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Justin Gendler

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Florida's Disenfranchisement of Ex-Offenders Shows Criminal Restitution Must Be Reformed

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* *By: Justin Gendler*



All eyes were on Florida after the passage of Amendment 4 in 2018, whereby voters passed a constitutional amendment seeking to restore voting rights to former felons who had completed “all terms of [their] sentence.”^[1] In an act that many saw as subverting the will of the people, the Florida Legislature convened shortly thereafter and passed an implementing bill that interpreted “all terms” of a criminal sentence to encompass the payment of any fees, fines, or criminal restitution orders.^[2] Thus, in Florida, ex-felons who have served their sentences are still prohibited from voting if criminal restitution debt related to their offense is outstanding.^[3]

Leading into the 2020 elections, this became increasingly topical. Some called the legislation a “poll tax” in part because its impact largely extended to low-income communities of color across the state.^[4] Advocates of Amendment 4 originally estimated 1.4 million Florida residents would have their voting rights restored by the amendment’s passage, but this did not come to fruition. In response to the

new law's passage, lawsuits were filed challenging its constitutionality. [5] Nonetheless, the Eleventh Circuit Court of Appeals upheld the law in September of 2020, [6] meaning that individuals with outstanding criminal debt--like unsatisfied restitution orders--were barred from participating in that election.

In response to the Eleventh Circuit's ruling, activists began raising money to pay off outstanding criminal restitution so that these individuals could participate in the electoral process.[7] Former New York City Mayor and well-known billionaire, Michael Bloomberg, made national news when he contributed \$16 million to help pay off outstanding restitution for ex-offenders in Florida.[8] Backlash swiftly ensued. Bloomberg's contribution was criticized by many, including President Donald Trump who accused Bloomberg of committing a "felony" by attempting to "pay people to vote" for Democratic candidates.[9]

The debacle surrounding Amendment 4 in Florida, however, highlights a bigger problem: our system is broken. Restitution to victims should not require millions of dollars in donations from the ultra-wealthy. Currently, victims are rarely made whole. The United States too often imposes thousands of dollars in criminal fines and fees onto indigent defendants unable to pay the debt. At the end of the 2016 Fiscal Year, the United States Department of Justice identified \$110 billion in criminal restitution ordered but not collected.[10] Unfortunately, it seems that number will continue to increase. According to a 2019 report published by the Congressional Research Service, courts impose about \$1 billion per year in criminal restitution orders, but "less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendant's inability to pay." [11]

Because criminal restitution orders are so prevalent in U.S. criminal courts, this is an issue with far reach. In federal criminal courts, restitution is "mandatory" for those criminal offenses that have an identifiable victim and constitute: (1) a "crime of violence," (2) an offense against property, (3) a violation of the Controlled Substances Act, (4) a crime committed by fraud or deceit, (5) an offense involving the theft of medical products, or (6) a crime that involves tampering with consumer products.[12] When the district court is not otherwise bound to impose a "mandatory" restitution order, federal law allows district courts to exercise their discretion.[13] However even for those offenses where the court may exercise such discretion, "[t]here is a strong presumption" that a restitution order will be imposed where there is an identifiable victim.[14]

The imposition of a restitution order onto offenders usually represents a short-lived win for victims. Too often, offenders are left saddled with debt that they will likely never pay off and victims are left holding an empty bag. Since most people charged with crimes in the United States are indigent,[15] a criminal restitution order imposed on at sentencing will likely never be paid. Instead, such orders artificially inflate a victim's hope that they will be made whole.[16] Many victims will come to perceive this process as a second victimization.[17] Unsatisfied criminal restitution orders amplify a feeling of lost control, reinforcing a victim's perception of justice unfulfilled.[18]

Rather than directing praise or even rage toward billionaires like Michael Bloomberg that seek to pay off outstanding criminal restitution, we should question why such a solution is necessary in the first place. The flaws inherent in our system of criminal restitution cause billions of dollars of unpaid restitution debt to accumulate without any genuine hope that it will ever be paid off. As a result, both offenders and victims are harmed; and the integrity of the judicial process is called into question.

Instead, we should consider a system whereby the State steps up to meet the rehabilitative needs of victims. The creation of a centralized Victim Crime Fund would mean that a victim's ability to access rehabilitative services would no longer depend on the economic status of the offender. This does not mean that the offender would be unjustly enriched by the fruits of his crime. Criminal restitution can still exist. It should simply be reexamined and reformed to create a system that disgorges offenders of gains achieved as a result of their crime. Once the offender is disgorged of those unlawful gains, the State should fill the gap. Such a system would ensure victims receive the help they need rather than asking mostly indigent offenders to pay for what they cannot.

**Justin Gendler is a 2L at Cardozo Law School, interested in the criminal defense field. Justin graduated with a B.S. in Social Science from Florida State University in 2018.*

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- [1] Gary Fineout, *Federal appeals court considers whether to uphold Florida felon voting law*, POLITICO, (Aug. 18, 2020), <https://www.politico.com/states/florida/story/2020/08/18/federal-appeals-court-considers-whether-to-uphold-florida-voting-law-1309985>.
- [2] Fla. Stat. Ann. § 98.0751 (West, Westlaw Edge through Chapter 184 of the 2020 Second Regular Session of the Twenty-Sixth Legislature).
- [3] *Id.*
- [4] Courtney Connley, *Why Restoring Former Voting Rights to Former Felons is “One of the Key Civil Right Issues of Our Time”* CNBC Make It, (Oct. 20, 2020) <https://www.cnbc.com/2020/10/20/restoring-voting-rights-to-former-felons-is-one-of-the-key-civil-right-issues-of-our-time.html>.
- [5] Jones v. Governor of Fla., No. 20-12003, 2020 WL 5493770 (11th Cir. 2020).
- [6] *Id.*
- [7] Greg Allen, *Bloomberg Adds \$16 Million to a Fund That Helps Florida Felons Get Chance to Vote*, NPR (Sept. 24, 2020), <https://www.npr.org/2020/09/24/916625348/bloomberg-adds-16-million-to-a-fund-that-helps-florida-felons-get-chance-to-vote>.
- [8] *Id.*
- [9] *Id.*
- [10] Congressional Research Service, *Most Debt is Outstanding and Oversight of Collections Could be Improved*, GAO (Feb. 2018), <https://www.gao.gov/assets/690/689830.pdf>.
- [11] Congressional Research Service, *Restitution in Federal Criminal Cases: A Sketch* (Oct. 15, 2019), <https://fas.org/sgp/crs/misc/RS22708.pdf>.
- [12] 18 U.S.C. § 3663(a) (West, Westlaw Edge through P.L. 116-259).
- [13] *Id.*
- [14] Catharine M. Goodwin, *Federal Criminal Restitution § 10:16* (2020).
- [15] Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics (Nov. 2000); *See also* Cortney E. Lollar, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 98 (2014).
- [16] Alison C. Cares et al., *Reducing the Harm of Criminal Victimization: The Role of Restitution*, *Violence & Victims* 450, 469 (2015).
- [17] *Id.*
- [18] *Id.*