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## "Once Victim, Always Victim": Compensated Individuals Under the Amended Sentencing Guidelines on Fraud

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## COMMENT

### “ONCE VICTIM, ALWAYS VICTIM”: COMPENSATED INDIVIDUALS UNDER THE AMENDED SENTENCING GUIDELINES ON FRAUD

Jacqueline Harrington\*

*Until recently, courts disagreed over whether individuals who were compensated by a third party such as a bank or insurance company ought to count as victims for purposes of the multiple-victim sentencing enhancement in the Federal Sentencing Guidelines on Fraud. The most recent Amendments to the Guidelines resolve this split, permitting compensated individuals to be counted as victims where their identity was used in the commission of the fraud. However, the new Guidelines do not resolve a separate split, likely to become more divisive under the new Guidelines, over whether both compensated individuals and their compensators can simultaneously be treated as victims for enhancement purposes. This Comment argues that the retributive purpose of sentencing suggests that the new Guidelines properly treat compensated individuals as victims, but that they should be further amended to clarify that treating both compensated individuals and their compensators as victims causes impermissible double counting. Resolving this issue is crucial to achieving the dominant purpose of the Guidelines: consistent and fair punishments throughout the federal courts.*

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## INTRODUCTION

“Once victim, always victim: that’s the law!” In Thomas Hardy’s famous work, *Tess of the D’Urbervilles*, Tess laments the permanent status of victims.<sup>1</sup> Yet until recently, some individuals who might have been considered the victims of financial crime under the Federal Sentencing Guidelines on Fraud (“Guidelines”) were stripped of the status of victimhood if they were subsequently compensated by a third party, such as a bank or insurance company. For those compensated individuals, whether the phrase “once victim, always victim” applied depended on which court heard their case.<sup>2</sup> The most recent Amendment to the Guidelines’ enhancement at § 2B1.1 ends this sentencing disparity in fraud cases: compensated individuals can be victims under the new Guidelines.<sup>3</sup> Although the Amendment resolves the split over the proper interpretation of the § 2B1.1 enhancement, it fails to address a separate, albeit subtler, dispute regarding whether compensated individuals and their compensators can simultaneously be counted as victims.

In 2001, the United States Sentencing Commission added a sentencing enhancement to § 2B1.1 of the Guidelines for defendants who commit fraud against multiple victims.<sup>4</sup> Under the Guidelines, a sentence is imposed by determining where it falls on a grid.<sup>5</sup> The point on the grid is located by finding the base-level offense and adjusting up or down (usually up) by examining the severity of the crime and the criminal history of the

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1. THOMAS HARDY, *TESS OF THE D’URBERVILLES* 261 (Scott Elledge ed., W. W. Norton & Co. 3d ed. 1991) (1891) (exclamation mark added).

2. See *infra* Part I.

3. The Sentencing Commission resolved the issue of whether compensated individuals “can be” victims. See *infra* notes 22–23 and accompanying text. The question is whether compensated individuals will be counted as victims by courts under the new Guidelines. See *infra* notes 28–29 and accompanying text.

4. Compare U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2000), with USSG § 2B1.1 (2001).

5. The Guidelines were intended to be mandatory for judges. 18 U.S.C. § 3553(a) (1988) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth [in the Guidelines].” (emphasis added)). Since the Supreme Court decision in *United States v. Booker*, 543 U.S. 220, 246 (2005), the Guidelines are no longer mandatory; however, the *Booker* decision also indicated that lower courts should continue “to take account of the Guidelines together with other sentencing goals.” *Id.* at 259. Lower courts still look to the Guidelines in determining how to treat compensated individuals. See, e.g., *United States v. Conner*, 537 F.3d 480, 490–92 (5th Cir. 2008) (finding that reimbursed account holders did not count as victims by analyzing the relevant Guidelines’ provisions); *United States v. Lam Thanh Pham*, 545 F.3d 712, 723 (9th Cir. 2008) (“Although the Guidelines are now discretionary, the Supreme Court has continued to indicate that a correct initial assessment of the Guidelines range is a starting point before the discretionary judgment is made on a reasonable sentence in the light of the 18 U.S.C. § 3553(a) factors.”); *United States v. Lee*, 427 F.3d 881, 894–95 (11th Cir. 2005) (finding that reimbursed individuals could count as victims after analyzing the relevant Guidelines’ provisions); *United States v. Yagar*, 404 F.3d 967, 970 (6th Cir. 2005) (“[T]he district court will need to consider the correct *Guidelines-recommended sentence* in fashioning its own post-*Booker* sentence on remand.” (emphasis added)).

defendant—the enhancements.<sup>6</sup> The Guidelines provide that defendants receive a 2-level enhancement if there are more than 10 but fewer than 50 victims, a 4-level enhancement if there are between 50 and 250 victims, and a 6-level enhancement if there are more than 250 victims.<sup>7</sup> Until the 2009 Amendments, the Application Notes to the Guidelines defined a victim as "any person who sustained any part of the actual loss,"<sup>8</sup> with actual loss further defined as the "reasonably foreseeable pecuniary harm that resulted from the offense."<sup>9</sup> Pecuniary harm, the Guidelines' Application Notes stated, was monetary harm or harm measurable in money.<sup>10</sup>

After these sentencing enhancements were enacted, a circuit split developed along two distinct lines. First, circuits disagreed over whether individuals compensated by a third party had suffered "actual harm," and so ought to be treated as victims.<sup>11</sup> Second, there was divergence as to whether treating both individuals and the institutions that compensated them as victims was impermissible double counting.<sup>12</sup>

For defendants who committed less serious crimes, involving more than 10 but fewer than 50 victims, a sentencing enhancement for multiple victims might raise their sentence by only six months. But for more serious crimes, involving greater than 250 victims, the enhancement could add years to a defendant's sentence.<sup>13</sup> This difference of interpretation between the circuits

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6. PHYLIS SKLOOT BAMBERGER, PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES xxx–xxxii (1989); MICHAEL TONRY, SENTENCING MATTERS (1996). For a more complete explanation of how the Guidelines work in practice, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

7. USSG § 2B1.1 (2008). The initial enhancement provided for increases only where there were "more than 10, but less than 50, victims" or "50 or more victims." USSG § 2B1.1 (2001). The 2002 revision added a further enhancement where there were "250 or more victims." USSG § 2B1.1 (Supp. 2002). This provision has remained consistent throughout subsequent revisions, including the most recent 2008 revision. USSG § 2B1.1 (2008).

8. USSG § 2B1.1 cmt. n.1 (2008). The Application Notes are to be given equal weight to the Guidelines themselves. *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."); see also *United States v. Hernandez-Sandoval*, 211 F.3d 1115, 1117 n.3 (9th Cir. 2000) ("[A]pplication notes are binding on the courts in their construction of the Sentencing Guidelines.").

9. USSG § 2B1.1 cmt. n.3(A)(i) (2008).

10. *Id.* § 2B1.1 cmt. n.3(A)(iii).

11. See *infra* notes 22–23 and accompanying text.

12. Some courts thought both compensated individuals and their compensators could be victims. See *infra* note 24 and accompanying text. Others thought this caused unfair double counting. See *infra* note 25 and accompanying text.

13. A crime that was not particularly serious, with no other relevant enhancements, would have a base level of six, which results in a sentence of 0 to 6 months in prison. USSG § 5A (2008). With an enhancement for 10 or more victims, this result does not change; however, for 50 or more victims, the base sentence increases to 6 to 12 months, and with 250 or more victims, the base sentence increases to 10 to 16 months. *Id.* The results are more extreme for more serious offenses. For example, a fraud that started with a base level of thirty-seven, or 210 to 262 months, would increase to between 262 and 327 months with 10 or more victims, 324 to 405 months with 50 or more victims, and life with 250 or more victims. *Id.* For an example of how the guidelines work in practice, see *supra* notes 5–7 and accompanying text.

consequently undermined the overarching goal of the Guidelines, which was to create consistent sentences for similar crimes across the federal court system.<sup>14</sup>

The 2009 Guidelines address the split by adding a definition of victim that includes individuals whose identities were used in the commission of a fraud.<sup>15</sup> The result of this addition is that even compensated individuals may be victims under the new Guidelines. However, the Application Note is unclear regarding whether the two categories of victim are mutually exclusive or whether the entity that sustained the “actual loss,” the third-party compensator, and the person whose identification was used may both be victims. In the past, some courts held that the victims who received restitution and the victims under the Guidelines’ sentencing enhancement ought to be identical.<sup>16</sup> In fraud scenarios, this meant that these courts found that only third-party compensators, to whom defendants owed restitution, were treated as victims. Under the Amendments, this misunderstanding may perpetuate double counting.<sup>17</sup>

This Comment argues that while the new Guidelines properly allow courts to consider compensated individuals to be victims for purposes of the enhancement at § 2B1.1, they should be further amended to eliminate the possibility of double counting that occurs when courts treat both compensated individuals and their compensators as victims. Part I provides a brief overview of the new § 2B1.1, concluding that the Commission addressed only one point of disagreement among the courts. Part II argues that allowing compensated individuals to be treated as victims comports with retributive goals of punishment, but that reading the Amendment to permit double counting would be inconsistent with retribution. Part III contends that the Commission should modify the Guidelines to avoid double counting by clarifying that the victims who receive restitution and the victims counted under the Guidelines’ enhancement need not be identical. The Commission’s failure to address double counting is likely to result in a continued circuit split, undermining the ability of the Guidelines to fulfill their primary purpose of ensuring uniform sentencing in federal courts.

#### I. THE NEW § 2B1.1: RESOLVING ONE SPLIT, LEAVING ANOTHER UNRESOLVED

In revising the Guidelines’ provision on fraud, the Sentencing Commission sought to end one part of the circuit split that had arisen over

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14. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES* 5 (1972) (explaining that guidelines were needed to address the “almost wholly unchecked” powers of sentencing authority vested in judges); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 *WAKE FOREST L. REV.* 223, 229–30 (1993).

15. See *infra* note 19 and accompanying text.

16. See *infra* Part II.

17. See *infra* note 45 and accompanying text.

interpretations of the word "victim."<sup>18</sup> The majority view under the old Guidelines was that fully compensated individuals were no longer victims, while the minority approach asserted that such compensated individuals remained victims. The Amendment to the Guidelines resolves this particular aspect of the circuit split in favor of the minority view, but leaves unaddressed the second point of disagreement regarding double counting of victims under the § 2B1.1 enhancement.

The 2009 Guidelines address the circuit split by adding a definition of victim that includes individuals whose "means of identification [were] used unlawfully."<sup>19</sup> "Means of identification" includes "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual."<sup>20</sup> By including such individuals, the Commission recognized that the victims of fraud, even if "fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines."<sup>21</sup>

The majority view under the old Guidelines had been that individuals counted as victims only where they had suffered a loss beyond that for which they were compensated, and so had suffered an "actual loss."<sup>22</sup> Although the Guidelines rely on the assumption that individuals frequently *do* suffer a loss beyond the loss for which they are compensated, this new

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18. The Commission had taken note of the circuit split, and the amended Guidelines were aimed at addressing it. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 4 (2009) [hereinafter AMENDMENTS], available at [http://www.ussc.gov/2009guid/20090501\\_Reader\\_Friendly\\_Amendments.pdf](http://www.ussc.gov/2009guid/20090501_Reader_Friendly_Amendments.pdf) ("Some courts have held that such an individual is not counted as a 'victim' for purposes of the victims table at § 2B1.1(b)(2).").

19. *Id.* at 7.

20. 18 U.S.C. § 1028(d)(7) (2006).

21. AMENDMENTS, *supra* note 18, at 4.

22. The majority view was that compensated individuals were not victims unless they had suffered uncompensated harm. *See* United States v. Orr, 567 F.3d 610, 616–17 (10th Cir. 2009) (finding that only the banks, not the reimbursed account holders, were victims); United States v. Adjei, No. 07-2295, 2009 WL 405680, at \*3 (3d Cir. Feb. 19, 2009) (holding that individuals were victims where evidence indicated that they spent time and money seeking reimbursement, thus sustaining part of the actual loss); United States v. Kennedy, 554 F.3d 415, 422 (3d Cir. 2009) (finding that reimbursed account holders had not suffered an actual loss and so were not victims); United States v. Abiodun, 536 F.3d 162, 166 (2d Cir. 2008) (finding reimbursed account holders had suffered an actual loss and were victims where they had expended effort to obtain compensation); United States v. Conner, 537 F.3d 480, 490 (5th Cir. 2008) (finding that where the defendant used commercial credit accounts at various stores to defraud account holders, the only victims were the stores because the account holders were fully reimbursed for their losses); United States v. Erpenbeck, 532 F.3d 423, 442 (6th Cir. 2008) (finding that compensated individuals were not fully compensated and so should be treated as victims); United States v. Lam Thanh Pham, 545 F.3d 712, 721 (9th Cir. 2008) (holding that costs associated with resolving disputed account activity and initiating fraud investigations were actual losses); United States v. Icaza, 492 F.3d 967, 970 (8th Cir. 2007) (holding that the Walgreens corporation was the only victim where defendant shoplifted from multiple Walgreens stores but the corporation fully repaid the individual stores); United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005) (finding reimbursed individuals had not suffered an actual loss and so were not victims); Conley v. United States, No. 1:07-CV-1111, 2008 U.S. Dist. LEXIS 8391, at \*8–9 (W.D. Mich. Feb. 5, 2008) (noting that the trial court properly applied *Yagar* by finding that individual account holders were not "victims" for Guidelines' purposes where they were fully reimbursed).

provision, which permits individuals to retain their status as victims where their identity has been used, does not *require* that they have suffered uncompensated loss. The Amendment, therefore, takes a position similar to that of the minority courts under the split.<sup>23</sup> By allowing even fully compensated individuals to be counted as victims, the revision both addresses the circuit split over the treatment of compensated individuals, and as discussed in Part II, allows the Guidelines to better comply with the goals of retribution.

Although the new Guidelines clarify that compensated individuals can be victims, they do not offer courts guidance regarding whether double counting is permissible. Under the old Guidelines, the circuits that treated reimbursed individuals as victims where they had expended time and energy sometimes also treated their compensators as victims.<sup>24</sup> For example, where a bank compensated its account holders for their losses, the court might treat both the compensated account holders and the bank as victims under the enhancement. However, some courts thought this caused double counting, or holding the defendant liable twice on the basis of the same actual loss.<sup>25</sup> As a result, one judge argued that the role of the court “is not to decide whether there was *any* victim who sustained the loss, but to choose between two possible victims.”<sup>26</sup> Courts that treated both groups as victims were in the

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23. The Eleventh Circuit’s minority view was that compensated individuals remained victims, even when they were fully and quickly reimbursed by their banks. *United States v. Smiley*, 210 F. App’x 972, 975 (11th Cir. 2006) (finding that “victims who are reimbursed for their losses are still victims for purposes of § 2B1.1(b)(2)”); *United States v. Cornelius*, 202 F. App’x 437, 439 (11th Cir. 2006) (“[T]he Guidelines allow a court to find an actual loss by a reimbursed party, and therefore treat that party as a victim.”); *United States v. Longo*, 184 F. App’x 910, 913 (11th Cir. 2006) (“[R]eimbursement does not preclude any of the persons who suffered an actual loss from being considered victims under § 2B1.1(b)(2).”); *United States v. Lee*, 427 F.3d 881, 894–95 (11th Cir. 2005) (finding that compensated individuals still suffered an actual loss). The First Circuit recently adopted the position of the Eleventh Circuit in two decisions issued on the same day. *See United States v. Stepanian*, 570 F.3d 51, 58 (1st Cir. 2009) (holding that reimbursed account holders were victims); *United States v. Ter-Esayan*, 570 F.3d 46, 51 (1st Cir. 2009) (same).

24. *See Lam Thanh Pham*, 545 F.3d at 718 (explaining that where there was an initial loss to account holders and a permanent loss of the same funds by a third-party compensator, the two groups had suffered harms that were “sufficiently distinct from one another to avoid a double counting problem”); *see also Ter-Esayan*, 570 F.3d at 50 (affirming the district court’s decision to consider “238 individuals, 26 banks, and the Stop & Shop chain” to be victims); *Abiodun*, 536 F.3d at 166 (“Taking these [compensated] individuals together with the ‘dozens’ of corporate victims and the ‘small percentage of individuals who actually did lose money,’ the District Court determined that it was ‘more likely than not’ that Abiodun’s crimes affected ‘250-plus victims,’ . . .”). The explanation given by the *Lam Thanh Pham* court was that the two groups had suffered distinct harms; however, it did not fully elucidate what this meant. 545 F.3d at 718 (“Just as a single gunshot would have two victims suffering two distinct injuries if the bullet passed through one person before striking a second, here Pham’s criminal acts could have two groups of victims suffering distinct pecuniary harms where the debits to the account balances first suffered by the account holders were later absorbed by the banks.”).

25. *See United States v. Moore*, 315 F. App’x 16, 18 (9th Cir. 2008) (“To avoid double-counting, the individual account owners and the banks who reimbursed them cannot both be victims on the basis of the same stolen funds.”).

26. *Lam Thanh Pham*, 545 F.3d at 726 (Fisher, J., concurring in part and concurring in the judgment). Judge Fisher also noted that, “No other circuit has held that two victims can both be counted under the Guidelines based on the same ‘actual loss’ of funds.” *Id.* Similarly, an earlier Ninth Circuit decision warned against treating account holders and banks as victims. *See supra* note

minority. The majority view was that fully reimbursed individuals did not qualify as victims; these majority courts did not often encounter any double-counting problem because only the compensator was considered a victim. Further, some courts in the minority treated only compensated individuals and not their compensators as victims.<sup>27</sup> Because the majority view is no longer valid, however, double counting may now be a problem in all cases rather than in just the minority of courts.

The old Guidelines were unclear about whether both groups could suffer the same "actual loss" and therefore simultaneously be victims, and the new Guidelines are similarly unclear. The new Guidelines explain that, "in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority."<sup>28</sup> The definition of a victim in Application Note 1 is "any person who sustained any part of the actual loss."<sup>29</sup>

The new Guidelines could be interpreted as meaning that the victim is *either* the individual whose means of identification was used unlawfully (ii) *or* the third party that suffered the actual loss (i). Alternatively, it might mean that *both* the compensated individuals whose identities were used *and* their compensators may be victims (i and ii). The second interpretation has the potential to lead to double counting. This ambiguity ought to be resolved by the Commission. But until it is, courts seeking to resolve the conflict should treat only compensated individuals as victims for purposes of the enhancement; doing so will best accord with retribution policies, as highlighted by Part II.

## II. READING THE NEW GUIDELINES TO ACHIEVE PROPER AMOUNTS OF RETRIBUTION

Retribution, or meting out of "just deserts," continues to be a major purpose of sentencing today,<sup>30</sup> and it is best satisfied by treating only compensated individuals as victims. In the Guidelines, this goal is expressed by the directive that sentences "reflect the seriousness of the offense" and the "nature and circumstances of the offense."<sup>31</sup> As evidenced by various Supreme Court opinions and scholarly views, "just punishment"—retribution—is an

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25 and accompanying text. The later *Lam Thanh Pham* court decision did not acknowledge the *Moore* decision at all.

27. See, e.g., *Longo*, 184 F. App'x at 912–13 (considering "whether each plan counts as a single victim or whether each individual participant in the plan counts as a victim" and concluding that the "plan participants should be counted as victims").

28. AMENDMENTS, *supra* note 18, at 5.

29. *Id.* at 2 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.1 (2008)).

30. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 9 (2d ed. 2007).

31. 18 U.S.C. § 3553(a)(1), (a)(2)(A)–(B) (2006). Some commentators, however, suggest that retributivism provides the outer margins of sentencing, arguing that "limiting retributivism" is the overriding purpose of sentencing and "that retribution sets the upper and lower boundaries of just punishment, within which other purposes can hold sway." DEMLEITNER ET AL., *supra* note 30, at 8; see also Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 6 (2006).

important rationale for sentencing in fraud cases.<sup>32</sup> This Part uses hypotheticals to explain why treating compensated account holders as victims under the Amendments properly accounts for the seriousness of certain fraud offenses. However, this Part also argues that if the amended enhancement is interpreted to mean that both compensated individuals and their compensators are victims, defendants will be punished beyond their culpability.

Achieving the correct level of retribution has been an important motivator behind the Sentencing Commission's enactment of sentencing enhancements for multiple victims, including the most recent Amendments. That Congress included a sentencing enhancement for multiple victims in the old Guidelines under § 2B1.1, and that the Amendments allow individuals whose identities were compromised during a fraud to be counted as victims, indicates that in some cases, the "scope of the crime" cannot be fully measured without viewing compensated individuals as victims.<sup>33</sup> In many fraud cases, the seriousness of an offense is adequately captured only where compensated individuals are treated as victims, which the Amendments properly permit when a victim's identity is used. If compensated individuals were never treated as victims, the goal of retribution would be inadequately served by the victim enhancement in § 2B1.1.<sup>34</sup> Consider the following scenarios:

Defendant commits the exact same fraud of \$100,000 per person against the following individuals:

**Situation 1.** 30 uninsured people.

**Situation 2.** 30 people insured by 30 different insurance companies.

**Situation 3.** 30 people insured by 1 insurance company.

The overall monetary harm in each case is exactly the same, \$3,000,000 taken from 30 individuals. Yet under a system that never treats fully compensated individuals as victims, there are 30 victims under Situation 1, and only 1 victim under Situation 3, because all individuals have been compensated by the same insurance company. Even more bizarre, there are 30 victims in Situation 2, which is identical to the compensation pattern in

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32. *Rita v. United States*, 551 U.S. 338, 348 (2007) (arguing that the Guidelines necessitate a consideration of "just punishment" (retribution) by the sentencing judge); *see also* *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997) (indicating that there are "two primary objectives of criminal punishment: retribution [and] deterrence"); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) ("§ 3C1.1 enhancement . . . furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation."); Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence After Booker*, 18 FED. SENT'G REP. 174, 174 (2006) ("*Booker's* emphasis on the factors enunciated in 18 U.S.C. § 3553(a) empowers district courts to fashion principled sentencing decisions that consider and further the traditional purposes of punishment, that is, retribution, deterrence, rehabilitation, and incapacitation.>").

33. *United States v. Mohammed*, 315 F. Supp. 2d 354, 362 (S.D.N.Y. 2003).

34. No court has taken such an extreme hypothetical position. The *Yagar* court came closest, but the dicta providing an exception where the loss was not "short-lived and immediately covered by a third party" meant that even the Sixth Circuit did not adopt the view that compensated individuals were never victims. *United States v. Yagar*, 404 F.3d 967, 971 (6th Cir. 2005).

Situation 3, except that the victims were compensated by different insurance companies rather than 1 insurance company.<sup>35</sup> For a serious offense, this could mean that a defendant's sentence might be as much as 117 months longer if convicted under situation 2 rather than situation 3.<sup>36</sup> The extreme hypothetical position of never treating compensated individuals as victims yields results clearly at odds with notions of retribution because the defendant would be punished differently for these very similar crimes.

Even prior to the 2009 Guidelines, no court had taken the position that compensated individuals could never be treated as victims. But the majority approach, which argued that only individuals who have not been fully compensated could be treated as victims, still yielded illogical results.<sup>37</sup> Consider the following situations in addition to the situations above:

Defendant commits the exact same fraud of \$100,000 per person against the following individuals:

**Situation 4.** 30 people insured by the same insurance company who are each compensated immediately.

**Situation 5.** 30 people insured by 30 different insurance companies who are each compensated immediately.

**Situation 6.** 30 people insured by the same insurance company who are each compensated one year after the initial fraud after substantial time and energy was expended to obtain compensation.

Under the analysis of the majority view, there was only 1 victim in Situation 4. But under Situation 5—arguably the exact same harm—there were 30 different victims (the insurance companies), which required a sentencing enhancement under § 2B1.1 that could yield up to 117 additional months.<sup>38</sup> In both cases, the individuals were immediately compensated, yet the defendant was punished differently. Finally, Situations 4 (1 victim) and 6 (30 victims), in which the defendant stole from 30 people insured by the same insurance company, treated the defendant differently based on factors he could not have "foreseen"—the amount of time that would pass before the insurance company would compensate the individuals and the amount of

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35. A similar hypothetical was put forth by the dissent in *United States v. Conner*. Judge Garza explained:

To exemplify how the majority has turned the enhancement on its head, compare a defendant who defrauds 1,000 individuals that, after the fact, have their losses reimbursed by a single insurer and a defendant who defrauds 10 uninsured individuals. Assuming an equal amount of loss, there can be no doubt that the first defendant's crime is more serious and therefore deserving of a more severe sentence. The majority's interpretation of the victim enhancement leads to the incongruous result of the second defendant receiving the higher Guidelines range.

*United States v. Conner*, 537 F.3d 480, 494 (5th Cir. 2008) (Garza, J., dissenting). *But see* *United States v. Kennedy*, 554 F.3d 415, 422–23 (3d Cir. 2009) (criticizing Garza's view because the Guidelines are no longer mandatory and judges can potentially deviate from the Guidelines in the hypothetical Garza posits).

36. *See supra* note 13.

37. *See supra* note 22.

38. *See supra* note 13.

effort those individuals would have to expend to obtain compensation. Again, the defendant could receive up to 117 additional months under Situation 6 based on how soon the account holders were compensated by an entity completely outside of his control.<sup>39</sup> Punishments are occasionally decided based on factors beyond the defendant's direct control. For example, a defendant who shoots a person intending to kill him will not be liable for murder if he only wounds his victim.<sup>40</sup> However, in that case, the defendant's sentence depends on something arguably within his control: whether he succeeds in killing the victim. In the case of fraud, it is irrational to allow the defendant to experience a lower sentencing level based solely on something outside his control: namely, that one insurance company had a better mechanism in place for compensating its account holders quickly and without hassle.

Odd results also occur when both the compensated individuals *and* their compensators are treated as victims, as suggested by a different minority approach prior to the 2009 Amendments. Courts employing this framework treated compensated individuals as victims where they expended time and energy to obtain compensation, but the courts also treated their compensators as victims. It is unclear whether the 2009 Guidelines permit both groups to be treated as victims. Consider the following additional scenario:

Defendant commits the exact same fraud of \$100,000 per person against the following individuals:

**Situation 7.** 30 people insured by 30 different insurance companies who are each compensated one year after the initial fraud after substantial time and energy was expended to obtain compensation.

Under the pre-Amendment, minority double-counting approach, Situation 4 yielded 1 victim and Situation 5 yielded 30 victims. Yet in Situation 6, there would have been 31 victims (30 account holders plus the insurance company), and in Situation 7 there would have been 60 victims (30 account holders plus 30 insurance companies). In Situation 7, the defendant could have received a sentence that was up to 195 months longer than that received under Situation 4, and 143 months longer than that received under Situations 5 or 6.<sup>41</sup>

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39. See *supra* note 13.

40. Murder and attempted murder are treated differently by the Guidelines. See U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.1, 2A2.1 (2008). First-degree murder has a base level of 43, or life in prison; attempted murder has a base level of only 33, or 135–168 months where the underlying offense would have constituted first-degree murder had the crime been successful. See *id.* § 5A. Felony murder, where the defendant is punished for murder even though the defendant's partner actually committed the murder, is another example. See *Dean v. United States*, 129 S. Ct. 1849, 1855 (2009) (giving the felony-murder rule as an example of punishing defendants “for the unintended consequences of their *unlawful acts*”). *But see id.* at 1859 (Stevens, J., dissenting) (distinguishing a case where the defendant's sentence was increased for the unintended discharge of his firearm during a crime from the case of felony murder because with felony murder the “enhanced penalties [are] for the infliction of some additional harm”).

41. See *supra* note 13.

Under the double counting that could take place under the Amendments, Situations 4 and 6 would both yield 31 victims, because the time and effort expended by an individual whose identity was unlawfully used is irrelevant under the Amendments. Similarly, Situations 5 and 7 would both have 60 victims. Again, the sentence under Situations 5 and 7 could be up to 143 months longer than that received under Situations 4 and 6.<sup>42</sup> This result may be even stranger than the results obtained when compensated victims are not treated as victims at all because the defendant could be seen as being punished twice on the basis of a single financial loss.<sup>43</sup>

The unfair results that may occur under the 7 situations above are corrected by treating fully compensated individuals as victims, which the new enhancement permits, but not treating their compensators as victims, which may or may not be permitted by the new enhancement. In all 7 situations, whether the victims are not compensated by an insurance company, compensated by one insurance company, or compensated by multiple insurance companies, and whether the victims are compensated easily or after expending their time, the defendant would be treated the same for purposes of the enhancement: there would be 30 victims and the defendant would receive an enhancement under all 7 situations. Rather than viewing these very similar crimes as having a different number of victims, each crime would have the same number of victims and the defendant would consequently be sentenced with the same 2-level enhancement under each scenario. This would yield a maximum sentence of 372 months for each situation, rather than a maximum of 262 months if only the banks were treated as victims, or a maximum of 405 months if both account holders and banks were treated as victims.<sup>44</sup>

This result logically fits with an understanding of retribution, which punishes defendants based on notions of justice: Defendants should certainly be punished to the extent that they are culpable, and to the extent to which that culpability is foreseeable to them. But there is no retributive justification for punishing them beyond their culpability. Rather than punishing defendants differently for a crime that affected thirty people, this system treats them the same. Courts interpreting the new Guidelines should now find that compensated individuals and not their compensators are the victims for purposes of the § 2B1.1 enhancement. As discussed in Part III, the next amendment to the Guidelines should clarify that this is the correct result.

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42. See *supra* note 13.

43. See *supra* note 25 and accompanying text. This result depends on how many victims are actually involved in the scheme and whether the double counting results in a high enough victim count to push the defendant into a new enhancement category. See *supra* note 7 and accompanying text.

44. See *supra* note 13.

### III. FUTURE AMENDMENTS SHOULD CLARIFY THAT DOUBLE COUNTING IS NOT PERMITTED

Because the new Guidelines can be read to permit double counting in spite of the fact that such a reading does not comport with retributive goals, the Commission should further modify the Guidelines to clarify that the victim under the § 2B1.1 enhancement and the victim who receives restitution need not be identical.<sup>45</sup> Under the old Guidelines, courts justified treating third-party compensators as victims because they were owed restitution, and courts thought that the restitution victim and Guidelines' victim should be identical even though the restitution statute is separate from the Guidelines. This confusion will continue to pose a problem under the Amendments because it provides courts with support for double counting. Courts might treat both compensated individuals whose identities were stolen *and* their compensators as victims, because the compensators were entitled to restitution. The next amendments should consequently clarify the distinction between the two categories of victims so that courts do not treat both compensated individuals, whose identities were used in a fraud, and their compensators, who receive restitution, as victims.

There can be a difference between a victim for restitution purposes under the Mandatory Victim Restitution Act ("MVRA") and a victim for § 2B1.1 Guidelines' purposes, although some courts were confused by this point under the old Guidelines.<sup>46</sup> Both restitution under MVRA and loss calculations under § 2B1.1 "are often involved in the sentencing of many federal economic crimes,"<sup>47</sup> and as a result, some courts found that the MVRA restitution victim and the Guidelines' enhancement victim ought to be identical.<sup>48</sup> MVRA was enacted in 2006 to expand victim restitution by

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45. The Sentencing Commission does not appear to have considered resolving the double-counting problem with the new Amendments. *See* AMENDMENTS, *supra* note 18, at 4. This makes sense given that double counting was a relatively small problem prior to the Amendments. *See supra* notes 24–27 and accompanying text.

46. *See* Catharine M. Goodwin, *Comparison of the New Calculation of Economic "Loss" with that of Restitution*, U.S. SENTENCING COMM'N 1 (2002), <http://www.ussc.gov/training/Goodwin502.pdf> ("[M]any orders of restitution have been vacated because the court confused guideline 'loss' concepts with those of restitution.").

47. *Id.*

48. There is evidence that some courts conflated the concept of restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663(a) (1996), with loss in the Guidelines. *See, e.g.,* *United States v. Conner*, 537 F.3d 480, 490 (5th Cir. 2008) (noting that because the "district court ordered restitution only to the five companies that credited the accounts used to perpetrate the fraud" the account holders were not victims); *United States v. Icaza*, 492 F.3d 967, 970 (8th Cir. 2007) (pointing out that only the Walgreens corporation would receive restitution in the court's decision finding that only the corporation, not the individual stores that had been reimbursed, was a victim); *see also* Goodwin, *supra* note 46, at 1. Other courts and judges, however, are aware that there is a difference between "an enhancement whose evident purpose is to gauge the magnitude of the crime, not to apportion damages, *restitution* or tax liability." *United States v. Stepanian*, 570 F.3d 51, 57 (1st Cir. 2009) (emphasis added); *see also Conner*, 537 F.3d at 493 n.1 (Garza, J., dissenting) ("A party must suffer pecuniary loss to receive restitution, but a party may suffer an actual loss without seeking restitution."); *United States v. Smiley*, 210 F. App'x 972, 975 (11th Cir. 2006) ("The fact that the [victims] did not seek restitution does not mean that they did not sustain an actual loss.").

requiring federal courts to order restitution in certain situations, including fraud offenses.<sup>49</sup> Restitution allows for crime victims to recover "all or some of their monetary losses."<sup>50</sup>

The definition of victim under the Guidelines and MVRA need not be identical. The purposes of loss versus restitution underscore this difference: "Loss serves the multiple, and partly 'constructive,' purposes of representing the relative seriousness of the offense and culpability of the offender, while restitution is intended to compensate."<sup>51</sup> As a result, when courts look at "victims" under the Guidelines in calculating loss, they should consider only compensated individuals to be victims, because this will properly take into account the seriousness of the offense.<sup>52</sup> In contrast, when providing restitution, courts should look at the party that suffered the ultimate loss, which is the party that repaid the individual who originally suffered the loss, or the third-party compensator.<sup>53</sup>

The Sentencing Commission should add a comment to explain this difference between restitution victims and § 2B1.1 victims. Such a comment might simply clarify the new enhancement by explaining that where the same loss is attributable to account holders and the third party that compensated them, only the "individual whose means of identification was used unlawfully," or the account holders, should be counted for enhancement purposes. The different goals of compensation for restitution and loss indicate that the victim for restitution purposes and the victim for purposes of the Guidelines' enhancement need not necessarily be the same. Such a clarification would help courts avoid double counting and the resultant unjust extra punishment to which defendants are potentially exposed.

#### CONCLUSION

When Tess famously cried out, "Once victim, always victim," she was grieving the permanent status of victimhood. Tess lamented the fact that victims could not escape their fate, yet the new Guidelines demonstrate that the Sentencing Commission *intended* that compensated individuals whose identities were used retain their status as victims for purposes of the § 2B1.1 enhancement. This Amendment to the Guidelines offers resolution to a split that has persisted among the Circuits for several years, but it does not resolve a smaller discrepancy, likely to become larger under the Amendments, about whether double counting is permissible. Until this split is addressed

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49. Morna Murray & Sterling O'Ran, *Restitution*, in NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK, Ch. 5.2 (2002), [http://ojp.usdoj.gov/ovcl/assist/nvaa2002/chapter5\\_2.html#1](http://ojp.usdoj.gov/ovcl/assist/nvaa2002/chapter5_2.html#1).

50. DANIEL MCGILLIS, U.S. DEP'T OF JUSTICE, CRIME VICTIM RESTITUTION 5 (1986).

51. Goodwin, *supra* note 46, at 12. Although the Goodwin commentary is not binding authority for analysis of the Guidelines, it is found on the Sentencing Commission website under educational materials.

52. *See supra* Part II.

53. Catharine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, FED. PROBATION, Dec. 1998, at 95, 98 ("[A] court may order restitution to a third party that compensates the *victim* for loss caused by the defendant . . ." (emphasis added)).

by further amendments, courts should let retributive goals of punishment guide them to the conclusion that only the compensated individuals in such cases should count as victims under the enhancement. At the same time, the Sentencing Commission should consider revising the Guidelines to clarify this point, ensuring that defendants do not receive inconsistent sentences across the circuits so that their sentences comport with the retributive goals of punishment.