenable. Such discrimination is ultimately based on random circumstances beyond the victim's control. Moreover, inclusion of all victims under restitution laws is consistent with the CVRA, which grants all victims of crime rights. The CVRA defines victims as, "a person directly and proximately harmed as a result of the commission of a Federal offense . . ." 18 U.S.C. 3771(e). The CVRA goes on to provide that "a crime victim has the following rights: . . . the right to full and timely restitution as provided by law. 18 U.S.C. 3771(a)(6). Expanding the scope of restitution under the Restitution Act of 1995 eliminates existing conflicts with the recently enacted CVRA.

In closing, may I suggest that there are a few ways in which the bill can be improved.

First and foremost, I strongly concur with the suggestion by the United States Department of Justice that provides for preservation of defendants' assets. See Letter to the Honorable Dennis Hastert, Speaker, from William Mochschella, Asst. Attorney General (May 25, 2006) Under current law there are no statutory provisions that require a defendant charged with crime to preserve his assets for restitution. Prosecutors have no way to preserve these assets, even if they are proceeds from the crime itself. The effective collection of restitution is substantially impaired as a result. See Criminal Debt: Court Ordered Restitution Amounts far Exceed Likely Collections For Crime Victims in Selected Financial Fraud Cases, GAO-05-80. (January 2005). Ironically, it is easier to protect assets in a civil suit than a criminal action. See, Federal Debt Collections Procedures Act of 1990, 28 U.S.C. et Seq. Preservation of assets is already possible in criminal forfeiture cases. 21 U.S.C. Sec. 853(e)(1).

Second, until restitution is met, victims should be able to claim the criminal loss as a loss to the I.R.S. I recently had an tax attorney call me and identify that the IRS was denying a loss claim because restitution had been ordered, even though there was no actual recovery. I expect it was never the intent of Congress, in providing for restitution, to give the I.R.S. a rationale for denying a tax loss deduction where restitution had not been forthcoming. This problem will only get worse if not corrected, because now restitution orders will exist until they are met by the defendant. In other words, a victim might never be able to claim the loss.

Third, courts need the discretion to order restitution for a broad array of losses. I suggest that 3663(C) include language such as: "In the discretion of the court, restitution may include any amount for any loss that restores the person, entity or estate to the position that would have existed had the defendant not committed the crime."

Fourth, The Act refers to loss to all identifiable "parties." The word "parties" is a term of art referring to the prosecution and defense. This could be a source of confusion. Better language is "each identifiable person, entity or estate."

In conclusion, the Restitution Improvements Act of 2006 is a solid bill and I wholeheartedly support it.

Thank you for the opportunity to appear before you today.

Mr. COBLE. Mr. Levey.

**TESTIMONY OF DANIEL LEVEY, PRESIDENT, PARENTS OF MURDERED CHILDREN, INC.**

Mr. LEVEY. Good morning, Mr. Chairman and distinguished Members of the Subcommittee. My name is Dan Levey, and I come before you as the current National President for Parents of Murdered Children, which is also for the friends and family of those that have died by violence.

I am pleased to be here on behalf of POMC to give input on this important piece of Federal legislation. I would like to acknowledge and thank Ohio Representative Steve Chabot, who has been a longtime supporter of victims rights and of Parents of Murdered Children. It is no surprise that Representative Chabot is a sponsor of this important piece of Federal legislation which aims to improve the collection enforcement of restitution for victims of Federal crimes.

I am also the Adviser for Victims to Arizona Governor Janet Napolitano, which I'm proud to say is the first position of its kind in any Governor's office in the Nation. And I'm the current National Vice President of Administration for the National Organization for Victim Assistance, which is based here in Washington, D.C.

However, my most important credential is one I'd rather not have. I lost a loved one to murder. In the early morning hours of November 3, 1996, my life as I knew it changed forever. Like so many victims who receive a phone call or a knock on the door with news that fundamentally alters their existence, my sister-in-law called to tell me that my brother, Howard, had been shot while waiting for his friends to show up for their weekly morning basketball game. My brother was a well-educated husband, father, son, and brother and friend to many. Howard was shot by two gang members at point-blank range, thrown out of his car and left to die. I learned firsthand the harsh reality of what it's like to have a loved one murdered, and have since dedicated my life's work in memory of my beloved brother.

It is with this experience and background that I come before you to speak on the importance of this piece of legislation.

Parents of Murdered Children, by way of background, was founded by Charlotte and Rob Hullinger in 1978 in Cincinnati, Ohio, 3 months after their daughter Lisa was murdered. POMC is headquartered in Cincinnati, Ohio, and is the only national self-help organization designed solely to offer emotional support and information about surviving the murder of a loved one. And POMC has grown from a small organization in the Hullinger's basement to a national organization with over 60 chapters throughout the United States, Canada, and Puerto Rico and provides support to over 100,000 survivors each year.

Restitution is the fundamental need of crime victims. Its importance for victims with respect to financial as well as psychological recovery from the aftermath of crime cannot be overstated. Being a victim of crime, especially a violent crime, leaves a devastating impact on victims who cannot put a price tag on human life, and there are no financial remunerations that can ever replace what victims have lost. However, restitution holds offenders accountable, and, when paid, helps offset the economic loss experienced by the victim who is left with medical bills, funeral costs and other ex-

penses. In some cases a murder takes away the primary breadwinner, leaving no way to even pay rent.

Restitution is critical to crime victims because it assists them in recovering the economic losses that resulted from criminally injurious conduct. It's a vital part of the criminal justice system because it offers victims a sense of justice and holds offenders accountable.

Payment of restitution promotes the active participation of offenders and victims in the justice process. It shifts the focus of justice system interventions and makes them victim-centered rather than offender-centered. Restitution can be an important mechanism for helping offenders understand the full impact of their criminal behavior on victims. The offender should be held accountable for restoring the victim and the community as much as possible to their pre-offense economic condition. Restitution is the primary tool for accomplishing this goal.

It is for these reasons that 10 years ago Congress passed the Mandatory Victims Restitution Act. In passing that act, Congress intended to, quote, "ensure that the loss to crime victims is recognized and they receive the restitution they are due," end quote, as well as to ensure the offender realizes the damage caused by the offense and pays the debt owed to the victim. This was critical legislation, but we must do more and better.

The victim is the only person in the entire criminal justice system process that did not choose to be here, and the victim is the one with the most at stake. Victims should never be surprised by a system that is designed to provide them justice. Issues arising with offender nonpayment or late payment should be shared with the victim within the confines of confidentiality.

This Criminal Restitution Improvement Act of 2006 would provide mandatory restitution for all Federal offenses, which we support. This is an improvement to current laws; it provides mandatory restitution for all Federal offenses. The act enables the victim to obtain restitution for losses incurred as part of the criminal episode and not just from the convicted offense.

In closing, I'd just like to read a quote that I have on my office wall, it's from the great Nobel Prize-winning author and Holocaust survivor Elie Wiesel, who said, "We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormenter, never the tormented." It's time that we are no longer silent when it comes to collection and enforcement of restitution. Thank you.

Mr. COBLE. Thank you, Mr. Levey.

[The prepared statement of Mr. Levey follows:]

PREPARED STATEMENT OF DANIEL LEVEY

STATEMENT
OF

DAN LEVEY, NATIONAL PRESIDENT
NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC.

BEFORE
THE

HOUSE COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY

ON

THE CRIMINAL RESTITUTION IMPROVEMENT ACT OF 2006

ON

JUNE 13, 2006
WASHINGTON, D.C.

Mr. Chairman and Distinguished Members of the Sub-Committee:

My name is Dan Levey and I come before you today as the current National President for The National Organization for Parents Of Murdered Children, Inc., (POMC) which is also for the families and friends of those who have died by violence. I am pleased to be here on behalf of POMC to give input on this important piece of federal legislation regarding restitution.

I would like to acknowledge and thank Ohio Representative Steve Chabot, who has been a longtime supporter of victims' rights and of POMC. It is no surprise that Representative Chabot is the sponsor of this important piece of federal legislation which aims to improve the collection and enforcement of restitution for victims of federal crimes.

I am the Adviser for Victims to Arizona Governor Janet Napolitano, the first position of its kind in any governor's office in the nation. I am also the current National Vice President of Administration for the National Organization for Victim Assistance (NOVA), which is based here in Washington DC. My most important credential is one I'd rather not have. I lost a loved one to murder.

In the early morning hours of November 3, 1996, my life as I knew it changed forever, like so many victims of violent crime who receive a telephone call or a knock on the door with news that fundamentally alters their existence. My sister-in-law called to tell me that my brother Howard had been shot while waiting for his friends to show up for their weekly Sunday morning

basketball game. My brother was a well educated husband, father, son, brother, and friend to many. Howard was shot by two gang members at point-blank range, thrown out of his car, and left to die. I learned firsthand the harsh reality of what it is like to have a loved one murdered and have since dedicated my life's work to the memory of my beloved brother. It is with this experience and background that I come before you to speak of the importance of this piece of legislation.

Parents Of Murdered Children, Inc. was founded by Charlotte and Robert Hullinger in 1978, in Cincinnati Ohio, three months after their daughter Lisa was murdered. POMC is headquartered in Cincinnati, Ohio, and is the only national self-help organization designed solely to offer emotional support and information about surviving the murder of a loved one. POMC has grown from the first meeting in the basement of the Hullinger's home to a national organization with 60 chapters throughout the United States, Canada, and Puerto Rico that provide assistance and support to over 100,000 survivors each year.

Restitution is a fundamental need of crime victims. Its importance for victims with respect to financial as well as psychological recovery from the aftermath of crime cannot be overestimated. Being a victim of a crime, especially a violent crime, leaves a devastating impact on its victims. You cannot put a price tag on human life and there is no financial remuneration that can ever replace what victims have lost. However, restitution holds the offender accountable and, when paid, helps offset the economic loss experienced by the victim, who is often left with medical bills, funeral costs and other expenses. In some cases, a murder takes the life of the primary bread winner, leaving no way to even pay the rent.

Restitution is critical to crime victims because it assists them in recovering economic losses that result from criminally injurious conduct. It is a vital part of the criminal justice system because it offers victims a sense of justice and holds offenders accountable for their crimes. Payment of restitution promotes the active participation of both offenders and victims in the justice process. It shifts the focus of justice system interventions and makes them victim-centered rather than offender-centered. Restitution can be an important mechanism for helping offenders understand the full impact of their criminal behavior on their victims. The offender should be held accountable for restoring the victim and community as much as possible to their pre-offense economic condition. Restitution is a primary tool used for accomplishing this goal.

It is for these reasons that, 10 years ago Congress passed the Mandatory Victims Restitution Act of 1996.[1] In passing that Act, Congress intended to "ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due" as well as "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[2]

This was critical legislation – but we must do more and better.

Victims often learn that justice is not always as swift, severe or certain as we learned in our civics class. Criminal and juvenile justice professionals, crime victims and victim service providers, all share frustration about how restitution is ordered, collected, distributed, and

[1] Pub. L. 104–132, title II, subtitle A (§201 et seq.), 110 Stat. 1227 (1996).

[2] S. Rpt. No.104-179, at 24 (1995).

monitored. Victims rightfully and reasonably expect that an order of restitution will be honored and collected upon. But too often it is not.

The victim is the only person in the entire criminal justice process that did not choose to be there – and the victim is the one with the most at stake. Victims should never be surprised by the system that is designed to provide them justice. Issues that arise with offender non-payment or late payment should be shared with the victim, within the confines of confidentiality. Communication needs to flow freely from and to the prosecutor, court and probation department. Helping families heal – and pay the light bill – should not be a matter of internal politics or buck passing. Our courts should live up to the promise of justice and to the intent of the legislation Congress passed 10 years ago.

There are several key components of The Criminal Restitution Improvement Act of 2006:

3663(a) - makes restitution mandatory for all offenses with an identifiable victim suffering a pecuniary loss. Expands restitution to include not only the convicted offense but also any other criminal conduct committed during the same criminal episode.

3663(c) - expands restitution to allow for attorneys' fees associated with collecting restitution.

3663(e) - instructs the court to order restitution to the best of its ability in cases with a large number of victims or complex restitution issues.

3664(b) - allows the victim to view the restitution portions of the presentence report upon request.

3664(j) - instructs the court to order that restitution is due in full immediately and makes a payment schedule discretionary. Currently, 3664(f)(2) requires the court to set a payment schedule. This new section is intended to assist with restitution collection by providing the court greater flexibility in ordering payments and creating a schedule.

3664(l) - changes current law from joint and several liability or apportioned payments to joint and several liability only.

3664(m) - prohibits early termination of supervised release and requires extension of supervised release for limited purpose of collecting restitution.

3664(r) - allows the government to collect restitution above the payment schedule if it discovers concealed assets.

Section 4 - prohibits early termination of probation and requires extension of probation for the limited purpose of collecting restitution.

Section 6 - rewrites the "Son of Sam" law (section 3681 of title 18) prohibiting profiting from criminal activity to conform with the Supreme Court's 1991 decision in *Simon & Shuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

These are important and significant improvements for victims of federal crime. I would respectively request that additional areas be considered such as;

1. Deposit unclaimed restitution payments (due to inability to locate the victim) into the Crime Victims Fund; if the victim is located, they can then be paid out of the Fund.

2. Federal judges can now decline to order restitution if there are too many victims to make calculating the individual amounts too difficult. I suggest authorizing judges to order the restitution be paid into the Fund.

3. Expand "community harm" restitution, which is now authorized only in certain drug cases, to be ordered in any similar non-drug case to be paid into the Crime Victims Fund

Specifically to the bill;

P. 3; ln.6-7: Special Rule for Misdemeanors: The Act would strike "in addition to" in section 3663A. Currently, a magistrate may make a restitution order "in addition to or in lieu of" any other penalty authorized.

*The "in addition to language" should be retained. Omitting this language encourages a magistrate judge to dispose of misdemeanor offense by ordering a defendant to make restitution. While acceptable in some cases, it may not be in all cases.*

P. 3; ln. 10-12: Alternative Arrangements in Light of Practical Problems: Subsection (e) encourages the court to make complete restitution as possible, "though not the full restitution to all victims otherwise required."

*The "though not the full restitution to all victims otherwise required by this section" language should be stricken. The preceding language provides sufficient discretion to the court to make*

*restitution orders to the extent practicable. Including this language may sway courts to find otherwise.*

P.5; ln 12: Notice to Victims: Subsection (D) requires the probation officer to inform the victim of the scheduled date, time and place of the sentencing hearing.

*This subsection should be stricken as it results in a duplication of effort. Currently, the U.S. Attorney's Office provides case status and sentencing information to crime victims. Victims may feel inundated and frustrated with information overload. There is no evidence that the Victim Witness Programs of the U.S. Attorney's Offices are not providing timely and accurate notice of this information to crime victims.*

P.6; ln 20-22: Date for Final Determination: This section provides that if a victim's losses are not ascertainable 10 days before sentencing, the AUSA or probation officer shall inform the court and the court shall set a date for final determination of the victim's losses not to exceed 90 days after sentencing. If the victim subsequently discovers further losses "the victim" must petition the court for an amended restitution order.

*Requiring the victim to file a petition to the court places a substantial burden on the victim. If enacted, this will be the first time that a crime victim is required to file a pleading in a federal case. Consistent with existing law and procedure, the attorney for the government should file the petition. Requiring a victim to do so will likely result in a victim not filing for actual losses and therefore undercut the purpose of the Act.*

P. 9; ln.1-8: Extension of Supervised Release: The court shall order sentenced to pay restitution to a term of supervised release. The supervised release term shall not terminate before the order to pay restitution is completely satisfied and can be the sole condition of supervised release.

*I think this is a favorable provision. Currently, if a restitution order is not fulfilled, some courts revoke supervised release and sentence the defendant to a custody term that voids the supervised release term and thus the restitution order. This provision ensures that the restitution order is fully complied with.*

P.9; ln.18: Effect of Insurance and Other Compensation: "or agency" should be inserted after "person."

P.12; ln 1-6: Name and Address Changes: Requires the victim to notify the court of his/her address changed while restitution is owing.

*For practical purposes, the victim should report name and address changes to the U.S. Attorney's Office.*

One must understand the depth of murder to appreciate how the long delays in receiving any meaningful criminal restitution compromise the justice victims so richly deserve. A friend and fellow survivor, Carrie Freitag, in her book, "Aftermath," eloquently describes homicide grief and with her permission, has let me expand on that description;

**Homicide Grief**

Homicide Grief is the yearning to say one last good-bye. Grief is clenching your teeth

until you have a headache that won't go away. Grief is a field of fog and distance where we wander lost and aimless. Grief is dreaming about our loved one and not being able to think of anything else. Grief is wondering why fate chose them and not me. Grief is the fear of living with the loss, and fear of losing more. Grief is the identify crisis that ensues when we lose those who help define who we are, how we live, and how we relate to one another. Grief is panning through memories over and over searching for jewels. It is looking at old family pictures and yearning for that day so long ago in the past.

Grief is wondering where your loved one really is, and if they can see you, hear you, or read your mind. Grief is waving or calling to them just in case. Grief is forging signs and symbols to replace the words you can no longer share. Grief is knowing the rainbow that shouldn't scientifically exist on a cloudy day is a message to you saying "I DO EXIST".

Grief is hearing that special song on the radio and knowing your loved one is with you. Grief is having to look into your nine-year old nieces eyes and try to explain why her daddy is never coming home. Grief is sitting in bed crying in the middle of the night saying "God I miss you." Grief is discovering pieces of what was lost, in places you don't expect. Grief is grasping opportunities to connect, to share, to care that you might have otherwise left for tomorrow, because you are ever mindful now that there may be no tomorrow. Grief is being able to better distinguish what is really important and meaningful after all is said and done, and choosing to do more of it. Grief is the yearning, the reaching, the unrequited love that hides behind our loses. Grief truly is a tribute to the depth of your love.

Restitution is important to ensuring the perpetrator is held accountable and crime victims

are financially compensated for their loss. We must and can do a better job of collecting and enforcing restitution. In the words of the great Nobel Prize winning author and holocaust survivor, Ellie Weissel, "***We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented.***"

It is time that we are no longer silent when it comes to collection and enforcement of restitution.

Mr. COBLE. And Mr. Felman, I'm advised now that the panel is functioning properly, so when the amber light appears, that's your 1-minute warning. Good to have you, Mr. Felman.

**TESTIMONY OF JAMES FELMAN, PARTNER, KYNES, MARKMAN & FELMAN, P.A. AND CO-CHAIR, COMMITTEE ON CORRECTIONS AND SENTENCING**

Mr. FELMAN. Thank you, Mr. Chairman, Ranking Member Scott, other distinguished Congressmen, it's an honor to have this opportunity to speak to you today about this important issue of restitution.

As a practicing criminal defense attorney in the trenches of our criminal justice system on a daily basis, I have concerns about the bill's provisions.

I cannot agree that it is a good idea to expand mandatory restitution without regard for the defendant's actual ability to pay it. The bill would needlessly inhibit rehabilitation by offenders who are attempting to reenter society after often very lengthy periods of incarceration.

The bill would greatly complicate sentencing proceedings with the addition of many fact findings, all given that most defendants are indigent and unable to make the payments anyway and will not be sufficient to warrant the use of those resources.

The bill will also result in an inefficient allocation of other scarce criminal justice resources, as prosecutors are diverted from their jobs of investigating and prosecuting crimes to acting as essentially civil collection agents.

Finally, there are at least two aspects to the bill that I believe are clearly unconstitutional. With respect to mandatory restitution, it sounds good in theory, but in practice we know that roughly 85 percent of defendants are indigent before they get prosecuted, and I would have to assume that a greater number of that are indigent after they have been prosecuted and served time in prison. The problem with ordering people to pay what everyone knows they can't pay is then they simply have no incentive to try, because they know that they'll never be able to pay all of their restitution, and so their incentive is to simply do the bare minimum.

And that's what I see every day. People are like, why should I go out and get a job that will pay me more money? All the probation officer is going to let me keep is enough to pay my bare expenses. My guess would be that mandatory restitution may result in less victim compensation and not more. I would certainly love to see that issue studied.

It also inhibits an offender's rehabilitation because, I agree that it's good for defendants to be able to make restitution, what's bad for defendants is to be saddled with an amount of restitution that everyone knows they can never pay.

The two unconstitutional parts of this bill are the provision that provides for restitution without a conviction. This bill, for the first time in our Nation's history, would authorize—would mandate courts to order restitution for conduct for which the defendant has been neither charged nor convicted, and perhaps even acquitted.

And I was surprised to see that, because I knew that in 1984 this body, the House of Representatives, put in a report—it's H.R. Re-

port number 98–1017—quote: "To order a defendant to make restitution to the victim for an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." I think it's pretty clear-cut. It's also just wrong and unfair. You shouldn't be punished for something you haven't been charged with, or convicted of.

Lifetime supervision will be routine in virtually every case now because the bill provides that supervised release and probation must continue indefinitely until the restitution obligation that has been ordered without regard to their ability to pay has been satisfied. Given, as I said, that 85 percent of defendants are indigent, none of them will be able to ever satisfy their restitution fully. So this bill will essentially provide for a lifetime supervision of everyone. That will be an incredible expenditure of resources for very little benefit, and to the tremendous detriment of the defendant, again, no incentive to rehabilitate themselves. No matter what they do, no matter how they behave themselves, they will be under supervision for life, they'll never really be free.

It's unconstitutional under Apprendi because right now there are statutory maximums to the terms of supervised release and probation. And this bill would allow a judicial fact-finding of restitution to then expose the defendant and in fact mandate that the defendant receive a term of supervised release or probation in excess of the otherwise existing statutory maximum.

Another unwise aspect of the bill is to expand restitution to include consequential damages. As any civil practitioner knows, issues of consequential damages are limited only by the imagination. And so you'll have issues of attorneys fees. Who likes litigating attorneys fees issues?

So we're going to now have attorneys fee litigation in every restitution hearing, we're going to have how much did the defendant lose from not being at work, what's his salary, how many days did he really need—the victim, rather—how many days did he really need to take off work for this? An incredible new array of fact-finding, all for nothing, because at the end of all that process nobody's got any money to pay it. So it sounds great to measure all of these things and to go through all of that work, but there's no money to pay it.

I also would not approve of mandated joint and several liability, and I think we should tread very carefully about disclosing any part of presentence investigation reports, which is what this bill for the first time would permit. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Felman.

[The prepared statement of Mr. Felman follows:]

PREPARED STATEMENT OF JAMES E. FELMAN

**TESTIMONY OF JAMES E. FELMAN, ESQ.**
*Kynes, Markman & Felman, P.A.*
*Tampa, Florida*

BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

**June 13, 2006, Hearing**
**The "Restitution Improvement Act of 2006"**

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to express my views regarding the "Restitution Improvement Act of 2006." I am a practicing criminal defense attorney in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law. Since 1994 I have helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines, which is a joint project of the Federal Bar Association and the United States Sentencing Commission. From 1998 to 2002 I served as Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission. I am the immediate past Co-Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section and a current member of the ABA's *ad hoc* task force on *Blakely* and *Booker*. I am also a member of the Sentencing Initiative of The Constitution Project, a bi-partisan panel of federal and state judges, scholars, and practitioners chaired by

former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. Our group also includes Judge Cassell as well as, until very recently, then circuit judge Samuel Alito. My testimony today is strictly in my personal capacity, and the views I express are not necessarily those of any of the above groups or organizations.

## I. Introduction

I have serious reservations about the Bill under consideration and believe that it will not result in an overall improvement of federal restitution law. My concerns stem from the fact that the bill would (1) expand mandatory restitution without regard for the defendant's actual ability to pay; (2) needlessly inhibit rehabilitation by offenders attempting to re-enter society after lengthy periods of incarceration; (3) greatly complicate sentencing proceedings with insufficient beneficial results; (4) result in inefficient allocation of scarce criminal justice resources; and (5) violate the Constitution. I urge the Subcommittee to reject this Bill, or at least to study whether there is any need for it and its likely consequences before legislating in this area.

## II. The Bill represents unwise policy because it is likely to result in less restitution, to hamper rehabilitation, and to waste scarce criminal justice resources.

### A. Expansion of mandatory restitution

Mandatory restitution sounds better in theory than it works in practice. This is primarily because, as the saying goes, "you cannot get blood out of a stone." Based on statistical reports from federal defenders and discussions with them and court officials (judges, circuit executives, and clerks of court), Defender Services estimates that approximately 85% of individuals prosecuted in the federal district and circuit courts of appeals are represented by federal defender organizations and private counsel appointed under authority of the Criminal Justice Act. By definition, these defendants are indigent and lack the financial means to make restitution even before they have gone to prison.[1] Their financial circumstances are not likely to improve during incarceration and employment opportunities are typically fewer after incarceration than before prosecution.

Given that at most 15% of defendants are able to pay any meaningful restitution, a fair question is whether it should be ordered in every case anyway. If

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[1]Persons unfamiliar with the criminal justice system often make the simplistic assumption that if a victim lost money it must be because the defendant took it, and restitution is simply a matter of ordering them to "give it back." In actuality, in many if not most cases there is virtually no connection between the losses suffered by victims and the personal gain reaped by individual defendants.

there were no costs associated with ordering indigent people to do what we all know they actually cannot, the "one size fits all" approach of mandatory restitution could perhaps be justified. Having experience in the field, however, I believe the better approach is to allow the federal judges of our nation to tailor appropriate payment obligations based on the actual ability of defendants to satisfy them.

Among the costs of ordering a defendant to pay what everyone recognizes he or she cannot is that there is little incentive for the defendant to try. A defendant ordered to pay an amount he or she can never hope to satisfy regardless of how many years he or she tries to do so has no incentive to earn anything more than the bare minimum necessary for survival. Indeed, individuals under this circumstance face unfortunate temptation to return to unlawful behavior because little hope for improvement is offered by a law-abiding lifestyle.

In contrast, by tailoring restitution orders based on what defendants can realistically hope to pay, they are given an incentive to do so. They have hope that if they do more than the minimum – if they rehabilitate themselves as fully as possible – they can one day satisfy their obligations and try to improve their overall lot in life. Thus, mandatory restitution orders imposed without regard to ability to pay may lead to victims ultimately receiving less restitution and not more. Morever, by giving

defendants every incentive to abide by the law, we prevent additional people from becoming victims in the first place.

The issue seems important enough to warrant actual research rather than legislation by anecdote or hunch. Congress should ask the Sentencing Commission to examine the extent to which mandatory restitution results in more rather than less restitution actually being received by victims.

Another cost of ordering defendants to pay what we know they cannot is that scarce criminal justice resources are squandered. Precious court time is spent determining victim losses that bear no resemblance to the resources available for payment. Limited probation office resources are expended on supervising indigent individuals' financial affairs with little return on the time invested. Assistant United States Attorneys, rather than investigating and prosecuting the next case, are instead diverted to efforts to establish loss amounts even though such amounts can be repaid in any amount in only 15% of cases.

In sum, mandatory restitution without regard to consideration of the defendant's ability to pay results in no greater, and possibly less, ultimate compensation for victims, inhibits rehabilitation efforts, and causes unnecessary waste of limited criminal justice resources. Thus, I view the Bill's expansion of mandatory restitution to be unwise.

**B. Restitution without conviction**

Sec. 2 of the bill, in proposed § 3663(a)(2), would authorize, for the first time in our nation's history, restitution for crimes with which a defendant has been neither charged nor convicted. Given the reduced procedural protections afforded during sentencing proceedings, a restitution order for uncharged and unconvicted conduct, indeed even conduct for which a defendant has been acquitted, will raise significant Constitutional issues. This is a Constitutional line familiar to the Congress and one which it has explicitly recognized and declined to cross. *See* H.R.Rep. No. 99-334, p.7 (1985) (citing H.R.Rep. No. 98-1017, p.83, n. 43 (1984))("To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law"). Restitution beyond the offense of conviction is also inconsistent with traditional notions of fairness. If the defendant has not been convicted of a crime, he should not be punished for it.[2]

[2]Restitution for losses beyond the offense of conviction is also inconsistent with the 2004 Victims' Rights Act, which defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e).

### C. Lifetime supervision in nearly every case

The Bill also provides that no term of supervised release or probation can ever be terminated while a defendant's restitution obligation remains unpaid. *See* Sec. 2, proposed § 3664(m); Sec. 4, proposed § 3564(f). In combination with mandatory restitution regardless of ability to pay, this will mean that in virtually every case defendants will effectively be under court supervision for the rest of their lives. Under existing law, a defendant's unpaid restitution obligation is automatically converted to a judgment upon expiration of the defendant's supervision, which is enforceable by the Financial Litigation Unit of the U.S. Attorneys Office. Thus, requiring defendants to remain under court supervision will not necessarily translate into additional compensation for victims beyond that already available under existing law. At the same time, however, the expenditure of resources necessary to keep every federal defendant ordered to pay restitution under supervision for the rest of his or her life will be enormous. These resources will generate few concrete benefits. Routine lifetime supervision will also needlessly hamper defendants' rehabilitative efforts because regardless of their efforts and behavior, they will still be under court supervision for the rest of their lives anyway. Automatic life terms of supervision based on restitution obligations ordered without regard to ability to pay is simply poor policy.

This aspect of the Bill is also likely unconstitutional. The proposed legislation would allow for increased punishment – a period of supervised release or probation beyond the otherwise applicable statutory maximum – based upon judicial factual finding regarding restitution. As the Supreme Court has explained, the Sixth Amendment prohibits a court from imposing punishment that relies upon a judicial finding of fact where the punishment was not available absent that finding. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Requiring supervised release or probation to continue until complete restitution is paid will routinely result in defendants remaining on supervised release or probation indefinitely solely because of a judge's restitution finding. The statutory maximum for supervised release in the absence of a restitution order, however, is limited to a period of five years, three years, or one year depending upon the classification of the offense. *See* 18 U.S.C. § 3583. The statutory maximum for probation is five years. *See* 18 U.S.C. § 3561. The increased punishment required by the proposed legislation – punishment based upon a judge's restitution finding and exceeding the statutory maximum – thus presents a significant Sixth Amendment issue.

Although courts have held the current restitution law does not violate the Sixth Amendment, the proposed legislation differs significantly from existing law. In

holding the current law does not violate the Sixth Amendment, courts have consistently relied upon the notion that the current statutes do not provide for any "statutory maximum," and, implicitly, that the amount of restitution due is the only consequence of the court's finding. *See, e.g., United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 338 (3rd Cir. 2006) (en banc); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005). Where the current law allows only a restitution order based on a court's restitution finding, the statute proposed by the Bill allows for longer periods of supervised release or probation based on a court's restitution finding. This change would fatally undermine the reasoning of the courts that have upheld the current restitution statutes against Sixth Amendment challenge.

**D. Restitution for consequential damages**

The Bill also expands mandatory restitution to include so-called consequential damages. The identification, litigation, and quantification of consequential damages would greatly complicate restitution determinations. As those familiar with traditional civil litigation involving consequential damages are aware, the factual complexities presented by consequential damages issues are limited only by the imagination. And given that only 15% of defendants will have any hope of paying

these additional damages, the complexity added by determining such consequential damages would be for naught in the vast majority of cases.[3]

Another cost of including consequential damages in restitution will be the complication and potential frustration of the plea bargaining process. Prosecutors and law enforcement agencies properly devote their resources to gathering the proof necessary to establish the guilt of the defendant. They are typically unaware of the details of victim losses at the time they plea bargain with defendants. Defendants are similarly unaware of the details of victim losses. Thus, even without the addition of consequential damages, it is sometimes difficult for the parties to resolve cases because neither party knows what restitution penalty will flow from any particular plea disposition. The addition of consequential damages will only exacerbate this difficulty by adding to the mix of information to be considered at sentencing yet more information that is unknown and unknowable at the time of plea negotiations.

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[3]Where a defendant has the ability to pay restitution, of course, all "consequential damages" will be recoverable in a parallel civil action wherein the victim will almost certainly be able to obtain a summary judgment against the defendant. *See* 18 U.S.C. § 3664(l) ("A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim").

A particularly poor candidate for inclusion in restitution calculations is the victims' "costs of seeking and collecting restitution." This may well be interpreted to include items such as the victims' attorneys fees in either interfacing with the criminal process or even possibly in parallel civil litigation. Altering the criminal restitution process to encompass fee shifting in parallel civil litigation will introduce yet another level of needless complexity, as those familiar with attorney fee litigation may attest. In 85% of cases all of this additional time and effort expended will not result in the victim receiving one more penny in actual compensation.

The Bill also proposes permitting restitution for all "personal injury." *See* Sec. 2, proposed § 3663(a). I do not construe this to include non-economic damages such as emotional distress, but this point should be clarified to avoid potential litigation. If I have misread the Bill and it is intended to authorize restitution for non-economic damages, then I would urge the Subcommittee to reject this approach. The introduction of non-economic damages into criminal restitution proceedings will convert them into civil tort damages hearings, complete with competing experts, that will add significantly to the complexity of the proceedings. Given that these hearings and findings would be mandatory regardless of ability to pay, this approach would be further unwise policy for the reasons I have set forth above.

**E. Mandatory joint and several liability**

Existing law permits joint and several liability where more than one defendant contributes to the loss of a victim, but also allows the court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and the economic circumstances of each defendant." 18 U.S.C. § 3664(h). The Bill would eliminate this discretion to order fair apportionment and replace it with mandatory joint and several liability in every case. I do not know what justification is offered for this change, but it does not appear to be a beneficial change. While there are many cases in which joint and several liability among co-defendants is appropriate, there are, as recognized by existing law, many cases in which apportionment is necessary to achieve fairness for all concerned. I am aware of no reason why the existing law regarding joint and several liability should no be retained.

**F. Disclosure of Presentence Investigation Reports**

The Bill would authorize, for the first time, disclosure of a portion of the Presentence Investigation Report ("PSR") to non-parties. This is an area in which the Congress should tread carefully and should receive input from the field. PSR's are treated in a highly confidential fashion for varied and compelling reasons. Indeed, in many jurisdictions defendants themselves are not permitted to have a copy of their own PSR and instead may only review it in the presence of their attorney or

classification officer. In many jurisdictions attorneys are prohibited from sharing PSR's with other counsel. PSR's are routinely sealed and are generally transmitted to appellate courts separate from the rest of the record on appeal to ensure their continued confidentiality. In short, PSR's are consistently handled in a highly confidential fashion and any decision to disclose portions of them to non-parties must be considered carefully if their purposes are to be fulfilled.

**III. Restitution settlements should be permitted**

One area in which current restitution law could be improved would be to permit restitution obligations to be the subject of settlement agreements. Given the routine entry of restitution orders in amounts defendants cannot pay, some victims may wish to give defendants an incentive to borrow money from others to make a lump sum payment in settlement of a greater restitution obligation that will be satisfied, if ever, only over a long period of time. Unfortunately, the statute as currently drafted and as proposed in the Bill deprives the district courts of jurisdiction to modify restitution orders to recognize such settlements, thus making them impossible even among willing defendants and victims. *See United States v. Maestrelli*, 156 Fed. Appx.144, 2005 WL 3078597 (11th Cir. 11/18/05) (district court had no jurisdiction to effectuate restitution settlement). Given the statute as construed in *Maestrelli*, the government was obligated to continue efforts to collect from the defendant even though no one

is entitled to receive funds collected. Victims obviously cannot be forced to settle if they do not want to, but reason suggests they should have the option to do so if they wish. The Bill could be improved by adding jurisdiction for district courts to modify restitution obligations to give effect to a settlement agreement reached in good fath between a victim and a defendant.

**Conclusion**

The effect of this Bill will be to allocate scarce prosecutorial resources to the role of civil collection agent where there is no money to be had instead of investigating, prosecuting, and incarcerating other criminals. Defendants attempting to successfully re-enter society after lengthy periods of incarceration will have little incentive to do anything more than the bare minimum and will be without hope that they will ever be truly free again. The process of determining the precise restitution amounts will be greatly complicated through the litigation of numerous matters unrelated to the facts of the case involving facts outside the possession of any of the parties. The Bill suffers from serious Constitutional defects to the extent that it authorizes punishment without conviction and increased punishment based on judicial fact-finding. And I believe the result of this Bill, even if Constitutional, this will be little if any additional compensation to victims. There is certainly no data at this point indicating this Bill is either necessary or desirable.

Mandatory restitution for every loss conceivably caused by the defendant sounds good in theory. In practice it will do nothing more for victims than would the pre-1996 law allowing Courts to order full restitution for all direct losses caused by the offense of conviction taking into account the defendant's actual ability to pay. Indeed, the fact that the Bill's approach will improve nothing in practice may explain why not one of the constituents within the criminal justice community (the Department of Justice, the Judiciary, U.S. Probation) appears to favor it. I appreciate this opportunity to assist the Subcommittee on these important issues. I will be pleased to answer any questions the Subcommittee might have at this time or, if necessary, in a subsequent written submission.

Mr. COBLE. Thank you all, gentlemen.

Gentlemen, we impose the 5-minute rule against us as well, so if you all can keep your questions rather tersely.

Mr. Beloof, in your testimony you recommend that the act include a provision for the preservation of the defendant's assets. Elaborate a little more in detail on that end, and tell us why you think this is significant.

Mr. BELOOF. Well, of course, it takes many months, sometimes over a year, for criminal cases to come to resolution. And during that period of time there is the—the defendant has the opportunity to disperse their assets. Preserving their assets makes the probability of restitution collection much greater.

I know that the Department of Justice has requested this provision in a letter to the Speaker of the House, and I strongly support their request for it. This can be—particular significant sums of assets can be obtained or frozen in white collar crime cases.

Mr. COBLE. I thank you, sir.

Mr. Levey, let me put a two-part question to you.

Based upon your own experience and your interaction with other crime victims, describe the financial impact of crime, particularly the victims of violent crime, A. And B, what do you say when one would say, well, listen, the offender has already paid his debt to society; don't you think an active prison sentence is sufficient? Why lean on him for further restitution?

Mr. LEVEY. Mr. Chairman, Members of the Committee, the financial impact of crime, especially of violent crime, in my experience is obvious, it's devastating, it's not—you know, crime is not a 1-hour TV show or book that we read. The ripple effect and the financial impact is endless. And it's not only the obvious economic loss that the victim suffers, but it's the things also that aren't covered under restitution as well. So I would say, while it's a piece of the puzzle, restitution is very important to crime victims.

And, you know, it's—I think it goes toward the accountability. And whether they have the means to pay it or not I think is somewhat moot, because the victim didn't ask to be in this position, they may not have had the money to lose, and it was taken from them in one way or another.

And on the other piece, I'm sorry, it was regarding the offender——

Mr. COBLE. Yeah. What do you say—after all, the defendant has already paid his debt to society, he's served an active prison sentence, get off his back; why do you want to let him—I'm just paraphrasing now.

Mr. LEVEY. Right. Well, I say to that, until they pay the economic loss—the prison sentence or the probation term is just one facet of their sentence—they need to complete their restitution as well. It's not just hollow words on paper that a judge orders. Victims should be allowed to recoup the economic loss. And so you haven't paid your debt to society if you've just done your prison term.

Mr. COBLE. Mr. Felman, do your concerns regarding mandatory restitution remain intact, despite the court's authority, under the current law and the bill, to establish a payment schedule or order

some sort of nominal periodic payments? Does that give you any comfort?

Mr. FELMAN. Not as much as I'd like. Obviously you can establish a payment schedule and you can order nominal payments, but the end result is the same. The restitution obligation will not be satisfied because it does not bear any relationship to the defendant's ability to satisfy it. What is the point of ordering a defendant to pay an amount of money everyone knows they cannot pay? And of course there is always the argument, well, what if he wins the Lotto? And of course I'm all in favor of the current law or the law under the bill where, if the defendant's economic circumstances change, they must advise the court of that and the court can then adjust the restitution accordingly. I'm just trying to talk about a policy that makes sense here. Let's give people a target they can hit.

Mr. COBLE. Professor Beloof, how does extending—strike that—no, I'll proceed with that. How does extending probation or supervised release improve the process of collection of restitution?

Mr. BELOOF. Well, it improves the process of collecting restitution because it allows the courts to participate in the collection—or the criminal courts to participate in the collection of restitution. The alternative to that is for victims to pursue the judgment in the courts and puts the burden on them of collection. So what it does is it makes more efficient for the victim the collection of restitution.

And I'd like to add one more thing. I think what we're discussing here or what the fundamental values we're concerned about are, and I think the fundamental values we're concerned with here are the values of standing by the crime victim and of maximizing the opportunity for restitution from them. They are the people whom an intentional crime was committed against.

Congress has—well, I'll stop there.

Mr. COBLE. Well, my red light appears.

I'm pleased to recognize the distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And Professor Beloof, I'd like to follow up on that.

First of all, you mention the fact that under present law you can't jail someone for nonpayment of something they can't pay; does this bill change that law?

Mr. BELOOF. No, it doesn't change the law of the Supreme Court, sir.

Mr. SCOTT. Okay. You also mention maximizing restitution. What is the likelihood that you'd be able to get any more money out of people who cannot meet the present standards of restitution, particularly in light of the fact that almost 90 percent of restitution is not collected now?

Mr. BELOOF. Well, it would increase the time period in which offenders would make minimum restitution payments, so the answer would be it would improve it.

Mr. SCOTT. What is the present period under which you have to make restitution payments? Does the bill change the period in which you can make restitution—you have to make restitution?

Mr. BELOOF. It changes the period in which courts supervise the payment of restitution, yes, criminal courts supervise the payment of restitution; it extends that to the life of the offender.

Mr. SCOTT. And what is the present law?

Mr. BELOOF. The present law is until supervision ends. The victim has a judgment that they can continue to enforce after that supervision is ended.

Mr. SCOTT. Mr. Felman, you mentioned the Apprendi case, and I assume the Blakely case would also be implicated. Who makes the finding of restitution?

Mr. FELMAN. The judge.

Mr. SCOTT. And in the bill, it's based on preponderance of the evidence. What is the present law on setting restitution?

Mr. FELMAN. It is also the case now that the judge makes the finding, but it does not violate Apprendi now, because the way the courts have construed it, there isn't any maximum amount of restitution. So therefore, whatever amount of restitution the judge sets does not change the maximum punishment that the defendant knows he is entitled—he could get in the absence of that judicial finding.

The reason this bill would violate the Constitution is because precisely it extends the period of supervised release and probation beyond the otherwise existing statutory maximum penalty. So it will increase defendant's punishments above the otherwise applicable statutory maximum based solely on judicial fact-finding.

Mr. SCOTT. And is that the same rationale for the problem you have with criminal conduct in the same episode that you're finding—the judge is finding guilt on preponderance of the evidence that the jury didn't find?

Mr. FELMAN. It's similar, but also worse. It just simply runs into the core of fifth amendment due process. The other concern is the sixth amendment one in terms of your right to a jury trial. Now we're implicating not just the sixth amendment, but also the fifth amendment. You're talking about punishing someone for something they've not been charged with or convicted of. And I think this body has recognized—and I don't think it will take courts long to recognize—that that violates the Constitution.

Mr. SCOTT. What's wrong with publication of the presentence report?

Mr. FELMAN. Well, I think that we want to tread very carefully there. Right now PSRs are the most sacred document in our system. In many jurisdictions the defendant himself is not allowed to have a copy of the PSR. Counsel may review it with their client, but counsel are typically required not to share the PSR even among co-counsel; they're often required to return it at the conclusion of the case. The reason is that we want to give every protection possible to the contents of that document so that the judge can get the maximum amount of information possible. And anytime you're disclosing to third parties and outside people the information that's in that report, the quality of the information and the ability to gather the information will suffer. Right now, no one is entitled to see a PSR other than the parties. And this bill would for the first time authorize the release of portions of the PSR—and it's somewhat

vague as to which portions—to third parties, who then presumably could publish them to the world.

Mr. SCOTT. The bill provides for pretrial freezing of assets. What would this to do an ongoing business, the right to retain counsel, and how much could you freeze?

Mr. FELMAN. I don't know the answer to any of those questions. I think it would all have to be litigated and sorted out. I mean, there's already a right of pretrial restraint of proceeds of crime, and there are exceptions to that that are limited for attorneys fees. There sometimes is a bit of a battle, frankly, between the Government and the victims. I mean, the Government forfeits—if you want to know where the money could come from to pay all this restitution, I routinely see the Government come in and forfeit all the defendant's assets, and they keep it and the victims get nothing. I think a fruitful avenue of examination would be where is all the forfeiture money going?

Mr. SCOTT. Mr. Beloof, can you address that question, the pretrial freezing of assets; what would it do to somebody's ongoing business? Whether it implicates your ability to retain counsel, and how much could you freeze?

Mr. BELOOF. Yeah, I think that the answer is it could impinge on the ability to do ongoing business, depending upon whether the business entity itself was indicted. Typically, individuals are indicted, so it's more likely that it would infringe on the individual defendant's ability to disperse their assets. But certainly where a business itself was indicted, it might affect their ability to conduct business.

Mr. SCOTT. Mr. Chairman, if I could, if you're self-employed——

Mr. BELOOF. That would affect your ability to do business.

Mr. SCOTT. Pretrial.

Mr. BELOOF. Pretrial after you were indicted.

Mr. SCOTT. Thank you.

Mr. COBLE. I thank the gentleman.

We've been joined by the distinguished lady from Texas, Ms. Sheila Jackson. Very good to have you with us, Sheila.

The distinguished gentleman from Ohio.

Mr. CHABOT. Thank you, Mr. Chairman.

As one whose name gets butchered around this place quite frequently, Professor, before I do it I've heard several pronunciations. Could you say your name, please, for me?

Mr. BELOOF. It's Beloof, sir——

Mr. COBLE. My apologies to you, Professor.

Mr. BELOOF. No, you were doing it well, I thought.

Mr. COBLE. Thank you for exposing me, Mr. Chabot.

Mr. CHABOT. That's all right.

Professor—it's probably easier to just say Professor anyway—the gentleman, Mr. Felman here, has alleged that this particular piece of legislation, in his view it's unconstitutional in several aspects. Could you respond to that?

Mr. BELOOF. Yeah. Well, I think, first of all, restitution without a conviction happens all the time. It's done in plea bargain settings; defendants agree to pay restitution on unindicted crimes. And my guess is that this legislation allows, simply facilitates the

ability of courts to order that restitution. It's stipulated to all the time.

In the narrow question in those cases where it goes to trial, I expect there might be some issue as to whether the court could order restitution on a crime for which there wasn't a conviction. That would be the vast minority of crimes, and I would expect that this provision would be interpreted to avoid that small potential constitutional problem.

In terms of lifetime restitution obligation supervision, I see no constitutional problem with that. You'll be passing a statute that postdates the probationary terms and other laws, and courts typically interpret statutes that have the potential to be in conflict not to have constitutional problems. Since this will be the most recent statute passed, I suspect that this statute will prevail over the other statute, and a constitutional confrontation will not occur.

Mr. CHABOT. Thank you. Professor, and Mr. Levey, if I could ask both of you this, Mr. Felman also made the statement that he felt that this legislation—if you have somebody in prison, that there may be a disincentive for them to attempt to pay anything or to better themselves because they're going to have this hanging over them their whole lives and they won't be able to ever pay it off, so why bother? And that's when I saw both of you writing sort of frantically when that statement was made.

Mr. Levey, how about if we——

Mr. LEVEY. Sure. Well, my response, Mr. Chabot, and Chairman, Members of the Committee, would be that we don't order restitution just because we think it may or may not get paid; we pay it for the economic harm that the victim suffered. We know that the victim lost that money for whatever reason, and to think that an inmate would not pay because it's too high of an amount or they don't feel that they're ever going to be able to pay it off, I think it's about accountability and responsibility that the inmates should take for their crimes. And so I think that that's a weak argument that there's not a likelihood that they'll pay it. I mean, what if they do pay it?

Mr. CHABOT. Professor?

Mr. BELOOF. Well, it's interesting. You know, if you look at other policies that Congress has passed, I mean, it's now virtually impossible for a student who has taken out a loan to declare bankruptcy. It's curious to me that we would want to allow an offender to have some equivalent bankruptcy kind of argument, that is, not be obligated to repay their restitution when they have committed an intentional criminal act.

So I agree with Mr. Levey, this is about accountability, it's about prioritizing the interest of victims over the convenience of Government and over the accommodations of the criminal defendant. It's really a question of fundamental values, where you come down on it.

Mr. CHABOT. It's also my understanding that about 95 percent of the people that are in prison right now will someday be out. Many of those will be gainfully employed at some point. And it's also my understanding that the amounts that are being paid are about—sometimes well under $100 a month; so they're not taking all the money, they're taking a portion of it.

Let me conclude. Mr. Levey, a few months ago I happened to have an opportunity to visit the headquarters of Parents of Murdered Children, and I was told that this really amazing group handles as many as a thousand calls a week from family members that are affected over the loss of a loved one—not that there's a thousand murders, but there are ongoing cases, et cetera.

From your personal experience, in addition to your role as President of Parents of Murdered Children, could you explain for the Subcommittee both the tangible and intangible loss that crime victims experience, and how restitution is important to the healing process of victims and their families?

Mr. LEVEY. Sure. You know, the intangible things are you don't have the comfort of your loved one anymore, you don't have the things that were in your life, and yet you must go on. And so the emotional strain that crime puts on victims is oftentimes insurmountable. The prevalence of drug abuse and alcoholism amongst survivors, divorce, is huge. The intangibles are a sense of justice and the feeling that someone is going to be held accountable. I would say that's intangible, you can't put your hands on it, you can't touch it or feel it, and yet you're thrust into a system that is often not as swift, severe, and certain as we learned in our civics class.

And some of the tangible things, the obvious things, are the person in violent crime, in murder, is no longer with you, the economic loss. And it's important because whether they can pay it or not, it's symbolic for many victims to know that whether they're paying 10 cents a week or whatever it is, that every time they pay that money, they're thinking about their crime, hopefully, and thinking about their victim.

And so it's very important that victims hear that restitution is ordered, one, for the loss that they had. I mean, to me it would be unconscionable, almost like another crime if I lost $100,000 as a fraud victim, and yet because the court felt the likelihood of the defendant paying is not good, we're going to only order 50,000 at a lower rate. It just doesn't seem right.

So I guess if I summed it up, you know—there's almost too much to put your hands around, but I guess if I had to sum it up I would say that restitution is meaningful in the sense that, one, it pays for the economic loss; but two, it may be in many respects it's symbolic that the offender, postconviction and postsentencing, is going to be thinking about their victim every time they pay restitution.

Mr. CHABOT. Thank you very much.

Mr. COBLE. The gentleman's time is expired. The distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Yes, thank you, Mr. Chairman.

Mr. Levey, you're aware, of course, that this particular legislation in the vast majority of murder cases would not be applicable.

Mr. LEVEY. Yes, I'm aware. You know, many murder cases, they're at the State level——

Mr. DELAHUNT. Almost all of them are. You know, I mean, to implicate a murder, a charge of murder, into the Federal courts is very, very rare.

Mr. LEVEY. Well, I work closely with our U.S. Attorney's Office in the District of Arizona, and they handle quite a few homicides.

We have a large Native American population, and obviously I know you're aware that the Federal crimes that occur, such as Oklahoma City bombings and others, murder does happen at the Federal level—not to the degree that the State——

Mr. DELAHUNT. Let me suggest, maybe—I just think it's important for clarity purposes that—and I'm just going to throw a number out and either one of the other witnesses can respond to it, but I daresay that 97, 98 percent of the homicides in this country are prosecuted at the State level, and that this particular proposal before us would not apply.

Professor Beloof.

Mr. BELOOF. Well, the short answer is that Federal legislation often establishes a model for the States.

Mr. DELAHUNT. But that doesn't answer my question, does it, Professor?

Mr. BELOOF. The answer is, I think I have it before me, 2003, 2004, there were 55 murders, Federal jurisdictions.

Mr. DELAHUNT. And thousands, tragically, of murders in the State system. I just think it is important to recognize that point.

Mr. BELOOF. Correct.

Mr. DELAHUNT. Because we don't want to confuse anyone that may be watching this particular hearing to think that murder victims would benefit in the overwhelming majority of cases. That just simply wouldn't happen.

I have a question for Mr. Felman.

Taking that premise that 99 percent of murder cases, most crimes of violence, this legislation would probably prevail mostly in white collar crimes; would you agree with that?

Mr. FELMAN. I think that's correct; most economic crimes would be the crimes in which restitution would be ordered.

Mr. DELAHUNT. Would you agree with me that the likelihood of white collar defendants having the capacity to return into society and earn a living that would allow them to meet restitution norms or standards would be a lot more likely than it would be at the State level?

Mr. FELMAN. I think that's correct. It depends on what you mean by restitution norms and standards.

Mr. DELAHUNT. Well, whatever the court decided.

Mr. FELMAN. Well, if the court had the discretion to take into account anything about the defendant or his capacity, then yes.

Mr. DELAHUNT. I guess what I'm going to is the changed economic conditions I daresay are very rarely enforced. And again, I'm just reading the bill for the first time. But do you have a problem in terms of post-termination of probation, some remedy for a crime victim to return into—the Federal court in this case—and demonstrate to the probation officer, without going through a lengthy fact-finding, that the defendant who defrauded the victim of substantial savings is now in a position to fully compensate the victim?

Mr. FELMAN. I think that is true under existing law. I don't think it is related to the period of supervision. I think 3663 A(k) is the part about material change of circumstances, and it is not tied to the period of release. What I think victims could benefit from is the ability to reach a settlement agreement with the defendant. There

are circumstances out there where a defendant is able to borrow money from somebody to pay off——

Mr. DELAHUNT. I understand that. What I am saying is there are far too many sophisticated criminal defendants that know how to gain the system that leave victims uncompensated, particularly in the area of economic or white collar crime so that, you know, a victim is disadvantaged permanently without really a genuine recourse, because you know Federal probation departments; they don't take the time. And I am not saying they don't have the resources to go out and make a determination that circumstances have changed. And I think that really is egregious.

Mr. FELMAN. I think I agree with you. But I think it is already covered by current law, but settlement agreements are not permissible. There is no jurisdiction in the district courts to approve a settlement agreement under current law.

Mr. DELAHUNT. If it is already covered by current law, that then goes to the issue—what you are telling me is that under current law—if I could have an additional 30 seconds.

Mr. COBLE. Without objection.

Mr. DELAHUNT. If, under current law, the enforcement of the restitution that is ordered by the court survives the termination of probation——

Mr. FELMAN. Well, it gets converted to a judgment, and then the Financial Litigation Unit at the U.S. Attorney's Office is charged with the enforcement of that. Typically defendants will enter into a payment agreement on the side that continues the exact same payments they were making while they were on supervision.

Mr. DELAHUNT. Are you aware of any study that has been done in terms of the enforcement post-probation?

Mr. FELMAN. No.

Mr. COBLE. The gentleman's time has expired.

The Gentlelady from Texas, Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I always try to look for the silver lining in some of the work that we do in this Congress. And frankly, I believe that some aspects of this initiatives have value to the extent that, if you have done wrong and harm to victims and the victims' families, that we should not be sympathetic to how much you can pay.

But I want to try to be realistic as well. And I will offer into the record, just by reciting the fact that, pursuant to a 1996 study, victims are impacted in the instance of murder by $2.9 million, $87,000 for rape and sexual assault, $8,000 for robbery, $1,400 for burglary and $370 for larceny. So there is an impact. Mr. Levey, I want to acknowledge and offer sympathy, in your circumstances being someone who has lived through this.

At the same time, we will note that 87 percent of Federal restitution is uncollected each year. And, frankly, I think that we should find a way to seek common ground where reality sinks in and we try to find solutions to that huge gap. In fact, I am looking for the number which I think is billions of dollars, and I will find that shortly.

So I raise these questions, and I would like Mr. Felman to talk again about his thoughts about the fact that a part of the legislation in this bill points to defendants that are neither charged nor

convicted. Would you offer your comments on that? Now remember, people listening are saying, well, you are dealing with criminals, so why worry about that? They were around the scene. Somebody thinks they might have been involved. What is the constitutional issue or any legal issue that would cause us to pause because of that provision in the bill? And might I just put on the record that the outstanding criminal debt since 2001 is probably more. It has ballooned to $13 billion.

[The prepared statement of Ms. Jackson Lee follows in the Appendix]

Mr. FELMAN. Well, I agree with Professor Beloof that in a circumstance in which it is a part of the plea agreement, that restitution will be made for conduct not charged and for which the defendant was not convicted. That will not violate the Constitution because that is being done with the defendant's consent.

Ms. JACKSON LEE. That is accepted?

Mr. FELMAN. No question about that. That is in the distinct minority of cases. Typically speaking, nobody knows what the restitution is until after the defendant has pled and you are getting to the sentencing proceeding. That is what is lost, I think, sometimes. Prosecutors don't have the time to have their agents go out and figure out what all of the different victims' losses are before a sentencing hearing. Their job is to convict this defendant. The restitution will get figured out later.

It is, I think, the rare exception where everyone knows what the restitution amounts are and they are put in a plea agreement. And in every case in which—I don't understand the fascination with punishing people for things they have not been charged with and have not been convicted of. And it is not like there is any limit that is available here. We have got conspiracy law. You charge somebody with a conspiracy. You convict them of a conspiracy or get them to plead guilty to a conspiracy. They are liable for all losses caused by any member of that conspiracy whose act was reasonably foreseeable to them and was undertaken in the course of the common scheme. It is a huge web. And if you can't fit your loss into that web, then I think we need to think again about whether that is something that we need to be ordering.

Ms. JACKSON LEE. In essence, what we are having is a fishnet out, throwing the fishnet and grabbing anybody who might have been walking by the crime scene. If we wanted to be serious about responding to, I think, the eloquence and the realness of Mr. Levey's situation as he speaks on behalf of victims, I want them to, one, see the criminal justice system work on their behalf fairly, and I think restitution is valid.

A provision like this carves away a reasonable bipartisan perspective which says let's find a way to make sure that $13 billion doesn't sit out there, and let's not have 87 percent of the restitution not being paid. Getting people who are not indicted seems to me, Federal or State level, bears on people's constitutional rights.

I would like to ask Professor Beloof whether or not this whole idea of continuing to hold people in supervised release and lack of probation until they pay. Particularly if we note—I would like to ask an additional minute.

Mr. COBLE. Without objection.

Ms. JACKSON LEE. Particularly, as we have noted that most of these people are indigent, have Federal defenders, et cetera, can we find a better way? And I would like Mr. Felman's thoughts on that. In addition to restitution, then, what is happening is, even though a lot of cities were looking to the forfeiture dollars, we don't get them. I would still like to know where those forfeiture dollars go. But if you forfeit property of a defendant, why can't some of those resources be included as restitution to the victim?

The victim should be made whole. I don't quarrel with that issue. No one can stand and choose a victim's—whether they survive the criminal act or whether or not their families have to live with their death. But this kind of feudal hostage indentureship certainly, I think, has constitutional problems. Professor——

Mr. BELOOF. I have a——

Ms. JACKSON LEE. I would like you to be able to respond first.

Mr. BELOOF. I would agree with you, Representative Lee, that the payments to victims should be prioritized over fines or recovery for Government. I do not agree that the extension of probation to collect restitution is futile. Your comment that——

Ms. JACKSON LEE. Feudal system.

Mr. BELOOF. Or feudal, not futile. In a feudal system, frankly—well, I won't tell you what would have happened.

Ms. JACKSON LEE. That is all right. We are close to it.

Mr. BELOOF. But you have talked about reality, and I think it would be good for the Committee—I support this bill strongly—to step back and look at what is being done to collect.

Mr. COBLE. Professor, I don't want to put you all in a straight jacket. We are going to have a vote at about 11:00, so if you could be brief. I want to have a second round as well.

But go ahead, Professor.

Mr. BELOOF. I think an assessment by this Committee and staff about things like forfeiture and what resources are available to the Federal Government to assure collection and how that is done is a laudable notion.

Ms. JACKSON LEE. Quickly, Mr. Felman, could you respond on that payment system?

Mr. FELMAN. We need to look at where the forfeiture dollars are going because, in my experience, I see a lot more money going into forfeiture, and I don't know where that money goes either.

Ms. JACKSON LEE. What about not releasing individuals because they have not paid?

Mr. FELMAN. If it was tied to the amount they could actually pay and if the judge was saying, I think, that in your lifetime, if you work this hard, you can pay this; if we let the judge actually make some rational assessment of what somebody could actually pay, I might be more inclined to look at that. The problem is that by definition the person's ability to pay is simply not relevant. So we know that the reason why the amount of uncollected restitution exploded after 1996 is that we started ordering amounts that everyone knew couldn't be paid.

Ms. JACKSON LEE. So that is a good amendment for this bill.

Mr. FELMAN. If we got rid of the mandatory nature of it, that would be a huge step in my opinion. At least, let's study it. I would

love to see a study on whether making—ordering people to pay what they can't pay results in paying any more.

Ms. JACKSON LEE. I thank you. I thank the Chairman.

Mr. COBLE. Thank the gentlelady.

We are going to go through a second round here, folks. This is an important issue. And Mr. Levey, I want to extend what the gentlelady of Texas said. We extend our condolences to you because you are right in the middle of it more so than the rest of us. You have direct exposure.

Professor Beloof, Mr. Felman expressed some concern about disclosing portions of the PSR as it relates to assets. As we all know, the PSR is now confined to the parties that are the defendant and the Government. What do say you to that?

Mr. BELOOF. Well, I say, first of all, that that is not correct that the PSR can be given to anyone or any portion of the PSR can be given to anyone at the judge's discretion. I would note that Congress has recently overwhelmingly passed the Crime Victims Rights Act which provides for full and complete restitution. That was in October of 2004. It was signed by the President, the most recent affirmation of full and complete restitution. And in order for victims to adequately speak at sentencing and seek restitution, courts should now and can now in their discretion be allowing portions of the PSR to be released to victims and their attorneys.

Mr. COBLE. I thank you, sir.

Mr. Felman, I don't think this was put to either of you witnesses. How does a court's extension of probation or supervised release violate Blakely?

Mr. FELMAN. Because, under current law, there is a statutory maximum term of probation that is permitted to be imposed, and it is 5 years. In the absence of any—that is the statutory limit on the term of probation. It is 5 years. For supervised release, depending on the classification of the felony, it is either 2 years, 3 years, 4 years or 5 years. What this would do is say that, based upon a judge's finding of fact with regard to an amount of restitution, that if that restitution exceeds the defendant's ability to pay it during the period of the statutory—the otherwise authorized statutory period of probation—that additional punishment will therefore be visited upon the defendant; that is a period of supervised release or probation in excess of the statutory maximum penalty that would apply in the absence of that judicial fact-finding solely based upon the judge's fact finding. And my reading, I mean, you know, you never know what the Supreme Court is going to do, but my reading of Apprendi, Blakely and Booker would be that that would squarely present a very significant sixth amendment issue.

Mr. COBLE. I don't want to simplify this, but as far as restitution is concerned, I don't want criminals to be able to conclude, well, I am going to go knock off a bank or I am going to go kill someone and not have to answer to it. That is the part that I want to keep in the forefront.

Thank you, gentlemen.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Beloof, can a defendant plead—file bankruptcy to discharge debts incurred in an institutional crime?

Mr. BELOOF. Not anymore, sir.
Mr. SCOTT. Were they ever able to do it?
Mr. BELOOF. Yes, they were.
Mr. SCOTT. When?
Mr. BELOOF. Well, I guess this issue first came across my desk about 14 years ago in a case in which I represented a State court judge, and since then, Congress has moved to eliminate bankruptcy for intentional criminal conduct.
Mr. SCOTT. Okay. Following up on the question of extended probation, what would be the enforcement mechanism after the otherwise statutory maximum time for supervision? Would the defendant be subject to jail for nonpayment even if he could pay after that maximum period of time?
Mr. BELOOF. If he could pay?
Mr. SCOTT. If he could pay.
Mr. BELOOF. Under this bill?
Mr. SCOTT. Right.
Mr. BELOOF. I believe so.
Mr. SCOTT. He could be jailed.
Mr. BELOOF. I believe so, if he could pay.
Mr. SCOTT. If he had the ability to pay and didn't pay after the statutory maximum period of supervision otherwise available in law.
Mr. BELOOF. I believe so, sir.
Mr. SCOTT. Mr. Felman, is that your view, too?
Mr. FELMAN. No doubt about it.
Mr. SCOTT. Does anyone have a study to show that this bill would actually increase or decrease the amount of money actually paid?
Mr. BELOOF. There is, to my knowledge, there is no study.
Mr. SCOTT. Does anyone have access to a study that would show that this would actually increase or decrease recidivism?
Mr. BELOOF. This particular bill, I don't believe there has been a study on this particular bill, sir.
Mr. SCOTT. Thank you.
Mr. COBLE. I thank the gentleman.
The distinguished gentleman from Ohio.
Mr. CHABOT. Thank you, Mr. Chairman.
I would just first note that we pass bills all the time around this place where we don't have a study that indicates exactly what is likely to happen, and sometimes, common sense tells us that if you do one thing, there will be an——
Mr. SCOTT. Would the gentleman yield?
Mr. CHABOT. Yes, I would be happy to yield.
Mr. SCOTT. We have actually passed bills where the studies showed our actions would actually increase crime.
Mr. CHABOT. In reclaiming my time, we have passed many bills around here, and we have had studies. We have also oftentimes had studies where this study says you are going to have this result; or you had this result, and you have another study that is completely opposite of that. And we have the ability around here to pick some studies over others or disregard all of them, but I don't think the fact that there hasn't been an independent expensive tax-

payer-paid study that is going to say what is going to happen as a result of this really amounts to anything.

And I might also add that I have—we were talking before with the Ranking Member, that we actually agree on a number of things besides the Federal prison industry, the Voting Rights Act, the Black farmers issues and others as well. This is one that we happen to disagree on.

My friend, Mr. Delahunt, before, I think, made some point about indicating rightly that most crimes that are committed in the United States are dealt with at the State level or at the local level because they are not Federal crimes, although there are Federal crimes that do have an impact on the lives of the American people. Look at the Oklahoma City bombing, as Mr. Levey mentioned, for example. But there are about 55 murders every year where there is Federal jurisdiction, and it is my understanding, according to a study, that in about 38 percent of those murders, there was no fine, no restitution or anything else. And those are the types of cases that this would plug up the hole.

I would also mention, there are an awful lot of fraud cases which are Federal crimes. According to a study, apparently there were 5,364 fraud cases at the Federal level and in only about a third of those, 30 percent, were there any fines or restitution in those cases. But as I believe Professor Beloof also mentioned, just because the crimes are committed at the State level, if we pass a law here in Washington, oftentimes what we do here doesn't get attention and State officials look and they say, well they did this at the Federal level, and why don't we do this in this State or this State? So what—we do have impact sometimes for the good and sometimes for the bad.

So getting back to that whole line of thought, Professor, if you could just comment on this idea about the number of crimes at the Federal level. Most crimes are actually at the State or local level, and what would be the impact something like this could have over and above just those people that would be directly affected in the Federal court system?

Mr. BELOOF. I know that the most recent significant crime victim law Congress has passed is grabbing the attention of State legislators and State Governors. And I have been consulted by several Governors' offices and legislative officers who are seeking to enact more meaningful victims' rights laws as a result of the overwhelming support for that statute in both the Senate and the House. So Federal approaches to criminal justice are—can be very significant in the States.

Mr. CHABOT. Thank you.

And I have just been handed a study here also—Cynthia Kempinen, it is called, "Payment of Restitution and Recidivism"—that indicates, at least this study says that paying restitution does decrease recidivism.

And going back to you, Professor, could you, again, just remind us, because sometimes we get sort of far field, what—why we have restitution and just what it is, what holes we are trying to plug here. What have been the problems, and what are we trying to solve by this particular piece of legislation?

Mr. BELOOF. Part of the problem has been the collection problem. And much of what is solved in this bill is making more efficient collection. The suggestion that we pre-freeze assets, facilitating probation officers, collection of information for the courts, providing the prosecutors' office with more tools to facilitate the collection, removing some of that information, collection out of the courtroom and into the administrative and executive branches. These things are all going to facilitate the collection of restitution.

In addition, the extension of time simply lengthens the time, the probability, I believe, increases the probability of the time during which offenders are going to continue to pay that restitution.

Mr. CHABOT. Thank you.

Mr. COBLE. I thank the gentleman.

Ms. Jackson Lee, do you have another round?

Ms. JACKSON LEE. Thank you.

Let me ask Mr. Levey just your vision, your passion and again my acknowledged sympathy for your loss. What would you like in terms of getting a bill passed? What would be your instruction? What can we do? You said—you heard what I said, $87 billion—$13 billion, I am sorry, not paid and 87 percent of the restitution not paid. What would strike the appropriate response for you?

Mr. LEVEY. Well, I know the answer isn't to not do anything to answer the question backwards, but I would like to see that number lowered. Obviously, I would like to see a more effective enforcement in collection of restitution and some consequence like still being under supervision if you don't pay it. It is amazing, in Arizona, we can extend restitution at the State level or we can extend probation 3 years on the end of their term, and you know, a lot of those people do find a way to come up with the money when they start to get to the point where they are going to be extended. Not all of them, but I don't think the burden should be less on the offender. I think victims are owed the restitution literally and always by the system, and so I don't have a remedy, a magic pill here. I think we are moving along the right direction with this type of legislation and just ramping it up and making offenders realize that this is an important part of their sentence, and it isn't going to be discharged because you can't pay it or because it is more than you can afford right now. They shouldn't have done the crime.

Ms. JACKSON LEE. I think you have, in your words, struck a very fair balance. You want something done. This legislation, of course, opens the door for discussion. But we can find a way to answer, I think, for your concerns as we develop something that will work and pass constitutional muster.

Just quickly to Professor Beloof, and I would like Mr. Felman to respond after, and this will be my last question. Isn't it possible or isn't there the potential that this expanded mandatory restitution may in fact include what is perceived to be a consequential damage? Do you see that happening?

Mr. BELOOF. Yes, the question—I mean, the question is whether, I guess, in the first instance, whether the bill allows consequential damages. If it does, and I am not confident that it does, it would be only implicitly. If it did, I am sure it would be constitutional. I don't think there is a constitutional problem with consequential damages.

Ms. JACKSON LEE. Mr. Felman?

Mr. FELMAN. I agree there is not necessarily a constitutional prohibition on including consequential damages, but I think this bill clearly does that. It requires——

Ms. JACKSON LEE. Is that the purpose of the criminal law?

Mr. FELMAN. Well, not in my view. I mean, it would be one thing if you were going to tailor it to what they could actually pay, then we could have an intelligent discussion about whether it is worth having to go through all of the trouble to litigate consequential damages. Get that. But we know nobody is going to be able to pay it, but it will be mandated litigated anyway.

Ms. JACKSON LEE. Let me—I think my concluding comment is that, why don't we do something that works here? And why don't we do something that alleviates the pain of Mr. Levey and many other families in order to do that? Why don't we address some of the fractures in this bill that I think keep it from seriously going forward? I hope to be able to do that.

Mr. FELMAN. One improvement that I would think that victims might be interested in having is, as I mentioned earlier, is the ability to actually settle. In other words, say a victim is owed a $100,000, and the defendant only has $10,000, but his mom will loan him $90,000 in order to satisfy his restitution obligation. Now, no victim has to agree to anything like that. Well, that would be a full settlement. Suppose they can compromise it. No victim would have to agree to any settlement. But right now, the law does not vest a district court with the jurisdiction to permit the settlement. And if I am the victim, I want to have the opportunity to at least settle if I want to. And I think that would be an improvement for the bill, and I would think most victims would at least want to have that option even if they don't choose to exercise it.

Ms. JACKSON LEE. I want a solution, as I close, for the pain of victims. I want somebody that is going to move forward, and what I have heard from the three of you is, we can address the plight of victims that should be addressed, but we can also be realistic and move forward so that victims are truly compensated. That is what I would like to say.

Mr. COBLE. I thank the gentlelady.

Mr. SCOTT. I would ask the gentleman from Ohio to provide the details of the study that he cited, and I would appreciate that.

Mr. CHABOT. Be happy to.

Mr. SCOTT. There are other studies on mandatory minimums and find what juveniles and adults, with a clear consensus of mandatory minimums as it wastes the taxpayers' money, in trying more juveniles as adults, the clear consensus of those studies is that it increases crime. Unfortunately, both poll well, and as the gentleman from Ohio has suggested, they tend to pass because they poll well, not because they will actually do anything about crime. I yield back.

Mr. COBLE. Well, this has been a good hearing, gentlemen. I thank you all for being here. I very much appreciate your contribution. In order to help ensure a full record and adequate consideration of this important issue, the record will be left open for additional submissions for 7 days, also written questions that a Mem-

ber wants to submit should be submitted within that same 7-day time frame.

This concludes the legislative hearing on the Criminal Restitution Act of 2006. Thank you for your cooperation and your attendance as well as those in the hearing room.

And the Subcommittee stands adjourned.

[Whereupon, at 10:50 a.m., the Subcommittee was adjourned.]

# APPENDIX

## Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

**Statement**
**By**
**Congressman Robert C. "Bobby" Scott**
**Ranking Member**
**Judiciary Subcommittee on Crime, Terrorism and Homeland Security**
**Legislative hearing on the "Criminal Restitution Improvement Act of 2006"**
**June 13, 2006**

Thank you, Mr. Chairman. I am pleased to join you in convening this hearing on "The Criminal Restitution Improvement Act of 2006." Unfortunately, I am unable to conclude that the bill would improve victim restitution, as its name implies. Restitution is already mandated in most instances of victim loss in federal criminal cases. Yet as the General Accounting Office (GAO) reported in its 2001 study of the issue of victim restitution, " the Mandatory Victims Restitution Act of 1996 .... requiring the court to order full restitution to each victim in the full amount of each victim's losses, without regard to the offender's economic situation (emphasis added)" had not resulted in significantly more restitution being collected, but only in "a dramatic increase in the balance of reported uncollected criminal debt".

The fact is that the vast majority of federal criminal defendants are indigent, requiring appointment of a federal public defender to represent them. And that same GAO report indicated that even in the few cases where the defendant does have some money or assets, it is difficult to collect restitution, noting that "[c]riminal defendants may be incarcerated or deported, with little earning capacity; they often spend money on attorneys, who are paid up front: and their assets acquired through criminal activity may be seized by the government prior to conviction. Thus, by the time fines or restitution are assessed, offenders may have no assets left for making payments on ... [restitution]....".

If the vast majority of offenders are broke when they come to prison, going out and trying to find a job with a federal felony criminal record is not likely to improve their ability to have money to meet their own need to survive and that of their dependants AND pay restitution.
Everyone is in favor of more victim restitution. However, tying it to the false hope of squeezing more restitution out of destitute prisoners is not likely to result in the collection of more restitution, but only in increasing the frustration of victims, offenders, and the criminal justice. There is an old English saying that you can't "squeeze blood out of a turnip". Mandating restitution in even more cases where it makes no sense, and insisting on collection efforts possibly for the life of the offender upon his or her release, will not result in more restitution being collected, but only in more frustration and additional unproductive costs, financial and otherwise, for all involved. Moreover, Mr. Chairman, many believe that imprisonment is the punishment for an offender's crime and restitution on top of incarceration means the offender pays twice for the crime. It has certainly been my observation that restitution works best when it is an alternative to incarceration and the loss of employment and assets that accompany such incarceration.

And even more dramatically, but realistically, placing more emphasis on mandating restitution where it makes no sense than the system already does, may actually .result in more failures of

offenders to succeed upon their return, which would likely result in more victimizations. As you know, Mr. Chairman, our counsels are working diligently on developing a comprehensive prisoner reentry program to reverse the tragic reality that more than 2/3 of released offenders end up back in prison within 3 years of release. Clearly, mandating more restitution where it doesn't make sense will only make that effort more difficult Ironically, the one program that does allow a modicum of restitution to be paid by prisoners, about $3 million dollars a year, the federal Prison Industries Program, is under siege in the Judiciary Committee and the Congress, has been substantially reduced in terms of numbers of inmates participating, and could be eliminated if some have their way.

We are all in favor of more victim restitution actually being paid to victims. However, I do not believe, Mr. Chairman, that we should condition the payment of more victim restitution on the false hope of mandating more of it from a destitute group of offenders at a cost of more frustration and unproductive effort for all concerned. Instead, I believe we should "bite the bullet" and establish a victim's restitution fund from federal appropriations. That way, victim restitution is neither dependent upon the vagaries of offender ability to pay or government collection success. We could then refocus the federal victim restitution collection efforts on areas where it may have more impact, such as going after the assets of white collar offenders who profit handsomely from their crimes and have the means of paying. And in the rare instance where more money can be collected for restitution than has been paid to the victim, the additional collections can also be paid. to him or her. I look forward to the testimony of our witnesses on the issue of more mandating of victim restitution, and to working with you, Mr. Chairman, on developing ways to actually assure that more restitution, rather than false hope, is provided to crime victims. Thank you.

PREPARED STATEMENT OF THE HONORABLE SHELIA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

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**CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS**

**STATEMENT**

**BEFORE THE**

**JUDICIARY SUBCOMMITTEE ON**

**CRIME, TERRORISM, AND HOMELAND SECURITY**

**AT LEGISLATIVE HEARING ON H.R. ____**

**"Criminal Restitution Improvement Act of 2006" (Chabot)**

**JUNE 13, 2006**

Mr. Chairman, I move to strike the last word. I thank the Chairman and Ranking Member for holding this hearing.

Everyone agrees that crime victims suffer loss at the hands of their assailants. In addition to physical and emotional trauma, victims suffer financial loss, including medical expenses, lost earnings, and property damage. Annual losses for crime victims have been estimated at more than $100 billion.

Restitution is intended to hold offenders accountable to their victims for their conduct while attempting to make the victims whole again by compensating their financial losses. At the federal level, however, it is claimed that more than 80% of criminal debt (restitution and fines) goes uncollected each year. In fact, according to a 2001 GAO study, the amount of outstanding criminal debt has ballooned to over $13 billion.

Currently, restitution is collected by the Financial Litigation Units (FLUs) of the United States Attorneys Offices. The GAO identified four factors impacting debt collection that fall outside the FLU's control: (1) the nature of debt collection from incarcerated offenders, deported offenders, or offenders with minimal earning capacity; (2) the statutory requirement that the court assess restitution regardless of the offender's ability to pay; (3) limitations on collection due to court-ordered payment schedules; and (4) state laws that limit the types of property that can be seized or amount of wages that can be garnished. GAO identified two factors within the FLU's

control that, if remedied, would improve criminal debt collection: (1) an inadequate collection process; and (2) a lack of coordination between the entities involved in restitution (the court, the FLU, the probation officer, the prosecuting attorney).

The intent of the Criminal Restitution Improvement Act of 2006 is to provide additional tools for restitution collection by the government and strengthen federal restitution so that it can adequately and effectively compensate victims.

How well it does it one of important questions we will consider today. That is why I am very interested in hearing from the witnesses.

Mr. Dan Levy has a perspective on this matter that none of us wishes to hold. His brother was murdered by thugs. Thus, he speaks with conviction and authenticity and direct knowledge of the financial and cathartic importance of restitution.

Professor Douglas Beloof, I understand supports the bill, because among other things, ordering a defendant to pay restitution to the victims of crime is a critical affirmation - a moment when the criminal justice system stands by the victim.

Mr. Jim Feldman, who is a long-time criminal defense attorney and sentencing expert, has a different view. I understand that he serious

reservations about the bill and does not believe it will result in an overall improvement of federal restitution law. In particular, Mr. Feldman claims that this restitution bill is unwise public policy because it is likely (1) to result in less restitution, (2) to hamper rehabilitation, and (3) to waste scarce criminal justice resources.

I am looking to hearing from the witness and considering their responses to the subcommittee's questions.

Thank you. I yield the balance of my time.

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

**Subcommittee on Crime, Terrorism, and Homeland Security - Legislative Hearing**
**The Criminal Restitution Improvement Act of 2006**
**Statement of Steve Chabot**

I would like to thank the Subcommittee Chairman, Howard Coble, for holding a hearing on such an important issue. The treatment of crime victims is an area I have been vigorously involved with during my tenure on the Judiciary Committee.

In fact, last year I helped craft sections of the Justice for All Act that would provide protections for crime victims. The law is only a statutory mandate, but the section meant to be a constitutional amendment, would provide crime victims with a "bill of rights" to truly provide crime victims with dignity and respect through an established and enforceable set of rights.

This year, I want to continue the progress Congress has made and on the 10th Anniversary of the federal Mandatory Victims Restitution Act of 1996, want to increase collection efforts and enact policies to help law enforcement make victims whole.

This week, I plan to introduce the Restitution Improvement Act of 2006 - the hallmark of the bill being that restitution will be mandatory for all offenses with an identifiable victim suffering a pecuniary loss. Additional highlights include:

- awarding restitution for all identifiable persons or entities
- awarding attorneys fees associated with the collection of restitution
- enhanced notification by probation officers of victim's loss and informing victims of provisions in the pre-sentence report that

assess the ability of the defendant to pay restitution

- prohibit early termination of supervised release when a defendant has an outstanding restitution balance and would allow for extension of the supervised release for the limited purpose of collecting restitution
- require that restitution is due immediately instead of automatically establishing a payment plan
- defendants are jointly and severally liable for the total amount of a victim's loss
- would allow the government to seek restitution from the defendant above the payment schedule when the government discovers unreported assets
- amends the "Son of Sam" law (the law that prohibits criminals from profiting from their crime) so it will withstand further judicial review in accordance with the *Schuster* case.

Restoring crime victims to the position they were in before the crime – otherwise known as restitution - is beneficial to both the victim and the offender. Studies have shown that criminals who paid a higher percentage of their ordered restitution have lower recidivism rates.

Most importantly, the loss crime victims experience must be publicly recognized by our criminal system. This recognition helps victims heal emotionally. Financially, these victims are owed compensation to move forward with their life. For example, at the federal level some of the most prevalent fraud case involve the elderly, it is essential that we recover restitution for some of

society's most vulnerable citizens, who often times have lost a lifetime worth of savings.

The way crime victims are treated within the criminal justice system has been of paramount importance to me during my tenure in Congress. This legislation will help to decrease the $40 billion criminal debt balance that is owed to victims and improve on the approximately 87% of restitution that currently goes uncollected every year.

I look forward to hearing from our panel of witnesses and want to publicly recognize and thank Mr. Daniel Levey, representing the Parents of Murdered Children who are headquartered in my district, in Cincinnati, Ohio.

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