

## **Abatement *Ab Initio* and a Crime Victim's Right to Restitution\***

On December 30, 1994, John Salvi fired multiple shots into two abortion clinics in Brookline, Massachusetts, killing two women and wounding many others. *See* Barry A. Bostrom, *John Salvi III's Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. CITY L. REV. 141, 145-47 (2002). Rejecting his insanity defense, a jury convicted him. *See id.* at 148. After Salvi committed suicide in prison pending his appeal, a Massachusetts court erased Salvi's convictions. *See id.* at 149.

On October 17, 2006, a federal district court wiped out Ken Lay's multiple Enron-related fraud and conspiracy convictions after he died of a heart attack prior to his sentencing. *See United States v. Lay*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2956273 (S.D. Tex. Oct. 17, 2006). The effect – 44 million dollars that the government was seeking to compensate victims defrauded in the stock scandal was lost. *See* Kris Axtman, *An Enron Twist: Convicted But Not Guilty?*, *The Christian Science Monitor*, Aug. 28, 2006. How could either of these results occur? Both John Salvi and Ken Lay were posthumous beneficiaries of the doctrine of abatement *ab initio*.

Abatement *ab initio* (meaning “from the beginning”) is a sweeping judicial action that can have a devastating impact on the rights of crime victims. The common law doctrine, applied when a criminal defendant dies pending appeal, operates to extinguish all criminal proceedings initiated against that defendant from indictment through conviction. Courts cite two policy rationales in support of the doctrine: 1) it is unfair to maintain a conviction against a deceased defendant which is untested by appellate review; and 2) the primary justifications for pursuing criminal proceedings – to punish and/or rehabilitate the defendant – no longer apply after the defendant's death. Both of these rationales are flawed because they fail to acknowledge the legal rights of the crime victims, the individuals injured by the deceased defendant's conduct. While abatement *ab initio* can have an adverse impact on a broad array of crime victims' rights, this article focuses on how the doctrine nullifies a victim's interest in restitution to demonstrate its fundamental lack of fairness.

### **Abatement in the Federal Courts**

To date the United States Supreme Court has issued two opinions addressing the doctrine of abatement *ab initio*; unfortunately neither offers any guidance as to how to address the interests of crime victims in the abatement context. In *Durham v. United States*, 401 U.S. 481, 483 (1971), the United States Supreme Court

upheld the lower court's application of the doctrine where a defendant died while his petition for writ of *certiorari* was pending. Five years later, the Court limited its application of the doctrine to situations where a defendant dies while pursuing an appeal of right, not a discretionary appeal. *Dove v. United States*, 423 U.S. 325, 325 (1976). Without clear direction from the Court, the lower federal courts that have wrestled with the issue have reached differing conclusions as to the ultimate disposition of a crime victim's restitution when a defendant dies prior to the resolution of his appeal. The courts' approaches are informed by the respective justifications for abatement—that punishment has no purpose after defendant dies and that a conviction untested by appeal should not stand.

### **The Punitive/Compensatory Distinction vs. the Finality Principle**

Three major approaches have emerged in the federal courts in response to the problem of how to address restitution where a defendant's conviction has been abated. Two of those approaches involve looking at whether restitution is meant to punish or compensate. The third approach disregards the penal/compensatory inquiry entirely, reasoning that because convictions and their attendant restitution orders are not final if they are untested by appellate review, they are subject to abatement.

Based on the fact that it is futile to punish a deceased defendant, the Third, Fourth, and Eleventh Circuit Courts look at whether restitution is punitive or compensatory when deciding whether it abates, and these courts have arrived at different conclusions. The Third and Fourth Circuit Courts have held that the purpose of restitution is to compensate crime victims, not to punish defendants, and have therefore abated the deceased defendant's conviction but not the attendant restitution orders. See *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001) (holding that restitution was "an equitable remedy . . . intended to reimburse a person wronged by the actions of another" and that abating restitution would grant defendant's estate "an undeserved windfall"); *United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984) (stating that "an order of restitution, even if in some respects penal, also, has the predominantly compensatory purpose of reducing the adverse impact on the victim"). In contrast, the practice of the Eleventh Circuit is to abate restitution along with conviction when applying the doctrine because, in the court's opinion "though restitution resembles a judgment for the benefit of a victim, it is penal rather than compensatory." *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997).

The Fifth Circuit, in *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004) (*en banc*), rejected the punitive/compensatory analysis, and adopted "the finality principle." The "finality principle" is based on the idea that a conviction untested by appeal is inherently unreliable, or not yet final. *Id.* According to the Fifth Circuit, because of this unreliability it is unfair to maintain an un-reviewed conviction against a deceased defendant, and all prior proceedings initiated against that defendant must be erased, including restitution. *Id.*

### **The Failure of the Federal Approaches**

All of the federal approaches described above are flawed because they continue to subscribe to some form of the abatement doctrine. Even the approach followed by the Third and Fourth Circuits, which is seemingly

beneficial to victims in that it preserves their restitution rights while abating the defendant's conviction, is inadequate because it rests on a legal fiction. Pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, mandatory restitution is dependent upon conviction. *See id.* at (a)(1). Under the MVRA, it is difficult to justify preserving a restitution order when the court has abated the conviction underlying that order.

The Fifth Circuit's "finality" approach is also problematic because its premise – that maintaining a conviction untested by appellate review is inherently unfair – is not grounded in constitutional principles. There is no federal due process right to appeal. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993) (stating that "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears"); *United States v. Burns*, 433 F.3d 442, 445 (5th Cir. 2005) (explaining that a federal criminal defendant's right to appeal is not constitutional in dimension). Instead, a defendant's right to appeal is statutorily based. *See* 18 U.S.C. § 3742(a). Thus, the Fifth Circuit appears to be adopting a policy choice that elevates a defendant's statutory right to appeal over a victim's statutory right to restitution. That choice is questionable in light of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, passed in fall 2004.

The CVRA reinforces and expands existing restitution law and grants victims explicit, enforceable rights, including the right to be treated with fairness, dignity, and respect. *See* 18 U.S.C. § 3771(a)(6), (a)(8). The CVRA's legislative history indicates that the Act's fairness provision "includes the notion of due process." *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Summarily erasing a crime victim's statutory right to restitution seems to violate the CVRA's fairness guarantee. Unfortunately, the one federal case that has addressed the abatement doctrine since Congress enacted the CVRA minimized its applicability.

In the Lay case, a crime victim who was defrauded opposed the Estate of Ken Lay's motion to vacate his conviction. The trial court vacated Lay's convictions without addressing the victim's argument that the CVRA's fairness guarantee precluded abatement. *See United States v. Lay*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2956273 (S.D. Tex. Oct. 17, 2006). The victim sought mandamus review of that decision, which the Fifth Circuit denied after concluding that, because a victim's right to restitution under the CVRA accrues at conviction, that right abates with conviction. *See In re: Russell P. Butler*, No. 06-20848, slip op. at 5 (5th Cir. Nov. 1, 2006) (unpublished).

In short, despite the substantive victims' rights conferred by the CVRA, abatement continues to be the rule in the federal courts. The states, on the other hand, are leading the way in acknowledging the rights of crime victims and rejecting abatement *ab initio*.

### **How States are Leading the Way**

While a slight majority of the states that have addressed abatement still follow the doctrine, there has been a growing trend towards abrogating abatement. *See, e.g., Washington v. Devin*, 142 P.3d 599 (Wash. 2006); *Alabama v. Wheat*, 907 So.2d 461 (Ala. 2005); *Idaho v. Korsen*, 111 P.3d 130 (Idaho 2005); *Michigan v.*

*Peters*, 537 N.W.2d 160 (Mich. 1995). There are other courts that have adopted the so-called “moderation approach,” meaning they refuse to automatically abate defendant’s conviction but may permit a third party to pursue an appeal on deceased defendant’s behalf. See, e.g., *Surland v. Maryland*, 895 A.2d 1034 (Md. 2006); *New Mexico v. Salazar*, 945 P.2d 996 (N.M. 1997); *Hawaii v. Makaila*, 897 P.2d 967 (Haw. 1995); *Ohio v. McGettrick*, 509 N.E.2d 378 (Ohio 1987). Most of the state courts rejecting abatement have cited the interests of crime victims as the reason for doing so, even extending their discussion of victims’ rights beyond the realm of restitution. For instance, the Idaho Supreme Court observed that, considering the state’s constitutional and statutory victims’ rights, the “abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.” *Korsen*, 111 P.3d at 135.

### **Conclusion**

The doctrine of abatement *ab initio* dates back to the 19th Century, leading one state court to refer to the rule as “one of antiquity.” *People v. Ekinici*, 743 N.Y.S.2d 651, 657 (N.Y. Sup. Ct. 2002). Since the origin of the abatement doctrine, the landscape of the criminal justice system has fundamentally changed in regards to rights of crime victims. Currently, every state in the union affords crime victims’ rights in the criminal justice system, and 33 states have enshrined these rights in their state constitutions. At the federal level, through the CVRA, Congress has firmly established a participatory role for victims within criminal proceedings. Considering the legislative protections gained by crime victims in recent years, the doctrine of abatement is outmoded and unjust. The death of a defendant, found guilty in a court of law, should not erase the rights of the victims left behind.

\* Originally published in *NCVLI News Fall/Winter 2006*.