Pay It Backward: Buy-Money Repayment as a Condition of Supervised Release

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INTRODUCTION

On February 10, 1995, Stanley Cottman and an acquaintance delivered sixty-five cable boxes to a warehouse operation in Kenilworth, New Jersey.[1] At the warehouse, they spoke with a man who paid Cottman $8,650.[2] Just over a week later, Cottman brought another seventy-five cable boxes to the same warehouse, where his customer paid him $10,500.[3] And again, on February 21, 1995, Cottman and his partner sold another eighty-six cable boxes to the same customer, who paid $13,280.[4] All told, in the month of February, Cottman sold 231 cable boxes for a total of $34,730. They were all stolen. And, to Cottman's surprise, his customer was an undercover FBI agent.[5]

Undercover law enforcement agents occasionally use sting operations to investigate individuals they suspect are committing crimes. Those operations often require the agents—like the FBI agent in the case above—to act as buyers for illicit goods or services. The money they use in those transactions—in this case the $34,730 the FBI agent paid to Cottman—is called "buy money."[6] The use of buy money is essential to sting operations and as

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1 *United States v Cottman*, 142 F3d 160, 162–63 (3d Cir 1998).

2 Id at 163.

3 Id.

4 Id.

5 *Cottman*, 142 F3d at 163.

6 See Jeffrey J. Noble and Geoffrey P. Alpert, *Managing Accountability Systems for Police Conduct: Internal Affairs and External Oversight* 280 (Waveland 2008) ("Buy money is used in drug and narcotic cases to purchase quantities of contraband and in property cases to purchase stolen property."). Buy money is not exclusively used to purchase narcotics; it can be used to purchase a variety of contraband or illicit items. See, for example, *Cottman*, 142 F3d at 168 (using the term "buy money" to refer to "the money [the FBI] paid [Cottman] to acquire the illegal cable boxes"). Police also use buy money in "reverse stings," in which they focus on the supply side of illegal activity and sell illicit goods instead of buying them. For examples of reverse sting operations, see Ian Duncan, *Federal Authorities Ensnare Criminals in 'Reverse Stings'* (Baltimore Sun, July

such has a lengthy history. Law enforcement pamphlets on how to use buy money have been around since at least the late 1970s.[7] Usually, the suspects to whom undercover agents pay buy money are arrested and convicted of the crimes in which they were caught participating. During sentencing in those cases, district-court judges sometimes require that defendants repay the buy money they received as a condition of supervised release.[8] In *United States v Cottman*,[9] for example, the district court sentenced Cottman to ten months in prison and three years of supervised release. As a condition of supervised release, the court ordered that he pay back $32,420 of buy money.[10]

The federal circuit courts disagree as to whether district courts have this authority. The Third and Sixth Circuits have held that the supervised release statute does not authorize or require repayment of buy money.[11] The Seventh Circuit has held that it does.[12] The result of this disagreement is that whether a defendant incurs this type of serious legal financial obligation (LFO) depends on the circuit in which she is prosecuted.

This Comment first considers the source of the circuits' disagreement. It explains that the circuits that prohibit buy-money repayment (BMR) as a condition of supervised release do so because they believe it is restitution. The Seventh Circuit, on the other hand, reasons that BMR is not restitution and as such is permissible under the catchall provision of the supervised release statute. By and large, the circuits that prohibit BMR as a condition of supervised release have not evaluated the possibility that it could be imposed under the catchall.[13]

27, 2013), archived at http://perma.cc/EEX7-859S; Matt Gutman, et al, *How Undercover Cops in a Florida City Make Millions Selling Cocaine* (ABC News, Oct 9, 2013), archived at http://perma.cc/U3NH-TCGV.

7 See Howard A. Katz, *Narcotics Investigations: Developing and Using Informants*, 7 Police L Q 5, 11 (April 1978) (describing best practices for use of buy money during criminal investigations); Robert H. Langworthy and James L. LeBeau, *Temporal Evolution of a Sting Clientele*, 9.2 Am J Police 101, 105–11 (1990) (explaining that the amount of buy money needed for a store-front sting is expected to increase throughout the length of the investigation).

8 See Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 1987. See also Part I.A.

9 142 F3d 160 (3d Cir 1998).

10 Id at 164.

11 See id at 168–70; *Gall v United States*, 21 F3d 107, 111–12 (6th Cir 1994).

12 See *United States v Daddato*, 996 F2d 903, 906 (7th Cir 1993).

13 The only Third or Sixth Circuit opinion to acknowledge this possibility is Judge Nathaniel R. Jones's concurrence in *United States v Gall*, 21 F3d 107, 112–13 (6th Cir 1994) (Jones concurring). See Part III.B.

This Comment agrees with the Seventh Circuit that BMR should not be considered restitution because, as the courts have already acknowledged, it does not involve payments to crime victims. It further argues, however, that even though BMR is not restitution, imposing it under the catchall is improper—but for two reasons that the Third and Sixth Circuits do not seriously consider. First, BMR conditions conflict with a comprehensive statutory scheme of criminal LFOs that already require a defendant to repay buy money. Punitive fines, criminal forfeiture, and community restitution provide ample opportunity for the defendant to disgorge her unlawful gains and face whatever harm she has caused her victims or the community. Because the process of imposing supervised release conditions does not include the same procedures and limits that are built into those other tools, imposing BMR as a condition of supervised release allows courts and prosecutors to end-run important procedural protections. These tools enshrine congressional judgments about not only the procedural protections due to defendants facing criminal LFOs, but also how proceeds from those LFOs should be disbursed. Finally, they give the government multiple avenues to seize back what it paid out.

Second, BMR conditions do not meet the substantive requirements that the supervised release statute sets for discretionary conditions. These binding statutory provisions require a judge to consider whether each condition she imposes will further the goals of specific and general deterrence, as well as rehabilitation. As a rule, monetary conditions of supervised release work against those goals. While the supervised release statute expressly allows some monetary conditions that might help to ease a defendant's transition back to her community, BMR is distinguishable from those conditions, as it does not further that purpose. Ultimately, the external and internal constraints on discretionary supervised release conditions work together to preclude BMR as a condition of supervised release.

I. FEDERAL SUPERVISED RELEASE, VICTIM-RESTITUTION STATUTES, AND BUY MONEY

The question whether BMR is proper as a condition of supervised release implicates the history, purposes, and case law of several federal criminal institutions, including federal supervised release itself, criminal restitution, and other criminal fines and fees. Part I.A begins by explaining the contours of federal

supervised release and the practical import of supervised release conditions. Part I.B then sets out the sources of authority for criminal restitution, as well as the circuits' approaches to interpreting them. Finally, Part I.C explains the interpretive methodology that has led circuit courts to unanimously disallow imposition of BMR outside the context of supervised release.

A. Federal Supervised Release

Supervised release is a federal program enacted by the Sentencing Reform Act of 1984[14] as part of an effort to increase certainty in federal sentences and reduce sentencing inequalities.[15] Supervised release replaced parole in the federal system and as such was not intended to be punitive.[16] In keeping with that paradigm, it was seen purely as an addition to a punitive term of incarceration rather than as a replacement for any part of the punitive sentence.[17] Practically, this means that a defendant completes her entire prison sentence before beginning a term of supervised release.[18] Legislative history makes clear that supervised release was not intended to further the goals of punishment or retribution. Instead, its purpose was to "ease the defendant's transition into the community" and "provide rehabilitation to [the] defendant."[19]

A defendant sentenced to supervised release is required to abide by certain conditions in order to avoid adverse consequences. The most typical and significant consequence is revocation, which results in a defendant's return to prison.[20] Between 2005 and 2009, approximately one-third of defendants sentenced to supervised release had their release revoked and

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14 Pub L No 98-473, 98 Stat 1987.

15 See Barbara Meierhoefer Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 Fed Sent Rptr 187, 187 (1994).

16 Id at 187–88.

17 Id at 188.

18 Michael P. Kenstowicz, Comment, *The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law*, 82 U Chi L Rev 1411, 1415 (2015), citing *Comprehensive Crime Control Act of 1983*, S Rep No 98-225, 98th Cong, 1st Sess 37–39 (1983).

19 S Rep No 98-225 at 124 (cited in note 18) ("The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community . . . or to provide rehabilitation.").

20 See 18 USC § 3583(e)(3).

were re-incarcerated.[21] The combination of conditions imposed on a defendant is decided by the sentencing judge. Judges must apply several mandatory conditions from the list in 18 USC § 3583(d) and may choose to apply any of the discretionary conditions listed in 18 USC § 3563(b). The twenty-two available discretionary conditions include completing community service,[22] working in "suitable employment,"[23] undergoing medical or psychiatric treatment,[24] supporting dependents,[25] and reporting to a probation officer.[26] Payment of "restitution to a victim of the offense" is included as a discretionary condition in 18 USC § 3563(b)(2). Repayment of buy money, on the other hand, is not explicitly authorized by the statute. Finally, the statute provides a catchall provision allowing judges to create additional discretionary conditions that are not explicitly provided for by the statute, subject to some limitations.[27]

All discretionary conditions of supervised release are required to further the sentencing purposes enshrined in 18 USC § 3553(a) in two ways. First, discretionary conditions of supervised release must be "reasonably related"[28] to "the nature and circumstances of the offense and the history and characteristics of the defendant,"[29] as well as to three of the four sentencing purposes set out in 18 USC § 3553(a): "to afford adequate deterrence to criminal conduct,"[30] "to protect the public from further crimes of the defendant,"[31] and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[32] This

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21 US Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* *4 (July 2010), archived at http://perma.cc/425D-6VLB. This statistic represents a significant portion of all criminal defendants sentenced to prison. For the same time period, district-court judges imposed supervised release to follow 99.1 percent of all prison sentences that exceeded one year and that *did not* statutorily require supervised release. Id at *3–4.

22 18 USC § 3563(b)(12).

23 18 USC § 3563(b)(4).

24 18 USC § 3563(b)(9).

25 18 USC § 3563(b)(1).

26 18 USC § 3563(b)(15).

27 18 USC § 3583(d) (allowing the court to order "any other condition it considers to be appropriate" as long as it fulfills the reasonable-relation and deprivation-of-liberty requirements as described in notes 28–33 and accompanying text).

28 18 USC § 3583(d)(1).

29 18 USC § 3553(a)(1).

30 18 USC § 3553(a)(2)(B).

31 18 USC § 3553(a)(2)(C).

32 18 USC § 3553(a)(2)(D).

Comment will refer to this first requirement as the reasonable-relation requirement and to the three goals as the general-deterrence goal, specific-deterrence goal, and rehabilitation goals, respectively. Second, the condition must "involve[ ] no greater deprivation of liberty than is reasonably necessary for the purposes"[33] listed above (the "deprivation-of-liberty constraint").[34] The statute requires each individual discretionary condition to comply with both the reasonable-relation requirement and the deprivation-of-liberty constraint.[35]

These two requirements reflect the idea that supervised release conditions should be nonpunitive. Notably, the statute does not require that conditions further 18 USC § 3553(a)(2)(A), which requires that sentences "reflect the seriousness of the offense, [ ] promote respect for the law, and [ ] provide just punishment." This is a meaningful omission that distinguishes supervised release conditions from other criminal sanctions—supervised release conditions are not meant to be retributive or punitive.[36] Courts thus are not encouraged or required to consider retributive purposes when setting conditions of supervised release.[37]

Courts have long exercised authority to strike down supervised release conditions that do not comport with the reasonable-relation requirement and deprivation-of-liberty constraint because the conditions are inappropriate either for the particular defendant or for her particular crime. Although the reasonable-relation requirement and the deprivation-of-liberty constraint are ostensibly analytically distinct, sentencing and appellate courts do not usually conduct a two-step analysis. Instead, they combine the question of whether the condition at issue is reasonably related to the sentencing goals[38] with the question of whether it represents "a greater deprivation of liberty

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33 18 USC § 3583(d)(2).

34 Discretionary conditions are also required to fulfill a third requirement: they must be "consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 USC § 994(a)." 18 USC § 3583(d)(3). This requirement is not relevant to the issues at stake in this Comment.

35 18 USC § 3583(d).

36 See Jennifer Bellott, Note, *To Humiliate or Not to Humiliate: Does the Sentencing Reform Act Permit Public Shaming as a Condition of Supervised Release?*, 38 U Memphis L Rev 923, 925 (2008).

37 Indeed, at least one author has suggested that Congress's affirmative omission of 18 USC § 3553(a)(2)(A) suggests that judges are prohibited from considering those factors. See id at 937.

38 18 USC § 3583(d)(1).

than is reasonably necessary" to fulfill those goals.[39] For example, the Third Circuit in *United States v Freeman*[40] struck down a condition forbidding the defendant from using internet in his home as "overly broad" under the deprivation-of-liberty constraint.[41] Although it had previously upheld an identical condition in another case,[42] the court distinguished the two cases by noting that the previous defendant had actually used the internet to solicit inappropriate contact with children.[43]

B. Sources of Authority for Criminal Restitution

Much of the case law evaluating BMR as a condition of supervised release centers on whether it constitutes restitution. This Section outlines the contours and limits of restitution in the criminal context, tracing its historical development and identifying its statutory sources.

Traditionally a civil-law concept,[44] restitution has been increasingly employed in the criminal context in recent decades.[45] Just as civil restitution was historically relied on to force tortfeasors to disgorge unlawful gains to their victims, contemporary criminal restitution is imposed "to compensate

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39 18 USC § 3583(d)(2). Borrowing from substantive due process case law, the Second Circuit in *United States v Myers*, 426 F3d 117 (2d Cir 2005), suggested that under 18 USC § 3583(d)(2), a supervised release condition should be analyzed first with regard to whether it implicates a "fundamental liberty interest" and, if so, whether it is "narrowly tailored to serve a compelling government interest." *Myers*, 426 F3d at 126. These prongs are not found in the statute itself, and such a test would seem to be even more restrictive than the test that courts generally use, as it requires narrow tailoring. The Second Circuit did not reach either of its prongs in that case, however, and I have found no case offering a comprehensive breakdown of the factors clearly required by the statute—the reasonable-relation requirement and its relationship with the deprivation-of-liberty constraint. Instead, most courts of appeals seem to assume that any condition of supervised release will cause some deprivation of liberty. Such a position is reasonable given that all defendants on supervised release face the possibility of incarceration (in addition to their original punitive sentences), which is undoubtedly a deprivation of liberty. The issue of re-incarceration is real and serious given the number of defendants whose supervised release is revoked, as indicated in Part I.A.

40 316 F3d 386 (3d Cir 2003).

41 Id at 391–92.

42 *United States v Crandon*, 173 F3d 122, 125 (3d Cir 1999).

43 *Freeman*, 316 F3d at 392.

44 See generally Bridgett N. Shephard, Comment, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution as Either a Criminal or Civil Law Concept*, 18 Lewis & Clark L Rev 801 (2014).

45 See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L Rev 93, 96–97 (2014) (discussing the rise in restitution as a criminal remedy in the wake of the victims' rights movement of the 1980s).

[victims of crimes] for economic, emotional, and psychological losses."[46]

As is suggested above, criminal restitution—like civil restitution—has always required a victim. The existence of a victim is inherent in the very concept of restitution, which is designed at least in part to compensate victims for their losses. *Black's Law Dictionary* defines "criminal restitution" as "[c]ompensation for loss; esp., full or partial compensation paid by a criminal to a victim."[47] The payment by a person convicted of a crime (or in the civil context, by a tortfeasor) to a victim—the person who has been harmed—is thus at the very core of restitution. Secondary literature on criminal restitution generally agrees. The existence of a victim is vital to one of the main purposes of restitution, as described by Bridgett Shephard: "When a victim is harmed by crime and the perpetrator is identified, restitution monies pay for the harm caused by the crime."[48] Similarly, Professor Cortney E. Lollar writes that restitution fulfills two desires: "[t]he desire to 'make victims whole' accompan[ied] [by] the desire, figuratively and literally, to 'make criminal defendants pay.'"[49] In fact, restitution as a criminal penalty rose in prominence in large part because of the victims' rights movement of the 1980s.[50] Whether or not victim compensation is the primary goal or purpose of restitution, the existence of a victim is an essential component of the concept.

Despite the increasing prevalence of restitution in criminal cases, federal judges do not have any inherent authority to impose restitution. Instead, the circuits agree that judges can only impose restitution when it is expressly authorized by statute.[51] As a result, federal courts impose restitution only in certain categories of cases. Although before 1982 "federal law authorized

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46 Id at 97.

47 *Black's Law Dictionary* 1507 (Thomson Reuters 10th ed 2014).

48 Shephard, Comment, 18 Lewis & Clark L Rev at 804 (cited in note 44).

49 Lollar, 100 Iowa L Rev at 97 (cited in note 45).

50 Id at 96–97 (describing how victims' rights advocates pushed for criminal restitution as a way to make victims whole).

51 See *United States v Brock-Davis*, 504 F3d 991, 996 (9th Cir 2007). See also *United States v Bok*, 156 F3d 157, 166 (2d Cir 1998); *United States v DeSalvo*, 41 F3d 505, 511 (9th Cir 1994); *United States v Hicks*, 997 F2d 594, 600 (9th Cir 1993); *United States v Helmsley*, 941 F2d 71, 101 (2d Cir 1991); William M. Acker Jr, *The Mandatory Victims Restitution Act Is Unconstitutional: Will the Courts Say So after* Southern Union v. United States*?*, 64 Ala L Rev 803, 810 (2012) ("It goes without saying that a federal court can only order restitution to the extent authorized by statute.").

restitution only as a condition to a defendant's probation,"[52] restitution can now be imposed in addition to incarceration as punishment for many crimes.

Since 1982, Congress has passed two major restitution statutes: the Victim and Witness Protection Act of 1982[53] (VWPA) and the Mandatory Victims Restitution Act of 1996[54] (MVRA). These acts authorize courts to impose restitution as part of the sentence in cases involving certain types of crimes or victims. Just as the supervised release statute provides for "restitution to a victim of the offense,"[55] the VWPA provides for "restitution to any victim of such offense,"[56] and the MVRA provides for "restitution to the victim of the offense."[57] The VWPA, which was passed in 1982 and covers most federal crimes,[58] differs from the MVRA in that it is completely discretionary.[59] The MVRA, on the other hand, *requires* courts to impose restitution to victims for a small number of crimes.[60] The VWPA and the MVRA authorize payments only to victims, and they define "victim" identically as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[61]

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52 Acker, 64 Ala L Rev at 810 (cited in note 51).

53 Pub L No 97-291, 96 Stat 1248, codified as amended in various sections of Title 18.

54 Pub L No 104-132, 110 Stat 1214, codified as amended in various sections of Title 28. See also Shephard, Comment, 18 Lewis & Clark L Rev at 805–06 (cited in note 44) (describing the ways in which the victims' rights movement brought about the broader use of criminal restitution).

55 18 USC § 3563(b)(2).

56 VWPA § 5(a), 96 Stat at 1253, 18 USC § 3663(a)(1)(A).

57 MVRA § 204(a), 110 Stat at 1228, 18 USC § 3663A(a)(1).

58 For the current list of covered crimes, see 18 USC § 3663(a)(1)(A).

59 18 USC § 3663(a)(1)(A) ("The court . . . *may* order . . . that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate.") (emphasis added).

60 MVRA § 204(a), 110 Stat at 1228, 18 USC § 3663A(a)(1) ("[T]he court *shall* order . . . that the defendant make restitution to the victim of the offense.") (emphasis added). For the current list of crimes covered by the MVRA, see 18 USC § 3663A(c)(1)(A)(i)–(iv).

61 MVRA § 205(a), 110 Stat at 1230, 18 USC § 3663(a)(2) (amending the original provisions of the VWPA); MVRA § 204(a), 110 Stat at 1228, 18 USC § 3663A(a)(2). Note that in 1996 Congress broadened the VWPA through the MVRA to also allow "restitution to persons other than the victim of the offense" "if agreed to by the parties in a plea agreement." MVRA § 205(a), 110 Stat 1228, 18 USC § 3663(a)(1)(A). Originally, § 3663(a)(3) did refer to plea bargains but did not make clear whether plea bargains could include restitution to individuals other than the victims: "The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 § 2509, Pub L No 101-647, 104 Stat 4859, 4863.

C. Narrow Interpretation of Statutes Authorizing Criminal Restitution

Neither the VWPA nor the MVRA has been interpreted to authorize courts to order defendants to repay buy money. Courts generally cite *Hughey v United States*[62] for this proposition. Frasiel Hughey, a US Postal Service (USPS) employee accused of unauthorized use of a credit card and stealing from his local post office, pleaded guilty to unauthorized use of a credit card.[63] In exchange, the Government dropped three counts of theft by a USPS employee.[64] Hughey was sentenced under the VWPA to pay restitution to the victim—the owner of one credit card account—of the offense for which he was convicted. However, he was also sentenced to pay restitution to the owners of several other credit card accounts that the Government claimed he had also defrauded, despite the fact that he was not charged with or convicted of those additional offenses.[65] The Supreme Court reversed the restitution order, holding that the VWPA could "compensate victims only for losses caused by the conduct underlying the offense of conviction."[66] The Court's holding in *Hughey* did not directly address whether the government could be considered a victim under the VWPA, but it relied on a very narrow reading of the VWPA for its conclusion.[67]

Although the Supreme Court has never expressly taken this step, most circuits agree that *Hughey*'s narrow reading of the VWPA also dictates that the government is not a victim when it voluntarily expends investigative funds in the form of buy money. Therefore, the courts reason, the government cannot recoup buy money as restitution. Most circuits conclude that the government cannot be a victim of a crime that it planned itself. The Ninth Circuit, for example, reasoned that "the government is not a victim under the Act. . . . The government wanted false identification papers as evidence of criminal activity and obtained them; the government got what it paid for."[68] Similarly, the Sixth Circuit contrasts the government in this context with more typical crime victims, concluding that "[t]he [VWPA] aims

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62 495 US 411 (1990).
63 Id at 413.
64 Id at 416–22.
65 Id at 413–14.
66 *Hughey*, 495 US at 416.
67 See id at 416–22.
68 *United States v Salcedo-Lopez*, 907 F2d 97, 99 (9th Cir 1990).

to protect victims, not to safeguard the government's financial interest in funds used as bait to apprehend offenders."[69] The First,[70] Seventh,[71] and Eleventh[72] Circuits agree. Consequently, there is no meaningful disagreement among the circuits as to whether BMR is authorized by the VWPA. However, the circuits disagree about whether judges can impose BMR in a different context: supervised release.

II. THE DISAGREEMENT: SHOULD BUY-MONEY REPAYMENT BE EVALUATED UNDER THE RESTITUTION PROVISION OR THE CATCHALL PROVISION?

Courts disagree as to whether BMR is a proper condition of supervised release. In its current formulation, that disagreement turns on whether BMR is a form of restitution. Circuits that treat BMR as restitution analyze it under the restitution provision of the supervised release statute, finding that restitution is not proper because buy-money schemes do not involve a victim. The Seventh Circuit, on the other hand, does not

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69 *United States v Meacham*, 27 F3d 214, 218 (6th Cir 1994). See also *Gall v United States*, 21 F3d 107, 110–12 (6th Cir 1994). In reaching this conclusion, the *Meacham* court cited a previous decision in which it held that investigation or prosecution costs more generally could not be imposed under the VWPA. *Meacham*, 27 F3d at 218 ("[R]estitution may not be awarded under the VWPA for investigation or prosecution costs incurred in the offense of conviction."), quoting *Ratliff v United States*, 999 F2d 1023, 1026 (6th Cir 1993).

70 *United States v Gibbens*, 25 F3d 28, 36 (1st Cir 1994) ("[A] government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA."). Based on its reasoning, however, it is possible that the First Circuit would determine that the government *is* a victim when it expends buy money in the context of reverse stings if the defendant attempted to defraud the government itself. In this case, Leroy Gibbens bought food stamps from an undercover agent at 25 cents to the dollar, ultimately purchasing $12,895 worth of stamps (for one-fourth of that amount). The court sentenced Gibbens to six months in prison and three years of supervised release, as well as a fine of $15,230 (the face value of the food stamps, plus the government's cost of acquiring the food stamps on the black market in the first place). In dicta the First Circuit reasoned that while the government is usually thought not to be a victim for purposes of restitution under the VWPA, it may be more like a victim when "the crime was designed to inflict harm on the government." The court ultimately applied the rule of lenity to the VWPA, however, and held that the government could not recoup its losses under the VWPA. Id at 30–36.

71 *United States v Munoz*, 549 Fed Appx 552, 554–55 (7th Cir 2013) ("[T]he government is not a victim when it fronts buy money."); *United States v Cook*, 406 F3d 485, 489 (7th Cir 2005) ("The buy money was an investigatory expense rather than property taken from, or damage to the property of, a victim of the defendant's crime.").

72 *United States v Khawaja*, 118 F3d 1454, 1460 (11th Cir 1997) ("Nor is the IRS a victim under VWPA.").

consider BMR to be restitution and evaluates it under the catchall provision. This approach leads the Seventh Circuit to allow BMR as a condition of supervised release. Ultimately, this Part argues that BMR is not restitution.

A. The Third and Sixth Circuits: Buy-Money Repayment Is Not a Permissible Condition

The Third and Sixth Circuits, which both see BMR as a form of restitution, have clearly ruled that it is not permissible as a condition of supervised release. The assumption that BMR is restitution is a fundamental part of their reasoning because it causes them to analyze BMR under the restitution provision of the supervised release statute instead of the catchall provision. In short, these circuits conclude that if BMR does not conform to the restitution provision, it cannot be a proper condition of supervised release.

In the case of *Cottman*, the Third Circuit's understanding of BMR as a form of restitution led it to find that it was impermissible as a condition of supervised release. In that case, the court considered whether defendant Cottman could be required to repay the $32,420 that he had received from an undercover FBI agent to whom he had sold 231 stolen cable boxes.[73] The district court had sentenced him to ten months in prison and three years of supervised release as a condition of which Cottman was to repay the $32,420.[74] Cottman appealed the sentence, arguing that the FBI was not a victim of his crime and had expended the funds voluntarily.[75] The Third Circuit first considered whether the government could be treated as a "victim" as required under 18 USC § 3563(b), the restitution provision of the supervised release statute.[76] It held that the government was not a victim, citing its own and other circuits' holdings that the government is not a victim under other victim-restitution statutes like the VWPA and MVRA.[77] Because "restitution to a victim" is included in the list of possible supervised release conditions[78] and because the government is not considered a victim (at least under the parallel provision in the VWPA), the Third Circuit held that the

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73 *Cottman*, 142 F3d at 163.

74 Id at 164.

75 Id at 168.

76 18 USC § 3563(b)(2). See also *Cottman*, 142 F3d at 169.

77 See *Cottman*, 142 F3d at 169. See also Part I.C.

78 18 USC § 3563(b)(2).

order was improper.[79] The court reasoned that allowing any other type of restitution under the catchall provision would allow it to "swallow the rule."[80]

In *Gall v United States*,[81] the Sixth Circuit also began from the principle that BMR was restitution and struck down a condition of supervised release that required it. In that case, the defendant, John Gall, pleaded guilty to four drug crimes after selling drugs to undercover government agents. The district court sentenced him to twenty-seven months in prison and three years of supervised release, requiring as a condition of the release that he repay the buy money that the government expended.[82] Gall appealed.[83] Using the same reasoning as the Third Circuit, the Sixth Circuit vacated the BMR condition.[84]

Although the Third and Sixth Circuits do not mention it, they may have another textual argument in favor of their interpretation of the supervised release statute's restitution provision. The provision allows "restitution to a victim of the offense under section 3556"[85]—the same section that acts as the mechanism for imposing restitution under 18 USC § 3663 (VWPA) and 18 USC § 3663A (MVRA).[86] Restitution under the supervised release statute, then, is not distinct from the type of restitution allowed by the VWPA and the MVRA. Instead, it uses the same mechanisms and, therefore, the same definitions. Even if it could be argued that "victim" in 18 USC § 3563(b)(2) does not

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79 *Cottman*, 142 F3d at 169. See also Part I.C.

80 Id at 169–70. Unsurprisingly, the dissent in *Cottman* pointed out that the district court had simply been working within the scope of a preprinted form and that it should be given some leeway to impose a condition that might be proper under the catchall, despite the fact that it had categorized it on the form as restitution. Id at 171 (Ludwig concurring in part and dissenting in part).

81 21 F3d 107 (6th Cir 1994).

82 Id at 108.

83 Id.

84 Id at 108–11. While the Second Circuit also has not confronted this issue directly, its reasoning in *United States v Varrone*, 554 F3d 327 (2d Cir 2009), suggests that it might also fall in line with the Third and Sixth Circuits. There, the Second Circuit applied *Hughey*'s narrow reading of the VWPA to the restitution provision of the supervised release statute, holding that because the victim's loss was not caused by the defendant, the defendant could not be held responsible for restitution. Id at 333. Similarly, the First Circuit's decision in *United States v Gibbens*, 25 F3d 28 (1st Cir 1994), because it focuses so heavily on whether the government is a victim of the crime, might also take the same approach as the Third and Sixth Circuits, deciding this issue under the restitution provision rather than the catchall provision of the supervised release statute. See *Gibbens*, 25 F3d at 32–33. See also note 70.

85 18 USC § 3563(b)(2).

86 18 USC § 3556.

carry the same meaning as "victim" under the VWPA at § 3663(a)(1)(A), § 3563(b)(2) actually points, through § 3556, to the VWPA and its mechanisms and definitions. This fact suggests that the restitution provision in the supervised release statute should be read to have the same limits as the VWPA and the MVRA. Because the circuits agree that BMR is not allowed under those statutes, a court could reason that it should not be allowed in the supervised release context, either.[87]

B. The Seventh Circuit: Buy-Money Repayment Is a Permissible Condition

The major difference between the Seventh Circuit's interpretation of the statute and that of the other circuits is that the Seventh Circuit does not treat BMR as restitution. It reasons that the government is not a victim in the buy-money context, the same conclusion reached by the Third and Sixth Circuits.[88] But instead of finding BMR improper under the restitution provision of the statutory release statute for that reason, the Seventh Circuit concludes that BMR is not restitution at all. In doing so, it removes its analysis entirely from the restitution provision of the statute and finds instead that BMR is valid as a discretionary condition imposed under the catchall provision of 18 USC § 3563(b).

The Seventh Circuit first took the position that BMR may not be restitution in *United States v Daddato*.[89] James Daddato pleaded guilty after selling hallucinogenic mushrooms to undercover law enforcement officers.[90] As a condition of supervised release, the district court required that Daddato pay back the $3,650 that he had received from undercover law enforcement officers as payment.[91] The Seventh Circuit unanimously upheld the condition. In its decision, it suggested briefly that repayment of buy money may not be restitution at all: "On the one hand, it seems unrealistic to describe the defendant as having wrongfully taken money eagerly tendered to him so that he could

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87 See *Gustafson v Alloyd Co*, 513 US 561, 570 (1995) (concluding that a word has the same meaning when used twice in the same act). The idea here is similar: statutory language at one location in the code should retains its meaning whether it is relied on as part of the VWPA or as part of the supervised release scheme.

88 See Part II.A. In fact, this is the same reasoning that the circuits all generally agree on, as described in Part I.C.

89 996 F2d 903 (7th Cir 1993).

90 Id at 904.

91 Id.

incriminate himself. On the other hand, it was money that he obtained through criminal activity and therefore had no right to keep."[92] It did not find that possibility important to its conclusion, however: "The list in section 3563(b) is not limited to restitution, or even to conditions that resemble restitution . . . ; it is enough that the order to repay the buy money is of the same general kind as the items in the list, and it is."[93] The Seventh Circuit did not describe what it considered the "general kind" of the items in the list to be.

Instead, the Seventh Circuit concluded that the interpretation of the word "victim" under the VWPA should not necessarily be extended to the word "victim" in the restitution provision of the supervised release statute. It gave several reasons for its refusal to make this extension. The court reasoned that *Hughey* and other cases interpreting the VWPA are not applicable to the supervised release context; the VWPA is concerned with how to make victims and witnesses whole, while supervised release has its own distinct goals and guidelines.[94] Judge Richard Posner was also careful to explain that the VWPA did not take up the entire field of federal criminal restitution.[95]

While the Seventh Circuit in *Daddato* offered various reasons for upholding the BMR condition, in subsequent cases it began to rely almost exclusively on its conclusion that BMR is not restitution and is thus permissible under the catchall. Specifically, in *United States v Munoz*,[96] the Seventh Circuit explicitly refused to overrule *Daddato* and upheld a BMR order as a condition of supervised release under the catchall provision but not as restitution under the VWPA.[97] The Seventh Circuit drew a clear line between BMR imposed under the VWPA and BMR imposed as a condition of supervised release, going so far as to suggest that BMR erroneously imposed under the former could simply be modified to the latter on appeal.[98] Later, in *United States v Williams*,[99] the Seventh Circuit provided explicit reasoning for its conclusion that BMR is not restitution: "The federal criminal code, including the supervised-release statute, defines

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92 Id at 905.

93 *Daddato*, 996 F2d at 905.

94 Id at 905–06.

95 Id.

96 549 Fed Appx 552 (7th Cir 2013).

97 Id at 555 ("Munoz offers no new argument for why *Daddato* should be overruled.").

98 See id at 555–56.

99 739 F3d 1064 (7th Cir 2014).

restitution as payment of losses sustained by victims of crime . . . and the government is not deemed a victim."[100] Departing from the reasoning in *Daddato* that the restitution provision should not be interpreted in light of the MVRA and VWPA, the *Williams* court reached its conclusion by reasoning that interpreting the meaning of "victim" under the VWPA and MVRA[101] *is essential* to understanding the definition of "victim"—and therefore also the definition of restitution itself. Because restitution requires a victim, and the government is not a victim when it expends buy money, BMR is not restitution.[102] The court thus moved the analysis definitively from the restitution provision to the catchall provision.

Throughout these cases, the Seventh Circuit has acknowledged the fact that it is alone among the circuits in its interpretation of the supervised release statute but nonetheless has doubled down on its precedent. In *United States v Brooks*,[103] for example, the court acknowledged the concurring opinion in *Gall* but was not swayed by it: "We stand by *Daddato* as a better interpretation of the law."[104] In *United States v Gibbs*,[105] another case involving drug buy money, the Seventh Circuit upheld the condition and again acknowledged the circuit split.[106] Along these lines, the Seventh Circuit's approach to the question has developed to evaluate BMR in an entirely different framework from that used by the Third and Sixth Circuits. While the Third and Sixth Circuits weigh BMR's appropriateness under the restitution provision of the supervised release statute, the Seventh

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[100] Id at 1067, citing 18 USC § 3663A(c), *Cook*, 406 F3d at 489, *Cottman*, 142 F3d at 168–70, *Gall*, 21 F3d at 112, and *United States v Salcedo-Lopez*, 907 F2d 97, 98–99 (9th Cir 1990). The Seventh Circuit thus used the very same fact that the Third and Sixth Circuits used to find BMR improper under the restitution provision to reach an entirely different conclusion—that BMR should not be evaluated under that provision at all.

[101] See Part I.C.

[102] The Seventh Circuit also interpreted *Cottman* as holding "that repayment of buy money is not restitution." *Williams*, 739 F3d at 1065, citing *Cottman*, 142 F3d at 170. While the Third Circuit did explain in its decision that BMR could likely be imposed as part of a criminal fine instead of as restitution, it also insisted that an order treating BMR as restitution be struck down. Additionally—because it was an order of restitution—the court reasoned that allowing it under the catchall provision would "swallow the rule." *Cottman*, 142 F3d at 170.

[103] 114 F3d 106 (7th Cir 1997).

[104] Id at 108.

[105] 578 F3d 694 (7th Cir 2009).

[106] Id at 696 ("We acknowledge that other circuits disagree, but we decline to overrule our long-standing precedent.").

Circuit has shifted almost entirely to analyzing it under the catchall.

* * *

As described above, the current circuit split implicates two issues: (1) whether BMR should be considered a form of restitution and, (2) if not, whether it can be imposed under the catchall provision. The circuit courts that refuse to permit BMR as a condition of supervised release have thus far reached that conclusion by assuming that BMR is a form of restitution that is precluded by the restitution provision of the supervised release statute. Even the Seventh Circuit agrees that BMR cannot be properly imposed under that provision.[107] Instead, the Seventh Circuit allows imposition of BMR under the catchall provision.[108] The other circuits, however, have not engaged in any comprehensive analysis of that possibility.

III. BUY MONEY UNDER THE CATCHALL PROVISION: EXTERNAL AND INTERNAL CONSTRAINTS

While the Third and Sixth Circuits have focused primarily on whether BMR is permissible as a form of restitution, they have not considered at any length the Seventh Circuit's premise that BMR is not restitution at all.[109] Part III.A argues that the Seventh Circuit is likely correct in its conclusion that BMR is not restitution. Parts III.B and C then set forth a comprehensive framework to evaluate BMR under the catchall provision, ultimately concluding—unlike the Seventh Circuit—that BMR is improper under that provision.

A. Not Restitution: Locating BMR under the Catchall Provision

BMR is not restitution because it does not provide compensation to a victim of a crime. As discussed in Part I.B, and as the Seventh Circuit concludes,[110] the concept of restitution is predicated on the existence of a victim to receive it. And as discussed in Part I.C, the circuit courts are in agreement that the government is not a victim when it expends buy money. While the term

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[107] *Munoz*, 549 Fed Appx at 555.

[108] *Daddato*, 996 F3d at 905.

[109] For the sole exception to this, see Part III.B.

[110] See Part II.B.

"victim restitution" seems to suggest a certain type or subset of restitution, it is simply redundant in that the term "restitution" already implies a victim—adding the word "victim" to it does not add meaning. In fact, nonvictim restitution does not exist. There is no restitution provision in any part of the federal criminal code that purports to provide a benefit for a party other than someone harmed by a crime (a victim).[111] So when the Third and Sixth Circuits focus on whether the government is a victim, the fundamental implication is not only that BMR is an improper form of restitution (as they acknowledge), but that it is not restitution at all. And while they do not acknowledge the possibility that BMR is not restitution, they do acknowledge that BMR could be effectuated through other penalties, such as fines.[112]

Because the Third and Sixth Circuits rely on the assumption that BMR *is* a form of restitution, their line of reasoning is irrelevant if it is not. On the other hand, the structure of federal sentencing generally and the supervised release statute specifically both provide other ways to evaluate the lawfulness of BMR as a supervised release condition under the catchall provision. These tools and standards are relevant whether BMR is restitution or not.

Besides BMR, there is only one other type of LFO that is regularly imposed as a condition of supervised release: judges often require that defendants pay fines or judgments that either predate or arise from the current case.[113] Indeed, I could find no other financial conditions of supervised release imposed since the program began in 1984, except for the requirement that

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[111] The community restitution statute discussed below in Part III.B.3 is the ostensible exception that proves the rule. Under that statute, courts are required to determine how much harm has been caused to the community and then to order restitution to community institutions that are tasked with repairing that harm in some way. The community restitution statute thus allows for restitution to more-nebulous victims who traditionally have not been able to recover restitution. But it does not authorize restitution to any party who could not be considered a victim at all. See Part III.B.3.

[112] See, for example, *Cottman*, 142 F3d at 169 n 14 (suggesting that district courts order a fine in lieu of BMR if they are concerned with ensuring defendants do not profit from buy money).

[113] These conditions are far less problematic than BMR under the statutory scheme described in Part III.A because the fines and fees that underlie the conditions have been arrived at through the processes and procedures dictated by that scheme. By the time repayment of a defendant's punitive fine is made a condition of supervised release, for example, she has already benefited from the statutory limits on fines and the burdens of proof that they are subjected to, as described below in Part III.B.1.

defendants pay the costs of their supervision, which is discussed in greater detail below.[114]

There are two possible reasons why judges do not impose new LFOs as conditions of supervised release. Taken together, they provide a strong legal argument against imposing BMR under the catchall provision. First, a statutory scheme of criminal fines, forfeiture, and community restitution external to the supervised release statute already takes into account a defendant's illegal gains and the losses she has caused to others. Second, LFOs, such as BMR, are not compatible with the supervised release statute's internal requirements for discretionary conditions.

B. External Constraints: A Statutory Scheme of Fines and Fees

Federal statutes provide a robust set of instruments for extracting financial payments from criminal defendants. The existence and comprehensiveness of these tools is significant to this analysis in two primary ways. First, judges who forgo imposing BMR do not have to be concerned that the government will not be reimbursed its costs or that the defendant will avoid disgorging unlawful gains. Second, and perhaps most importantly, imposition of BMR allows courts and prosecutors to evade the protections defendants are due under this statutory scheme. Moreover, imposition of BMR requires ignoring congressional judgments about how proceeds from these fines and fees should be distributed.

1. Punitive fines.

Judges are required to take buy money into account when setting punitive fines for criminal defendants. 18 USC § 3572(a) states that judges "*shall*" consider, among other factors, "any pecuniary loss inflicted upon others as a result of the offense" and "the need to deprive the defendant of illegally obtained gains from the offense."[115] These two factors consequently require the judge to consider any buy money expended or received when she determines the amount of the defendant's fine. The first factor, § 3572(a)(3), should encompass the government's investigative expenses, including buy money, as the buy-money expenditure is

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[114] See Part III.B.1.

[115] 18 USC § 3572(a)(3), (5) (emphasis added).

certainly a "loss" for the government that is a "result" of the underlying offense.[116] Section 3572(a)(3) should not be interpreted to have the same narrow limits as victim restitution because "whether restitution is ordered or made" is yet another factor in the § 3572(a) analysis.[117] This indicates that "loss inflicted upon others" is a distinct category without the definitional limits that exclude buy money from the victim-restitution statutes. Alternatively, § 3572(a)(5) ("illegally obtained gains") could also be interpreted to include the defendant's buy-money earnings because buy money is always earned in an illegal transaction and is thus "illegally obtained."[118]

Along these lines, the presence of 18 USC § 3572(a)(3) and (5) in the punitive-fine equation works to ensure that the defendant will disgorge any unlawful gains and that the government will seize back its expenditure of buy money. To the extent the defendant can argue that § 3572(a)(5) does not pertain to her because she did not benefit personally from the government's buy-money payment—perhaps because she passed buy money from a drug sale on to a dealer higher up in her criminal organization—§ 3573(a)(3) still ensures that the judge will take into account the government's loss of buy money. Additionally, although the federal fine statute generally and other crime statutes individually set limits on the amount of fines that can be imposed for certain crimes,[119] the fine statute provides an exception if the defendant "derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant."[120] In those cases, the court is permitted to fine the defendant twice the amount of the "gross" loss or gain.[121] Allowing the court to take *gross* gain or loss into account protects the government from a statutory maximum fine that is lower than its buy-money expenditure. It also protects the government from any possible argument by the defendant that only net gain or loss should be included in the fine. That is, that the government's loss should be limited by what it gained from the

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116 See 18 USC § 3572(a)(3).

117 18 USC § 3572(a)(4). See also *United States v Juanico*, 2015 WL 10383206, *11 n 8 (D NM) ("Congress listed this factor separately from the restitution factor, and the court should seek to give that drafting decision content.").

118 18 USC § 3572(a)(5).

119 See, for example, 18 USC § 3571(b)(1)–(7).

120 18 USC § 3571(d). See also USSG § 5E1.2 (establishing factors for setting fines that closely resemble those Congress set forth in § 3571).

121 18 USC § 3571(d).

transaction (in drug cases, for example, the government might theoretically have "gained" drugs or evidence)[122] or that the defendant's gain should be limited by her costs in the transaction (the cost of obtaining the illicit goods in the first place, for example).[123] The provisions of the fine statute thus guarantee that the government will be able to fully seize back what it paid out in buy money.

It could be argued that including the defendant's gain or the government's loss in the fine calculation is not intended to simply reimburse the government but is also a factor in arriving at an appropriate retributive estimate of the penalty the defendant should pay. That is, considering the loss amount is not a mechanism to recover costs and disgorge gains but a form of criminal punishment in itself. As a result, including it in a fine would serve a different purpose than BMR and would therefore not be a true replacement for either disgorgement by the defendant or reimbursement to the government. The text of the fine statute precludes this argument. 18 USC § 3572(a)(5) addresses "the need to deprive the defendant of illegally obtained gains." That wording suggests that 18 USC § 3572(a)(5) requires deprivation and repayment of specific proceeds, not an overarching punitive penalty (although repayment can often be punitive in itself). Consequently, there is a strong argument that the purpose of § 3572(a)(5) is to actually recover illegal gains, meaning that it should work as a perfect substitute for BMR in that regard.

The fact that the fine statute requires complete disgorgement and reimbursement is a strong argument against also allowing BMR in the supervised release context. In fact, the Second Circuit dealt with an analogous issue in *United States v Mordini*,[124] a case about a supervised release condition requiring a defendant to repay the costs of his supervision. The court in *Mordini* reasoned that if a judge is required to impose costs under the fine statute, she cannot impose those costs in another context.[125] *Mordini* involved a provision of the fine statute that instructs judges to consider "the expected costs to the

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122 For an example of this sort of argument, see *United States v Salcedo-Lopez*, 907 F2d 97, 99 (9th Cir 1990) ("The government wanted false identification papers as evidence of criminal activity and obtained them; the government got what it paid for.").

123 See *United States v BP Products North America Inc*, 610 F Supp 2d 655, 683 (SD Tex 2009) ("'Gross' pecuniary gain or loss simply means that the court is not to reduce the amounts to a net sum, by deducting such items as costs.").

124 366 F3d 93 (2d Cir 2004).

125 Id at 94–95.

government of any imprisonment, supervised release, or probation component of the sentence" in setting fines.[126] As of 1997, the US Sentencing Guidelines also instruct judges to take those costs into account.[127] In the years since then, courts have occasionally included explicit "cost of supervision" fines in a defendant's sentence.[128] In *Mordini*, the trial court "purported to assess no fine . . . but instead assessed [defendant Edward] Mordini $9,741 to pay the costs of his supervision."[129] Under the Sentencing Guidelines, however, the maximum fine for which Mordini was eligible was $5,000.[130] Evaluating the cost-of-supervision fee as a fine under the Guidelines and the statute, the Second Circuit restricted the district court to the Guidelines limit of $5,000 and remanded the case to let the district court explain whether it had good reason to depart from the Guidelines.[131] The Second Circuit thus prohibited the district court from imposing the cost-of-supervision fee apart from its punitive fine. It based that holding on the fact that the cost of supervision was included among the factors to be taken into account under the fine statute and the Guidelines.[132]

This same reasoning should be applied to BMR. Because—like the cost of supervision—BMR is already required to be imposed under the fine statute by § 3572(a)(3) and (5), it should not be allowed outside the fine statute. Specifically, it should not be allowed as a condition of supervised release. And when a district court attempts to impose it as a condition of supervised release, the circuit court should ensure that the practical consequences of that mistake for the defendant are limited to the maximum allowable amount of the fine under either the Guidelines or the statute.[133]

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126 18 USC § 3572(a)(6).

127 USSG Appx C, Volume I, Amend 572.

128 See, for example, *United States v Tiser*, 170 Fed Appx 396, 398–99 (6th Cir 2006).

129 *Mordini*, 366 F3d at 94.

130 Id.

131 Id at 94–95.

132 Id at 94. The First Circuit took a similar approach to evaluating a cost-of-supervision LFO in *United States v Chan*, 208 Fed Appx 13 (1st Cir 2006). In that case, although the district court had improperly assigned the LFO as a condition of supervised release, the court reasoned that mistake was not an abuse of discretion, as the full amount of the fine plus the cost of supervision was still less than the statutory limit. Id at 16.

133 The Sixth Circuit took this approach in *Tiser*, 170 Fed Appx at 399 (holding that the defendant's combined cost of incarceration and cost-of-supervision fines could not exceed the Guidelines limit).

The cost-of-supervision analogy above hints at perhaps the greatest problem with BMR as a condition of supervised release: when defendants are subjected to fees outside the punitive-fine structure that should be (or are already) imposed within it, they (and others) lose the scant protections it provides. In addition to placing monetary limits on fines as indicated above,[134] the fine statute circumscribes punitive fines both substantively and procedurally. Substantively, for example, § 3572 requires that sentencing courts consider "the burden that the fine will impose upon the defendant [or] any person who is financially dependent on the defendant."[135] This evaluation could be valuable in ensuring that a defendant's family is not unduly harmed by her sentence. Similarly, the statute requires that judges consider "whether the defendant can pass on to consumers or other persons the expense of the fine."[136] This factor could be important in protecting community members from the ripple effects of the defendant's sentence. The statute also requires that any fine imposed "not impair the ability of the defendant to make restitution" if she is otherwise required to do so.[137] This requirement reflects Congress's express preference for how the benefits LFOs are distributed. Imposing additional LFOs outside the fine statute, such as BMR, interferes with this legislative judgment. Procedurally, 18 USC § 3613A(a)(2) requires that a judge evaluate the willfulness of a defendant's failure to make payments on a punitive fine before deciding to revoke her supervised release as a consequence.[138] A defendant who misses a BMR payment during her term of supervised release, on the other hand, could be denied the benefit of this protection.[139]

Imposing BMR as a condition of supervised release instead of or in addition to a fine is thus an end run around the statutory protections imposed by the fine statute and may even be an evasion of the Sixth Amendment jury trial right. In *Southern Union Co v United States*,[140] the Supreme Court applied

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134 18 USC § 3571(b).

135 18 USC § 3572(a)(2).

136 18 USC § 3572(a)(7).

137 18 USC § 3572(b).

138 18 USC § 3613A(a)(2).

139 There is no general willfulness standard for finding violations of supervised release conditions under the revocation procedures set forth in 18 USC § 3583(e)(3), FRCrP 32.1(b), or USSG § 7B1.3.

140 567 US 343 (2012).

Apprendi v New Jersey[141] to criminal fines and held that any fact that increases a fine above the statutory limit must be submitted to a jury and found beyond a reasonable doubt.[142] The fine at issue was based on the number of days that the defendant company was in violation of environmental statutes, and the Supreme Court vacated it because the jury had only found that the defendant violated the statute for at least "one day."[143] Because the jury had not decided the exact number of days for which the defendant should be fined, the ultimate amount of the fine was based on facts that were not found by a jury beyond a reasonable doubt. As is illustrated above by *Mordini*,[144] costs of prosecution and supervision like BMR may rise above statutory limits. When a sentencing judge imposes BMR as a condition of supervised release, the amount of buy money originally expended is not subject to jury testing. If BMR were included in a fine, on the other hand, any amount over the statutory maximum *would* need to be jury tested.[145]

Finally, interpreting the supervised release statute to allow BMR creates a logically absurd result. Because judges are *required*[146] to take the defendant's gain[147] and the government's

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141 530 US 466 (2000) (holding that any fact that increases a defendant's penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

142 *Southern Union*, 567 US at 349.

143 Id at 347.

144 See notes 129–32 and accompanying text.

145 It is important to note, however, that fines resulting from "petty" underlying offenses are not subject to the Sixth Amendment at all. *Southern Union*, 567 US at 350. Whether an offense is petty is evaluated by the "severity of the maximum authorized penalty." *Blanton v City of North Las Vegas*, 489 US 538, 541 (1989). That is, for Sixth Amendment purposes, what matters is whether the underlying offense triggers the jury trial right under *Apprendi*, not whether the fine meets some monetary threshold. As a result, offenses that trigger the Sixth Amendment jury trial right should trigger the right for purposes of calculating both the length of incarceration and the amount of the fine. See *Southern Union*, 567 US at 350 ("Where a fine is so insubstantial that the underlying offense is considered 'petty,' the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises."). Note also that circuits disagree on the question whether restitution is a criminal fine subject to *Apprendi*. Therefore, if BMR *is* restitution, *Apprendi* may not actually apply to it. Contrast *United States v Kieffer*, 596 Fed Appx 653, 664 (10th Cir 2014) (holding restitution to be a civil remedy when *Apprendi* does not apply), with *United States v Leahy*, 438 F3d 328, 333–35 (3d Cir 2006) (holding that restitution is "criminal rather than civil in nature"). Regardless, however, there is no dispute that *Apprendi* applies to fines, so it certainly applies to buy money calculated as part of a fine. This means that imposing BMR outside the fine statute functions as an end run around *Apprendi*.

146 The statute states that judges "shall" consider these factors. 18 USC § 3572(a).

147 18 USC § 3572(a)(5).

loss[148] into account in setting fines, it is theoretically possible that defendants who are ordered to repay buy money as a condition of supervised release could ultimately repay their buy money twice. Given the large number of factors judges consider in setting fines (as well as the fact that they often are not clear about how they arrive at the ultimate number), it is difficult to know whether this happens in fact.[149] Regardless of whether defendants actually repay buy money twice, however, judges applying the fine statute faithfully should include the amount of buy money in a defendant's fine. And if such a judge also imposes BMR, double counting by including buy money in a fine as well is not only possible but legally *required*. This possibility—whether or not it manifests in practice—indicates that interpreting the supervised release statute to allow BMR generates an outcome unmoored from its stated justifications.

2. Criminal forfeiture.

Criminal forfeiture provides an even more obvious route for the government to reclaim buy money. Criminal forfeiture is available for many crimes, including all crimes covered under the Comprehensive Drug Abuse Prevention and Control Act of 1970.[150] Property subject to forfeiture under that act includes "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the] violation."[151] That definition easily encompasses buy money in drug cases.[152] To effect forfeiture, the government must identify the property in its indictment and, after convicting the defendant of a drug crime, prove by a preponderance of the evidence that the property "either constitutes or was purchased with proceeds from the crime."[153]

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148 18 USC § 3572(a)(3).

149 I did not find any case in which a party stated that the defendant was being fined for the amount of the buy money and was also required to repay buy money as a condition of supervised release.

150 Pub L No 91-513, 84 Stat 1236, codified as amended in various sections of Title 21.

151 21 USC § 853(a)(1).

152 *United States v Garcia-Guizar*, 160 F3d 511, 519 (9th Cir 1998) (allowing the forfeiture of $4,300 in buy money).

153 *United States v Messino*, 122 F3d 427, 428 (7th Cir 1997).

While the government could also pursue civil forfeiture of buy money,[154] criminal forfeiture should be especially easy to obtain in most cases. At a hearing to determine whether the property is connected to the crime, for example, the criminal forfeiture statute allows the court to consider evidence inadmissible under the Federal Rules of Evidence.[155] Additionally, in drug cases, a felony conviction establishes a rebuttable presumption that any part of the defendant's property is subject to forfeiture if the government can establish by a preponderance of the evidence that the defendant acquired it during or after her illegal activities and that there is no other "likely source for such property."[156] Finally, in cases in which defendants have passed the buy money on to another party, the court can order forfeiture of "any other property of the defendant, up to the value of"[157] the property that "has been transferred or sold to, or deposited with, a third party."[158]

In this way, the criminal forfeiture statute strikes an uneasy balance between allowing the government to easily seize tainted property like buy money and providing some limited protections of defendants' due process rights.[159] The requirement that the government charge the amount to be forfeited in the indictment and prove it by a preponderance of the evidence, for example, protects defendants from the possibility of being required to pay based solely on the government's allegations. No such statutory protections are available for BMR as a condition of supervised release. While it is theoretically possible that the government is consistently reliable in its allegations of buy-money expenditures, it is impossible to know with certainty without any factual investigation of those allegations.[160]

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[154] See, for example, *United States v Premises Known as 3639-2nd Street, NE, Minneapolis, Minnesota*, 869 F2d 1093, 1097 (8th Cir 1989) (allowing the forfeiture of $12,585 in buy money).

[155] 21 USC § 853(e)(3).

[156] 21 USC § 853(d)(1)–(2).

[157] 21 USC § 853(p)(2).

[158] 21 USC § 853(p)(1)(B). The statute also allows for substitute property to be forfeited when the tainted property "cannot be located upon the exercise of due diligence," "has been placed beyond the jurisdiction of the court," "has been substantially diminished in value," or "has been commingled with other property which cannot be divided without difficulty." 21 USC § 853(p)(1)(A), (C)–(E).

[159] David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J Crim L & Crimin 328, 406–10 (1988).

[160] In fact, it may be the case that allowing the government to recover buy money so easily decreases its incentives to avoid risking important taxpayer resources. The intuition is that the government will use more buy money than is actually necessary to

3. Community restitution.

Finally, community restitution provides a route for judges to ensure that defendants redress any harm they might have caused to the community by accepting buy money. The MVRA allows judges to order community restitution when a defendant is convicted of a drug crime "in which there is no identifiable victim."[161] This provision should apply to many buy-money cases, as buy money is often used to investigate traditionally "victimless" crimes, such as drug trafficking.[162] While community restitution is optional under 18 USC § 3663(c), following the Sentencing Guidelines would require it. The Guidelines state that the judge "*shall* order an amount of community restitution" in certain categories of cases with no identifiable victim.[163]

The community restitution statute also reflects congressional judgments about how harm to the community should be compensated. The statute requires that restitution be set "based on the amount of public harm caused by the offense."[164] It further directs that 65 percent of the restitution award should be paid to the state for crime victim assistance and that 35 percent should be directed to state agencies tasked with substance abuse prevention.[165] It is unclear why courts do not impose community restitution more often in cases involving buy money.[166] It is possible, however, that prosecutors do not pursue community restitution because payments made into victim-compensation funds do not benefit the federal government directly.

In sum, punitive fines, criminal forfeiture, and community restitution work together to guarantee that any defendant who has received buy money will be required to repay it (and often to pay more). And they provide limited procedural protections to ensure that the defendant is not subjected to LFOs contradictory

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further an investigation or will keep very loose accounting. Courts' further failure to scrutinize government allegations of buy-money expenditures would only exacerbate these problems.

161 18 USC § 3663(c).

162 See, for example, *United States v Leman*, 574 Fed Appx 699, 701 (6th Cir 2014) (affirming a restitution order of $1,000,000 under the community restitution provision for a defendant who had been convicted of a conspiracy to distribute oxycodone and methadone); *United States v Lopez-Rosado*, 224 Fed Appx 186, 187 (3d Cir 2007).

163 USSG § 5E1.1(d) (emphasis added).

164 18 USC § 3663(c)(2)(A).

165 18 USC § 3663(c)(3)(A)–(B).

166 I could not find any case involving buy money in which community restitution was imposed.

to Congress's judgment. Disallowing BMR as a condition of supervised release will help ensure that defendants receive the limited protections afforded under these statutes and that the proceeds from those LFOs go to the causes that Congress designates. It also better comports with a reality in which Congress has provided the government with many comprehensive tools to seize back its buy-money expenditures and other related costs.

C. Internal Constraints: Restrictions on Discretionary Conditions

In addition to the robust scheme of fines and fees described above, the internal construction of the supervised release statute itself also categorically excludes BMR as a condition of supervised release. This Section untangles courts' interpretations of the requirements built into the supervised release statute, establishing that the statute's requirements meaningfully limit the categories of discretionary conditions courts may impose. It then argues that LFOs, including BMR, will not usually meet the statute's requirements. Finally, it distinguishes BMR from other types of LFO conditions that *are* allowed under the supervised release statute.

Sixth Circuit Judge Nathaniel Jones prefigured this argument. In his concurrence in *Gall*, he responded to the Seventh Circuit's conclusion in *Daddato* that BMR could be imposed not as restitution but instead under the catchall provision.[167] Without providing any detailed analysis of the sentencing purposes in 18 USC § 3553(a)(2)(B)–(D) (respectively, general deterrence, specific deterrence, and rehabilitation), Jones briefly argued that BMR might not fulfill any of them.[168] This Section more thoroughly develops Jones's position.

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[167] *Gall*, 21 F3d at 113 (Jones concurring).

[168] Jones noted that:

> Ordering a criminal defendant, as a condition of supervised release, to repay the government's buy money or other investigating costs, deprives the defendant of liberty during the period of supervised release, yet does not advance any of these three purposes; such an order neither deters criminal conduct, nor does it protect the public from further crimes, not does it provide any educational, vocational, medical, or correctional benefit to the defendant. Indeed, such a deprivation of liberty during the supervised release period could actually encourage the defendant to commit further crimes as a means of repaying such an onerous financial burden.

Id (Jones concurring).

1. The statutory requirements placed on discretionary conditions are substantive and binding.

While courts often use a case-specific approach to analyze whether a condition of supervised release is appropriate under the reasonable-relation requirement and deprivation-of-liberty constraint,[169] they also frequently establish categorical rules against certain conditions. The circuits' willingness to impose these rules illustrates that it is possible for a supervised release condition to be categorically impermissible. For example, in *United States v Russell*,[170] the DC Circuit struck down a supervised release condition that set a thirty-year ban on the defendant's access to a computer because it "deprive[d] the defendant of substantially more liberty than [ ] 'reasonably necessary for the purposes set forth'" in § 3583(d)(1).[171] Neither the characteristics of the defendant nor the particulars of the crime had an impact on that result. Similarly, the Eighth Circuit in *United States v Smith*[172] held that a condition requiring the defendant not to father children with anyone other than his wife could not possibly be reasonably related to any of the § 3583(d)(1) goals.[173]

Moreover, Congress itself has indicated that it is possible for certain sanctions to be categorically incompatible with particular § 3553(a) goals. Under 18 USC § 3582(a), courts are required to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation" when deciding whether to impose a prison term as part of a sentence.[174] In *Tapia v United States*,[175] the Supreme Court interpreted that requirement to preclude trial courts from sentencing defendants to prison for rehabilitative reasons.[176] In *Tapia*, the sentencing court had lengthened the defendant's prison term for the sole purpose of making her eligible for a rehabilitative treatment program.[177] The Court relied on legislative history and the plain meaning of the statute to conclude that it prohibited imposing a prison term for the reason the court had given.[178] The result in

169 See Part I.A.
170 600 F3d 631 (DC Cir 2010).
171 Id at 637, citing 18 USC § 3583(d)(2).
172 972 F2d 960 (8th Cir 1992).
173 Id at 962.
174 18 USC § 3582(a).
175 564 US 319 (2011).
176 Id at 332.
177 Id at 334.
178 Id at 325–34.

Tapia indicates that Congress is willing to find certain criminal sanctions categorically incompatible with particular sentencing goals.

One might argue that Congress could have made a similarly explicit judgment about the incompatibility of BMR and any of the § 3553(a) goals when it drafted the supervised release statute. After all, Congress's clarity in declaring incarceration incompatible with rehabilitation indicates that it knew how to explicitly and categorically find a sanction incompatible with a purpose of sentencing. It is more likely, however, that lawmakers simply did not think to do so in the case of BMR. It would be impossible for Congress to think of (and spell out the sentencing relevance of) every possible discretionary condition a judge might impose. I found no evidence that Congress has ever considered the issue of buy money; nor could Congress have anticipated that prosecutors or district-court judges would allow BMR as a condition of supervised release given the courts' narrow construction of the VWPA as described above in Part I.C. Indeed, instead of attempting to foresee every discretionary condition courts might impose, Congress constrained the universe of possible conditions by requiring the sentencing courts themselves to evaluate those conditions against the purposes of sentencing.

Not all possible conditions of supervised release actually meet the reasonable-relation requirement and deprivation-of-liberty constraint. While empirical research has not examined the effects of BMR on rehabilitation, specific deterrence, or general deterrence, there are myriad studies of the effects of other LFOs on those goals. A typical account describes LFOs as "debt[s] arising from a . . . court order to pay money in connection with a criminal case," including "restitution, fines, fees, and costs."[179] BMR, which is a financial obligation imposed by sentencing courts, is an LFO. It is therefore possible to draw conclusions about the effectiveness of BMR with respect to the relevant sentencing goals from the extensive research that has been conducted on the effects of other LFOs.

As Part III.B.2 explains, LFOs generally undermine the specific-deterrence and rehabilitation goals. The claim that they provide general deterrence, while stronger, is also relatively weak

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[179] Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 Gonzaga L Rev 547, 548 (2012).

in comparison with other possible sanctions. As an LFO, BMR is likely to have many of the same issues, and as such its compliance with the sentencing goals should be carefully scrutinized.

2. Monetary conditions of supervised release undercut the goals of rehabilitation and specific deterrence.

The imposition of LFOs does not further the goal of rehabilitation. 18 USC § 3553(a)(2)(D) requires that a condition of supervised release help "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[180] Requiring a defendant to pay money to the government is clearly unrelated to those services. Even an LFO requiring that a defendant pay for such rehabilitative services as vocational training or medical care would not *help* an individual defendant access those services, assuming they were otherwise available. Instead, it would act as an added barrier given that the defendant would have to come up with the resources to comply in the first place.

Along those lines, it is possible that LFOs can actually frustrate the goal of rehabilitation. First, empirical research indicates that LFOs make rehabilitation more difficult for defendants. In general, LFOs "exacerbate poverty by reducing available income and limiting access to employment, credit, transportation, and housing."[181] LFOs' "rehabilitation-defeating propensities"[182] result from their regressive effects, which push already impoverished families further into poverty. In their article, Professor Alexes Harris, Heather Evans, and Professor Katherine Beckett argue that "legal debt is [often] substantial relative to expected earnings" and that it "contributes to . . . disadvantage . . . by reducing family income [and] limiting access to opportunities and resources."[183] LFOs' effects on income thus create greater barriers to the kinds of products and services

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[180] 18 USC § 3553(a)(2)(D).

[181] Vander Giessen, Note, 47 Gonzaga L Rev at 552–53 (cited in note 179).

[182] Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 Minn L Rev 1735, 1743 (2015).

[183] Alexes Harris, Heather Evans, and Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am J Sociology 1753, 1756 (2010). See also Katherine Beckett and Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 Crimin & Pub Pol 509, 514–15 (2011). For an extended treatment of the subject, see generally Note, *Developments in the Law: Policing*, 128 Harv L Rev 1706 (2015).

that former criminal defendants need to readjust to life in the community.

Similarly, LFOs undercut the goal of specific deterrence. Section 3553(a)(2)(C) requires that any condition of supervised release "protect the public from further crimes of the defendant."[184] It is conceivable, of course, that imposing LFOs (or, specifically, requiring a defendant to pay BMR) in one case might make her less likely to commit similar crimes in the future. There is research that points the other way, however. For example, reduced income—combined with more difficult access to credit and employment—can increase a defendant's incentives to seek alternate sources of income in the illicit economy.[185] Some scholars argue that LFOs can further specific deterrence by encouraging released defendants to remain employed and avoid increasing their criminal justice debt.[186] However, the evidence that LFOs have that effect in practice is quite weak.[187]

Finally, it is possible that monetary conditions of supervised release further the general-deterrence goal.[188] However, a weak link to general deterrence cannot justify imposing an LFO under the reasonable-relation requirement and deprivation-of-liberty constraint. LFOs in general—and BMR specifically—may not undermine general deterrence in the same way that they undermine specific deterrence and rehabilitation. But the reasonable-relation requirement[189] calls for BMR to actually further general deterrence in some way. Absent evidence to the contrary, there is no plausible reason to believe that LFOs create *better* deterrent effects than other possible criminal sanctions like incarceration or community service. Especially given that the supervised release statute also imposes the deprivation-of-liberty constraint,[190] a conceivable general deterrent effect does not justify imposing an LFO. If it did, virtually any condition that placed some limit on the defendant would qualify, and the requirements of 18 USC § 3583(d)(1)–(2) would hold no

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184 18 USC § 3553(a)(2)(C).

185 Reitz, 99 Minn L Rev at 1743–45 (cited in note 182).

186 Id at 1742.

187 Id at 1743–44 ("Unrealistic or heavy financial obligations interfere with offenders' abilities to obtain credit, pay for transportation (often essential to employment), pursue educational opportunities, and sustain family ties.").

188 18 USC § 3553(a)(2)(B) (setting out the goal of "afford[ing] adequate deterrence to criminal conduct").

189 18 USC § 3583(d)(1).

190 18 USC § 3583(d)(2).

weight at all. Such a result would not only be absurd but would also be contrary to courts' general willingness to strike down conditions under those provisions as described in Part I.A and Part III.B.1.

3. Buy-money repayment is distinguishable from other LFOs that Congress explicitly allows as conditions of supervised release.

There are, of course, three expressly provided discretionary conditions of supervised release that qualify as LFOs. They are all distinguishable from BMR in terms of their possible deterrent or rehabilitative effects, however. First, a defendant can be required to "support his dependents and meet other family responsibilities"[191] ("dependent-support condition"). Second, as discussed above, a defendant may be required to "make restitution to a victim of the offense"[192] ("restitution condition"). Finally, the defendant may be required to "comply with the terms of any court order . . . requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living"[193] ("child-support-and-maintenance condition").

Because Congress made these conditions available under the supervised release statute, it is likely that lawmakers thought the conditions would comport with the reasonable-relation requirement and deprivation-of-liberty constraint in at least some cases. Congress did not, however, elect to require these conditions in all cases. And in the case of victim restitution, that choice seems to have been intentional. That is, while the probation statute—from which the discretionary conditions of supervised release were lifted almost wholesale[194]—actually *requires* that all defendants make restitution as applicable under the VWPA or MVRA,[195] the supervised release statute does not. Instead, it leaves the imposition of victim restitution entirely up to the discretion of the judge.[196] The fact that Congress

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191 18 USC § 3563(b)(1).

192 18 USC § 3563(b)(2).

193 18 USC § 3563(b)(20).

194 See 18 USC § 3563.

195 18 USC § 3563(a)(6)(A).

196 Congress, in other words, did not require restitution in all cases of supervised release. This decision was likely due to the fact that restitution as a monetary condition has some punitive aspects that are a better fit with probation (which, as a substitute for

chose not to require these conditions in every case indicates that it knew they might not always fulfill the requirements of the supervised release statute.

Each of the three discretionary LFO conditions, however, has a better claim to fulfilling the supervised release goals than BMR. Although all LFOs may undercut specific deterrence and rehabilitation as described above,[197] the three financial conditions expressly provided in the statute may have benefits for certain defendants that BMR does not.

The dependent-support condition and child-support-and-maintenance condition may further the goal of rehabilitation. Both conditions require the defendant to support her family members, and in doing so to take responsibility for normal life expenses and burdens. The conditions may ease the defendant's transition back into the community by alerting her to and preparing her for the financial obligations she will have there and ensuring that she fulfills them. They might also help to improve the defendant's family relationships to the extent she would not have fulfilled her responsibilities without this additional legal incentive. Cooperative family relationships, in turn, might provide the defendant with more support as she transitions back to the community.

The restitution condition may also have positive implications for the sentencing goals. Specifically, restitution may help the defendant better understand the harm she has caused her victim—a mechanism that may further both rehabilitation and specific deterrence. The rehabilitative effect of restitution comes from its particular ability to focus the defendant on the exact kind and amount of harm she has caused[198] and put a face on the victim.[199] Forcing the defendant to acknowledge and recognize her victim and then actually repair some of the harm may also

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incarceration, is intended to be punitive) than with supervised release (which is intended to be imposed in addition to a punitive sanction like incarceration, not instead of one).

197 See Part III.B.2.

198 Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv L Rev 931, 938 (1984) ("[B]y ordering restitution, a court forces the defendant to acknowledge in concrete terms the harm he has caused.").

199 Id. Interestingly, this student note also argues that restitution can be more beneficial than fines or imprisonment for specific deterrence because it "more directly corresponds to the loss the offender has caused." Id at 939. For further support of the general rehabilitative theory, see Kenneth Winchester Gaines, *The Newly Adopted Criminal Restitution Statutes of South Carolina: Analysis and Recommendations for Change*, 46 SC L Rev 289, 331 (1995). For examples of older articles espousing some version of this argument, see note 201.

"enable[ ] [her] to achieve a sense of accomplishment which further promotes [her] reform."[200] And while the actual rehabilitative effects of victim restitution are almost impossible to measure, it is clear that Congress could reasonably have relied on these types of rehabilitative theories in choosing to allow the restitution condition.[201] In terms of specific deterrence, a study conducted by Professors Maureen Outlaw and R. Barry Ruback found that restitution payments may actually be linked to lower rates of re-arrest.[202] Outlaw and Ruback, as well as previous researchers,[203] posit that restitution is most effective in preventing recidivism when it helps defendants understand the harm they have caused for their victims. Their argument is similar to the arguments about rehabilitation above: "[R]estitution may be effective because it emphasizes the benefits to the victim and allows offenders to take responsibility for their actions without stigmatizing them."[204]

BMR is unlike the discretionary conditions expressly included in the supervised release statute in that it does not have any cognizable rehabilitative effects. It differs from the restitution condition in that it does not focus the defendant on the harm to her victim, and it differs from the dependent-support and child-support-and-maintenance conditions in that it

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[200] Stan Siegel, *Crime and Punishment: The Propriety and Effect of South Dakota's Victim Restitution Legislation*, 31 SD L Rev 783, 788 (1986).

[201] Scholarship linking restitution and rehabilitation predates the passage of the Sentencing Reform Act in 1984. See, for example, James L. Bonta, et al, *Restitution in Correctional Half-Way Houses: Victim Satisfaction, Attitudes, and Recidivism*, 25 Canadian J Crimin 277, 290–91 (1983) (finding a correlation between the amount an offender repaid and his success in a rehabilitation program); James William Casson III, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 New Eng J Crim & Civ Confinement 349, 354 (1983) ("[R]estitution, while restoring the victim, is also therapeutic and aids in the rehabilitation of the criminal."); David Shichor and Arnold Binder, *Community Restitution for Juveniles: An Approach and Preliminary Evaluation*, 7 Crim Just Rev 46, 48 (1982) (finding, in a small sample, a link between participation in a restitution program and lower rates of recidivism); Charles W. Colson and Daniel H. Benson, *Restitution as an Alternative to Imprisonment*, Det Coll L Rev 523, 527 (1980) ("We are persuaded that if restitution is adopted in the United States as a primary post-conviction response to criminal behavior, there will be significantly greater rehabilitation of offenders.").

[202] Maureen C. Outlaw and R. Barry Ruback, *Predictors and Outcomes of Victim Restitution Orders*, 16 Just Q 847, 849–50 (1999) (finding lower rates of re-arrest for defendants ordered to pay restitution).

[203] See generally Laurie Ervin and Anne Schneider, *Explaining the Effects of Restitution on Offenders: Results from a National Experiment in Juvenile Courts*, in Burt Galaway and Joe Hudson, eds, *Criminal Justice, Restitution, and Reconciliation* 183 (Willow Tree 1990).

[204] Outlaw and Ruback, 16 Just Q at 851 (cited in note 202).

cannot help ease the defendant back into her regular duties and obligations.

First, BMR does not provide the same opportunity to understand the harm to the victim that is crucial to the restitution condition's rehabilitation and specific-deterrence effects. While BMR could conceivably be ordered in cases in which there are victims, BMR itself does not involve payments *to* victims and as such does not help defendants empathize with particular people harmed.[205] Additionally, while victim restitution can help a defendant understand the amount of harm she has caused (in addition to identifying the individuals whom she has harmed),[206] the amount of repayment in the buy-money context is entirely arbitrary—it depends on the amount that the government decided to expend in the investigation. Unlike victim restitution, which attempts to reimburse losses as exactly as possible, BMR does not purport to reflect the quality or quantity of harm the defendant has inflicted on the community. It simply involves reimbursing the government for an investigative expense. And in any case, judges already have a tool for ordering restitution in situations with no identifiable individual victim but in which the court determines that some harm has been done to the community: the community restitution statute described above in Part III.A.3.

Second, BMR does not have the same rehabilitative effects as the dependent-support and child-support-and-maintenance conditions—helping to ease the defendant back into her regular duties and obligations—and for that reason is not related to the rehabilitation goal in the same way. BMR does not provide any sort of compensation for community members or other individuals who might feel threatened or harmed by the defendant, or who might need her support. And BMR is not a responsibility that the defendant will automatically or inevitably have upon release—it provides no training for "real life."

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Because LFOs generally tend to undercut the relevant sentencing goals, specific LFOs should not be permitted as conditions of supervised release unless they are unusually well suited to further those goals. BMR is unique in that it has all of the

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[205] See Part I.C.

[206] See Note, 97 Harv L Rev at 938 (cited in note 198).

drawbacks of the LFOs expressly permitted by the supervised release statute without any of the possible rehabilitation or specific-deterrence benefits that those LFOs might provide. And given that it is an LFO, BMR is likely to have effects that counteract those sentencing purposes entirely. Because Congress requires each condition of supervised release to further the goals of the supervised release statute independently, BMR—which does not further those goals—should not be imposed under it.

CONCLUSION

The circuit courts' disagreement regarding whether BMR is a permissible condition of supervised release currently focuses primarily on whether BMR should be considered restitution. The Third and Sixth Circuits insist that it *is* restitution, while the Seventh Circuit allows the condition in large part because it is *not* restitution. As a result, no circuit court has engaged in a comprehensive analysis of whether BMR could be imposed under the catchall provision, assuming that it is *not* restitution.

In fact, BMR likely is not restitution because it does not involve payments to crime victims. However, there are two primary reasons that it is also impermissible under the catchall. First, BMR as a condition of supervised release is precluded by a broad and robust statutory scheme of criminal LFOs. Punitive fines, criminal forfeiture, and community restitution already guarantee that defendants will be obliged to repay buy money. Imposing buy money as a condition of supervised release in this statutory context thus creates two major problems. First, the government will be able to end-run Congress's procedural protections for defendants. And second, courts will effectively disregard Congress's judgments about where the proceeds of criminal LFOs should end up.

Second, BMR does not meet the supervised release statute's requirements for discretionary conditions. The statute requires that supervised release conditions be "reasonably related" to the § 3553(a) sentencing purposes[207] and that they not be excessively broad even if they fulfill those goals.[208] LFOs in general, however, are unlikely to further the goals of deterrence or rehabilitation. In fact, they may undermine those goals by making it more difficult for defendants to transition back into the

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[207] 18 USC § 3583(d)(1).

[208] 18 USC § 3583(d)(2).

community. While some LFO conditions are already expressly permitted by the supervised release statute, those conditions have rehabilitation and specific-deterrence purposes that may justify their use as discretionary conditions. BMR, however, does not have the same positive effects.

Taken together, the external and internal constraints on discretionary supervised release conditions create a strong legal argument against imposing BMR as a condition of supervised release. BMR conflicts directly with a comprehensive statutory scheme of criminal LFOs, and it violates the requirements for discretionary conditions expressly written into the supervised release statute itself.