RESTITUTION IN THE ABATEMENT CONTEXT

Charles See

INTRODUCTION

On December 2, 2001, the Enron Corporation declared bankruptcy, sparking one of the largest scandals in the history of corporate America.[1] As late as August 2000, Enron was a Wall Street darling, hailed as a harbinger of the "New Economy," with a sterling $90-per-share stock price to match.[2] But then-CEO Jeff Skilling abruptly resigned in August 2001 shortly after taking the helm from founder Ken Lay, shocking investors.[3] In a matter of months, the company that a year prior had ranked seventh in the Fortune 500[4] imploded amid a series of accounting restatements, SEC investigations, and a failed merger with its bitter rival, Dynegy.[5] By December 2001, the once blue-chip stock had fallen to less than a dollar per share before Enron filed for Chapter 11 protection.[6] Thousands were laid off.[7] Many more lost their retirement savings.[8]

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1 The N.Y. Times, writing in late 2001, days before Enron filed for bankruptcy, noted that "[t]here have been plenty of other once-unfathomable implosions on Wall Street, but perhaps none so sudden or of such magnitude." Editorial, *An Implosion on Wall Street*, N.Y. TIMES (Nov. 29, 2001), http://www.nytimes.com/2001/11/29/opinion/an-implosion-on-wall-street.html.

2 *See id. See also* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON loc. 5833--71 (Penguin Group, 2012) (ebook), for Wall Street analysts variously describing Enron as an "impressive story," the "Babe Ruth" of trading, and "WOW." McLean and Elkind note that one analyst even apologized for "failing to do justice" to the business.

3 Shaheen Pasha & Jessica Seid, *Lay and Skilling's Day of Reckoning*, CNN (May 25, 2006), https://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict.

4 *See* N.Y. TIMES, *supra* note 1.

5 *See* George J. Benston, *Policy Analysis*: *The Quality of Corporate Financial Statements and Their Auditors Before and After Enron*, CATO INST. 12 (2003), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa497.pdf.

6 Dan Ackman, *Enron Files Chap. 11*, FORBES (Dec. 3, 2001), https://www.forbes.com/2001/12/03/1203topnews.html#6cbd20f62027 ("Enron and 13 related companies filed their bankruptcy petition in a New York federal court.").

7 Frank Ahrens, *From the Ex-Employees: Revenge, Shock, Sadness*, WASH. POST (May 26, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052501954.html ("Horton joined Enron in 1998 and was one of the thousands of employees who boxed up their belongings and marched out of the gleaming Enron tower around the time the company declared bankruptcy in December 2001.").

8 See MCLEAN & ELKIND, *supra* note 2, at 9408 ("Between the company's savings and stock-ownership plans – 60 percent of the total assets in both consisted of Enron stock – 20,000 Enron employees lost about $2 billion in 2001.").

Following the bankruptcy came the inevitable flurry of lawsuits, claiming billions in damages.[9] But for many victims, the *criminal* proceedings took center stage: A conviction of Lay, who had been indicted by a grand jury in mid-2004 for charges including wire fraud, securities fraud, and bank fraud,[10] could offer some measure of vindication for the financial destruction that Lay and other executives had caused.[11] On May 25, 2006, after a sixteen-week jury trial and separate one-week bench trial, Lay was finally convicted, guilty of all ten counts against him.[12] Absent a successful appeal, experts opined he would die in prison.[13]

Enron employees rejoiced.[14] However, the conviction would soon leave a sour taste in the public's mouth. Lay died on July 5, 2006, vacationing in Aspen, the wealthy Colorado resort town, before he was even sentenced.[15] He did not spent a single day in prison. To add insult to injury, Judge Lake, who had presided over his trial a mere six weeks earlier, erased Lay's convictions.[16] Nothing in his opinion suggested that Lay was actually innocent of the crimes he was convicted of. But, by virtue of his timely demise and a common law doctrine called abatement ab initio, Lay would die an "innocent" man. In so doing, Lay would save his estate tens of millions of

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9 *See, e.g.*, James Doran, *Enron Staff Win $85m*, THE TIMES (May 14, 2004), https://www.webcitation.org/5tZ5myXGx?url=http://business.timesonline.co.uk/tol/business/article423518.ece (describing legal victory for former Enron employees in partial settlement of class action).

10 United States v. Lay, 456 F. Supp. 2d 869, 870 (S.D. Tex. 2006) (listing charges).

11 For a discussion of Enron victims' dissatisfaction with settlements resulting from civil litigation, *see* Kris Axtman, *How Enron Awards Do, or Don't, Trickle Down*, CHRISTIAN SCI. MONITOR (June 20, 2005).

12 *Lay*, 456 F. Supp. 2d at 870.

13 *See* Shaheen Pasha & Jessica Seid, *Lay and Skilling's Day of Reckoning*, CNN (May 25, 2006), https://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict/index.htm.

14 Christian Zappone, *Ex-Enron Workers Rejoice After Verdicts*, CNN (May 25, 2006), https://money.cnn.com/2006/05/25/news/newsmakers/enron_reaction/index.htm. Far from taking responsibility or showing some semblance of remorse, since the bankruptcy Lay maintained that he, too, was a victim. MCLEAN & ELKIND, *supra* note 2, at 413. His wife's appearance on NBC's Today Show, where she tearfully told the hosts that the family was "fighting for liquidity" despite living in a $7 million penthouse, had done little to improve his public image. Dan Ackman, *In Houston, a Cry from the Heart*, FORBES (Jan. 29, 2002), https://www.forbes.com/2002/01/29/0129topnews.html#118a65ac4712.

15 Jeremy W. Peters & Simon Romero, *Enron Founder Dies Before Sentencing*, N.Y. TIMES (July 5, 2006), https://www.nytimes.com/2006/07/05/business/05cnd-lay.html?mtrref=www.google.com.

16 *Lay*, 456 F. Supp. 2d at 875 ("[T]he court concludes that Lay's conviction must be vacated and that this action against him must be dismissed.").

dollars in potential criminal restitution payments.[17] Legal academics and laymen alike were furious.[18]

Despite public outrage over the Lay abatement and an emerging consensus in the academic community that abatement is in need of reform,[19] federal courts remain unmoved: Abatement today is the sine qua non in every federal court to have considered the matter. It is well-established that "when a convicted defendant dies while his direct appeal . . . is pending, his death abates not only the appeal, but also all proceedings had in the prosecution from its inception."[20] The defendant's conviction is vacated and the indictment dismissed.[21] Thus, whether he was in the Second, Fifth, or Ninth Circuit, today or in 2006, Ken Lay's conviction would have been abated ab initio.

However, there has historically been much more diversity of thought about the *extent* of abatement. Federal courts routinely abate criminal fines and penalties—orders to pay the government—which are seen as inherently punitive in nature. But the abatement of criminal restitution payments, as in the Lay case, is more controversial. Where courts come out on this issue in large part depends on how they explain abatement in the first place. The "finality" rationale for abatement, which views abatement as justified by the principle that the state should not label a defendant guilty until she has exhausted her opportunity to appeal,[22] supports the abatement of *all*

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17 *Id.* ("[T]he motion of alleged crime victim Russell L. Butler for an order of restitution contained in the instrument titled Crime Victim's Motion Opposing Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment is DENIED.") (omitting citations) (emphasis in the original). See also Juan A. Lozano, *Judge Vacates Conviction of Ken Lay*, WASH. POST (Oct. 18, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101700827.html ("Tuesday's ruling thwarts the government's bid to seek $43.5 million in ill-gotten gains prosecutors allege he pocketed by participating in Enron's fraud.").

18 For the public's reaction, *see, e.g.*, Ann Woolner, *How Kenneth Lay Died an Innocent Man*, OTTAWA CITIZEN, July 8, 2006, at D1 (describing abatement as "the sort of legal principle that may look good on paper, but seems ridiculous in real life"); Leon Gettler, *In Death, as in Life, Lay Cheats His Detractors*, THE AGE (July 8, 2006), https://www.theage.com.au/business/in-death-as-in-life-lay-cheats-his-detractors-20060708-ge2o97.html. (expressing dissatisfaction with abatement); Christopher Helman, *Lay Cheats Justice*, FORBES (July 5, 2006), https://www.forbes.com/2006/07/05/lay_cheats_justice_cz_ch_0705laycheats.html#46ad5e86ea51. For responses from academics, *see e.g.*, Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice and What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2195 (2007) (complaining that abatement of Lay's conviction put justice "in grave jeopardy").

19 *See supra* note 18.

20 *United States v. Brooks*, 872 F.3d 78, 87 (2d Cir. 2017) (quoting *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998)).

21 United States v. Christopher, 273 F.3d 294, 296-97 (3d Cir. 2001).

22 *See, e.g.*, *id.*; United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017) ("In particular, the finality rationale reflects the notion "that the state should not label one as guilty until he has exhausted his opportunity to appeal." (quoting United States v. Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014))).

penalties.[23] Those courts following the "punishment" rationale, in contrast, view abatement as justified only to the extent that the purpose of the punishment can no longer be fulfilled.[24] Fines abate, as there is no reason to punish a dead man, while restitution, which can still be paid out of the defendant's estate to make the victim whole, does not.[25]

With the Supreme Court's recent decision in *Nelson v. Colorado*,[26] however, what was previously a mere common law interpretive dispute has gained a constitutional dimension. Both the Second and Fourth Circuits have held that in light of *Nelson*, due process considerations essentially *mandate* the abatement of criminal restitution payments ordered pursuant to the Mandatory Victims Restitution Act ("MVRA"), the federal law requiring courts to order restitution payments to victims of certain federal crimes.[27] This Article explores the burgeoning split in the federal circuits regarding the treatment of criminal restitution under the abatement doctrine.

The Article proceeds in three Parts. Part I examines the common law doctrine of abatement ab initio and its historical practice, the advent of the victim's rights movement in the 1980s, and the subsequent passage of the MVRA. Part II identifies and discusses the aforementioned circuit split in how to treat restitution in the abatement context, and in particular how federal courts have wrestled with the "finality" and "punishment" rationales that underpin the abatement doctrine. Finally, Part III argues that the recent Second and Fourth Circuit decisions, which relied on *Nelson v. Colorado*[28] to abate restitution payments following the death of defendants appealing their criminal convictions, rest on a fundamental misunderstanding of the nature of the defendant's "right to appeal" and the civil nature of restitution payments. And once the text, history, and purpose of the MVRA are given proper consideration, it becomes clear that Congress has already spoken on this issue: While convictions should abate, restitution should not. New legislation, and new common law doctrine, are unnecessary. The statute controls.

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23 United States v. Brooks: *Second Circuit Decision Illustrates Harms of Abatement Doctrine*, 131 HARV. L. REV. 1147, 1153-54 (2018).

24 *Id.*

25 *See, e.g.*, *Libous*, 858 F.3d at 66 ("First, the interests of justice ordinarily require that a defendant not stand convicted without resolution of the merits of an appeal." (quoting United States v. Wright, 160 F.3d 905, 908 (2d Cir. 1998))).

26 Nelson v. Colorado, 137 S. Ct. 1249 (2017).

27 *See* United States v. Ajrawat, No. 16-4231, 2018 WL 3045619 (4th Cir. June 20, 2018); United States v. Brooks, 872 F.3d 78 (2d Cir. 2017).

28 Nelson v. Colorado, 137 S. Ct. at 1249.

PART I: HOW DID WE GET HERE? THE HISTORY OF ABATEMENT AB INITIO AND THE MANDATORY VICTIMS RESTITUTION ACT

This Part introduces the practice of abatement ab initio and restitution in federal courts. Section I.A describes the abatement doctrine, recapping the major cases and tracing the development of modern abatement practice, where the criminal conviction itself, and not just the appeal, is abated. Section I.B then reviews the MVRA and its predecessor statutes, their purpose, and places their passage in the context of the victims' rights movement.

A. Background to the Abatement Doctrine

While this Article addresses the exact contours of the circuit split in Part II, debates in federal courts over abatement have historically centered around the underlying rationale for the doctrine in the first place: whether abatement is justified on "punishment" and "finality" principles. Those arguing for the primacy of the finality rationale are in part making an argument from history—that the past hundred-or-so years of case law support a defendant rights-protective view of the doctrine. This Section, therefore, examines the history of abatement doctrine. Section I.A.1 considers the early history of abatement: the development of criminal law in the late-nineteenth and early-twentieth century and the first cases to reach the federal courts. Section I.A.2 discusses the diversity of abatement practices in state courts and their role in shaping the practice in federal courts. Many state and federal courts, it notes, practiced a form of abatement that differs substantially from the modern practice: Courts would abate the defendant's *appeal* as moot, but leave the *legal conviction*, and sometimes criminal *penalties*, intact.[29] Finally, Section I.A.3 describes the rise of the practice ultimately endorsed by the Supreme Court and used in federal courts today—the abatement of *all criminal proceedings*, including the conviction, and any associated criminal penalties.

1. Early Years of Federal Abatement

Abatement, at least in federal courts, was a twentieth century innovation. For the first hundred years of American history, criminal law

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[29] When this Article speaks of abating, or leaving intact, a "conviction," it refers to the court's legal finding that the person was guilty of a crime. See *Conviction*, BLACK'S LAW DICTIONARY (10th ed. 2014). Today, when a court "abates" a conviction, the conviction is vacated and the indictment is dismissed. *See, e.g.*, United States v. Lay, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006) ("Since the Fifth Circuit Court of Appeals has adopted the abatement rule . . . the court concludes that Lay's conviction must be vacated and that this action against him must be dismissed.").

was almost exclusively managed by state governments.[30] Rapid economic growth and technological innovation in the late 1800s led to increases in trade and communication across state lines, broadening the reach of federal criminal law.[31] Federal courts gained appellate jurisdiction over criminal cases in 1879, but it wasn't until Congress "burst out of its cage" in the first few decades of the twentieth century that Congress finally crafted significant criminal legislation at the federal level.[32] Federal cases dealing with abatement are scarce in these early years, and Supreme Court had little to say on the matter when the issue arose.[33]

The Supreme Court's two direct decisions on abatement in the nineteenth century treat the abatement of criminal *appeals* in a practical sense as a foregone conclusion—the defendant had died, so the court of appeals could give no decision on the merits.[34] The first, *United States v. List*, merely notes that given the defendant appealing his conviction had died, "as this is a criminal case, it is considered by the court that this cause has abated."[35] A year later, in a similarly sparse opinion, *Menken v. City of Atlanta*, the Supreme Court affirmed itself, repeating with no elaboration: "this cause has abated."[36] This language, however, left unclear things that, to the modern scholar of the doctrine, would seem crucial to the decision. What did it mean that "the cause had abated"? Was the defendant now viewed as legally no longer guilty of the crime? Was the judgment, say a fine or restitution payment, abated as well?[37]

In these early years, federal appellate courts were apparently equally confused. In an early-1900s case dealing with the abatement of criminal fines, *United States v. Pomeroy*, the Second Circuit bemoaned the lack of guidance from the higher courts:

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30 Thane Rehn, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1994 (2008) ("Before the twentieth century, criminal law was not a significant concern of the federal government; rather, it was almost exclusively the province of the state governments."). The Supreme Court heard constitutional challenges to the new, significant criminal statutes, but generally upheld them under the Commerce Clause. *Id. See also, e.g.*, Hoke v. United States, 227 U.S. 308, 323 (1913) ("Congress . . . may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.").

31 Rehn, *supra* note 30, at 1994.

32 *Id.* (quoting LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 261-62 (BasicBooks, 1993)).

33 State courts, however, have extensively considered the doctrine. *See infra* section I.A.4 for discussion.

34 *See* Razel, *supra* note 18, at 2198 ("Beginning in the late nineteenth century, the earliest American cases dealing with the question generally treated abatement as the obvious course of action when a defendant died.").

35 List v. Pennsylvania, 131 U.S. 396 (1888).

36 Menken v. Atlanta, 131 U.S. 405 (1889).

37 *See* Alexander F. Mindlin, Note, *"Abatement Means What It Says": The Quiet Recasting of Abatement*, 67 N.Y.U. ANN. SURV. AM. L. 195, 211 (2011) (noting this opacity, and arguing that to traditional courts, the defendant's fate "was not the point").

> It is well settled that all prosecutions for crimes before judgment are abated by the death of the party charged. When the punishment for a crime is imprisonment, the death of the convict, of course, puts an end to the punishment; but, upon the question whether a judgment in a criminal prosecution imposing a fine as a punishment is abrogated by the defendant's death, there appears to be very little authority.[38]

Abatement, thus, was apparently a "well settled" doctrine by 1907, but what exactly it meant to "abate" was much less clear.

2. A Diversity of Practices in State and Federal Courts

Given the dearth of guidance, it is not surprising that the lower federal courts did not strictly adopt the Supreme Court's vague abatement language from *List* and *Menken*. Describing abatement, the Ninth Circuit used the expressions "the cause of action abated"[39] and "the criminal action abated."[40] The Seventh Circuit held that "the judgments abated."[41] The Fifth, that "a criminal prosecution abates ab initio upon the death of an appellant."[42] Finally, the Second simply wrote that "[t]he authorities give us no alternative but to dismiss the appeal."[43]

Instead, federal courts turned to the states for guidance.[44] And early state court practices varied widely. One common method for dealing with abatement was to abate the appeal, but to leave the conviction, and attendant punishment or penalty, intact—the opposite of modern abatement.[45] As one

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38 United States v. Pomeroy, 152 F. 279, 280 (C.C.S.D.N.Y. 1907).

39 United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909).

40 Baldwin v. United State, 72 F.2d 810, 812 (9th Cir. 1934).

41 McGovern v. United States, 280 F.73, 74 (7th Cir. 1922).

42 Daniel v. United States, 268 F.2d 849, 850 (5th Cir. 1959).

43 United States v. Mook, 125 F.2d 706 (2d Cir. 1942).

44 *See, e.g.*, United States v. Pomeroy, 152 F. 279 at 281; United States v. New York Cent. & H.R.R. Co., 164 F. 324 (2d Cir. 1908) (citing to state court cases from Georgia, Illinois, Missouri, Texas, Kansas, and Colorado). For other instances of federal courts relying on state court opinions for guidance, *see, e.g.*, Howard v. Wilbur, 166 F.2d 884, 885 (6th Cir. 1948) (citing to an Iowa Supreme Court case for the proposition that "the rule in criminal cases is that the death of a defendant pending appeal abates the appeal"); United States v. Mitchell, 163 F. 1014, 1015 (C.C.D.Or. 1908) (citing to an Illinois Supreme Court case for the proposition that "an appeal or writ of error to a higher court is abated by the death of the defendant in a criminal cause"); Wasserman v. United States, 161 F. 722 (8th Cir. 1908) (distinguishing a Texas Court of Appeals case on the grounds that the abated fines were in criminal, rather than civil, proceedings).

45 *See* Mindlin, *supra* note 37, at 209. Mindlin notes that this practice may originally have been due to the writ system, which differs from the modern system of appeals. As he writes, "a writ of error 'was, unlike an appeal, an original action, not a continuation of the case that had been litigated in the trial court.'" *Id.* (quoting David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 525 (1990)). The reviewing court was in essence trying the record, rather than the defendants; it therefore had limited power to change the outcome of the proceedings. *Id.*

Oregon court wrote when dealing with a deceased appellant, although the appeal was abated, this still left the judgment in the court below in full force:

> When the judgment was rendered against Whitley . . . it devolved upon him to procure a reversal of that judgment, if he expected to escape the sentence inflicted by it, or save his property from the payment of the costs and disbursements adjudged against him. [H]is dying as completely satisfied the sentence of the law as if he had lived and served out his time in the penitentiary; but it did not satisfy the judgment for costs and disbursements, any more than his serving out his time in the penitentiary would have done.[46]

This practice remains widespread in a substantial minority of states.[47] Others included abating the punishment but leaving the conviction intact (frequently practiced in the case of fines or other criminal penalties)[48] and abating the conviction (in addition to the appeal) as well as any associated penalties.[49]

In federal courts, this final practice of abating the conviction itself, and not just the appeal, would come to be the dominant one by the 1960s. A 1963 review of case law by the Eighth Circuit in *Crooker v. United States*, found "no difference in the nature or scope of the abatement" among the federal courts, despite the aforementioned diversity of terminology.[50] As the *Crooker* court stated confidently, federal courts "have recognized the rule that the death pending appeal of a defendant convicted of a criminal offense abates not only the appeal, but likewise all proceedings had in the prosecution from

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46 Whitley v. Murphy, 5 Or. 328, 331-32 (1874).

47 The Illinois court of appeals, in reviewing the issue in *People v. Robinson*, found fourteen states which dismiss appeals but leave convictions intact: Alabama (Ulmer v. State, 39 Ala.App. 519 (1958) (court ruled "appeal abated" without saying more)); Connecticut (State v. Trantolo, 209 Conn. 169 (1988) (appeal dismissed as moot given fine uncollectible)); Delaware (Perry v. State, 575 A.2d 1154 (Del. 1990)); Florida (State v. Clements, 668 So.2d 980 (Fla. 1996)); Georgia (Harris v. State, 229 Ga. 691 (1972)); Indiana (Whitehouse v. State, 266 Ind. 527 (1977)); Kentucky (Royce v. Commonwealth, 577 S.W.2d 615 (Ky. 1979)); Michigan (People v. Peters, 449 Mich. 515 (1995)); Minnesota (In re Carlton, 285 Minn. 510 (1969)); Montana (State v. Cripps, 177 Mont. 410 (1978)); New Hampshire (State v. Poulos, 97 N.H. 352 (1952) (court ruled "appeal abated" without elaboration)); North Dakota (State v. Dalman, 520 N.W.2d 860 (N.D. 1994) (post-conviction appeal)); Oregon (State v. Kaiser, 297 Or. 399 (1984)); and South Carolina (State v. Anderson, 281 S.C. 198 (1984)). People v. Robinson, 298 Ill. App. 3d 866, 873 n.3 (1998). *See also* Polhemus v. State, 659 S.W.2d 433 (Tex. Crim. App. 1983).

48 *See* Mindlin, *supra* note 37, at 212 ("Many fine-abating opinions thus begin with the observation that the defendant's body is unavailable for punishment.").

49 *Id.* at 220. Mindlin traces the genesis of this practice to the Iowa Supreme Court, in *State v. Kriechbaum*, which declared that "[t]he judgment below could not become a verity until the appellate court made it so by an affirmance . . . . The question of the defendant's guilt was therefore necessarily undetermined at the time of his death." State v. Kriechhaum, 258 N.W. 110, 113 (Iowa 1934).

50 Crooker v. United States, 325 F.2d 318, 319 (8th Cir. 1963).

its *inception*."[51] Federal abatement, in the *Crooker* court's construction, was thus not limited to just the appeal, but extended to the *entire criminal proceedings* as well, including the conviction, fines and other forms of punishment.[52] The conviction would be vacated and the deceased would be left as if she had never been charged with a crime at all. The *Crooker* court was wrong, of course: There is ample case law across multiple circuits indicating that federal courts, likely influenced by state court practices, had at times abated appeals, but left the conviction intact.[53]

3. Durham, Dove, Moehlenkamp*: Abatement Today*

But the Eighth Circuit's narrative of the development of the abatement doctrine in federal courts has become the dominant one and in fact was echoed by the Supreme Court a few years later in 1971. In *United States v. Durham*, 401 U.S. 481 (1971), the Ninth Circuit affirmed a criminal defendant's conviction and the defendant filed for certiorari. The defendant died, but the Supreme Court subsequently granted certiorari, vacated the judgment of the Ninth Circuit and remanded the case to the district court with instructions to dismiss the indictment.[54] Acknowledging it had "basically allowed the scope of the abatement to be determined by the lower federal courts," the Court, relying on the Eighth Circuit's research, endorsed the "unanimous" rule adopted by the courts of appeals, that both the "appeal and *all proceedings* . . . in the prosecution from its inception" abate.[55]

A mere five years after endorsing the lower federal courts' supposedly "unanimous" approach to the abatement doctrine, though, the Supreme Court reversed itself, [56] overruling *Durham* in *Dove v. United States*.[57] Writing in

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[51] *Id.* at 320 (citing to J.C. Vance, *Annotation, Effect, on Proceedings Below, of Death of Defendant Pending Appeal From Criminal Conviction*, 80 A.L.R.2d 864-72 (1962)).

[52] *Id.* at 321 (abating the fine as "[a] fine is not something to which the United States is entitled by way of compensation or damages, but only as a matter of punishment being thereby meted upon the defendant") (emphasis added).

[53] *See, e.g.*, Pope v. United States, 394 F.2d 832, 832 (5th Cir. 1968) (noting that "[w]here a convicted defendant dies pending review of his case, the appeal is to be dismissed," and refraining from ruling on the punishment); Howard v. Wilbur, 166 F.2d 884 (6th Cir. 1948) (distinguishing the abatement of criminal cases, where "the rule . . . is that the death of a defendant pending appeal abates the appeal," with civil cases, where "the death of a party . . . does not abate the appeal"); United States v. Mook, 125 F.2d 706, 706 (2d Cir. 1942) (dismissing the appeal but not the conviction); Baldwin v. United States, 72 F.2d 810, 812 (9th Cir. 1934) (distinguishing the appeals of living defendants from that of the deceased defendant-appellant Charles H. Barnett, whose "appeal is therefore dismissed"). For other federal cases which abate the appeal alone, *see also* John H. Derrick, *Annotation, Abatement Effects of Accused's Death before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446 § 7 (2009).

[54] Durham v. United States, 401 U.S. 481, 482-83 (1971).

[55] *Id.* at 482 (emphasis added).

[56] Joseph Sauder, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement* Ab Initio *Doctrine*, 71 TEMP. L. REV. 347, 351 (1998).

[57] Dove v. United States, 423 U.S. 325, 325 (1976) (per curiam).

dissent in *Durham*, Justice Blackmun had, at the time, argued that the petition for certiorari, rather than the indictment, should be dismissed: "[T]he dismissal of the indictment," he complained, "wipes the slate entirely clean of a federal conviction which was unsuccessfully appealed throughout the entire appeal process to which the petitioner was entitled as of right."[58] Justice Blackmun now got his wish: While dismissing, rather than abating, a case with facts essentially identical to those in *Durham*,[59] the Court cryptically held in a three-sentence opinion that "[t]o the extent that *Durham* . . . may be inconsistent with this ruling, *Durham* is overruled."[60] Once again, the lower courts were left to "divine the intentions of the Supreme Court."[61]

The Seventh Circuit was the first to interpret the decision, and it immediately narrowed the opinion to, essentially, its facts. Criminal appeals in the Supreme Court, the *Moehlenkamp* court noted, were materially different from those in a Court of Appeals: Appeals at the appellate level are of right, but writs of certiorari are purely discretionary.[62] Thus, while the Supreme Court, as in *Dove*, could deny cert without prejudicing the rights of the deceased defendant, "the interests of justice . . . require that [defendants exercising as of right appeals] not stand convicted without the resolution of the merits of his appeal, which is an integral part of [our] system for finally adjudicating innocence or guilt."[63]

With *Dove* disposed of, the Seventh Circuit held that the appeal was moot, vacated the conviction, and remanded the case to the district court to dismiss the indictment.[64] Thus, an opinion that expressly, explicitly overruled *Durham* "to the extent that it is inconsistent with [*Dove*],"[65] was, the Seventh Circuit held, instructing appellate courts to do exactly what they were doing in the pre-*Dove* era. "We do not believe," the court wrote: "that the Court's cryptic statement in *Dove* was meant to alter the longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him."[66]

The *Moehlenkamp* interpretation of *Dove*, that the Supreme Court was promulgating a rule that applied only to itself, quickly became the dominant one. At some level, this is difficult to understand. *Moehlenkamp* finds a distinction in *Dove* between abatement for first appeals (i.e., those to the court of appeals), which it holds are "of right," and second appeals (those to

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58 *Durham*, 401 U.S. at 484-85 (Blackmun, J, dissenting).
59 United States v. Christopher, 273 F.3d 294, 296 (3d Cir. 2001).
60 Dove v. United States, 423 U.S. 325, 325 (1976).
61 United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977).
62 *See id.* at 128.
63 *Id.*
64 *Id.*
65 *Dove*, 423 U.S. at 325.
66 *Moehlenkamp*, 557 F.2d at 128.

the Supreme Court), but this distinction is not made in the text of the opinion. One must infer from the Court's language that *Durham* is only overruled "to the extent that it is inconsistent with this ruling." But perhaps other factors have led to its enduring popularity. *Dove* is a three-sentence long per curiam opinion, while *Durham* is not; *Moehlenkamp* gave judges an opportunity to ignore it. And *Moehlenkamp* was the first appellate opinion to consider abatement in a post-*Durham* world, giving it first-mover advantage.

Regardless of the reason, however, the *Moehlenkamp* explanation has had undeniable persuasive authority. It has been cited by nine[67] separate courts of appeals for the proposition that "the *longstanding and unanimous* view of the lower federal courts [is] that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the *entire course of the proceedings brought against him*."[68] As this Article has illustrated, that "abatement" meant "vacating the conviction," historically, was not the unanimous view. But the *Moehlenkamp* court has now, at least, made it a reality.

B. Discussion of the Mandatory Victims Restitution Act

Section I.B of this Article will provide brief background history on the Mandatory Victims Restitution Act, the federal statute allowing federal courts to order restitution payments, before returning to the current circuit split in how to treat restitution payments in Part II.

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67 *See* Mindlin, *supra* note 37, at 198. For specific cases, *see* United States v. Rich, 603 F.3d 722, 724 (9th Cir. 2010) ("The rationale for abatement ab initio is that 'the interests of justice ordinarily require that [the deceased] not stand convicted without resolution of the merits of his appeal.'" (quoting *Moehlenkamp*, 557 F.2d at 128)); United States v. DeMichael, 461 F.3d 414, 416 (3d Cir. 2006) ("When a defendant dies pending an appeal, 'the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an integral part of our system for finally adjudicating his guilt or innocence.'" (quoting United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir.1977))); United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004) (citing to *Moehlenkamp* for the proposition that "[d]espite the common acknowledgment that abatement ab initio is a well-established and oft-followed principle in the federal court"); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) ("[W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal . . . ." (quoting *Moehlenkamp*, 557 F.2d 126, 128 (7th Cir.1977))); United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) ("The principle underlying the abatement rule is that "the interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits" of an appeal." (quoting *Moehlenkamp*, 557 F.2d 126, 128 (7th Cir.1977))); United States v. Johnson, 937 F.2d 609 (6th Cir. 1991) (citing *Moehlenkamp* for the proposition that "[d]eath pending direct appellate review of a criminal conviction abates the appeal, the conviction, and any fine accompanying such conviction"); United States v. Littlefield, 594 F.2d 682, 683 (8th Cir. 1979) (citing *Moehlenkamp* for the proposition that "[t]he death of a defendant in a criminal case during the pendency of an appeal renders moot the appeal and abates the cause against the deceased defendant").

68 *Moehlenkamp*, 557 F.2d at 128 (emphasis added).

Restitution has deep roots in the common law and is common in the civil context, but the practice had little role in criminal law until late in the twentieth century.[69] In early colonial times, a victim's responsibilities included "conducting a large part of his own investigations, obtaining an arrest warrant, and presenting prosecution at trial," but by the end of the colonial period, the creation of public prosecutorial offices and police departments dramatically reduced the role of the victim in the criminal justice system.[70] Incarceration replaced money damages as the primary form of punishment, and the focus shifted from compensating the victim for her injury to protecting the public interest.[71] Federal law authorized judges to order defendants to pay compensation to crime victims, but the power was limited to a condition of probation.[72] The welfare of crime victims was, by the twentieth century, only a minor concern.

Beginning in the 1960s, however, the Victims' Rights Movement ("VRM") sought to re-center the role of the victim in the criminal justice system.[73] Combining aspects of the general civil rights movement, the women's movement, and the law and order lobby, the VRM cut across conventional political lines and achieved widespread and rapid success. Dozens of states amended their constitutions to guarantee basic rights for crime victims, and thousands of federal and state statutes governing their rights and interests have been enacted.[74]

Perhaps the VRM's most lasting accomplishment was the Victim and Witness Protection Act ("VWPA").[75] Passed by Congress and signed by President Reagan in 1982, the Act provides federal courts with discretionary authority to order restitution to victims of most federal crimes, and authorizes restitution payments for three categories of costs: the value of lost property,

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69 Historically, however, the line between crimes and torts has been blurry. *See, e.g.*, Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782 (1997) (noting that distinction probably did not begin until the nineteenth century); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 80 (1996) (tracing the history of civil and criminal law to "between 1180 and 1290").

70 Heidi M. Grogan, Note, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1082 (2005). Grogan relies on WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE §1.4(k) (2d ed. 2004) for this early colonial history.

71 *Id.*

72 *Id.*

73 *Id.*

74 John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002). These provisions, Gillis and Beloof note, include "the right to be informed of hearings, trial dates, and the status of their case; the right to be heard at sentencing and parole hearings through victim impact statements; and the right to receive restitution from convicted offenders." *Id.*

75 18 U.S.C. § 3663 (2012).

the expenses incurred recovering from bodily injury, and funeral costs.[76] In 1994, pursuant to the Violence Against Women Act ("VAWA"), Congress added 18 U.S.C. § 3663(b)(4) to the list, covering the "reimburse[ment] [of] the victim for lost income and necessary child care, transportation, and other expenses related to the participation in the investigation or prosecution of the offense."[77]

Exercise of this restitutionary authority under the VWPA, however, was discretionary, and courts' refusal to order payments curtailed the VWPA's effectiveness: Federal courts, according to the United States Sentencing Commission, ordered restitution in only 20 percent of criminal cases.[78] To add to the dysfunction, provisions in the 1994 VAWA provided for mandatory restitution provisions in some but not all offenses, as well as different procedures for the issuance of the restitution orders.[79]

In 1996, Congress responded: "[W]hile significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution."[80] The result was the Mandatory Victims Restitution Act of 1996. As its title suggests, the Act makes restitution a mandatory part of sentences imposed for certain categories of federal offenses, including certain types of violent crimes and property crimes, and requires restitution for the same categories of costs as covered in the VWPA, as amended.[81] Individuals must, however, suffer a physical injury or pecuniary loss.[82]

II. CIRCUIT SPLIT: DO RESTITUTION ORDERS ABATE?

As discussed above in Section I.A, federal courts are today in now-universal agreement that "a conviction abates on the death of the accused

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76 *Id.* § 3663(b)(1) (lost property); § 3663(b)(2) (bodily injury); § 3663(b)(3) (funeral costs).

77 18 U.S.C. § 3663(b)(4) (2012).

78 S. Rep. No. 104-79, at 13 (1996) ("According to the 1994 Annual Report of the United States Sentencing Commission, during fiscal year 1994, Federal courts ordered restitution in only 20.2 percent of criminal cases."). *See also* U.S. SENTENCING COMM'N, ANNUAL REPORT 60, tbl. 22 (1994). Data from the report show that restitution was ordered in only 27.9 percent of all murders, 28.2 percent of all kidnappings, 55.2 percent of all robberies, and 12.5 percent of sexual-abuse cases. *Id.*

79 18 U.S.C. § 2248 (2012); 18 U.S.C. § 2259 (2012).

80 S. Rep. No. 104-179, at 13 (1996).

81 18 U.S.C. § 3663A(c)(1)(A) (2012). "[C]rime[s] of violence" are defined under 18 U.S.C.A. § 16 (2012), and include those offenses in which the relevant offense has an element "the use, attempted use, or threatened use of physical force against the person or property of another," or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* There is no further definition of property crimes, which are merely described as "offense[s] against property under this title," and include "any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii) (2012).

82 *Id.* § 3663A(c)(1)(B).

before his appeal has been decided."[83] That is, where a convicted defendant dies while appealing his conviction in a federal court, "the conviction will be abated and the case remanded to the District Court with instructions to dismiss the indictment."[84] However, the treatment of restitution orders has divided the courts of appeals.[85]

In Section II.A, this Article considers the "punishment rationale" endorsed by those courts holding that restitution does not abate, because, they argue, restitution is fundamentally compensatory, not punitive in nature.[86] In Section II.B, this Article examines the "finality rationale," endorsed by courts holding that restitution does abate, as "a defendant not stand convicted without resolution of the merits of an appeal."[87] Finally, Section II.C considers the recent opinions by the Second[88] and Fourth Circuits,[89] which argue that the 2017 Supreme Court opinion *Nelson v. Colorado* forecloses the debate entirely, and mandates the abatement of restitution payments for the quasi-due process reasons that underpin the finality rationale.[90]

A. Punishment Rationale

As discussed supra Part I, in the years since *Moehlenkamp* (re)interpreted *Dove* to endorse *Durham*, there has been broad agreement in federal courts that criminal *proceedings*, and not merely the appeal, abate following the death of a criminal defendant.[91] What is less clear, however, is exactly *why* this happens to the defendant. The *Durham* Court itself, when it announced the rule that abatement acted on the proceedings and not merely the appeal, failed to provide any real underlying philosophy behind the doctrine. Instead, the Court emphasized, unhelpfully, the seemingly contradictory ways in which the Supreme Court has dealt with the doctrine:

> Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted

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83 United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001).

84 *Id.*

85 *See* United States v. Brooks*: Second Circuit Decision Illustrates Harms of Abatement Doctrine*, *supra* note 23, at 1151 (noting the split, and citing cases). The Article attributes the split to disagreements between the circuits on the justification for abatement; while the punishment rationale, which does not support abating restitution payments, was initially dominant, the finality rationale gained traction, and is today the dominant view. *Id.*

86 *See* United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001) ("We conclude that the order of restitution in this case is more compensatory in nature than penal . . . To absolve the estate from refunding the fruits of the wrongdoing would grant an undeserved windfall. We are persuaded that abatement should not apply to the order of restitution in this case.").

87 United States v. Brooks, 872 F.3d 78, 87 (2d Cir. 2017).

88 *See id.*

89 *See* United States v. Ajrawat, No. 16-4231, 2018 WL 3045619 (4th Cir. June 20, 2018).

90 Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

91 *See supra* section I.A.3.

> certiorari, vacated the judgment below, and ordered the complaint dismissed. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take whatever action it deemed proper. Our practice in cases on direct review from state convictions has been to dismiss the proceedings. In an earlier case the Court announced the appeal had abated, while in another the Court stated the cause had abated.[92]

Although presented with an opportunity to clarify the issue, the Court instead merely noted the supposed uniformity of federal practice in abating criminal proceedings,[93] and in the years since, two divergent strands of rationale for abatement emerged.[94]

Under the punishment rationale, criminal sentences and unpaid fines abate because they are rendered moot by the death of the defendant.[95] Abatement, for these courts, "[does] not speak to the question of the defendant's guilt; it serve[s] instead to recognize the court's limitations."[96] The practice rather is borne out of practicality: There is little purpose, the argument goes, in punishing a dead man. In the words of the Fifth Circuit, "an uncollected fine in a criminal case is comparable to the balance of the defendant's prison sentence; the uncollected fine, like the remaining sentence, abates with death."[97] Thus, abatement is not about exoneration, but expediency.

But it does not necessarily follow that simply because the criminal proceedings have abated restitution is abated as well. After all, the victim still has an interest in the money judgment that the now-deceased defendant was ordered to pay. The question of whether restitution abates, therefore, comes down to whether the restitution payment is fundamentally punitive or compensatory in nature.

An early 1990s case, *United States v. Asset*, is illuminating. In 1992, Melba Asset pled guilty to issuing altered government checks in violation of 18 U.S.C. § 495.[98] As part of the plea agreement, Melba agreed to pay the government $50,000, representing restitution to the United States Railroad Retirement Board, the "victim" of Asset's crime.[99] As this is an abatement case, Asset, of course, died. The district court refused a request by the

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92 Durham v. United States, 401 U.S. 481, 482 (1971) (internal citations omitted).

93 *Id*. at 481.

94 *See generally* Mindlin, *supra* note 37. Mindlin notes that "[t]he punitive-compensatory approach to abatement of restitution orders made headway in the courts during the early 1990s." *Id.* at 218. The finality appellate rationale for abatement "first appeared in the federal courts in *United States v. Moehlenkamp*." *Id.*

95 *See* United States v. Brooks*: Second Circuit Decision Illustrates Harms of Abatement Doctrine*, *supra* note 23, at 1151 (2018).

96 *See* Mindlin, *supra* note 37, at 208.

97 United States v. Morton, 635 F.2d 723, 725 (8th Cir. 1980).

98 United States v. Asset, 990 F.2d 208, 210 (5th Cir. 1993).

99 *Id*.

executor of his estate for a return of the $50,000 Asset had paid under the terms of the plea agreement.[100] The Fifth Circuit affirmed. "Courts," it noted, "have consistently interpreted the abatement principle to apply only to *penal* aspects of the criminal proceeding."[101] Thus, while the death of the defendant abated any unserved portion of the prison term and uncollected fines (the punitive portion of the sentence), the same was not true of the restitution payment. "Unless," the court wrote, "the goal of restitution is to punish the defendant, the principles of abatement simply do not apply."[102] Restitution served a different purpose: to restore the victim's losses.[103] And this purpose, the court held, survived the defendant's death, and therefore did not abate.[104]

After Congress gave federal courts the power to order restitution in 1982[105] and the Fourth Circuit, conducting the punitive-compensatory analysis described above, held in *United States v. Dudley*[106] that restitution payments do not abate, it appeared for a time that this punishment-centered approach would become settled doctrine.[107] The punishment rationale gained steam throughout the '90s and by 2001 it had been adopted by the Third,[108] Fourth,[109] Fifth,[110] Sixth,[111] and Ninth Circuits.[112] Over the ensuing decade, however, the punishment rationale would become eclipsed by what has been termed the finality rationale.[113]

B. Finality Rationale

The finality rationale in the federal system can be traced back to the first post-*Dove* court of appeals decision, *United States v. Moehlenkamp*.[114] As discussed supra Part I, the Supreme Court, in overturning *Durham*, had thrown the entire doctrine of abatement into question. *Moehlenkamp*

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100 *Id.*

101 *Id.* at 211.

102 *Id.* at 214.

103 *Id.*

104 *Id.*

105 For discussion of the Victim Witness Protection Act, *see supra* Part I.B.

106 United States v. Dudley, 739 F.2d 175 (4th Cir. 1984).

107 *See* Mindlin, *supra* note 37, at 218.

108 United States v. Christopher, 273 F.3d 294, 298 (3d Cir. 2001) ("The question whether an order of restitution should abate depends essentially on its categorization as penal or compensatory.").

109 United States v. Dudley, 739 F.2d 175 (4th Cir. 1984).

110 United States v. Asset, 990 F.2d 208 (5th Cir. 1993) (distinguishing between penal and compensatory orders of restitution).

111 United States v. Johnson, No. 91-3287, 91-3382, 1991 WL 131892 (6th Cir. July 18, 1991) ("To the extent that the deceased appellant has been ordered to make restitution as a consequence of his conviction, such restitution is not affected hereby.").

112 United States v. Cloud, 921 F.2d 225, 226-27 (9th Cir. 1990) (refusing to abate restitution, on grounds that this would violate the compensatory purposes of the VWPA).

113 This punitive-compensatory analysis does come up in other legal contexts. *See infra* Part III.B.

114 United States v. Moehlenkamp, 557 F.2d at 126.

reaffirmed the doctrine, but grounded it, rather than in punishment rationale, in the defendant's right of appeal. Relying on *Griffin v. Illinois*, the *Moehlenkamp* court wrote:

> [W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an integral part of (our) system for finally adjudicating (his) guilt or innocence.[115]

While the punishment rationale frames the issue as one of practicality—the defendant is dead, and thus beyond the ability of the state to punish—the finality rationale focuses on fairness issues: The defendant should not be labeled as guilty until she has exhausted her opportunity to fully appeal the conviction.[116] And the state should not "enjoy the fruits of an uncontested conviction."[117]

Advocates of the finality rationale argue that abatement is an almost *exonerative* act. The abatement of the conviction, after all, pursuant to *Durham*, abates not just the appeal, but "all prior proceedings" as well,[118] including the indictment and conviction. Thus, proponents of the doctrine argue, the defendant should be viewed as presumptively not guilty of the crime. As the Fifth Circuit described it when abandoning the punishment rationale and endorsing the finality rationale:

> Any references to the wrongful nature of the defendant and his actions are conditioned on an appellate court's upholding the conviction, assuming the defendant pursues an appeal. The defendant's death during the pendency of appeal pushes a court to nullify all prior proceedings . . . Thus, at least in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone.[119]

With the criminal proceedings expunged, the presumption of innocence is reestablished, the argument goes. Fines and payments must abate, but so too must restitution payments.[120] The government no longer has any legal basis for retaining the funds, according to the doctrine, and so it is as much entitled to retain them as if the defendant had been acquitted.[121]

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115 *Id.*at 128 (quoting Griffin v. Illinois, 351 U.S. 12, 18, (1956)).
116 United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004).
117 *Id.* at 414.
118 *Id.* at 415.
119 *Id.* at 415-16.
120 *Id.* at 418.
121 United States v. Libous, 858 F.3d 64, 67 (2d Cir. 2017).

C. Does *Nelson v. Colorado* Now Control?

In recent years, the finality rationale has gained the upper hand in the debate. A majority of federal courts now endorse it,[122] along with its exonerative and restitution-blocking effects. And scholars, while criticizing abatement from a policy perspective,[123] have generally been in agreement that the finality rationale has a "more accurate argument" for abatement.[124] Until last year, the issue was viewed as one of judicial interpretation: Which rationale, as the Fifth Circuit put it, had "the better explanation" for abatement?[125] The Supreme Court had not spoken on the issue since *Dove*, and there was no constitutional dimension at play.

As Section C will show, however, the Second and Fourth Circuits, in *United States v. Brooks*, discussed infra in Section II.C.2, and *United States v. Ajrawat*, discussed infra in Section II.C.3, respectively, have held that federal courts no longer have a choice in the matter. The punishment rationale, they argue, is no longer, and *Nelson v. Colorado*, a 2017 opinion in which the Supreme Court held that a Colorado state law permitting the state to retain conviction-related assessments (including restitution payments) violated the 14th Amendment (discussed infra in Section II.C.1), is entirely controlling.

1. Nelson v. Colorado

In *Nelson*, the Supreme Court considered a challenge to a Colorado law (the "Exoneration Act") requiring a defendant to prove her innocence by clear and convincing evidence to obtain to the refund of costs, fees, and

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122 Six courts, including the *Brooks* and *Ajrawat* courts, abate restitution payments, while only two do not. *Compare* United States v. Christopher, 273 F.3d 294 (3d Cir. 2001) (holding restitution order is not abated), *and* United States v. Johnson, 937 F.2d 609 (6th Cir. 1991) (unpublished per curiam) (holding the same), *with* United States v. Ajrawat, No. 16-4231, 2018 WL 3045619 (4th Cir. June 20, 2018) (holding that restitution orders abate), *and* United States v. Brooks, 872 F.3d 78 (2d Cir. 2017) (holding the same); United States v. Volpendesto, 755 F.3d 448, 451 (7th Cir. 2014) (same); United States v. Rich, 603 F.3d 722 (9th Cir. 2010) (same); United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004) (same); United States v. Logal, 106 F.3d 1547 (11th Cir. 1997) (holding the same).

123 *See, e.g.*, United States v. Brooks*: Second Circuit Decision Illustrates Harms of Abatement Doctrine*, *supra* note 23, at 1153 (2018) (arguing that the abatement of restitution payments encourages defendants hoping for postconviction reversal to delay the initial restitution payment); Sabrina Margret Bierer, *The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large*, 78 BROOK. L. REV. 1699, 1699 (2013) (criticizing the abatement of restitution payments for "deny[ing] the victim his interest in compensation").

124 Tim E. Staggs, Note, *Legacy of A Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement Ab Initio in Line with the Victims' Rights Movement*, 38 IND. L. REV. 507, 515 (2005).

125 United States v. Estate of Parsons, 367 F.3d 409, 415 (5th Cir. 2004).

restitution paid pursuant to an invalid conviction.[126] The petitioners, Shannon Nelson and Louis Alonzo Madden, unlike in the abatement cases discussed supra, were very much alive: Nelson had her conviction reversed for trial error on appeal and was acquitted of all charges on retrial, while Madden had one of his convictions on direct review by the Colorado Supreme Court and the other vacated on post-conviction review.[127] Their convictions invalidated, both petitioners moved for the return of the funds, including both fines and restitution payments, that had been taken from them.[128]

The Colorado Supreme Court, however, concluded that the parties were not entitled to a refund: A court, it ruled, must have statutory authority to issue a refund, and given that the petitioners had not filed a proper claim under the Act, the trial courts lacked the authority to order it.[129] The U.S. Supreme Court disagreed. Writing for a 7-1 majority, Justice Ginsburg opened the opinion by explaining why the traditional *Mathews v. Eldridge*, 424 U.S. 319 (1976) due process balancing test,[130] rather than the more restrictive approach used in criminal cases articulated in *Medina v. California*, 505 U.S. 437 (1992), applied. *Nelson*, she wrote, concerned the "continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution": *Mathews*, not *Medina*, therefore provided the relevant inquiry.[131] The Court then turned to the traditional three factors of *Mathews*: All three factors, it wrote, weighed heavily against the state.[132] First, the petitioners had an obvious property interest in regaining the money they repaid to Colorado.[133] Second, the risk of erroneous deprivation was high—the Exoneration Act, the exclusive remedy by which the defendants could seek the return of their funds, conditioned the refund on "clear and convincing evidence" of their innocence, despite the fact that they were no longer judged guilty of any crime.[134] Finally, the Court concluded, Colorado had no countervailing interest in retaining money to which it had "zero claim of right."[135] Colorado's statutory scheme, therefore, failed to comport with the Fourteenth Amendment's guarantee of due process, and the

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126 Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

127 *Id.* at 1253.

128 *Id.*

129 *Id.* at 1254 ("Because neither Nelson nor Madden had filed a claim under the Act . . . their trial courts lacked authority to order a refund.").

130 *Id.* at 1255 (Under the *Mathews v. Eldridge* test, courts will evaluate "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.").

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 1256.

135 *Id.* at 1257.

Court held the state was "obliged to refund fees, court costs, and," crucially, "restitution" exacted from the defendants.[136]

2. United States v. Brooks

Brooks interpreted *Nelson* later that same year, applying it in the abatement context. The facts of *Brooks* are largely unremarkable. David Brooks was the founder, Chair of the Board of Directors, and CEO of DHB Industries, a publicly traded company that manufactured and sold body armor to government agencies.[137] In October 2007, he was indicted on charges of defrauding shareholders by overvaluing inventory, reclassifying costs to inflate the company's profitability, misrepresenting the company's inventory levels, and obstructing an SEC investigation.[138] After an eight-month trial, Brooks was convicted on all charges, and faced years in prison, as well as over $100 million in mandatory restitution payments.[139] He appealed, but died while his appeal was pending.[140] The Second Circuit thus considered the application of abatement to, inter alia, Brooks's conviction and restitution order.[141]

Writing for a three-judge panel, Judge Droney first quickly disposed of the conviction. Brooks's convictions, the Court held, must abate because he died while his direct appeal was pending—an uncontroversial position.[142] The Second Circuit then went even further, laying the groundwork for its second, more consequential holding. "We recognize," the Court noted, "that courts have often considered abatement to be justified by the finality and just punishment principles," but, it held, "finality is the paramount consideration," grounding its holding in *United States v. Libous*, decided earlier that year.[143]

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136 *Id.* at 1252.

137 United States v. Brooks, 872 F.3d 78, 82 (2d Cir. 2017).

138 *Id.* Brooks, the government alleged in the indictment, had then sold substantial shares of stock while the price was inflated, making hundreds of millions of dollars in profit, as well as paying himself millions of dollars through DHB that was not reported to the IRS. Additionally, the government alleged, Brooks had stolen assets from the company, using millions in DHB funds to pay for his personal horse-racing business and his family's personal expenses.

139 *Id.* at 85-86. The district court, in March 2015, subsequently issued an order of restitution, pursuant to the Mandatory Victim's Restitution Act, imposing $53.9 million in restitution to Point Blank Solutions (the then-successor to DHB), plus an additional $37.6 million to individuals identified by the government and $2.8 million to the IRS.

140 *Id.*

141 *Id.*

142 *Id.* at 87 ("[W]hen a convicted defendant dies while his direct appeal as of right is pending, his death abates not only the appeal but also all proceedings had in the prosecution from its inception." (quoting United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017))).

143 *Id.* at 87-88.

The Court then moved on to consider Brooks's restitution payments. These too had to be abated.[144] It was here the Second Circuit broke new ground.[145] "Following the recent guidance of the U.S. Supreme Court," the Court wrote, "when a criminal conviction abates upon the death of a defendant, any restitution ordered as a result of that conviction must also abate."[146] *Nelson v. Colorado*, in the Court's view, was clear: "'When a criminal conviction is invalidated by a reviewing court and no retrial will occur,' the state must 'refund fees, court costs, *and restitution* exacted from the defendant upon, and as a consequence of, the conviction.'"[147] Although, it conceded, *Nelson* was resolved on the basis of due process violations rather than the application of the abatement ab initio doctrine, "the reasoning of *Nelson* also compels abating monetary penalties where a defendant dies during his direct appeal, as 'there is no longer a valid conviction to support the government's retention of the penalty.'"[148]

The Second Circuit then considered the abatement doctrine's interaction with the MVRA. This, it held was no obstacle: The MVRA depended upon a valid conviction, and once that had been vacated, even by death, there was no longer a basis to require payment of restitution.[149] As for congressional purpose? The Second Circuit shrugged its shoulders. "We recognize," the Court wrote, "that this result may frustrate the purpose of Congress to compensate victims through restitution," and while this may be "unsettling," the court repeated, it "[could not] separate restitution from conviction."[150] To the Second Circuit, *Nelson* foreclosed even acknowledgment of the punishment principles underpinning abatement and any concomitant analysis of the purpose of the MVRA.

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144 *Id.* at 89-90 ("[B]ecause the language of the statute requires restitution in cases only where a defendant has been 'convicted of an offense,' we cannot separate restitution from conviction. Without a valid conviction, the statute-based restitution order must be vacated." (quoting 18 U.S.C. § 3663A(a)(1) (2012))).

145 *See* United States v. Brooks*: Second Circuit Decision Illustrates Harms of Abatement Doctrine*, *supra* note 23, at 1149.

146 *Brooks*, 872 F.3d at 89.

147 *Id.* (quoting Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017)).

148 *Id.* (quoting United States v. Libous, 858 F.3d 64, 68 (2017)).

149 *Id.*

150 *Id.* at 89-90. The court engaged only in a perfunctory manner with the punitive-compensatory dichotomy of the statute, acknowledging it only in dicta to close the restitution section of the opinion. "Whether," the court declared, "restitution is compensatory rather than in the nature of punishment is irrelevant . . . when the conviction underlying the order of restitution has abated. Brooks's restitution order is therefore vacated for those counts on which he was convicted by a jury."

3. United States v. Ajrawat

It did not take long for another court of appeals to follow suit. In a per curiam opinion issued in early 2018, the Fourth Circuit, in a surprising turn, abandoned the precedent established in *United States v. Dudley* and adopted the *Nelson*-controlling view articulated by the Second Circuit only a year earlier.[151] As with all abatement of restitution cases, the facts center on a plaintiff who died appealing a criminal conviction in a federal court. Paramjit Ajrawat was convicted of health care fraud, wire fraud, and aggravated identity theft.[152] The district court imposed an order of 111 months in prison, restitution of $3.1 million, forfeiture for the same amount, and a special assessment of $900.[153] Ajrawat filed an appeal challenging these convictions and various aspects of his sentence, but in November 2017, while his appeal was pending, he passed away.[154] The government agreed with the defense that Ajrawat's convictions, sentence, and any unpaid portion of the special assessment should abate.[155] However, the government argued, inter alia, that pursuant to *Dudley*, the restitution orders were unaffected.[156] The Fourth Circuit, in an about-face, disagreed.

Mirroring (and citing to) *United States v. Brooks*, the court held that, although *Nelson*'s analysis was grounded in due process rather than the common law abatement ab initio rule, this did not preclude its application:

> Whether restitution is compensatory rather than in the nature of punishment is irrelevant to this inquiry when the conviction underlying the order has abated. In light of *Nelson*, we can no longer say that an order of restitution is an exception to this rule; to the extent *Dudley* conflicts with *Nelson* in this regard, it is no longer good law.[157]

The Fourth Circuit confined its analysis of the compensatory-punitive dichotomy to a lonely footnote, noting that even under the *Dudley* regime, the special assessment would have abated, as there is a "substantial difference between restitution to the person victimized by the crime . . . and forfeiture, collectible only by the avenging United States government bent on punishing

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151 United States v. Ajrawat, 738 F. App'x 136, 140 (4th Cir. 2018) ("[W]e grant the Administrator's motion for abatement and remand to the district court with instructions to vacate Ajrawat's conviction and sentence, including the orders of restitution and forfeiture . . . [and] to dismiss all indictments relating to the underlying conviction.").

152 *Id.* at 137.

153 *Id.* at 138.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* (quoting United States v. Brooks, 872 F.3d 78, 91 (2d Cir. 2017)).

an offender."[158] That the victims of the crime in this new, post-*Nelson* era would be out of luck was left conspicuously undiscussed.

III. RESTITUTION SHOULD NOT ABATE

The Second and Fourth Circuits are wrong, however: Restitution should not abate. Part III of this Article will show why. In Section III.A, this Article discusses *Nelson* in detail, explaining how the constitutional concerns that led the Supreme Court to hold that "the State [must] refund fees, court costs, *and restitution* exacted from the defendant" does not apply in an abatement context.[159] And Section III.B emphasizes that while the Supreme Court's *Nelson* opinion has little to say about the issue, Congress has a lot: The text, purpose, and history of the Mandatory Victims Restitution Act make clear that the statute was intended to be fundamentally compensatory, not punitive in nature. Courts, this Article concludes, should defer to Congress's intent and leave restitution payments intact.

A. Weaknesses in the *Brooks-Ajrawat* Jurisprudence

Section III.A of this Article will show that while the *Brooks* and *Ajrawat* courts have pointed to the recent Supreme Court case *Nelson v. Colorado* as endorsing the recent line of appellate court cases abating restitution payments ordered pursuant to the MVRA, *Nelson* is eminently distinguishable, and Justice Alito's concurrence, in fact, highlights many of the *weaknesses* in the arguments made by the *Brooks* and *Ajrawat* courts.

Section III.A.1 highlights a key distinction between *Nelson* and *Brooks-Ajrawat*: While the *Nelson* decision was grounded on due process concerns, the "right" implicated in abatement cases—the right to an appeal—is in fact no right at all. Section III.A.2 focuses on the supposed justifications for the "finality" rationale, emphasizing that the "innocent until proven guilty" axiom that underpins *Nelson* does not map well onto the facts of *Brooks*, *Ajrawat*, or other abatement cases. Rather, the *Brooks* and *Ajrawat* courts fall into traps laid over thirty years ago in *Moehlenkamp*—equating "abatement" with "innocence." Finally, Section III.A.3 responds to arguments that *Nelson* should be read as endorsing equal treatment of fines and restitution orders, concluding that this represents an overreading of *Nelson*, particularly in light of Justice Alito's thoughtful concurrence discussing the issue.

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158 United States v. Dudley, 739 F.2d 175, 177 (4th Cir. 1984).

159 Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

1. Brooks-Ajrawat *Misunderstands the "Right to Appeal"*

While the *Brooks* court stated that it was "guid[ed]" by *Nelson*,[160] the recent Supreme Court case makes for poor precedent upon which to ground an abatement opinion. *Nelson* and *Brooks*, clearly, are distinguishable on numerous levels, the most obvious being that *Nelson* rested on a constitutional claim, while *Brooks* did not. But the *Brooks* court breezily glides past this, emphasizing that "the reasoning of *Nelson* also compels *abating* monetary penalties where a defendant dies during his direct appeal, as "there is no longer a valid conviction to support the government's retention of the [penalty].'"[161] *Brooks* would not be the first to find due process concerns in the abatement context. A standard defense of the modern restitution-blocking practices followed in a majority of federal courts is that the practice exists to protect the appellate right of review, the idea that "a conviction that cannot be tested by appellate review is both unreliable and illegitimate."[162] While the *Brooks* court failed to make the due process argument outright, instead merely borrowing language from a due process opinion to buttress it, other courts have not been so subtle. "Abatement," proclaimed the Third Circuit in 2006, "is grounded in procedural due process concerns."[163]

In fact, the practice dates back to the *Moehlenkamp* court that the Seventh Circuit opinion so widely relied upon today to interpret the Supreme Court's cryptic *Dove* opinion, and effectively the source of the modern finality rationale.[164] To interpret *Dove*, the *Moehlenkamp* court first relied upon *Griffin v. Illinois*, a Supreme Court decision in which the Court held that an impoverished criminal appellant had the right to a free transcript of his trial.[165] Relying on the language of the *Griffin*, the *Moehlenkamp* court declared that when a defendant dies pending appeal, "the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an 'integral part of (our) system for finally

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160 United States v. Brooks, 872 F.3d 78, 89 (2d Cir. 2017) (referring to "the recent guidance of the U.S. Supreme Court").

161 *Id*. (quoting United States v. Libous, 858 F.3d 64, 68 (2d Cir. 2017)).

162 Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 954 (2002). "Innocence," Cavallaro argues, "is a bar to punishment," and therefore appeals, which provide an error-correcting function, are a necessary predicate. *Id.* at 972.

163 United States v. DeMichael, 461 F.3d 414, 416 (3d Cir. 2006). Note that the Second Circuit cited to *DeMichael* in *United States v. Libous*, decided the same year as *Brooks*, for the principle that "the 'finality rationale'—is 'grounded in procedural due process concerns' and more readily supports the far-reaching consequences of abatement ab initio." United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017).

164 *See supra* notes 61-68 and accompanying text for discussion of *Moehlenkamp*.

165 Griffin v. Illinois, 351 U.S. 12 (1956).

adjudicating (his) guilt or innocence.'"[166] Effectively declaring a quasi-due process right to appeal, the *Moehlenkamp* court "crafted a persuasive new rationale for the federal practice of abatement."[167]

The problem with the *Brooks* and *Moehlenkamp* courts, however, is that in articulating this "right of appellate review" in abatement cases, they ignore one critical detail: The Supreme Court has, time and again, ruled that there *is* no right of appellate review. In *McKane v. Durston*, the Supreme Court declared that:

> A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.[168]

Some maintain that this language is not binding, arguing that because the state in which the defendant was tried *did* guarantee the right of criminal appeal, the *McKane* court was in fact speaking in dicta.[169] But, even assuming that such commentators are correct, the Supreme Court's subsequent jurisprudence in this area leaves little doubt that the Constitution does not guarantee the right to appeal: The Court has laid out clear lines of demarcation between the *procedural* guarantees that are covered by the Due Process and Equal Protection Clauses, and the fundamental guarantee *of an appeal itself*, which is not.

Once a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,"[170] the Supreme Court has made clear that the procedures used in deciding appeals

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166 United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (quoting Griffin v. Illinois, 351 U.S. at 18).

167 *See* Mindlin, *supra* note 37, at 225. Mindlin argues that this ascendancy of the finality rationale rests on the "refusal of courts to examine abatement's history." *Id.* Modern courts, he argues, fail to recognize that "abatement as we know it today is a novelty," that the finality rationale is of a recent vintage, and that even the modern, defendant-friendly practice of abating restitution is of a "recent vintage," not deeply rooted in history. *Id.* at 204.

168 McKane v. Durston, 153 U.S. 684, 687 (1894).

169 *See, e.g.*, Alex S. Ellerson, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 376 (1991) (maintaining that "[t]he Constitution will not allow a total revocation of the right to appeal."). Ellerson argues that "because no case reaffirming *McKane* has ever involved a state law that purported to dispense entirely with the right to appellate review," all subsequent pronouncements by the Supreme Court that have reaffirmed *McKane* are also dicta. For other criticism of this odd feature (or perhaps bug) in American constitutional law, *see e.g.*, John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 628 (1984) ("It is difficult to imagine a civilized system of justice without appeals."); C.R. Haworth, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77, 82 (1973) ("Given popular expectations . . . it would be unacceptable, if not unconstitutional, to eliminate the practice of one appeal as of right.").

170 Griffin v. Illinois, 351 U.S. 12, 18 (1956).

must comport with the demands of the Fourteenth Amendment.[171] In general, the Court's cases have focused on barriers to appeal faced by indigent (and living) defendants. As Justice Ginsburg noted in *Halbert v. Michigan*, such barriers implicate both equal protection and due process concerns, with the equal protection concerns focusing on "the legitimacy of fencing out would-be appellants based solely on their inability to pay court costs," and due process concerns focusing on "the essential fairness of the state-ordered proceedings."[172] These protections the Supreme Court provides are numerous. The state must provide transcripts of trial court proceedings to indigent criminal defendants who cannot afford to buy them.[173] It cannot require defendants to pay fees before filing a notice of an appeal of a conviction.[174] It must provide lawyers to support an indigent defendant's appeal as of right,[175] although not for those seeking a second-tier appellate review.[176] Finally, lawyers supplied to the defendant must provide her with effective assistance.[177]

But in the same opinions in which the Supreme Court has promulgated extensive protections for criminal defendants seeking appellate review, time and again, the Court has repeated the supposed "dicta" of *McKane*: that the Constitution does not impose on states, or the federal government,[178] an

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171 Evitts v. Lucey, 469 U.S. 387, 393 (1985).

172 Halbert v. Michigan, 545 U.S. 605, 610-11 (2005). *Griffin v. Illinois*, the progenitor of this quasi-right to appeal, itself stresses that these protections are meant to protect the poor. *See Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in judgment) (states may not "bolt the door to equal justice"); *see id.*, at 23 ("[W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such . . . review.").

173 *Griffin*, 351 U.S. at 18.

174 Burns v. Ohio, 360 U.S. 252 (1959) ("[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.").

175 Douglas v. People of State of Cal., 372 U.S. 353, 355 (1963) ("We agree, however, with Justice Traynor of the California Supreme Court, who said that the '(d)enial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin v. People of State of Illinois*.'").

176 Ross v. Moffitt, 417 U.S. 600 (1974) (holding that a state need not appoint counsel to aid a poor person seeking to pursue a second-tier discretionary appeal to the State's highest court, or, thereafter, certiorari review in the Supreme Court). Some commentators, and Justice Stevens, have suggested that appellate review is required in capital cases. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 23 (1989) (Stevens, J., dissenting) ("The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases, but also enhances the importance of the appellate process."); *see also* Cavallaro, *supra* note 162, at 967 (noting that "[p]ost- *Furman* decisions—which approve and disapprove various capital sentencing regimes—suggest that appellate review is such an important piece of the package of procedural safeguards that it makes some capital sentencing regimes constitutional and others inadequate.").

177 Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

178 Ross v. Moffitt, 417 U.S. at 618-19 ("Our reading of the Fourteenth Amendment leaves [the choice to grant appeal as of right] to the State, and respondent was denied no rights secured by the Federal

obligation to provide appellate review of criminal convictions.[179] In fact, in an ironic twist, in the exact case which the *Moehlenkamp* court cited to when it first planted the seeds for the finality doctrine—that "appeals were a quasi-due process right, and abatement the guarantor of that right"[180]—the Supreme Court expressly disavowed such a position. While states, the Supreme Court held in *Griffin*, that do grant a right to appellate review cannot do so "in a way that discriminates against some convicted defendants on account of their poverty," the Court, citing as always to *McKane*, emphasized too that "a State is not required by the Federal Constitution to provide appellate courts *or a right to appellate review at all*."[181] The opinion was centered, quite clearly, on the importance of equity in *access* to courts, not on the fact that appeal itself was a fundamental right.[182] But somehow, this key factor escaped the notice of the *Moehlenkamp* court, and in so doing laid the foundation for federal appeals courts, like the *Brooks* and *Ajrawat* courts, to find due process issues like those raised in *Nelson* in abatement cases, where none in fact exist.

2. Abatement Does Not Have Exonerative Force

Even adopting a less formalistic approach, the equitable issues present in *Nelson* are fundamentally distinct from those in *Brooks*. In *Nelson*, petitioner Nelson had already had her convictions variously reversed and acquitted at the trial level, while one of Madden's, her co-defendant, had been reversed by the Colorado Supreme Court, and the other had been vacated on post-conviction review.[183] With their convictions invalidated by courts empowered to do so in prior proceedings, the presumption of their innocence had been restored.[184] As the *Nelson* Court put it, "Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated

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Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.").

179 For Supreme Court cases affirming McKane v. Durston, 153 U.S. 684, 687-88 (1894), *see, e.g.*, Halbert v. Michigan, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."); Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); *Douglas*, 372 U.S. at 365 ("[A]ppellate review is in itself not required by the Fourteenth Amendment, and thus the question presented is the narrow one whether the State's rules with respect to the appointment of counsel are so arbitrary or unreasonable, in the context of the particular appellate procedure that it has established, as to require their invalidation.").

180 *See* Mindlin, *supra* note 37, at 223.

181 Griffin v. Illinois, 351 U.S. 12, 18 (1956).

182 *See* Mindlin, *supra* note 37, at 222. Mindlin puts it, "*Griffin* turned on the necessity of providing appeal equitably where it existed at all—a logical extension of the principle that everyone, rich or poor, should have access to the basic machinery of the courts."

183 Nelson v. Colorado, 137 S. Ct. 1249, 1253 (2017).

184 *Id.* at 1255.

convictions, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions."[185]

The core of *Nelson*, thus, is really just a simple application of the axiom that one is innocent until proven guilty.[186] No system of punishment can or should tolerate the conviction and punishment of innocent defendants, of course.[187] And the *Nelson* Court correctly stresses that it is "inconsequential" that the petitioners prevailed on "subsequent review" rather than on the first instance.[188] But there is no suggestion in the opinion that it is "inconsequential" that the petitioners prevailed on subsequent review at all. The fact that a prior court had reviewed their convictions and found a defect, either procedural or substantive, was essential to the Supreme Court's decision.

Nelson, thus, is inapt in the case of *Brooks* and other abatement cases, where the defendant has been found guilty in the last court to consider the matter. Abatement is not predicated on a defect in the procedural protections granted to the defendant to ensure proper adjudication of her innocence or guilt; the death of the defendant post-conviction does not create some essential "unfairness" in the prior proceeding that suggests an improper outcome. Nor is abatement based on some sort of substantive violation of the defendant's rights; as discussed supra, there is, in fact, no "right to appeal." Rather, abatement is a legal fiction,[189] a technicality in the purest sense of the word. As the *Brooks* court itself wrote, quoting *Nelson*, a state "'may not presume a person, *adjudged guilty of no crime*, nonetheless guilty enough for

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185 *Id.* at 1256.

186 *Id.* at 1252 ("Absent conviction of a crime, one is presumed innocent.").

187 Cavallaro, *supra* note 162, at 972. Both retributivists and those favoring a deterrence mode require an actual determination of guilt, as Cavallaro notes. *Id.* For retributivists, "a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137 (1987); *see also* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992) ("[Retributivism] is the claim that what makes the practice of punishment morally permissible is that criminals deserve punishment, regardless of whatever beneficial consequences might flow from imposing that punishment."). For utilitarians, the issue is complicated by the fact that theoretically, the punishment of an innocent person could still have deterrence value, but scholars have generally noted that sanctions function best as a deterrent when they reflect community intuitions about culpability and only punish blameworthy actors. *See, e.g.*, Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 332-33 (1984) ("The evidence is all around us that large numbers of people are willing to play the crime game when the threatened punishment no longer communicates moral disapproval."); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 82 (2d ed. 2008) ("The qualification to be made is the admission that the individual has a valid claim not to be made the instrument of society's welfare unless he has broken its laws."). Cavallaro also examines the rehabilitative and restitution models. Cavallaro, *supra* note 162, at 973-77.

188 *Id.*

189 Bevel v. Commonwealth, No. 2373-09-4, 2010 WL 3540067, at *2 (Va. Ct. App. Sept. 14, 2010) (noting that there is an implied "fiction" that the conviction is erroneous in abatement proceedings).

monetary exactions,' including costs, fees, and restitution."[190] *Nelson* meant what it said: The opinion applies to those "adjudged guilty of no crime." And the defendants in *Brooks* and *Ajrawat* died guilty men—there is nothing in *Nelson*, at least, that suggests their deaths exonerated them.

3. Restitution's Fundamentally Civil Nature

Finally, the *Brooks* court overlooked important differences between restitution and criminal fines and penalties when it baldly declared that *restitution orders*, like fines, must abate to the extent that they are tied to an abated conviction. These issues were raised in *Nelson* itself: As Justice Alito noted in his *Nelson* concurrence, the Court's equation of fines and restitution is not supported by historical practice, which has long made a distinction between "restitution, which is paid to the victims of an offense," and "fines and other payments that are kept by the state."[191]

Restitution orders, he reminded the *Nelson* Court, are much more civil than criminal in nature, and there are attendant legal consequences.[192] Entitlement to restitution need not be established beyond a reasonable doubt or in accordance with the standard rules of evidence or criminal procedure, and because restitution orders are much like civil judgments, there is reason to doubt that the reversal of the defendant's underlying criminal conviction undermines the basis for the conviction.[193] It was unnecessary, he argued, for the Supreme Court to have included restitution too when it stated that the state must refund conviction-related assessments when the conviction is invalidated. Rather, the Court should have acknowledged that, in at least

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190 United States v. Brooks, 872 F.3d 78, 89 (2d Cir. 2017).

191 Nelson v. Colorado, 137 S. Ct. 1249, 1261 (2017) (Alito, J., concurring in the judgment). For further discussion on this civil-criminal divide, *see, e.g.*, Gail Heriot, *An Essay on the Civil-Criminal Distinction With Special Reference to Punitive Damages*, 7 J. CONTEM. LEGAL ISSUES 43, 47 (1996). Heriot notes that civil and criminal law have fundamentally different purposes: Civil law "confronts a situation in which a loss has occurred and determines who shall bear it," while the criminal law "inflicts a loss that did not exist before" in order to impose a punishment. But the lines historically were blurrier. *See supra* note 69 and accompanying text.

192 The Supreme Court has occasionally confronted this civil-criminal issue in the constitutional context. *See, e.g.*, United States v. Ward, 448 U.S. 242, 248 (1980) (listing the Fifth Amendment Self-Incrimination Clause and Double Jeopardy Clause, and the Sixth Amendment as examples of constitutional protections afforded criminal but not civil defendants).

193 Justice Alito posed the following hypothetical to illustrate the issue: Suppose a victim successfully sues a criminal defendant civilly, and introduces the defendant's criminal conviction on the underlying conduct as evidence establishing an essential element of the crime. *Nelson*, 137 S. Ct. at 1262 (Alito, J., concurring in the judgment). It would be, he noted, "unprecedented," to suggest that due process requires unwinding the civil judgment simply because it rests in part on a criminal conviction that has since been reversed. The only salient difference, he wrote, between the latter case and *Nelson*, is that the restitution order has been entered as part of the proceeding itself. What substantive difference this makes, he concluded, is unclear. *Id.*

some circumstances, refunds of restitution payments made under later reversed judgments are not constitutionally required.[194]

Justice Alito's point is well-taken: Restitution, properly considered, should not automatically be vacated merely because the underlying conviction has been vacated, even in the case of a living defendant.[195] The Supreme Court's statement in *Nelson* that the state is obliged to refund restitution should not be read as applying at all times in all places. One must consider the specific statutory scheme in place and the context of the restitution payment being ordered. To read *Nelson* as endorsing, even mandating, that restitution payments be vacated in the *abatement* context is a bridge too far. The issues are suis generis and should be treated as such.

Something, clearly, is rotten in abatement jurisprudence. Federal courts have misread the history of the doctrine, finding "unanimity" in the treatment of criminal convictions where none existed.[196] They have invented for deceased defendants a quasi-due process right to an appeal where no such right exists for living ones.[197] And now, with *Brooks* and *Ajrawat*, a majority of court have found in *Nelson*—an opinion in which all defendants were living and had their convictions vacated in earlier, separate, proceedings[198]—constitutional justification for stripping their victims of any compensation they have received for them.

B. The MVRA Is Fundamentally Compensatory

The courts' gradual recasting of abatement, discussed supra section III.A, has not gone entirely without notice, and judges and academics alike have called for reform.[199] This discussion is at times illuminating and always

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194 *Id.* at 1263.

195 While Justice Alito's analysis apparently escaped the notice of the *Brooks* court, it has not been so overlooked by others. Earlier this year, the Massachusetts Supreme Judicial Court considered a case, Commonwealth v. Martinez, 480 Mass. 777 (2018), in which a defendant filed a motion for the return of his fines and restitution payment made pursuant to a now-vacated drug conviction. *Id.* at 780. The Court, distinguishing its case from *Nelson*, noted that while the issue had been rendered moot by the state's refund of the restitution payments, *Nelson* may not have been applicable in its present case. *Id.* at 788. Citing to Justice Alito's concurrence, the Court suggested that the fact that Massachusetts restitution payments are made directly to private victims, rather than to the state, may have been dispositive. *Id.* at 789. Moreover, it noted, it is unclear whether the *Nelson* analysis would apply to a system like Massachusetts', which, as in Justice Alito's hypothetical, forces victims seeking civil judgments against defendants to initiate a separate civil action. *Id.* at 789-90.

196 *See supra* note 53 and accompanying text.

197 *See supra* section III.A.1.

198 Nelson's conviction was reversed for trial error, and on retrial, a new jury acquitted Nelson of all charges. Nelson v. Colorado, 137 S. Ct. 1249, 1253 (2017). Madden, the other petitioner, had one conviction reversed on direct review, and a post-conviction court vacated the other.

199 Within months of the Second Circuit handing down the *Brooks* opinion, for example, an article in the Harvard Law Review, while agreeing with the court's legal reasoning, noted that the case has "'unsettling' consequences" for victims, and called for Congress abolish the abatement doctrine entirely and permit a defendant's estate to litigate unexhausted appeals. *See* United States v. Brooks*:*

well-meaning, but both sides in this debate wrongly assume that Congress has *not* already spoken on this issue, that the only potential paths for reform can come from legislative action or via courts adopting their own, wholly-court made judicial practice writing essentially on a blank canvas. In this Article's final section III.B, infra, this Article will give proper consideration to abatement and its interaction with the specific statutory scheme that governs many federal restitution payments: the MVRA. It concludes that the MVRA is clearly *compensatory* in nature, and it follows that while convictions should abate, Congress intended restitution payments not to.

In section III.B.1, this Article will discuss the framework that the Supreme Court has laid out for determining whether a statute is fundamentally civil or criminal in nature. In section III.B.2, this Article looks to the text of the MVRA itself, conceding that the statute is not textually explicit as to whether restitution under the MVRA is to be a civil or criminal penalty. However, section III.B.3 argues, the purpose and effect of the restitution payments, as outlined by the MVRA, and the legislative history (covered in section III.B.4), support a view that the MVRA is fundamentally civil, not criminal, in nature. And the *Brooks-Ajrawat* response falls short, as shown in section III.B.5. The decision to abate restitution payments, this Article concludes, undermines the clear congressional objective of requiring federal criminal defendants to pay compensatory restitution to the victims of their crimes. Courts can, and should, give proper respect to Congress and the statutory scheme it has created by choosing *not* to abate them.

1. Framework for Determining the Civil or Criminal Nature of Statutes

Although the Supreme Court has not had occasion to determine whether the MVRA is criminal or civil in nature, the issue is not an unfamiliar one for courts. Many constitutional protections, like the Fifth Amendment's Self-Incrimination and Double Jeopardy Clauses, and the Sixth Amendment Ex Post Facto Clause, apply only in criminal cases.[200] The framework for

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Second Circuit Decision Illustrates Harms of Abatement Doctrine, *supra* note 23, at 1153. This solution was previously endorsed by Time E. Staggs and by the Second Circuit itself in *Libous*. *See* Staggs, *supra* note 124, at 529; United States v. Libous, 858 F.3d 64, 69 (2d Cir. 2017) ("Abatement ab initio is a common law doctrine: If Congress deems it an undesirable one, it can act accordingly."). Others, like Timothy Razel, have earlier proposed that courts, rather than using a per se rule, adopt a multi-factor balancing test which would consider, among other factors, the presence and amount of the restitution ordered and the "heinousness" of the crime committed. *See* Razel, *supra* note 17, at 2223.

200 *See, e.g.*, Smith v. Doe, 538 U.S. 84 (2003) (state sex offender registry did not violate the Ex Post Facto Clause); Hudson v. United States, 522 U.S. 93 (1997) (pecuniary penalty imposed by the Office of Comptroller did not violate the Double Jeopardy Clause); Kansas v. Hendricks, 521 U.S. 346 (1997) (civil commitment of a sex offender did not implicate the Ex Post Facto or Double Jeopardy Clauses); United States v. Ward, 448 U.S. 242 (1980) (Federal Water Pollution Control Act proceedings did not violate the Fifth Amendment).

conducting such analysis of statutes and their attendant sanctions is well-established.[201] Courts, the Supreme Court, has held, determine the character of a sanction by first examining whether the legislature, in creating the penalty or remedy at issue, indicated "expressly or impliedly a preference for one label or the other."[202] If the legislature designates a penalty as criminal, the inquiry ends. But if the legislature nominally designates a penalty as civil, or if the label is ambiguous, courts must dig deeper to see "whether [a] statutory scheme [is] so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[203]

2. The Text of the MVRA Does Not Expressly Characterize Restitution as Criminal or Civil

Whether the MVRA is civil or criminal in nature is therefore first a question of statutory construction.[204] However, the express language of the statute does not provide a definitive answer as to the character of restitution granted under the MVRA. As the Seventh Circuit noted in *United States v. Newman*, sections 3363A(a)(1) and 3663(a)(1)(A), both simply state that restitution should be made in addition to or in lieu of "any other penalty authorized by law."[205] Those "other" penalties, the court correctly points out, could be either civil or criminal punishments, so it is not possible to determine the character of restitution solely from the word "other." While the Eighth Circuit has imbued importance to the word "penalty," arguing that the plain meaning is that restitution is punitive and criminal,[206] the Seventh Circuit, fairly, notes that the word "penalty" was used by the Supreme Court itself in the opinion laying out the *test* for determining the character of a challenged statute. It expressly contemplates the idea of a "civil penalty."[207] The word "penalty," thus, seems not dispositive on the issue.

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201 *See* Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2732 (2005) ("The foundational case for the modern court test--which sets out a general structure for making [civil-criminal] determinations--is *Kennedy v. Mendoza-Martinez*."); *See also, e.g.*, *Smith*, 538 U.S. at 92 (noting that "[t]he framework for our inquiry . . . is well established.").

202 *Hudson*, 522 U.S. at 99 (quoting *Ward*, 448 U.S. at 248).

203 *Id.* (quoting *Ward*, 448 U.S. at 248-49 and Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

204 Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

205 United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998).

206 United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997).

207 *See Newman*, 144 F.3d at 540 n. 9; *See also Hudson*, 118 S. Ct. at 493.

3. The Purpose and Effect of the MVRA is Compensatory, Not Punitive

Courts, therefore, should look to the second prong of the Supreme Court's test and consider the "purpose or effect" of the statute, to determine its civil or criminal character.[208] And as the Fourth Circuit has explained in depth, the purpose and effect of the MVRA is clearly non-punitive in nature; its compensatory effects reach far beyond the criminal case.[209] In restitution orders made under the MVRA and the VWPA, as amended, district courts must order restitution to "each victim in the full amount of each victim's losses, as determined by the court and without consideration of the economic circumstances of the defendant."[210] District courts' orders of restitution create property rights for the victim or his estate, which has the effect of a *civil* judgment against the criminal defendant or his estate.[211] Such restitution orders are heritable,[212] assignable,[213] and function as "liens on the property of the defendant . . . in the same manner . . . as a judgment of a court of general jurisdiction . . . ."[214]

Moreover, as Judge Dennis noted in his thoughtful dissent in *United States v. Estate of Parsons*, restitution orders carry the civil effects of joint and several liability, res judicata or collateral estoppel, and subrogation.[215] Defendants are protected from the order's possibly punitive effects: In the case of property losses, a defendant may only be required to return the property or a payment of equal value,[216] and where there is bodily injury, the victim is merely compensated for specific losses, like medical expenses or expenses related to the prosecution, but not more general ones, like pain and suffering, or for punitive damages.[217] Any amount paid must be reduced by the victim's recovery of compensatory damages in civil proceedings.[218]

As Judge Posner put it elegantly in *United States v. Bach*, in which the Seventh Circuit found that restitution was so compensatory that the MVRA could be applied retroactively without violation of the Ex Post Facto Clause, the MVRA is effectively a tort statute, "enabl[ing] the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution."[219]

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208 *Hudson*, 118 S. Ct. at 493 (quoting *Ward*, 363 U.S. at 617).

209 *See generally* United States v. DiBruno, 438 F. App'x 198, 202 (4th Cir. 2011) ("A review of the MVRA and VWPA . . . confirms that restitution orders continue to be compensatory in nature.").

210 18 U.S.C. § 3664(f)(1)(A) (2012).

211 United States v. Estate of Parsons, 367 F.3d 409, 421 (5th Cir. 2004) (Dennis, J., dissenting).

212 18 U.S.C. § 3663(a)(1)(A) (2012).

213 *Id.* at § 3664(g)(2).

214 *Id.*

215 *Estate of Parsons*, 367 F.3d at 421 (5th Cir. 2004) (Dennis, J., dissenting).

216 18 U.S.C. § 3664(b)(1) (2012).

217 *Id.* at § 3664(b)(2).

218 *Id.* at § 3664(j)(2).

219 United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999).

The fact that the Act did not make clear the distinction between criminal and tort proceedings, he emphasized, was irrelevant:

> It is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in . . . prosecution. It would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine, which is, of course, traditionally a criminal remedy.[220]

A fair reading of the purpose and effect of the statute, therefore, indicates that an order of the MVRA or the VWPA, as amended, is "expressly compensatory, non-punitive, and equivalent to a civil judgment against the defendant."[221]

4. Legislative History of the MVRA Reveals its Civil Nature

Justice Scalia once described the use of legislative history as the equivalent of "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[222] The late Justice's point is well-taken, and his influence on statutory interpretation cannot be overstated.[223] His view, however, is not the only one; Chief Judge Katzmann has argued recently for greater use of committee reports in the statutory interpretation process.[224] Keeping in mind Justice Kagan's admonition that legislative history "is not what Congress passed,"[225] the history of MVRA, to the extent that one considers it relevant, also suggests that Congress intended restitution to be a *civil*, not criminal remedy, and therefore to survive the death of the defendant.

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220 *Id.*

221 United States v. Estate of Parsons, 367 F.3d 409, 422 (5th Cir. 2004).

222 Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

223 *See, e.g.*, Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:09 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation (explaining that "the primary reason" Justice Scalia will "go down as one of the most important, most historic figures in the Court" is that he "taught everybody how to do statutory interpretation differently.").

224 *See generally* ROBERT A. KATZMANN, STATUTORY INTERPRETATION: JUDGING STATUTES 38 (2014) (acknowledging that although "[l]egislative history is not the law," committee reports can be "authoritative" guides to understanding the meaning of the law). For criticism, *see* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2123 (2016) (disagreeing with that view, and responding that "Congress could easily include the relevant committee report" as part of the statute if it wished to); *see also* John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559 (2016) (reviewing ROBERT A. KATZMANN, STATUTORY INTERPRETATION: JUDGING STATUTES (2014)).

225 Kagan, *supra* note 223, at 32:10.

While legislators found both punitive and compensatory *benefits* in mandating criminal restitution, Congress's discussion, scholars have pointed out, was centered on concern for the victims.[226] Senator Orrin Hatch's remarks, made at the initial Senate hearing, are illuminating.[227] "Restitution," he emphasized, "is not an alternative to punishment, nor is it even part of the sentence imposed. Rather, it is what the victim is due irrespective of any other punishment."[228] The Senator, thus, clearly expressed a desire to return the victim to a "pre-crime state."[229] Senator Hatch's words should carry weight, to the extent that any legislative history should—similar language appears in the text of the statute itself.[230] Congress's specific discussions around structuring MVRA restitution as a civil judgment,[231] and its emphasis that the statute be limited to ascertainable victims, so as to avoid "a mini-civil trial,"[232] similarly suggest congressional purpose to create a statute which is civil, rather than punitive, in nature.[233] A civil judgment, of course, would survive abatement and be enforceable against the estate of the defendant. Restitution payments should be construed to do so as well.

5. The Brooks-Ajrawat *Response Falls Short*

The *Brooks* court, at some level, appears to acknowledge all of this, attempting to preempt criticism that it is ignoring the statutory requirements of the MVRA with a conciliatory remark that "[w]e recognize that this result may work to frustrate the purpose of Congress to compensate victims through restitution," and conceding that the results may be variously "unsettling" and "devastating to those affected by the defendant's conduct."[234] The language of the statute, *Brooks* maintains, allows for this outcome, as restitution is mandated only where a defendant has been "convicted" of an offense.[235] Restitution, thus, cannot be separated from the underlying conviction, and must abate along with it.

This position is problematic on a number of levels. For one, common law doctrines like abatement should not work to "frustrate the purpose of

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226 *See* Grogan, *supra* note 70, at 1101.

227 *Id.* at 1102.

228 *Id.*

229 *Id.* ("Rather, by giving a victim 'what he is due,' Senator Hatch intended restitution to restore a victim to his pre-crime state.").

230 *See* 18 U.S.C. § 3663A(a)(1) (2012) ("[T]he court shall order . . . in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victim . . . .").

231 141 Cong. Rec. H1302 (1996) (statement of Rep. Pryce); 141 Cong. Rec. H1302, at *H1302.

232 141 Cong. Rec. S19, 280 (1995) (statement of Sen. Hatch).

233 *See* Grogan, *supra* note 70, at 1103.

234 United States v. Brooks, 872 F.3d 78, 89 (2d Cir. 2017).

235 *Id.*

Congress"—courts only speak where Congress itself has not spoken.[236] Moreover, it acknowledges that the MVRA is "compensatory," or civil, rather than penal in nature, while failing to appreciate the importance of that distinction. For the defendant, of course, it is a mere detail whether he must repay his victim pursuant to a tort suit or as a result of a criminal conviction. But, as discussed supra section III.A, this should merit the *court's* attention, as the vacation, or even reversal, of a defendant's criminal conviction does not necessarily infect related civil proceedings. Congress impliedly (as seen in the purpose and effect of the statute and the tort-like civil remedy it created) and expressly (as seen in the legislative history) created a noncriminal, nonpunitive vehicle to compensate victims for their losses. While it is refreshing to have a court plainly state that its decision is contrary to congressional purpose, rather than dance around the issue, it would be better if the court gave effect to, rather than ignored, laws passed by the nation's duly elected representatives.

CONCLUSION

When a convicted defendant dies while her direct appeal is pending, federal courts today unanimously agree that the common law doctrine of abatement ab initio requires that the defendant's conviction be "abated": The conviction is vacated and the case remanded to the district court, with instructions to dismiss the indictment. But the courts have historically disagreed about *what*, exactly, is abated along with the conviction, particularly in the restitution context. Those focusing on the "punishment" rationale favor abating the conviction, but not any associated restitution payments, while those favoring the "finality" rationale argue that due process concerns require that restitution payments be abated along with it.

The Second and Fourth Circuits have recently held that the Supreme Court's 2017 decision in *Nelson v. Colorado* ended this debate: There, the Court made clear that restitution payments must be made pursuant to a valid conviction, so it follows that if a conviction is *abated*, any restitution paid pursuant to it must be returned to the defendant's estate. This reading, however, is based on a deep misunderstanding of the defendant's "right to appeal" and the fundamentally civil nature of restitution. Congress and the MVRA have long been clear: The minority, or "punishment" view, has the better argument. Restitution should not abate.

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[236] Legislation, the Supreme Court has written, "should be interpreted so as to effect its purpose." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). And "[t]he rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." Jamison v. Encarnacion, 281 U.S. 635, 640 (1930).