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THE PROSECUTORIAL PERSPECTIVE: THE VICTIM AND WITNESS PROTECTION ACT OF 1982

WILLIAM A. KOLIBASH*

1. INTRODUCTION

It is an anomaly of our criminal justice system that the victims of crime have apparently received less attention and concern than the criminals themselves. The criminal justice system has evolved as society’s response to the violation of the victim’s rights, yet a recurrent theme in legislation, law enforcement and prosecution has dealt with protecting the rights of the accused. The exclusionary doctrine and Miranda warnings are two popularly known manifestations of this concern. The criminal justice system has been ineffectual in affording adequate protection to witnesses, who are, after all, often key factors in effective criminal prosecutions.

In recent years this lack of recognition of the rights of victims and witnesses has been brought to the forefront by many groups, resulting in both state and federal legislation which is responsive to those needs.1 In 1982, Congress enacted the Federal Victim and Witness Protection Act,2 which is designed to improve the treatment of, and afford greater protection to, the crime victims and witnesses in the federal criminal justice system. The stated purposes of the legislation are:

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendants; and

(3) to provide a model for legislation for State and local governments.

Basic changes wrought by the six major provisions of the Federal Victim and Witness Protection Act (hereinafter “Act”) include requiring the presentation of a victim impact statement at sentencing; creating new substantive crimes in order to enhance the prosecutor’s abilities to protect witnesses and victims; providing restitution as a potential sentencing option; requiring promulgation of “Federal Guidelines” to ensure fair treatment for victims and witnesses and heightened sensitivity to their needs; and finally, providing that any money received by a criminal for the sale of the rights to that person’s story should be escrowed to provide a fund from which the criminal’s victims might recover any judgments or restitution

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1 W. Va. has passed legislation which is analogous to the federal act discussed in this article, W. VA. CODE § 61-11A-1 to 7 (Supp. 1984).
3 *Id. at 1249.
awarded them by the courts. The potential impact of the Act will be discussed from a pragmatic, prosecutorial perspective in this Article.

II. THE OBSTRUCTION OF JUSTICE PROVISIONS

One of the general areas of concern addressed by the Act is the obstruction of justice through harassment and intimidation of, or retaliation against, people involved in the prosecution of crimes. The provisions of the Act expand on prior law to afford protection from such activity to victims and informants, as well as witnesses. They also expand the type of activity proscribed to include attempts to intimidate, harass or retaliate where these attempts, if successful, would be in contravention of the statute. This expansion to include "attempts" remedies an earlier failure by the law to provide sanctions for verbal harassment, which has been described as "the most common form of intimidation."

The anti-tampering provision proscribes the use of physical force, threats or misleading conduct to influence testimony in an official proceeding, which is defined elsewhere in the Act, but generally refers to any federal trial, grand jury, congressional or agency proceeding. Section 1512(a) further prohibits the use of such activities to "cause or induce" anyone to withhold testimony or other evidence, alter evidence, evade legal process, ignore a summons, or to hinder or prevent anyone from providing a federal law enforcement officer or judge with information relative to a federal crime or violation of probation, parole, or condition of release. The potential penalty for any act in contravention of these provisions is a maximum fine of $250,000.00, or imprisonment for a maximum of ten years, or both.

Section 1512 also defines the lesser included offense of intentional harassment, which carries a potential maximum fine of $25,000.00, or imprisonment for up to one year, or both. The provisions of section 1512 are clearly designed to protect victims, witnesses and informants before and during trial.

The focus of section 1513 may be characterized as the prevention of retaliatory actions directed against victims, witnesses or informers who have aided or cooperated with the prosecuting authorities. Its terms specifically provide sanctions against bodily injury, property damage, or threats to cause bodily injury or property damage in retaliation against a person who testified, attended an official proceeding, or provided information concerning the commission of a federal crime, or a violation of parole, probation or release conditions. The prescribed penalty for these acts

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7 Id. § 1515.
8 Id. § 1512(b).
or attempted acts is a maximum fine of $250,000.00, or a prison term of not more than ten years, or both.

In addition to the criminal sanctions which can be imposed upon a person for tampering or retaliating against a victim, witness or informant, the Act also provides for civil actions to restrain harassment directed at a victim or witness. These provisions offer new options for United States Attorneys to deal with such harassment.

Section 1514(a)(1) is phrased in mandatory language so that, upon proper application by the government attorney and where other requirements are met, the federal district court shall issue a temporary restraining order prohibiting harassment of the victim or witness. The other requirements include a finding by the court that "there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists," or that such order will prevent physical harassment or retaliation against the victim or witness. This finding by the district court may be predicated on the facts contained in an affidavit or verified complaint. Under certain conditions the court may issue the temporary restraining order without notice to the adverse party. A temporary restraining order thus issued without notice is only valid for a maximum of ten days, unless extended by the court upon a showing of good cause. Absent agreement to a longer period by the adverse party, this extension is also only valid for up to ten days. The issuance of a temporary restraining order, without notice, automatically places a hearing on a motion for a protective order on the court calendar. Further provisions deal with the effect of the government's failure to pursue the protective order, the effects of motions by the adverse party to dissolve or modify the temporary restraining order, and the specific elements required to be set forth in the temporary restraining order.

The district court is also addressed in mandatory language with respect to the issuance of a protective order. Action under this section is triggered by a motion of the government's attorney. As a prerequisite to the issuance of a protective order there must be notice and a full-scale hearing in which the government must demonstrate by the preponderance of evidence that harassment or retaliation has taken place, or is likely to do so. Once this burden of proof has been met

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9 Id. § 1514.
10 Id. § 1514(a)(1).
11 Section 1514(2)(A) provides, in part, that notice is not required "if the court finds, upon written certification of facts by the attorney for the Government, that such notice should not be required and that there is a reasonable probability that the Government will prevail on the merits."
13 Id. § 1514(a)(2)(D).
14 Id.
15 Id. § 1514(a)(2)(E).
16 Id. § 1514(a)(2)(F).
17 Id. § 1514(b)(1).
court must issue an order. The duration of such order, up to a maximum of three years, is left to the court to determine in light of what it considers to be necessary under the circumstances.\textsuperscript{18} Within ninety days of the protective order's expiration date, the government attorney may request a new order.\textsuperscript{19} It should be noted that harassment, under these circumstances, has been defined as "a course of conduct directed at a specific person that . . . causes substantial emotional distress in such person" where such conduct lacks a legitimate purpose.\textsuperscript{20}

From the prosecution viewpoint, the statutory provisions set forth above will be extremely helpful in combating situations where victims and witnesses are abused. The new criminal penalties are substantial and should deter those who would tamper with witnesses or retaliate against victims. The harassment features of the Act fill a void which existed before the passage of this legislation. Although previous obstruction of justice statutes provided some protection to witnesses and victims, threats or the use of force were required to trigger the operation of the statutes' sanctions.\textsuperscript{21} Many defendants, aware that overt threats constituted an additional crime, avoided this type of activity. Instead they resorted to applying subtle pressure to prevent a witness or victim from testifying, or to retaliate against such a witness. This type of harassment activity is now proscribed both criminally and under the civil provisions. These sections should be very effective in providing protection for witnesses and victims who instigate or participate in federal criminal proceedings. Further protection is afforded witnesses and victims by the Act's addition of section 3146(a), which predicates the defendant's release pending trial for noncapital offenses on the condition that he not obstruct justice.\textsuperscript{22} Therefore, not only can the defendant be prosecuted for tampering or retaliation, he can also have his bail revoked.

III. THE VICTIM IMPACT STATEMENT

Greater sensitivity to the victim is evidenced by the Act's amendment of Rule 32(c)(2) of the Federal Rules of Criminal Procedure to require the inclusion of a Victim Impact Statement in the presentence report. This insures that, at sentencing, the judge is cognizant of the problems encountered by the victim as a result of the crime.\textsuperscript{23} The statement should contain information about financial, social, psychological and medical harm which the victim has suffered. By having this type of information available, the court will have a greater understanding of the serious ramifications of the crime. The court will also have a basis for determining the amount of restitution that the defendant should pay to the victim.

\textsuperscript{18} Id. \textsuperscript{19} Id. \textsuperscript{20} Id. \textsuperscript{21} 18 U.S.C.A. \textsuperscript{22} See 18 U.S.C.A. §§ 1503, 1512, 1513 (Supp. 1984). \textsuperscript{23} Pub. L. No. 97-291, 96 Stat. 1248, 1249 (1982).

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Since the information contained in the Victim Impact Statement will be provided by a third party, defendants may lodge a hearsay objection to its use. This objection is easily disposed of, since the rules of evidence do not apply to sentencing proceedings. In addition, the defendant is given both the right to review and discuss the presentence report, and the right of allocution at sentencing. If the defendant disputes the restitution claims, the government is required to prove said claims by the preponderance of evidence. Thus, there are sufficient safeguards to protect a defendant who contends that the Victim Impact Statement is in error.

IV. Restitution

One of the most significant portions of the Act is the section dealing with restitution. This section permits the court to order restitution in addition to, or in lieu of, any other sentence, including incarceration. In fact if the court fails to order restitution, or only requires partial restitution, section 3579(2) requires the court to state its reasons on the record. The Act further provides that, if restitution is ordered, it shall become a condition of any subsequent probation or parole. Thus parole or probation may be revoked if the defendant fails to comply with the restitution order. The statute does not otherwise address the issue of supervision of restitution; therefore, existing parole and probation procedures would seem to apply.

The use of restitution as a criminal sanction, which was previously available only in conjunction with probation, is thus greatly expanded and encouraged under the new Act. This does, however, raise certain interesting issues. For instance, does the availability of restitution as part of the sentence mean that courts are required under Rule 11(c)(1) of the Federal Rules of Criminal Procedure to so advise the defendant at the plea proceeding? In view of the expansive language of the rule, requiring the judge to advise the defendant of the maximum possible penalty provided by law, it seems clear that the court must advise the defendant that full restitution may be ordered as part of the sentence. This should preclude a later attack on the sufficiency of the court’s compliance with Rule 11 requirements. Because the order of restitution will be part of the sentence, it will be subject to correction or modification under Rule 35 of the Federal Rules of Criminal Procedure which deals with the correction or reduction of sentence.

Section 3580 broadly defines the factors the court must consider in ordering restitution. These factors include the losses sustained by any victim, the general financial situation of the defendant and his family, and any other information the court deems pertinent. This section also specifies that any dispute about the proper

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24 FED. R. EVID. 1101(d)(3).
26 Id. § 3579.
27 Id. § 3579(g). See W. VA. CODE § 61-11A-4(g) (Supp. 1984) for corresponding provisions.
type or amount of restitution should be resolved by the court through application of a preponderance of the evidence test. In this determination, the attorney for the government must carry the burden of demonstrating the amount of loss sustained by a victim as a result of the offense, while the defendant must demonstrate the extent of both his financial resources and his financial needs.

As noted before, prior to the Act, restitution was imposed only as a condition of probation. The language of the Federal Probation Act, the traditional source of the court’s power to order restitution, provides that, “[w]hile on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .” This language has generally been interpreted to mean that, absent an agreement to the contrary, a court could not order restitution for an amount in excess of that contained in the actual counts of the indictment on which either the defendant’s guilty plea or conviction was premised.

This was the analysis which underlay the decision of the Third Circuit Court of Appeals in United States v. Buechler. The defendant, pursuant to a plea bargain, pled guilty to a one-count information which involved only $262.12. The trial court, however, ordered restitution in the amount of $1,989.35. This larger amount, although it represented the actual loss to the victim, fell outside the statutory constraints of the Federal Probation Act since it was not based on an offense for which there had been a conviction. The court of appeals deemed the restitution order illegal.

The Second Circuit case of United States v. Tiler also dealt with a plea bargain. After pleading guilty, the defendants were placed on probation, but were required to deposit $100,000.00 with the court. This was a fund from which restitution would be made once the amount of the defendants’ liability was fixed by a determination of the actual damages flowing from their illegal conduct. After finding that the trial court’s actions were reasonable in this regard, the court of appeals noted that the issue would have been different if the district court had “ordered a payment to an ‘aggrieved party’ rather than the explicitly conditional deposit with the court at issue here.”

The Victim and Witness Protection Act departs from this restriction. It allows victims named in a restitution order to receive the amount of compensation necessary to make them as whole as possible. Under the Act, only those victims named in

25 Id. § 3580(d).
26 Id.
29 Id. at 1008.
30 United States v. Tiler, 602 F.2d 30 (2d Cir. 1979).
31 Id. at 34.
the restitution order may recover from the defendant.\textsuperscript{36} This brings heightened importance to the prosecutorial function of drafting indictments. Because only those victims named in the indictment are eligible to be included in the restitution order at the conclusion of the case, care must be taken to include the names of all victims. To avoid this difficulty, it might be possible to utilize a drafting technique whereby the indictment gives a description of a class of persons, rather than names of individual victims. Indictments so drawn have been accepted by the courts in the context of mail fraud schemes.\textsuperscript{37}

A task that may require even greater care than drawing up the indictment is the negotiation of a plea agreement. If counts of an indictment are to be dropped according to a plea agreement, victims of the offenses charged in those counts may not be eligible for restitution under the Act. There are, however, some cases which suggest ways in which this problem in plea negotiation may be obviated.

One such case, \textit{United States v. Davies,}\textsuperscript{38} dealt with a sentence of probation conditioned on restitution. The amount of restitution ordered exceeded the liability of the defendant under the two counts to which he had pleaded guilty. The court of appeals upheld the sentence, noting that the defendant had acknowledged his total liability to the victim, both in the plea agreement and before the court. It is this acknowledgement of liability which makes this case distinguishable from \textit{Buechler,} and mandates this different result.

The same reasoning was applied in \textit{Phillips v. United States.}\textsuperscript{39} The court explained its position as follows:

\begin{quote}
We feel that when a defendant consents pursuant to a plea agreement to pay such a restitutionary amount and such plea bargain is fully explored in open court and the defendant thereafter signs a stipulation to the effect that restitution in such a sum is to be paid, then the Court is bound by law to carry out that specific agreement.\textsuperscript{40}
\end{quote}

Thus, there are two alternatives for the prosecuting attorney involved in plea negotiations that can be extrapolated from this line of cases. One would be to have the defendant acknowledge his total financial liability to victims both in a plea agreement and before the court, while allowing him to plead to a limited number of counts. The second option would be to have the defendant enter a guilty plea to a one-count superseding information that alleges the total amount of the financial

\textsuperscript{37} Butler v. United States, 317 F.2d 249 (8th Cir. 1963); United States v. Unger, 295 F.2d 889 (7th Cir. 1961); Wolpa v. United States, 86 F.2d 35 (8th Cir. 1936); Hyney v. United States, 44 F.2d 134 (6th Cir. 1930). See also, United States Attorneys' Manual, § 9-43.410.
\textsuperscript{38} United States v. Davies, 683 F.2d 1052 (7th Cir. 1982).
\textsuperscript{39} Phillips v. United States, 679 F.2d 192 (9th Cir. 1982).
\textsuperscript{40} \textit{Id.} at 194. For a thorough discussion of restitution in an amount greater than that contained in the count or counts to which defendant has entered a guilty plea, see United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981).
loss as a result of his crime. The defendant, in his plea agreement, should specifically waive any issue as to multiplicity and specifically agree to make restitution for the entire amount alleged.

Another novel aspect of this legislation provides that the order of restitution can be enforced, by either the federal government or a victim named in the order, in the same manner as any civil judgment. Thus, it is possible to enforce the order through a writ of execution, which could lead to seizing the defendant's assets, or garnishing his wages, or both.

The choice of whether to pursue these enforcement measures on behalf of the victim remains within the discretion of the United States Attorney. Despite the additional burdens these enforcement actions will place on the United States Attorney's Office, the concomitant rewards in terms of protecting and compensating the victim certainly make it foreseeable that every effort will be made to assume those burdens.

The defendant, with the victim's consent, may make restitution by providing services, in lieu of money. The victim may designate a person or organization to be the beneficiary of such services. Many courts already use public service as a flexible sentencing option. This section of the Act expands on that familiar concept, and opens the door for creative sentencing of the many creative, sophisticated criminals who are being prosecuted today. Restitution through service, is a particularly viable option when the defendant lacks the financial resources to make monetary restitution feasible.

If the defendant is incarcerated and restitution is ordered, the enforcement of the restitution order may be delayed. Of course, if the defendant has assets, they can be seized under appropriate judicial procedures. Also, if the crime involves property, such as theft of an automobile, that property can be returned to the rightful owner. Where the defendant has no assets and the restitution can only come from the future earnings of an incarcerated defendant, the court can require that restitution be made within five years after the end of the term of imprisonment.

A defendant whose sentence includes an order of restitution is estopped, in subsequent civil proceedings, from denying the allegations which gave rise to his criminal conviction. This in effect, reduces the burden of proof placed on a victim named in the restitution order if he later brings a civil suit, since he will not need to re-establish the defendant's liability. However, the Act has foreclosed the possibility of a double recovery by providing that any amount paid to a victim under a restitution order shall be set off against any compensatory damages recovered in a later civil proceeding.

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45 Id. § 3579(e)(2).
Although not specifically covered by the Act, the issue of apportioning the restitution in multiple-defendant cases has already arisen.\footnote{United States v. Welden, 568 F. Supp. 515 (N.D. Ala. 1983), No. 83-7444 (11th Cir. argued June 25, 1984).} The greatest potential for recovery by victims would be under a theory of joint and several liability that would hold all defendants equally responsible for the full amount of restitution, subject to the victim receiving no more than the full amount. However, there is no prohibition on dividing the restitution amount among all defendants equally or unequally should a court find a greater degree of financial responsibility should be borne by a particular defendant.

In United States v. Welden,\footnote{Id.} the first reported litigation involving the restitution provisions of the Act, the United States District Court for the Northern District of Alabama struck down the restitution provisions as being unconstitutional. The court reasoned that the imposition of restitution at a sentencing proceeding, in effect, makes the restitution order a civil judgment. Because 18 U.S.C. sections 3579 and 3580 prevent a court from impanelling a jury for the purpose of deciding the disputed issues of damages, the restitution provisions were deemed to be in contravention of the seventh amendment,\footnote{U.S. Const. amend. VII.} which secures the defendant’s right to a jury trial in civil actions where the value in controversy exceeds twenty dollars. The court noted that an adjudication of criminal guilt does not remove from the defendant this right to a jury trial in a civil contest.\footnote{568 F. Supp. at 534.}

The court further criticized the Act for its failure to provide standards, such as rules of evidence, rules of discovery, burdens of proof, requirements of notice, and requirements of standing, by which the determination of restitution would be made. The absence of standards, reasoned the court, would give rise to disparate results among federal courts asked to address sections 3579 and 3580. This potential for widely varying results led the Welden court to find the provisions violative of the equal protection requirement of the fifth amendment. Equating a restitution order to a civil judgment, the court found that because these sections permitted entry of a civil judgment against a person on hearsay testimony, without discovery and without cross examination, they also violated the fifth amendment’s due process mandate.

The court’s analysis in the Welden case concerning both the seventh amendment and fifth amendment contentions is questionable. The restitution order is imposed as part of a sentencing hearing and is not an action for damages; it is merely a sentencing option. The Act adds a requirement that the court consider restitution in every case, instead of only those cases where probation is imposed.\footnote{S. Rep. No. 532, 97th Cong., 2d Sess. 30, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 2536.} Restitution as a remedy is not a novel idea. As discussed before, the Federal Pro-


\footnote{\textit{Id.}}

\footnote{U.S. Const. amend. VII.}

\footnote{568 F. Supp. at 534.}


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bation Act provides that the defendant may be required to make restitution, as a condition of probation. Thus, where probation is imposed, the new Act provides no remedy which has not been previously available to, and imposed by, courts. The new provisions merely expand the availability of the restitution concept to all criminal cases, including those where a term of imprisonment or a fine, or both, are imposed.  

A jury trial has never been deemed necessary under the provisions of the Federal Probation Act. Because restitution is part of the sentencing option, it would follow that the defendant would have no greater right to trial by jury on a restitution issue than he would on the length of a prison sentence or the amount of a fine. It is a long-standing provision of our criminal code that a fine or penalty imposed as part of the sentence in a criminal case may be collected "by execution against the property in like manner as judgments in civil cases." This provision has never been challenged as converting a criminal fine into a civil judgment. The fine collection provision does not convert the proceeding at which a fine is imposed into a civil proceeding. Nor does it convert the fine into a civil judgment. It simply makes the procedures for collecting a civil judgment available for collecting a criminal fine.

In addition, the due process and equal protection arguments are inappropriate. In Welden, the defendant was represented by counsel at the sentencing hearing. He and his attorney had the right, as provided by the Federal Rules of Criminal Procedure, to review the presentence report and to present information in mitigation of punishment at the time of the sentencing. Compliance with Rule 32 of the Federal Rules of Criminal Procedure insures that any dispute the defendant may have with the presentence report, including the Victim Impact Statement will be presented to the court. Although due process has been held to be applicable to the sentencing process, this does not mean that each aspect of this process should be turned into a "full-scale evidentiary-type hearing." As noted by the court in Gardner v. Florida, "due process is flexible and calls for such procedural protections as the particular situation demands. . . ." The purpose of the sentencing process "is to ensure that the district court is sufficiently informed to enable it to exercise its sentencing discretion in an enlightened manner."

As to the equal protection concerns, it could be observed that disparate sentencing results arising in different courts is not uncommon. As long as sentences must be based on the circumstances of each case, results will differ. Variation in

51 Id.
52 The defendant has no constitutional right to have a jury participate in the sentencing process. See, e.g., Morgan v. Wainwright, 676 F.2d 476, 480-81 (11th Cir. 1982).
54 Fed. R. Crim. P. 32(a)(1) and 32(c)(3).
56 United States v. Espinoza, 481 F.2d 553, 556 (5th Cir. 1973).
58 United States v. Stephens, 699 F.2d 524, 539 (11th Cir. 1983).
lengths of prison sentences handed down by different district courts does not constitute a violation of equal protection. If lack of uniformity with regard to incarceration does not rise to the level of an equal protection violation, then it seems ludicrous to suggest that disparate results in sentences involving restitution would breach this constitutional guarantee.

Further litigation centering on the restitution provisions of the Act was generated in the Fourth Circuit. The novel issue presented in this case, United States v. Dudley, was the effect of the criminal’s death on an order of restitution. While the court acknowledged that the death of Dudley, before his appeal was heard, abated the penal sanctions such as imprisonment and fines, it held that the restitution order was not so abated. Judge Murnaghan, writing for the court, stressed the difference between restitution, which has the “predominantly compensatory purpose of reducing the adverse impact on the victim,” and measures such as forfeitures which are strictly punitive in nature. Interestingly, Judge Murnaghan went on to discuss, in what was purely dicta, the issues raised by the Welden case.

Both Welden and Dudley reveal that the implementation of the Act, in particular the restitution provisions, will raise interesting and novel legal issues. These issues will clearly demand judicial interpretation, and may ultimately generate a number of new legal doctrines.

V. THE ATTORNEY GENERAL’S GUIDELINES

Recognizing the skeletal nature of the statutory scheme it had created, Congress incorporated into the Act a mandate to the Attorney General to develop and implement guidelines to help the Justice Department give effect to the stated purposes of the Act. These guidelines, addressing a variety of pertinent topics, were published on July 9, 1983. In part, the guidelines supplement the statutory provisions by providing definitions for terms not otherwise defined, such as “victim,” “witness,” and “serious crime.”

The guidelines reveal an effort to be more sensitive and responsive to a victim’s needs by providing the victim with helpful information concerning available emergency medical or social services, compensation, and public programs providing counseling, treatment, and support. Additionally, the guidelines require that victims and witnesses of serious crimes who provide a current address or telephone number should be advised of the following: (1) what steps may be taken, if warranted, to protect the victim, his family, and witnesses from intimidation; (2) the

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40 Id. at 3.
41 Id. at 7.
42 Id. at 6.
45 Id. at 33,776.
arrest or formal charging of the accused; (3) scheduling changes; (4) the release or detention status of the accused; (5) the acceptance of a plea of guilty or nolo contendere, or the results of trial; (6) the date set for sentencing if the defendant is found guilty; (7) the sentence imposed, including the date on which the defendant may be eligible for parole; and (8) for victims, the opportunity to address the court at the time of sentencing. If a victim or witness requests notice, he should also be advised if the defendant escapes or is released from custody.

The guidelines set forth certain instances in which the victims of crimes should be consulted. Specifically, these are the release of an accused pending judicial proceedings and the conditions thereof; the decision not to seek an indictment; dismissal of any charges; the continuance of a judicial proceeding; plea bargains; pretrial diversion programs; juvenile proceedings; restitution; and the presentation to the court of the victims' views regarding sentencing. The burdensome nature of this duty to consult is readily apparent in the context of multivictim cases.

VI. NEW OBLIGATIONS CREATED BY IMPLEMENTATION OF THE ACT

The passage of the Act and the implementation of its requirements will result in substantial changes in the current criminal justice process. Increased burdens will be placed upon investigative agencies, prosecutors, probation officers, and the courts. Since one of the focal points of the Act involves the restitution order, every federal investigative agency will be required to provide the United States Attorney with information about all known victims and any losses they have suffered. This information will include losses by victims who may not have been identified in the indictment.

The first step in this process is determining who is a victim of the crime. For the purposes of the Act, a victim is anyone who suffers direct or threatened physical, emotional, or financial harm as a result of the commission of a crime. This would include individuals who have been subjected to extortionate demands and who consequently suffer emotional harm, and if the threatened actions were carried out, physical and financial harm as well. Anyone who is kidnapped for ransom suffers emotional and financial harm and in all probability physical harm. Individuals who lose money because of fraudulent schemes obviously suffer financial harm, and probably emotional harm. The retiree or disabled person whose social security check is stolen suffers emotional and financial harm. The financial institutions whose funds are embezzled are also victims under the Act. Identification of the victims in the above described examples should not be very burdensome or difficult in most situations.

Multiple victim cases, however, will present some problems. In these cases, investigative agencies may have to devote additional time to the investigation of a given case in order to identify all victims and losses. This could be particularly burdensome in multidefendant fraud cases. In many mail fraud cases, for instance, losses suffered by an individual victim are extremely small. In the classic fraudulent
solicitation case, where a defendant sets up a company and advertises certain products or services for sale, or solicits contributions, the loss to an individual may be less than ten dollars. If the scheme occurs nationwide, however, the cumulative wrongful gains by the defendants could well be substantial. It would be virtually impossible to identify and contact all victims of such a scheme. Yet, if the mandates of the Act are strictly construed, these contacts must be accomplished.

This same type of problem permeates every multidefendant case. The Attorney General's Guidelines recognize that these types of situations will occur. Although the Guidelines state that victim assistance should not be denied solely because there are multiple victims of an offense, some discretion is vested in the United States Attorney to determine the degree of victim services and assistance to be given in each case.

The second step that is required as a precursor to restitution is the determination of the loss. The Act is very specific in setting forth what losses are compensable. If the object of the crime is property, the Act requires the return of the property, or its value as of the date of the loss or the date of sentencing. The most common example of a property crime in the federal system is interstate transportation of stolen automobiles. If the automobile is recovered, the restitution order should provide for its return to the lawful owner. If the automobile is returned, but damaged, the restitution order should include a monetary amount to cover the damages. Where the automobile owner received compensation from an insurer, the order can direct that restitution be made to the insurer.

Other losses that are compensable under the Act are the cost of medical or related professional services, loss in income, and funeral and related expenses in cases that result in the victim's death. The amount of these losses should not be too difficult to ascertain, since they will generally be documented by undisputed evidence such as a hospital or doctor bill, or wage and earnings statements.

After potentially compensable losses have been identified by the government, they must be established as such in court. Some situations will occur in which establishing a loss will be difficult. Once again, multiple victim mail fraud cases provide a good example of the context in which such difficulties arise. Typically such cases transcend the many judicial districts in the country and involve small, but numerous, individual losses. Since restitution may be very complicated and prolong sentencing in these cases, the court could invoke its discretion and limit restitution to identified victims or amounts, or alternatively, choose not to order restitution at all.

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69 18 U.S.C.A. §§ 3579(b)(2) and (3).
70 18 U.S.C.A. §§ 3579(a)(1) and (d).
Embezzlement cases also pose problems in identification of losses, since the amounts computed by the bank, the insurance company, and the defendant will rarely be in agreement. The varying figures will have to be reconciled so that an amount can be specified in the restitution order.

A restitution order will also generate the problem of continued supervision. It is unrealistic to suppose that lump sum payments will be available in many cases. Therefore, some payment or installment plan must be tailored to the defendant’s financial circumstances. Under the present division of responsibilities, the supervision of most restitution payment schemes would fall most naturally in the bailiwick of the Probation Office, with the collection unit of the United States Attorney’s Office supervising payment only in government fraud cases.

The structure of the sentencing hearing may also change in response to concerns about restitution. With the heightened significance of the amount of a victim’s loss and, correlatively, the financial situation of the defendant, we are faced with the specter of seeing the sentencing proceeding turn into an evidentiary-type proceeding, which would, in essence, be a full-blown trial on the issue of damages.

To guard against this transformation of sentencing hearings into mini-trials, the courts can streamline the hearing procedures. Because the Rules of Evidence do not apply to sentencing hearings extensive use can be made of hearsay testimony or documentary evidence. The court must be careful, however, to protect the due process rights of the defendant, and, before accepting any hearsay or other evidence not normally admissible, the court should assure itself that such evidence is reliable. The same procedures used to establish the reliability of informants or reliability of evidence in general should be applied. In addition, scrupulous compliance with the requirements of Rule 32, in affording the defendant and his attorney an opportunity to review the presentence report and personally address the court, will also safeguard due process rights. The requirements that the court disclose in advance of the sentencing hearing any additional evidence to be submitted at the hearing which is not included in the presentence report should ensure the fundamental fairness of the sentencing hearing by guaranteeing that the defendant is advised of the accusation against him and given an opportunity to respond.

VII. Conclusion

The above discussion sets forth several of the new obligations and problems created by the Act. As the implementation of the Act generates more cases, it is certain that additional issues will be raised, such as those set forth in the Welden case. Other novel issues will have to be resolved through litigation and perhaps

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72 FED. R. CRIM. P. 32.
additional legislation. However, in the interim, investigative agencies, the United States Attorney's Offices, and the United States District Courts must endeavor to fully comply with the mandates of the Act without denigration of anyone's statutory or constitutional rights. Although the process may be slow, it is a crucial step in ensuring that victims of crimes, as well as the witnesses who are so essential to the successful investigation and prosecution of criminal offenses, are given proper consideration and treated fairly at all stages of the proceedings.