Harsher Penalties for the Poor: Constitutional Considerations of a Defendant's Ability to Pay Restitution in Sentencing

ALIZA HOCHMAN BLOOM[†]

I. THE CONSTITUTION FORBIDS DEBTOR PRISONS

The Supreme Court has long focused on the treatment of indigent criminal defendants and emphasized the need to eliminate wealth-related disparities in criminal justice.[1] The Court interprets the Constitution as forbidding imprisonment solely for failure to pay a debt. That is, if a state or federal court imposes a sentence with no incarceration, such as a fine, upon a defendant, it cannot incarcerate that defendant for his or her failure to pay that fine. Three seminal cases invalidated state laws permitting the imprisonment of individuals upon failure to pay a fine.[2] These cases rely on principles of equal protection and due process.

In *Williams*, the Supreme Court invalidated a state law because it imposed upon an indigent defendant a term of imprisonment beyond the statutory maximum so that he might "work off" a fine that he was unable to pay.[3] The Court clarified that debtors' prisons are unconstitutional: concluding that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[4]

Subsequently, in *Tate*, the Supreme Court concluded that the Fourteenth Amendment prevents the imposition of a jail sentence as an alternative to a monetary penalty for any defendant unable to pay, reiterating that "the Constitution prohibits the State from imposing a fine as a sentence and then

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[†] Assistant Federal Defender, Office of the Federal Defender of the Middle District of Florida, appellate division. Previously, Ms. Hochman Bloom clerked for the Honorable Charles Wilson of the Eleventh Circuit Court of Appeals and the Honorable Charlene Edwards Honeywell of the Middle District of Florida. Ms. Bloom is grateful to Rosemary Cakmis, chief of the appellate division, for her brainstorming about the cases that inspired this note, and constant support.

[1] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 17, 19 (1956) (calling the need to eliminate disparate treatment in the criminal justice treatment based upon wealth "the central aim of our entire judicial system."). In *Griffin*, the Supreme Court struck down the requirement that defendants pay certain costs to receive a trial transcript, explaining that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religious, race, or color" and that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *See also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (citing the goal of achieving a criminal justice system where, regardless of finances, "every defendant stands equal before the law.").

[2] Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983).

[3] *Williams*, 399 U.S. at 2021.

[4] *Id.* at 2023–24.

automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[5] There, the Supreme Court invalidated a state law because the petitioner's imprisonment for the nonpayment of funds "constitute[d] precisely the same unconstitutional discrimination [as in *Williams*] since, like Williams, petitioner was subjected to imprisonment solely because of his indigency."[6]

Most notably, in *Bearden*, Justice Black, quoting from *Griffin,* emphasized that a defendant's financial status had no place in criminal sentencing, explaining that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[7] The Supreme Court there held that a state cannot impose a term of imprisonment in lieu of a fine when a defendant cannot pay that fine.[8] In other words, if a state determines that a fine is the appropriate and adequate penalty for a criminal act, it cannot thereafter imprison a defendant solely for lacking the resources to pay. Indeed, "to do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." The Court's analysis rests upon due process and equal protection principles.[9]

Bearden demonstrates a balance between the constitutional impermissibility of imprisoning a defendant solely because of his lack of financial resources and the desirability of considering all relevant factors when determining an appropriate sentence for an individual defendant.[10]

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[5] Tate v. Short, 401 US. 395, 398 (1971).

[6] *Id.* at 398.

[7] Bearden v. Georgia, 461 U.S. 660, 667–68 (1983).

[8] *Id.* ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.").

[9] In *Bearden*, the Supreme Court explains in its holding that a sentencing court cannot revoke defendant's probation for failure to pay a fine and make restitution, stems from both equal protection and due process principles. The Court explains that "[m]ost decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns." ("Due process and equal protection principles converge in the Court's analysis in these cases . . . we generally analyze the fairness of relations between the criminal defendant and he State under the Due Process Clause, while we approach the questions whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause."). The imprisonment of indigents more severely than the defendants with financial means seems to be a clear violation of the equal protection clause. Indeed, some courts have acknowledged that the "central mandate of the equal protection guarantee is that [t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 817 (11th Cir. 2004) (citing Lehr v. Roberson, 463 U.S. 248, 265 (1983)). However, it has also been argued, in other contexts, that wealth discrimination does not provide an adequate basis for strict scrutiny. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that the Texas educational system does not operate to the peculiar disadvantage of any suspect class because the children in districts with low assessable property values are still receiving public education); Lewis v. Casey, 518 U.S. 343, 374 (1996) (explaining that wealth discrimination alone does not operate to the peculiar disadvantage of any suspect class).

[10] *Bearden*, 461 U.S. at 661.

Indeed, the Court recognizes that this is "a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources."[11]

These early Supreme Court cases establish that a defendant cannot be subject to imprisonment, or a longer term of imprisonment than he otherwise would have, solely based upon his financial means. However, they do not preclude a sentencing court's consideration of a defendant's financial means entirely when fashioning an appropriate criminal sentence. To the contrary, in *Bearden*, the Court explicitly states that a court may consider a defendant's financial resources as part of his "entire background" when determining "whether the State's penological interests require imposition of a term of imprisonment."[12] This holding, however, begs the critical question: to what extent can a defendant's means be considered when imposing a sentence for an economic crime?

Recently, at least two federal courts of appeal have relied upon these precedents in holding that a sentencing court is forbidden from incarcerating poor defendants more severely than they would have had those defendants been able to pay more restitution.[13] While *Bearden* involved the revocation of a defendant's probation, these courts are applying the constitutional constraints to initial sentencing decisions. At least one state supreme court has reached the same conclusion.[14]

In *United States v. Burgum*, the Ninth Circuit held that the district court's treatment of defendant's inability to pay restitution as an aggravating sentencing factor was plain error violating his constitutional right to due process.[15] Although the district court's reference to the defendant's limited financial means was brief and considered several other aggravating factors in sentencing him for armed robbery, the court's explicit consideration of defendant's inability to pay restitution was plain error. The Ninth Circuit determined that "[b]y invoking [defendant's] inability to pay as an 'aggravating factor,' and emphasizing that its sentencing decision was based

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[11] *Id.* at 661.

[12] *Id.* at 670.

[13] United States v. Burgum, 633 F.3d 810 (9th Cir. 2011); United States v. Plate, 839 F.3d 950 (11th Cir. 2016). *See also* United States v. Ellis, 907 F.2d 12, 13 (1st Cir. 1990) ("[T]he government cannot keep a person in prison solely because of indigency.")

[14] *See* Noel v. State, 191 So. 3d 370 (Fla. 2016) (holding that the trial court justified defendant's harsher prison sentence on his failure to pay a particular sum, and that this deprivation of an additional two years of his freedom was "contrary to the fundamental fairness required by the Fourteenth Amendment."). In *Noel*, the Florida Supreme Court affirmed that a trial court may consider a defendant's financial resources at sentencing, but consideration of a defendant's background cannot "undermine the core constitutional prohibition against imposition of a longer prison term as a substitute for a monetary penalty."

[15] *Burgum*, 633 F.3d at 814 (citing *Williams*, *Tate*, and *Bearden* for the "well established" principle that "the Constitution forbids imposing a longer term of imprisonment based on a defendant's inability to pay restitution").

in part on aggravating factors, the court improperly injected socioeconomic status into the sentencing calculus."[16] Indeed, the Ninth Circuit explained that "the authority forbidding such an approach is abundant and unambiguous."[17] In contrast, the Eighth Circuit rejected an appellant's similar challenge, that the district court improperly considered her socioeconomic status upon sentencing. The appellate court dismissed the district court's statement that "[w]e're going to try and squeeze every nickel we can out of you, and we're just not going to get a lot" as a mere observation that the defendant would be unable to pay the restitution that had been ordered.[18]

Similarly, in *United States v. Plate*, the Eleventh Circuit acknowledged that consideration of a defendant's inability to pay restitution as an aggravating sentencing factor warranting further imprisonment is unconstitutional.[19] The Eleventh Circuit cited *Williams*, *Tate*, and *Bearden* for the proposition that incarcerating a person "solely because he lacked the resources to pay" a fine or restitution would violate Equal Protection principles.[20] The Court concluded that "[i]t is apparent that [defendant] was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional, as multiple courts have held."[21]

It is evident from these seminal cases that the Constitution forbids incarceration of indigent defendants that is more severe than wealthy ones

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[16] *Burgum*, 633 F.3d at 816.

[17] *Id.*; *see also* United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996) ("[The defendant] may be receiving an additional eight months on this sentence due to poverty. Such a result is surely anathema to the Constitution.")

[18] United States v. Kouangvan, 884 F.3d 996 (8th Cir. 2017). The Eighth Circuit acknowledged that "To we see no way to understand the statement "We're going to try and squeeze every nickel we can out of you, and we're just not going to get a lot" except as an observation that Kouangvan would likely be unable to pay the restitution the district court had ordered." *Id.* at 1001. However, the court concluded that "it is far from clear that the district court's observation resulted in a longer prison sentence than Kouangvan would have received otherwise." *Id.* The court found that the district court did not signal or even imply that it was increasing the defendant's prison sentence to compensate for its expectation of not receiving much in restitution.

[19] United States v. Plate, 839 F.3d 950, 955–56 (11th Cir. 2016) ("It is apparent that Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional, as multiple courts have held.") (citing *Williams*, *Tate*, and *Bearden*). In *Plate*, the Eleventh Circuit concluded that the defendant's sentence was substantively unreasonable, and in light of the principle of constitutional avoidance, the decision does not rely on the arguable constitutionality of her sentence. *Id.* at 956 ("Nevertheless, despite the strength of her constitutional argument—indeed, the government did not even oppose this argument in its brief—we do not base our decision on that ground as we agree with Plate's additional argument that the sentence imposed was substantively unreasonable and an abuse of discretion.").

[20] *Id.*

[21] *See Burgum,* 633 F.3d at 814 (citing *Williams, Tate,* and *Bearden* for the "well established" principle that "the Constitution forbids imposing a longer term of imprisonment based on a defendant's inability to pay restitution"); *Plate*, 839 F.3d at 956 ("It is apparent that Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional, as multiple courts have held."); Noel v. State, 191 So.3d 370 (Fla. 2016) (relying on the same federal cases and reaching the same conclusion).

solely due to their inability to pay restitution. Accordingly, at least some appellate courts are willing to reverse sentences where the record demonstrates that a defendant *would have* gotten a lower sentence *but for* his or her inability to pay more restitution.

II. COURTS ARE DIVIDED ON HOW A DEFENDANT'S FINANCIAL RESOURCES CAN AFFECT THE LENGTH OF THEIR PRISON SENTENCE

While the Constitution forbids the incarceration of defendants lacking financial resources more severely *solely* due to their inability to pay restitution, the extent to which a sentencing court can consider a defendant's likelihood of paying restitution when fashioning his sentence remains ambiguous. Indeed, the Supreme Court does not forbid the consideration of a defendant's financial resources. Indeed, the Court explains that a sentencing court is enabled to "consider the entire background of the defendant, including his employment history and financial resources."[22] In addition, the statute providing factors that a district court is obligated to consider upon imposing an appropriate sentence, 18 U.S.C. § 3553(a), includes "the need to provide restitution to any victims of the offense."[23]

A. Courts Recognize that Causing Serious Financial Harm is a Valid Sentencing Factor

Some courts reject the claim that a defendant's sentence was increased because of an inability to pay restitution by explaining that "a court is entitled, and indeed is obligated, to consider the devastating harm, financial or otherwise, that is inflicted on victims."[24] Acknowledging that it is unquestionably true that a court cannot impose a heightened sentence on a defendant because he cannot pay a fine or restitution, the court explained that "[a] defendant's poverty in no way immunizes him or her from punishment and nothing precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law."[25] Courts routinely consider severe or irreparable financial harm that a defendant causes his or her victims upon imposing punishment, either implicitly or explicitly citing 18 U.S.C. § 3553(a)(7).[26]

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[22] Bearden v. Georgia, 461 U.S. 660, 669–70 (1983); *see also* Sonja Starr, *Evidence Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (Apr. 2014).

[23] 18 U.S.C. § 3553(a)(7) (2012).

[24] United States v. Nathanson, 948 F. Supp. 2d 1055, 1064 (C.D. Cal. 2013).

[25] *Id.* (citing *Bearden*, 461 U.S. at 669–70).

[26] *See, e.g., United States v. Schlueter*, 634 F.3d 965, 967 (7th Cir. 2011) (affirming above-guideline range sentence where defendant "conned not just vulnerable [elderly] victims out of large sums of money, but because he took advantage of personal relationships to cheat them out of significant sums they needed at critical stages of their lives"); *United States v. Lalonde*, 509 F.3d 750, 771 (6th Cir. 2007) (holding that sentence at the high end of guideline range was reasonable "given the seriousness of Lalonde's scheme which defrauded over $1.6 million dollars from several individuals and caused major financial and emotional disruption in those victims' lives"); *United States v. Martin*, 455 F.3d 1227, 1239

The Ninth Circuit explained that by considering the severe financial impact that a defendant's crimes had on his victims, the district court did not impermissibly rely on his inability to pay restitution.[27] The Ninth Circuit emphasized that there is not "an absolute bar to considering the possibility of restitution" and that the consideration of a defendant's inability to pay restitution is permissible when focused "on the impact on the victims of [the defendant's] crimes" rather than as an aggravating factor in and of itself.[28] Under this logic, a defendant's inability to pay back his victims serves to increase to the financial harm he has caused, as opposed to an aggravating factor in it of itself. That appears to be a difficult and tenuous distinction.

B. Many Courts are Uncomfortable with Downward Variances for Defendants with the Financial Ability to Pay Restitution

On the other hand, many courts are uncomfortable with a sentencing court's imposition of a more lenient prison sentence in order to enable a relatively affluent defendant to pay restitution. Courts have articulated the concern that repeatedly mitigating prison sentences for the wealthy sends the wrong message to defendants and potential defendants that, despite constitutional limitations for the indigent, money can indeed permit an offender to avoid imprisonment.[29]

The Fourth Circuit, for example, has held that a downward departure to probation was substantively unreasonable where the "district court made it clear that, but for [defendant's] earning capacity, it would have imposed a within-Guidelines sentence of imprisonment."[30] In finding the sentence unreasonable, the appellate court explained that "[r]educed to its essence, the district court's approach means that rich tax evaders will avoid prison, but poor tax evaders will almost certainly go to jail. Such an approach, where prison or probation depends on the defendant's economic status, is impermissible."[31] While *Booker* has vested sentencing courts with considerable discretion in fashioning a defendant's sentence, the Fourth

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(11th Cir. 2006) (seven-day sentence was unreasonable in part under § 3553 because sentence did not reflect the seriousness of a crime that "resulted in over a billion dollars of loss harming thousands of victims").

[27] United States v. Rangel, 697 F.3d 795, 799 (9th Cir. 2012).

[28] *Id.* at 804.

[29] *See* Daniel Faichney, *Autocorrect? A Proposal to Encourage Voluntary Restitution Through the White-Collar Sentencing Calculus*, 104 J. CRIM. L. & CRIMINOLOGY 389 (2014); *see also* United States v. Broderson, 67 F.3d 452, 458 (2d Cir. 1995) ("Ordinarily, payment of restitution is not an appropriate basis for downward departure under Section 5K2.0"); United States v. Harpst, 949 F.2d 860, 863 (6th Cir. 1991) (holding that the district court may not depart downward to preserve defendant's ability to make restitution).

[30] United States v. Engle, 592 F.3d 495, 504 (4th Cir. 2010). In *Engle*, the sentencing court was clear that "absent the apparent ability to generate the income, I would simply impose a Guideline sentence and be done with it." *Id.*

[31] *Id.*; *see also* United States v. Bolden, 889 F.2d 1336, 1340 (4th Cir. 1989) ("[W]e do not think that the economic desirability of attempting to preserve [defendant's] job so as to enable him to make restitution warrants a downward adjustment from the guidelines.").

Circuit "do[es] not believe the change wrought by *Booker* was so great that it permits district courts to rest a sentencing decision exclusively on such constitutionally suspect grounds."[32]

Similarly, the Ninth Circuit reversed the district court's decision to reduce a defendant's sentence due to his ability to pay restitution, explaining that "[r]ewarding defendants who are able to make restitution in large lump sums . . . perpetuates class and wealth distinctions that have no place in criminal sentencing."[33] Similarly, the Seventh Circuit reasoned that "[a]llowing sentencing courts to depart downward based on a defendant's ability to make restitution would thwart the intent of the guidelines to punish financial crimes through terms of imprisonment by allowing those who could pay to escape prison. It would also create an unconstitutional system where the rich could in effect buy their way out of prison sentences."[34]

The Eleventh Circuit, while recognizing that the need to provide restitution to victims of a crime is one appropriate factor to consider, has found in at least once occasion that the district court afforded it too much weight, and as a result vacated a defendant's probationary sentence was substantively unreasonable.[35] In *United States v. Crisp*, the district court imposed a downward variance from defendant's applicable guidelines of 24-30 months' imprisonment to a sentence of probation for bank fraud, explaining that "the main reason" it had imposed probation was to allow the defendant that time to pay off the restitution.[36] The Eleventh Circuit reasoned that "[t]he sentence essentially converts a theft by fraud into a loan that is unlikely to ever be repaid."[37] The court held that reducing a defendant's sentence just to enable restitution would lead to an unreasonable result, wherein the more severe the extent of a defendant's fraud, the less time they would be imprisoned in order to facilitate restorative payments.[38] This moral hazard, wherein the great amount of fraud leads to less prison time, is indeed troubling. Moreover, it is another example of where defendants with financial means would tend to get shorter sentences for economic crimes.

Similarly, the Ninth Circuit rejected an affluent defendant's argument that the long prison sentence imposed by the district court was unreasonable because it would "assure restitution would never be paid."[39] The Court reasoned that if it were to accept the defendant's argument, the most severe fraud cases would be punished with the shortest prison sentences, in order

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[32] *Id.* at 505 (citing *Bearden*, 461 U.S. at 661).
[33] United States v. Bragg, 582 F.3d 965, 970 (9th Cir. 2009).
[34] United States v. Seacott, 15 F.3d 1380, 1388–89 (7th Cir. 1994).
[35] United States v. Crisp, 454 F.3d 1285, 1291–92 (11th Cir. 2006).
[36] *Crisp*, 454 F.3d at 1288.
[37] *Crisp*, 454 F.3d at 1291.
[38] *Id.*
[39] United States v. Treadwell, 593 F.3d 990, 1012 (9th Cir. 2010).

to enable the payment of restitution.[40] Although recognizing that the "possibility of a wrongdoer making restitution is . . . one factor that a district court must weigh in balancing sentencing considerations," the court concluded that "the district court did not abuse its discretion when it denied [defendant] a shorter prison sentence than that warranted by other elements in the sentencing calculus merely so he could begin paying restitution sooner."[41] Conversely, the D.C. Circuit denied defendant's argument of the reverse, that the court had imposed a longer sentence in order for him to pay more restitution through prison earnings.[42] The D.C. Circuit found no support for the claim that defendant's prison term was longer than a wealthy person's would have been for a similar crime.[43] Moreover, it would be "absurd" to think that defendant's meager prison earnings towards restitution would motivate the district court to give him a longer sentence.[44]

C. Other Courts are Comfortable with a Defendant's Payment of Restitution Resulting in a Less Severe Sentence

While some courts are disturbed by even the implication that a defendant's financial means contributes to the length of their sentence, other courts find ways to determine that it is an appropriate and realistic consideration.

For example, where the record provides other reasons supporting a downward variance from a defendant's applicable sentencing guidelines, some courts deny the claim that a defendant could "buy his way out of prison" by finding no direct connection between a defendant's means and the resulting downward departure for an economic crime. For example, in *Tomko*, the Third Circuit explained that the sentencing court provided other justifications for downward varying to probation, including defendant's minimal criminal history, record of employment, and charitable endeavors.[45] Accordingly, the Court found the government's argument that the district court "permitted [the defendant] to buy his way out of prison" to be "a misreading of the record that is unfair to the District Court."[46]

Other courts reconcile this apparent conflict—lower sentences for defendants who can afford to pay restitution—by finding that a defendant's

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[40] *Treadwell*, 593 F.3d at 1012.

[41] *Id.*

[42] United States v. Godoy, 706 F.3d 493, 498 (D.C. Cir. 2013).

[43] *Godoy*, 706 F.3d at 498.

[44] *Id.*

[45] United States v. Tomko, 562 F.3d 558, 570 (3rd Cir. 2009) ("Indeed, the record exhibits no connection between the fine imposed and the failure to incarcerate. To the contrary, the District Court explicitly stated that the two served unrelated purposes. On the one hand, probation was warranted because of Tomko's negligible criminal history, his record of employment, his community ties, and his extensive charitable works. On the other hand, the statutory maximum fine was necessary to effect deterrence in light of Tomko's wealth. We cannot conclude that the District Court abused its discretion where there exists nothing more than an implication of impropriety arising out of simple coincidence.")

[46] *Tomko*, 562 F.3d at 570.

payment of extraordinary restitution may be the basis of a downward variance only to the extent that it shows acceptance of responsibility.[47] These courts explain that a defendant's payment of "extraordinary restitution, whether paid before or after adjudication of guilt, may, in the unusual case, support a departure from the guidelines."[48] In *Kim*, a case decided under the former mandatory guidelines scheme, the Eleventh Circuit refused to accept the government's argument that a defendant's payment of restitution could not help him, explaining:

> We are persuaded by the comments of the late Senior Circuit Judge Calebrezze . . . . The fact that [defendant] may have some economic means should neither be held for him or against him. To suggest that when a defendant is affluent, his attempts at restitution can never qualify as an exceptional circumstance[ ] is as repugnant to equal protection ideology as to hold the lack of ability to make restitution against an indigent defendant.[49]

Accordingly, the court concluded that payment of extraordinary restitution is not a prohibited factor for departing downward under the sentencing guidelines.

Indeed, despite Judge Black's exhortation that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has,"[50] some courts have cited a defendant's payment of extreme restitution in fraud cases as a basis for imposing a significant downward variance from the applicable sentencing guidelines.[51] The Ninth Circuit interpreted the district court's "goal," pursuant to 18 U.S.C. § 3553(a)(7), as "obtaining restitution for the victims of Defendant's offense," and concluded that goal was "better served by a non-incarcerated and employed defendant."[52] This interpretation, of course, has logical appeal. A defendant with means and employment can more readily redress his criminal harm by earning money outside of prison. However, it would not be logical to interpret the statutory language of 18 U.S.C. § 3553(a)(7), "the need to provide restitution to any victims of the offense," as justifying a shorter

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[47] *See* United States v. Crook, 9 F.3d 1422, 1426 (9th Cir. 1993) ("We recently held in [*Miller*] that extraordinary restitution is a basis for downward departure only 'to the extent it shows acceptance of responsibility.'")

[48] United States v. Kim, 364 F.3d 1235, 1238 (11th Cir. 2004) (holding that extraordinary restitution paid after adjudication of guilt is not a forbidden factor for departure from the guidelines).

[49] *Kim*, 364 F.3d at 1243.

[50] Bearden v. Georgia, 461 U.S. 660, 664 (1983).

[51] *See, e.g.*, United States v. Lombardi, Case No.: 6:15-cr-155, Doc. 57; Doc. 61, p. 8 (the district court explained that it "was going to sentence [Defendant] to 15 months in prison," but it sentence[d] [Defendant] 18 months' probation and a $100 special assessment, because the restitution has been paid."

[52] United States v. Menyweather, 447 F.3d 625, 634 (9th Cir. 2006) (overruled on other grounds).

sentence where the economic harm is greater. As discussed, such a result is counterintuitive.

Unlike in *Burgum*, in *Rangel*, the Ninth Circuit explained that the district court did not consider the defendant's inability to pay restitution itself as an aggravating factor in imposing a longer sentence, and instead focused on the severe financial impact to the victims of defendant's crimes.[53] There, the appellant argued that the district court could not consider restitution in its decision to impose a sentence longer than the guidelines, and had improperly relied upon his inability to pay the victims in imposing sentence.[54] However, the appellate court determined that "[t]he court's discussion made clear that its concern over restitution was based on the impact [defendant's] crime had on the victims and was not designed to punish [defendant] for his inability to pay."[55]

Furthermore, some scholars maintain that common sense dictates permitting a wealthy client to redress his crime by payment of prompt restitution. In the case of white-collar crime, some posit that a defendant's ability to pay restitution should be encouraged and factored into sentencing in order to achieve a major goal of punishment: redressing the harm caused to victims.[56] The argument is that although prison plays a meaningful role for deterrence, incarceration should not overpower other measures that can limit the adverse impacts of fraud and other economic crimes. Accordingly, courts should encourage measures to mitigate prison sentences when an offender "voluntarily and promptly pays victims restitution."[57]

III. CONCLUSION

While the Supreme Court explicitly refers to the "impermissibility of imprisoning a defendant solely because of his lack of resources," there is common agreement among courts that some consideration of a defendant's financial means is appropriate at sentencing.[58] Indeed, the statute governing a district court's sentencing lists the need to consider financial harm done to any victims of a crime as a required consideration upon imposing sentence.[59] Courts, however, disagree as to whether a defendant who owes a great amount of restitution should be imprisoned for longer because of the harm caused, or for shorter, in order to practically facilitate repayment.

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[53] United States v. Rangel, 697 F.3d 795, 804 (9th Cir. 2012).

[54] *Id.; see* Opening Brief for Appellant at 20, United States v. Rangel, 697 F.3d 795 (9th Cir. 2012) (No. 10cr1061-SJO) (citing sentencing: "I think tellingly, Mr. Rangel has come here today without a penny to offer you. He has made no efforts to borrow money from friends or people who have written letters on his behalf to attempt to make a good-faith effort to return any of the monies to you. And I believe he probably will not be able to accomplish that after his release from prison.").

[55] *Rangel*, 697 F.3d at 804.

[56] *See, e.g.*, Faichney, *supra* note 29.

[57] *Id.* at 390.

[58] Bearden v. Georgia, 461 U.S. 660, 661 (1983).

[59] 18 U.S.C. § 3553(a)(7) (2012).

Many courts and practitioners remain uncomfortable with the notion, or appearance, that a defendant of means will get a lower sentence of imprisonment than an indigent defendant, in light of the fact that he has the ability to pay restitution. Other courts maintain that payment of extraordinary restitution is a legitimate basis for a downward variance, and can show remorse for a financial crime.

Without further guidance from the Supreme Court on this conflict and the exact meaning of U.S.S.C. § 3553(a)(7), courts of appeal will continue, on a case by case basis, to decide whether a particular sentencing court's consideration of a defendant's ability to pay restitution, or payment of restitution, appropriately contributed to the length of his or her sentence. In other words, courts of appeal will decide in each individual challenge whether the sentencing court's imposition of sentence considered the defendant's financial means in a manner that was so distasteful or unfair as to implicate constitutional limitations.