THE ARITHMETIC OF JUSTICE: CALCULATING RESTITUTION FOR MORTGAGE FRAUD

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The Mandatory Victims Restitution Act requires restitution for federal crimes involving property. In particular, the defendant is required to return any property taken, or, if return is impossible, to pay for the victim's loss, which may be offset by a partial return of the property. In mortgage fraud cases, this usually entails calculating the lender's loss—an unpaid loan—and offsetting that loss by the value of the collateral for the loan, which the lender recovers. The circuits disagree about how to value the recovered collateral as an offset to restitution: Should its value be determined by its appraised fair market value or, conversely, by its final foreclosure price when the victim-lender sells it? This Note concludes that courts should presumptively use the foreclosure price, except when that price can be shown not to approximate the value at the date of return.

INTRODUCTION

In 2004 and 2005, Benjamin Robers was a straw buyer in a massive mortgage fraud scheme that involved nearly twenty houses and many millions of dollars.[1] Robers himself received only $500 per loan for his participation in two closings; no payments were ever made, and the banks foreclosed on the two houses.[2] When the banks attempted to sell them, the houses had lost nearly half their combined value.[3] Based on the value of the unpaid loans, offset only by the low foreclosure prices of the properties, the district court ordered Robers to pay approximately $220,000 in restitution to the banks.[4]

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1. United States v. Robers, 698 F.3d 937, 939–40 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013). For details of the broader scheme see, for example, United States v. Valadez, No. 07-CR-245, 2008 WL 4066092, at *2 (E.D. Wis. Aug. 27, 2008) (sentencing one of main conspirators based on thirteen sales and losses of more than $1 million); see also Plea Agreement at 3, United States v. Lytle, No. 07-CR-113 (E.D. Wis. May 15, 2007), available at http://www.mortgagefraudblog.com/images/uploads/lytleplea.pdf (on file with the *Columbia Law Review*) (admitting to fraud involving nineteen houses and loans totaling $4 million).

2. *Robers*, 698 F.3d at 940.

3. Id.

4. Id. at 941. The restitution was owed jointly and severally by Robers and the more central figures who orchestrated the scheme. Id.

Some of this loss may have been due to fraudulently inflated appraisals secured by the main conspirators,[5] but Robers contended that the housing market was responsible for the decline in the houses' value and that it would be unjust to use the final sale prices to calculate the restitution he owed, since the property was worth more when the lenders took possession than when they sold it.[6] The Seventh Circuit, however, affirmed the restitution order,[7] staking out a strong position in a disagreement that has been percolating through the circuits. Given the recent mortgage crisis and housing crash, the split is more salient than ever.[8]

This Note argues that the Seventh Circuit reached the right result, but not for the right reasons. Part I of this Note explains the origins of restitution in federal criminal law, restitution in mortgage fraud cases, and the increased relevance of real property valuation to restitution in the current housing market. Part II explores the disagreements among the circuits that have weighed in on the proper method of valuing real property when it is used to offset restitution. Part III proposes a solution based primarily on the purpose of the Mandatory Victims Restitution Act of 1996 (MVRA), after determining that the text of the statute does not tell courts which method to use.

I. The Salience of Property Valuation in the Restitution Context

Restitution for criminal offenses has evolved significantly over the past few decades. Part I.A describes the evolution of restitution in federal criminal law, including the two major federal restitution statutes, the Victim and Witness Protection Act of 1982 (VWPA) and the MVRA. Part I.B explains how the MVRA applies to federal crimes involving real property, which often involves offsetting restitution owed by the value of returned property. Part I.C argues that the method of valuing property gains relevance and importance in volatile property markets, particularly when prices are decreasing, as has been the case over the past few years.

A. *Restitution in Federal Criminal Law*

Restitution, in the criminal context, is a court-ordered payment by a defendant to a victim, and is the functional equivalent of damages in a

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5. See Plea Agreement at 2–3, *Lytle*, No. 07-CR-113 (admitting defendant "fabricated information about the condition or appraisal value of the subject properties").

6. *Robers*, 698 F.3d at 941 ("Robers maintains that . . . he was wrongly held responsible for the decline in their value.").

7. Except as it related to attorney's fees and "other expenses," irrelevant here. Id. at 955–56. For a full exposition of the Seventh Circuit's reasoning, see infra notes 140–153 and accompanying text.

8. See infra text accompanying notes 46–67 (discussing housing crisis and factors making valuation methodology increasingly important).

civil tort action.[9] It is well established that "[f]ederal courts have no inherent power to order restitution."[10] Congress first granted federal courts this power in 1925, but restitution was limited to being a condition of probation.[11] Concern for crime victims' welfare led Congress to grant federal courts greater power to order restitution in the Victim and Witness Protection Act of 1982.[12] The VWPA granted judges broad discretion to order restitution based on the losses sustained by victims, although they were also to consider the financial ability of the defendant.[13] The purpose was to have criminals compensate their victims to the greatest extent possible.[14]

Despite the considerable expansion of restitution in the VWPA, Congress believed that victims could still be more fully compensated.[15] The MVRA took away courts' discretion and made restitution mandatory

9. See, e.g., Margaret Raymond, Note, The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment, 84 Colum. L. Rev. 1590, 1592 (1984) ("[T]he restitutionary remedy replaces the victim's civil action for damages."). This definition of restitution is *not* the same as common law restitution, which is a civil liability based on unjust enrichment. See, e.g., United States v. Fair, 699 F.3d 508, 512 (D.C. Cir. 2012) ("[I]t is distinguishable from restitution in the civil law context . . . ."); cf. Restatement (Third) of Restitution & Unjust Enrichment § 1 (2010) (explaining nature of common law, or civil, restitution). Indeed, the Restatement quite explicitly notes that in "statutes authorizing compensation to victims . . . the liability imposed . . . is not based on unjust enrichment but on compensation for harm. To the extent that this aspect of criminal sanctions has a basis in civil obligations, it is found in tort rather than restitution." Id. § 1 cmt. e(2). Federal criminal restitution is a newcomer relative to common law restitution, which was already well established by 1937, when the ALI published the first Restatement. See generally Restatement of Restitution (1937).

10. United States v. Zangari, 677 F.3d 86, 91 (2d Cir. 2012); accord *Fair*, 699 F.3d at 512; United States v. Gossi, 608 F.3d 574, 577 (9th Cir. 2010).

11. Federal Probation Act, ch. 521, § 1, 43 Stat. 1259, 1259–60 (1925), repealed and replaced by Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

12. Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253–55 (codified as amended at 18 U.S.C. §§ 3663, 3664 (2012)).

13. 18 U.S.C. § 3663(a)(1)(A)–(B) (directing court to consider "financial resources [and] financial needs and earning ability of the defendant and the defendant's dependents" and any other appropriate factors). The consideration of the defendant's financial resources often led to no or minimal restitution being ordered when the defendant was indigent. See S. Rep. No. 104-179, at 18 (1995) (noting "85 percent of all Federal defendants are indigent at the time of sentencing, and thus unlikely to be able to pay restitution").

14. VWPA § 2(b)(2), 96 Stat. at 1249 (stating purposes include "to ensure that the Federal Government does all that is possible . . . to assist victims and witnesses of crime"). Although the term "restitution" is used for this compensatory payment, it bears little relation to common law restitution. See supra note 9 (noting difference between common law and criminal restitution).

15. The Senate Report accompanying what eventually became the MVRA noted that in 1994, "[f]ederal courts ordered restitution in only 20.2 percent of criminal cases." S. Rep. No. 104-179, at 13. This was in large part due to indigent defendants. See supra note 12 (observing large majority of defendants are indigent and unable to pay restitution).

in all crimes of violence and against property, as well as certain other enumerated offenses.[16] It instructed judges not to consider the defendant's financial situation, unlike the VWPA, and required that restitution be based solely on the victim's losses.[17] In addition, the statute explicitly provided that restitution should be ordered for criminal conduct that, although not charged against a given defendant, was part of a broader "scheme, conspiracy, or pattern" related to the charged offense.[18] There is no explicit statement of congressional purpose in the MVRA, but based on all these provisions, courts have almost uniformly treated the sole purpose of the statute as compensation of victims' losses.[19] Indeed, the procedural requirements for issuing an order of restitution focus on "a complete accounting of the losses to each victim," with opportunities for the victim to submit information to the probation officer or file an affidavit to protect her own interests.[20]

16. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227–29 (codified as amended at 18 U.S.C. § 3663A).

17. § 3663A(b); § 3664(f)(1)(A). Of course, many defendants are unable to pay, but in those cases restitution is both symbolic and an assurance that if a defendant acquires financial resources, she will not have escaped restitution through a temporary inability to pay. The symbolic nature of restitution was explicitly recognized by Congress: The Senate Report states that in addition to compensating victims, the MVRA will "ensure that the loss to crime victims is recognized . . . [and] that the offender realizes the damage caused." S. Rep. No. 104-179, at 12.

18. § 3663A(a)(2). The Supreme Court had previously held that under the VWPA, restitution could only be ordered for the "loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). Congress wanted to expand this narrow interpretation of victims' losses with the MVRA. Although there may be legitimate concerns about allowing restitution for conduct of which a defendant may not have been convicted, this provision of the MVRA is now well established. See, e.g., United States v. Dickerson, 370 F.3d 1330, 1341 (11th Cir. 2004) ("Our brief survey of the law shows that . . . the MVRA all but eviscerated *Hughey* with respect to crimes involving schemes.").

19. See, e.g., United States v. Fair, 699 F.3d 508, 513 (D.C. Cir. 2012) (holding purpose of MVRA to be compensation of loss, not disgorgement of gains by defendant); United States v. Zangari, 677 F.3d 86, 91 (2d Cir. 2012) (same); United States v. Balentine, 569 F.3d 801, 806 (8th Cir. 2009) (same); United States v. Parker, 553 F.3d 1309, 1323 (10th Cir. 2009) (same). There is some language in other circuits indicating a contrary understanding; for instance, the Seventh Circuit has stated that restitution "operates to ensure that a wrongdoer does not procure any benefit." United States v. Newman, 144 F.3d 531, 538 (7th Cir. 1998) (citing United States v. Gifford, 90 F.3d 160, 163 (6th Cir. 1996); 1 George E. Palmer, The Law of Restitution § 1.1, at 5 (1978)). The Third Circuit, as well, at one point followed this logic and *Newman*. See United States v. Russo, 166 F. App'x 654, 662–63 (3d Cir. 2006) (quoting *Newman*, 144 F.3d at 538). But the Restatement has rejected the equation of common law restitution with criminal restitution, see supra note 9, and more recent decisions by both circuits confirm that they view the MVRA's sole and overriding purpose as victim compensation. See, e.g., United States v. Robers, 698 F.3d 937, 943 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013); United States v. Stoerr, 695 F.3d 271, 278 (3d Cir. 2012) (citing United States v. Diaz, 245 F.3d 294, 312 (3d Cir. 2001)).

20. 18 U.S.C. § 3664(a), (d)(2)(A)(iii), (d)(2)(A)(vi).

B. *Restitution for Mortgage Fraud Under the MVRA*

The MVRA covers any "offense against property . . . including any offense committed by fraud or deceit."[21] When the defendant has illegally taken property from a victim, whether by force[22] or by fraud,[23] restitution is intuitive and often easy to calculate. When the property is returnable, it is to be returned; when no return is possible, the defendant is to pay the value of the property.[24] The lost property is assigned either its value on the date of loss or its value on the date of sentencing, whichever is greater.[25] In cases where part of the property is returned to the victim, the value of that returned property is used to offset any payment owed, and this provision specifies that the value is calculated "as of the date the property is returned."[26] This is a fairly clear framework for calculating restitution payments in property crimes, except that the statute mentions no method for valuing property. As the Tenth Circuit states, "[the MVRA] instructs the court on *what* to value—the property—and *when* to value it . . . . However, the statute is silent on the question of *how* the referenced property is to be valued."[27] Certain kinds of property, like real estate, are prone to disagreements over the method of valuation.[28]

Attempting to determine restitution owed in mortgage fraud cases provides fertile ground for such disagreements. To begin with, more than a billion dollars a year may be at stake.[29] "Mortgage fraud" is a catchall term for many types of fraud involving misrepresentations to obtain a mortgage.[30] Sometimes an individual homebuyer lies about her income, job, or outstanding debt in order to obtain a loan for which she

21. § 3663A(c)(1)(A)(ii).

22. E.g., robbery or burglary. §§ 2111–2119.

23. For frauds generally, see §§ 1001–1040; for mail fraud, wire fraud, and the like, see §§ 1341–1351.

24. § 3663A(b)(1).

25. § 3663A(b)(1)(B). As might be expected given the compensatory purpose of the MVRA, the date of valuation is intended to maximize the award to the victim.

26. § 3663A(b)(1)(B)(ii).

27. United States v. James, 564 F.3d 1237, 1245 (10th Cir. 2009) (citation omitted).

28. See infra notes 46–52 and accompanying text (discussing disagreements over appraisals of property).

29. In fiscal year 2011, the Federal Bureau of Investigation (FBI) recorded $1.38 billion in restitution. FBI, U.S. Dep't of Justice, Financial Crimes Report to the Public: Fiscal Years 2010–2011, at 26 (2011) [hereinafter FBI Crime Report], available at http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011/financial-crimes-report-2010-2011.pdf (on file with the *Columbia Law Review*).

30. The FBI identifies different types of mortgage fraud by names such as loan origination schemes, illegal property flipping, equity skimming schemes, short sale schemes, and advance fee schemes, among others. Fin. Crimes Intelligence Unit, FBI, 2010 Mortgage Fraud Report: Year in Review 17–22 (2011) [hereinafter FBI Mortgage Report], available at http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010 (on file with the *Columbia Law Review*).

is not qualified.[31] In those cases, the buyer's intent is to live in the house and repay the loan, not to turn a profit.[32] But more complex schemes involve industry professionals, who systematically obtain a series of fraudulent loans and generate profits.[33] A broker might use a fake "straw" buyer so that she could profit from, for instance, flipping the property to another straw buyer, "skimming" off its equity by taking out additional loans against its value, or some other means.[34] Professional loan origination schemes, the most common kind of fraud, can easily be repeated to multiply the ill-gotten gains with a neverending supply of fake names or willing accomplices. Because of this, they tend to be more serious, and to be prosecuted more often, than individual mortgage frauds.[35] In each kind of scheme, the loan is never paid back, and the perpetrator ends up with extra cash, while the lender is left with nothing but a claim to the collateral.[36]

When the federal government prosecutes mortgage fraud[37] and obtains a conviction (including after a guilty plea), the MVRA clearly applies.[38] In mortgage fraud cases, the victim's lost property is the money wrongfully obtained from a lender, and mandatory restitution requires that the defendant pay it back to make the victim-lender whole.[39] How-

31. Among the simplest forms of fraud is listing false income or assets on the loan application. See id. at 16–17 (detailing personal mortgage fraud to obtain housing). Another form involves deceptively taking out multiple mortgages to erase the buyer's own risk. See FBI Crime Report, supra note 29, at 27 (explaining "silent second" mortgages). These forms of fraud are usually intended to obtain a residence rather than generate profits. FBI Mortgage Report, supra note 30, at 17.

32. FBI Mortgage Report, supra note 30, at 17 (describing "fraud for property").

33. See id. at 5 (listing "brokers, lenders, appraisers," and others who can "earn high profits" from fraud).

34. See FBI Crime Report, supra note 29, at 26–27 (noting various means of draining equity); FBI Mortgage Report, supra note 30, at 18–21 (same).

35. See FBI Crime Report, supra note 29, at 22 (explaining FBI considers loan origination to be "most egregious type of mortgage fraud"); FBI Mortgage Report, supra note 30, at 17 (noting prevalence of loan origination schemes).

36. For instance, in illegal flipping, a fraudulent appraisal is used to sell the property to a straw buyer; the lender loaning that buyer the money pays cash to the seller, who often pays a kickback to the straw buyer. Both walk away, leaving the lender to foreclose on property worth less than the mortgage. See FBI Mortgage Report, supra note 30, at 18. This was the type of scheme perpetrated by the defendant in *Robers*. See supra notes 1–6 and accompanying text (explaining facts of case).

37. It may be prosecuted under a number of statutory provisions, including as mail fraud, wire fraud, or bank fraud. 18 U.S.C. §§ 1341, 1343–1344 (2012).

38. The statute explicitly covers "convictions of, or plea agreements relating to . . . an offense against property . . . committed by fraud or deceit." § 3663A(c)(1).

39. See, e.g., United States v. Robers, 698 F.3d 937, 939 (7th Cir. 2012) ("The property originally stolen was cash."), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013).

ever, mortgages always involve collateral,[40] and when a mortgage goes unpaid (because the defendant, often having lied about her finances, is unable to pay) the lender—here the victim—will foreclose and ultimately sell the collateral to recoup its loss.[41] Under the MVRA, the foreclosure on the collateral is treated as a partial return of property, and its value is used to offset the restitution owed by the defendant to the victim-lender.[42] If the value of the property returned is equal to or greater than the loss to the lender, the defendant will owe no restitution at all.[43] If the collateral is valued at nothing, on the other hand,[44] the defendant will end up owing the entire amount of the mortgage as restitution.[45] Where there is disagreement over the value of collateral, then, the method of valuation takes on paramount importance to the defendant and to the victim.

C. *Increased Potential for Large Disparities in Valuing Real Estate*

The mortgage crisis and the recent volatility in the U.S. housing market have made the valuation of collateral more difficult than ever. First, appraisals are more contested, for a number of reasons. Second, when housing prices are rapidly decreasing, the exact timing of valuation may make a large difference in the final calculation. In such a climate, if a lender takes title to property, by the time it is sold the property's value may have decreased significantly. Both these factors mean that the method of valuing collateral is increasingly likely to have an enormous effect on the actual amount of restitution ordered in mortgage fraud cases.

1. *Disputed Appraisals.* — Rapidly changing housing prices have diminished the accuracy of appraisals, or at least created more disagreements over their accuracy.[46] In part, this is because appraisers rely on the

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40. Collateral refers to property "that is pledged as a security against a debt." Black's Law Dictionary 297 (9th ed. 2009). The purpose of collateral is to make the lender more confident that it will not lose money on a loan; if the borrower defaults, the lender can take all or part of the collateral in lieu of the money owed.

41. See, e.g., United States v. Statman, 604 F.3d 529, 537 (8th Cir. 2010) (noting testimony by party "responsible for attempting to recoup and sell the collateral originally pledged" for mortgage).

42. 18 U.S.C. § 3663A(b)(1).

43. The final restitution amount equals the loss minus any offset value; if the offset value equals the loss, no restitution will be owed.

44. This is unlikely where real property is the collateral. But consider "air loans," where the borrower or broker has simply invented a nonexistent property to serve as collateral. See FBI Crime Report, supra note 29, at 28 (describing air loans).

45. See supra note 43. As the offset value decreases, the final restitution amount increases.

46. See, e.g., S. Mitra Kalita & Carrick Mollenkamp, Judgment Call: Appraisals Weigh Down Housing Sales, Wall St. J. (Aug. 11, 2011, 10:31 PM), http://online.wsj.com/article/SB10001424053111904006104576500170808091148.html (on file with the *Columbia Law Review*) ("Disputes over valuations are rising.").

prices of "typical transactions" in similar properties in the local real estate market.[47] When "typical" sales are rare and "distressed" sales are common, the very definition of "typical" is subject to dispute.[48] When the market is highly volatile, comparisons are more difficult, and small changes in methodology (for instance, changing the geographic area of comparison) may yield large changes in appraised values.

Some appraisers also blame new regulations, including the temporary Home Valuation Code of Conduct promulgated by Freddie Mac,[49] new requirements for appraisal independence in Dodd-Frank,[50] and others, for diluting the quality of appraisals.[51] Experienced appraisers argue that they are being pushed out by new rules and the new economics of the industry, and that less experienced appraisers, spending less time per appraisal, are making more mistakes.[52] Regardless of whether these factors actually affect the accuracy of appraisals or merely provide ammunition for critics of the process, they demonstrate why methods of valuation take on increased importance in the current housing market.

2. *Falling Prices.* — One additional factor driving the importance of valuation methods is that when real estate prices fall, a lender who has taken title to the property may end up selling at an even larger loss. Property prices rose fairly consistently over the past seventy years, and increased rapidly from 1997 until 2006.[53] In 2007, though, housing prices fell nationally: The "national median single-family home price fell in

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47. Id. ("[A]ppraisers are increasingly relying on automated valuation models . . . [that] are most reliable when there are a larger number of typical transactions to observe.").

48. See id. ("[V]aluations are being heavily influenced by distressed sales . . . . [T]ypical transactions have been scarce while distressed sales have been abundant.").

49. Fed. Home Loan Mortg. Corp. et al., Home Valuation Code of Conduct (2008), available at http://www.fhfa.gov/webfiles/2302/HVCCFinalCODE122308.pdf (on file with the *Columbia Law Review*).

50. 15 U.S.C. § 1639e (2012).

51. Jenifer B. McKim, Appraisers Say New Rules Will Cause Confusion, Bos. Globe (Sept. 1, 2011), http://www.boston.com/business/articles/2011/09/01/changes_in_home_appraisals_raise_concerns/ (on file with the *Columbia Law Review*) (reporting possible "confusion, delays, and higher costs in an already vulnerable housing market").

52. See Kalita & Mollenkamp, supra note 46 ("[A]ppraisers with less experience . . . are getting assignments while more experienced appraisers are going out of business.").

53. See Case Shiller Home Price Index by Year, http://www.multpl.com/case-shiller-home-price-index-inflation-adjusted/table (on file with the *Columbia Law Review*) (last visited Sept. 25, 2013) (showing rise, then fall, of home prices); see also Press Release, S&P Dow Jones Indices, Sustained Recovery in Home Prices According to the S&P/Case-Shiller Home Price Indices (Dec. 26, 2012) [hereinafter Case-Shiller Press Release], available at http://www.housingviews.com/wp-content/uploads/2012/12/SP-Case-Shiller-Home-Price-Indices-Oct-2012.pdf (on file with the *Columbia Law Review*) (showing same over shorter time period).

nominal terms for the first time in 40 years of recordkeeping."[54] This decline continued to accelerate, and after dropping more than thirty percent, national prices took until 2012 to return even to 2003 levels.[55]

When real estate prices are dropping by as much as eighteen percent a year,[56] any delay in the date of valuation can result in a drastically lower value. Depending on the state, considerable time may elapse between when a lender takes title to collateral and when the lender sells it.[57] In some states, particularly those that have only "judicial" foreclosure and not "power of sale" foreclosure,[58] delays can be anywhere from months to years.[59] Even efficient alternative arrangements, like a "deed-in-lieu of foreclosure" transaction, do not prevent significant time from passing between a default and the ultimate sale and recoupment by the lender.[60] For lenders who are victims of mortgage fraud, the value of the collateral may differ significantly from the time of the initial transaction,

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54. Joint Ctr. for Hous. Studies of Harvard Univ., The State of the Nation's Housing 1 (2008), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2008.pdf (on file with the *Columbia Law Review*).

55. Case-Shiller Press Release, supra note 53, at 3.

56. As they did in 2008. See, e.g., Ruth Mantell, Home Prices Off Record 18% in Past Year, Case-Shiller Says, MarketWatch (Dec. 30, 2008, 11:49 AM), http://www.marketwatch.com/story/home-prices-off-record-18-in-past-year-case-shiller-says (on file with the *Columbia Law Review*) (reporting on December 2008 Case-Shiller price index).

57. States have different procedural requirements before a foreclosure can be completed, including required notice periods and sometimes redemption periods; these can add up to a few months or more than a year. See Prentiss Cox, Foreclosure Reform amid Mortgage Lending Turmoil: A Public Purpose Approach, 45 Hous. L. Rev. 683, 698–707 (2008) (noting "bewildering diversity in both substantive rights of the parties and the procedures" of foreclosures); see also Kasey Curtis, Note, The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry, 36 W. St. U. L. Rev. 119, 122–24 (2008) (distinguishing between main methods of foreclosure: "judicial" and "power of sale").

58. Around forty percent of states have no "power of sale" foreclosure. Curtis, supra note 57, at 124.

59. See Kyle F. Herkenhoff & Lee E. Ohanian, Foreclosure Delay and U.S. Unemployment 3 (Fed. Reserve Bank of St. Louis, Research Div., Working Paper No. 2012-017A, 2012), available at http://research.stlouisfed.org/wp/2012/2012-017.pdf (on file with the *Columbia Law Review*) (finding median time to foreclose to be fifteen months). Of course, foreclosures are often contested, leading to delays beyond the simple minimum requirements of notice. A cottage industry of merely delaying inevitable foreclosures has sprung up in the aftermath of the housing crisis. See, e.g., Keep Me in My Home, http://www.keepmeinmyhomellc.com/default.html (on file with the *Columbia Law Review*) (last visited Sept. 25, 2013) (offering to delay sales for up to fifteen months); Trust Sale Delay Service, http://www.delaytrustsale.com (on file with the *Columbia Law Review*) (last visited Sept. 25, 2013) (offering to delay foreclosure for up to thirty-six months).

60. A deed in lieu of foreclosure means that the defaulting borrower turns over the property voluntarily, usually in exchange for ending any litigation. See Cox, supra note 57, at 708 (explaining incentives to work out alternative arrangements like deed in lieu of foreclosure). The deed in lieu method avoids the delays associated with the foreclosure procedures, see id., but not delays in selling property on the market.

to when the lender takes title after the default, to the final sale.[61] And all this assumes that criminal investigations and proceedings do not delay any of the processes.

In short, the method and timing of valuation can have a dramatic impact on the value of real estate. The value assigned to collateral that the victim-lender recovers, in turn, can have an enormous effect on the amount of restitution that the defendant will owe.[62] The main methods of valuation are an appraisal of the fair market value at the time that the title is transferred to the lender[63] and the actual price paid at a foreclosure or other sale of the property.[64] In most cases, the foreclosure method[65] favors the lender,[66] because foreclosure sale prices are considerably below sales for similar nondistressed property.[67] This effect is amplified when falling market prices make the prices even lower relative to the initial market value. Restitution under the MVRA can depend heavily on whether the courts allow the collateral to offset the loss at fair market value or only at the foreclosure or other final price obtained by the lender. The method chosen by courts determines the extent to which restitution compensates victims, and whether that compensation makes those victims whole, as Congress intended.

II. The Circuit Split: Fair Market Value or Foreclosure Price?

The circuit courts are in fundamental disagreement about how to value collateral property recovered by the victim-lender when calculating restitution for mortgage fraud. There are two separate questions implicated in this circuit split: first, whether the text of the statute requires a particular method of valuation, and second, if it does not, which method courts should adopt. Part II.A explains the view of the Ninth, Fifth, and Second Circuits that the collateral is a "partial return" of taken property and must be valued at the fair market value as of the date that title is

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61. Again, the timing depends on state law and on the form of the foreclosure or alternative transaction. See supra note 57 and accompanying text.

62. For instance, in *United States v. Boccagna*, restitution of approximately $18 million turned on the method of valuing collateral. 450 F.3d 107, 112 (2d Cir. 2006); see infra notes 99–107 and accompanying text (explaining facts and reasoning of *Boccagna*).

63. See infra Part II.A.

64. See infra Part II.B.

65. For conciseness, this Note refers to "foreclosure sales" and the "foreclosure method," although the sale may not formally be a foreclosure sale if some alternative transaction, like a deed in lieu, is used. See supra note 60 and accompanying text (discussing deed in lieu transaction). The method remains the same in principle: valuing the property at the subsequent sale price.

66. But not always. See, e.g., United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004) (noting fair market value would likely have been less than eventual price obtained).

67. See, e.g., Cox, supra note 57, at 701 ("For a variety of reasons, the foreclosure sale rarely brings a market price."). If the court takes the lower foreclosure price as the value, that provides a smaller offset to any restitution, leaving the defendant owing more restitution to the lender.

transferred. Part II.B explains the view of the Third, Eighth, Tenth, and Seventh Circuits that, for purposes of restitution, returned collateral should be valued at the price obtained at the foreclosure or other sale. Within each side of the split, the circuits vary in their justifications for their views. Some circuits hold that the plain language of the MVRA mandates a certain method, while others have determined that the language is not clear and base their decisions on the statutory purpose.[68]

A. *Fair Market Value at Date of Transfer*

A number of courts have determined that for purposes of offsetting restitution, collateral must be valued according to an appraisal of its fair market value on the date that the collateral is legally turned over to the victim-lender. Part II.A.1 and Part II.A.2 discuss how the Ninth and Fifth Circuits, respectively, have concluded that the plain language of the statute mandates that district courts use the fair market value method. Part II.A.3 explains the Second Circuit's view that while the MVRA does not clearly require a method, the statutory purpose is usually best fulfilled by the fair market value method.

1. *The Ninth Circuit's Argument for Fair Market Value as of the Date of Transfer.* — The Ninth Circuit first addressed the question of how to value returned collateral in calculating restitution for mortgage fraud in *United States v. Smith*.[69] Jerry Smith was convicted of bank fraud and related conspiracy charges and was ordered to pay $12,792,160 in restitution to his victim, the Federal Savings and Loan Insurance Corporation.[70] He challenged the amount of restitution on the basis that, among other things, the district court had valued the collateral that he had already turned over as of the date of sentencing, instead of the date that he turned it over to the victim.[71] The majority, interpreting the VWPA,[72] had

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68. Where circuits have determined that the language does not require either method, and that statutory purpose guides the decision, it is not always clear whether the court is suggesting a default for district courts or is requiring adherence to its chosen method. See infra notes 198–201 and accompanying text (discussing practical extent of discretion allowed by circuit courts).

It is worth noting that the Eleventh Circuit may be the next to take a position on this issue. One recent piece of scholarship suggested some possible factors that might lead that court to side with the Seventh Circuit and use the foreclosure price method. Morgan Clemons, Restitution for Federal Crimes: Will Mortgage Criminals Pay for the Real Estate Bubble?, 130 Banking L.J. 316, 320–22 (2013). A recent opinion in the Middle District of Georgia noted the split, but avoided the question by finding that the prosecutors had simply failed to provide sufficient evidence of causation of loss. United States v. Jordan, No. 1:12-CR-2 (WLS), 2013 WL 1333506, at *5, *8–*9 (M.D. Ga. Mar. 29, 2013).

69. 944 F.2d 618 (9th Cir. 1991).

70. Id. at 620.

71. Id. at 625.

72. 18 U.S.C. § 3663 (2012). The relevant language, relating to the date that property is partially returned, is identical in the VWPA and the MVRA, codified respectively at § 3663(b)(1)(B)(ii) and § 3663A(b)(1)(B)(ii).

no trouble agreeing with the defendant on that point.[73] The statute clearly stated that if the defendant had already returned property to the victim, restitution should be the loss "less the value (as of the date the property is returned) of any part of the property that is returned."[74] For the two judges in the majority, any reduction in value that occurred after the defendant turned over the collateral was not his responsibility: "As of that date, the new owner had the power to dispose of the property and receive compensation."[75] The court assumed that the only way to retroactively measure value as of the date of return was through an appraisal of fair market value as of the date of transfer.[76] Having determined when to value the property, the Ninth Circuit felt that the date constrained the court to only one method of valuation: fair market value.[77]

The *Smith* court relied in part on its previous interpretation of the same statutory language in *United States v. Tyler*.[78] There, the defendant pled guilty to "conspiracy to commit timber theft" and was ordered to pay restitution.[79] The Ninth Circuit held that the district court had improperly calculated restitution by comparing the value of the timber when stolen to its value at sentencing.[80] Since the property was "'returned' . . . the same day that the crime occurred," there was no loss to the victim, and no restitution owed.[81] By the same logic, the two-judge majority in *Smith* held that the collateral was "returned" on the date of title transfer and must be valued to offset restitution as of that date.[82]

The Ninth Circuit has continued to apply *Smith*, including to nondiscretionary orders of restitution under the MVRA.[83] In *United States v.*

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73. *Smith*, 944 F.2d at 625 ("Smith should receive credit against the restitution amount for the value of the collateral property as of the date title . . . was transferred . . . .").

74. § 3663(b)(1)(B)(ii).

75. *Smith*, 944 F.2d at 625.

76. Id. ("Value should therefore be measured by what the financial institution would have received in a sale as of that date.").

77. The Ninth Circuit did not explicitly reject the use of the foreclosure price method, but presumably it would argue that the foreclosure price improperly measures the value on some other date than the date of transfer.

78. 767 F.2d 1350 (9th Cir. 1985).

79. Id. at 1351.

80. Id.

81. Id. at 1352 (quoting 18 U.S.C. § 3579(b)(1)(B)(ii) (1982) (current version at § 3663(b)(1)(B)(ii) (2012))).

82. United States v. Smith, 944 F.2d 618, 625 (9th Cir. 1991). Judge O'Scannlain dissented on that point in *Smith*, pointing out that unlike in *Tyler*, the collateral being returned by the defendant was not part of the property taken: "What Smith stole was capital, and . . . he must return the present value of that capital." Id. at 632 (O'Scannlain, J., concurring in part and dissenting in part). This is fundamentally the same argument that drives the Seventh Circuit's opinion in *Robers*. See infra notes 140–147 and accompanying text (discussing *Robers*'s reading of statutory language).

83. *Smith* was decided under the VWPA before the MVRA was passed, but the relevant language in the statutes is identical. See supra note 72.

Gossi, the court affirmed the district court's calculation of mandatory restitution after the defendant pled guilty to mail fraud.[84] The district court had—correctly, the Ninth Circuit held—offset restitution by the appraised value of the collateral property as of the date that the victim took title through foreclosure.[85] Most recently, the Ninth Circuit reaffirmed this principle in *United States v. Yeung*.[86] There, the court agreed with the defendant that the trial court had "erred in relying on the value of the collateral when it was sold to a third party several months later," instead of following *Smith* and determining fair market value as of the date of transfer.[87]

These Ninth Circuit decisions have an internal logic that puts the risk of lost property value on the lender once the lender gains control. However, they also frustrate lenders who are unable to obtain the assessed fair market value of the properties, selling at a loss that is not compensated or acknowledged by the order of restitution.

2. *The Fifth Circuit Agrees that the Language Requires Fair Market Value.* — The Fifth Circuit has taken the same position as the Ninth Circuit on how to calculate restitution when offset by the return of collateral. In two cases construing the VWPA,[88] the Fifth Circuit has agreed that the offset value of returned collateral is properly determined by the fair market value at the time of transfer, and not by a later sale.

In *United States v. Reese*, five defendants were convicted of conspiracy to defraud the government and related charges, based in part on three real estate transactions.[89] Louis Reese appealed the order of restitution on the basis (among others) that the district court had not offset the restitution by the proper value of the returned collateral real estate.[90] The Fifth Circuit, considering the VWPA language, determined that the "property" taken in a fraudulent mortgage is not real estate, but "loan proceeds funded in cash."[91] Despite holding that only cash was taken

84. 608 F.3d 574, 577–78 (9th Cir. 2010). The five defendants were charged with various crimes relating to fraudulently obtained mortgage loans. Id. at 576.

85. Id. at 578.

86. 672 F.3d 594 (9th Cir. 2012). *Yeung* involved three restitution orders, including two where the Ninth Circuit held that the district court had failed to determine the value of the collateral at the time it was returned. Id. at 602–05.

87. Id. at 605. The court rejected the foreclosure method, more explicitly than it had done in *Smith*, as inconsistent with valuing the property at the date of transfer. Id.

88. The MVRA had not yet been passed at the time. See supra notes 15–19 and accompanying text (explaining history of statutes). The relevant statutory language is the same in the MVRA and VWPA. See supra note 72 (noting identical language).

89. 998 F.2d 1275, 1277–78 (5th Cir. 1993). A bank, seeking to deceive federal regulators, lent excess money to Reese to buy one property, in exchange for Reese using some of the excess to put down payments on two other properties through a shell corporation. Id.

90. Id. at 1280–82.

91. Id. at 1283. Although the court recognized that a mortgage lender has an "interest" in the mortgaged property, it reasoned that that interest is "never anything

from the lender, the court believed that real estate could be returned: "Conceptually, it would seem to us that when a lender accepts conveyance of the secured property . . . the value of such property should constitute a partial return of the 'cash loan proceeds.'"[92] Having determined that the real estate was acceptably returned to the lender as a partial return of cash, the court held that it should be valued as of the date of title transfer.[93]

United States v. Holley arose out of similar banking and mortgage fraud convictions.[94] The restitution order was based solely on losses related to a single piece of property.[95] The defendants had immediately defaulted on the loans that they had used to purchase the real estate, and the victim-lender had bought it back at a trustee's sale shortly thereafter.[96] The district court, however, valued the property for the purposes of restitution *not* on the date the bank acquired it, but on the date, some six years later, when the bank finally sold it at a loss.[97] The Fifth Circuit, citing *Reese* and the Ninth Circuit's *Smith*, rejected this method of valuation and remanded the case to calculate restitution by valuing the property as of the date that the victim acquired it.[98]

3. *The Second Circuit Sees Foreclosure Price as Potentially Giving the Victim a Windfall.* — In *United States v. Boccagna*, the Second Circuit reversed a district court's determination of restitution on the basis that the returned collateral was improperly valued at the price of a later sale.[99] Francis Boccagna had pled guilty to a single count of making a false statement to a federally insured lending institution.[100] Because he had fraudulently obtained a loan with that statement, and the U.S. Department of Housing and Urban Development (HUD) guaranteed that loan, he was ordered to pay HUD some $18 million in restitution.[101] The district court, in calculating restitution, valued the collateral properties that HUD had acquired at their later resale prices; however, HUD had transferred them to the New York City Department of Housing Preservation

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except a lien holder," and doubted "that such a security interest would qualify as 'property of the victim'" within the meaning of the statute. Id.

92. Id. at 1284.

93. Id. Again, the Fifth Circuit here assumed that only an appraisal of fair market value could appropriately measure the value as of that date, and did not consider an alternative method like foreclosure price.

94. 23 F.3d 902, 907–08 (5th Cir. 1994).

95. Id. at 914.

96. Id. The victim-lender foreclosed on the property and acquired it at the consequent auction. Id.

97. Id.

98. Id. at 915. The court once again addressed the government's argument that only capital was taken and none was returned until the collateral property was sold, but considered it precluded by *Reese*. Id.

99. 450 F.3d 107, 121 (2d Cir. 2006).

100. Id. at 108.

101. Id.

and Development (HPD) for nominal prices rather than selling them to the highest bidder.[102]

The Second Circuit viewed this method of valuation as clearly unfair under the circumstances. It pointed out that HUD would end up with a "windfall" if it received "*both* restitution in the full amount of loss offset only by the nominal sale price *and* the benefit of the recouped property."[103] The court noted that the language of the MVRA fails to specify a method of valuation, but suggested that "[i]n most circumstances, fair market value will be the measure most apt to serve this statutory purpose."[104] Nonetheless, it felt that the MVRA "appears to contemplate the exercise of discretion by sentencing courts" in methods of valuation, and limited its holding to the proposition that "a nominal sale price cannot reliably measure offset value."[105]

While *Boccagna*'s suggestion to use a "fair market value" appraisal at the time of the transfer is comfortably in line with the Ninth and Fifth Circuits' views, the unusual facts and limited holding make it sui generis. The vast disparity between the nominal sale price and any probable fair market value meant that the court could decide the case simply by relying on the windfall principle.[106] The Second Circuit has not had to decide a case in which both foreclosure price in an arm's-length transaction and fair market value were viable options; and indeed, *Boccagna* suggests that in that case it might defer to the district court to determine which was appropriate, within reasonable bounds, despite the Circuit's apparent preference for the fair market value method.[107]

102. Id. at 110. HUD spent some $20 million to acquire the properties after the defendant's illegal conduct resulted in widespread defaults; the trial judge simply subtracted the $2 million in total "nominal" prices paid by HPD to HUD, and ordered the defendant to pay HUD the remaining $18 million. Id. at 110–12.

103. Id. at 117.

104. Id. at 115. Valuation, of course, would be as of the date of the transfer of title, when HUD was able to dispose of the property as it wanted. Id. at 113. The court briefly touched on the issue of whether the collateral can serve as a "return" of the loan, mentioning the possibility that a victim could reject real estate as a substitute for cash. Id. at 116 (citing United States v. Oren, 893 F.2d 1057, 1066 (9th Cir. 1990)).

105. Id. at 114, 120.

106. See supra notes 102–103 and accompanying text. The *Boccagna* court cited United States v. Nucci, 364 F.3d 419, 423 (2d Cir. 2004), for the idea that the MVRA does not allow recovery in excess of the victim's loss. *Boccagna,* 450 F.3d at 109.

107. See 450 F.3d at 114–15 ("[W]e construe 'value' as used in the MVRA to be a flexible concept to be calculated by a district court by the measure that best serves Congress's statutory purpose."). The Second Circuit has not addressed this exact issue in any other cases, but may be forced to confront the question in *United States v. Nawaz.* See Brief for the United States of America at 100–29, United States v. Nawaz, No. 11-4080(L) (2d Cir. filed Aug. 5, 2013), 2013 WL 4038704, at *100–*129 (arguing defendant's challenge to restitution is based on mere "dicta" in *Boccagna* about preferring fair market value method, and should therefore be rejected).

B. *Valuation by Subsequent Price at a Foreclosure Sale*

Part II.A addressed one method of valuing collateral for purposes of offsetting restitution: using fair market value at date of transfer. Part II.B examines an alternative method: using the actual price paid for the property when the victim subsequently sells it. A number of circuits have embraced this view. Part II.B.1 explains the views of the Third, Tenth, and Eighth Circuits, which believe that the method appropriately fulfills the purpose of the MVRA. Part II.B.2 details the extensive analysis of the Seventh Circuit in *United States v. Robers*. While *Robers* states that it holds the same view as the three other circuits,[108] only the Seventh Circuit believes that the plain language of the statute requires the foreclosure price method.

1. Himler*,* James*, and* Statman*: Foreclosure Price Is the Most Appropriate Means of Valuing the Offsetting Property at the Date of Return.* — The Third, Tenth, and Eighth Circuits have upheld restitution orders in fraud cases that calculated offsets using the final foreclosure price of recovered property. Each case is explained, in Part II.B.1.a, II.B.1.b, and II.B.1.c, respectively, but the courts are in fundamental agreement that in order to most fully compensate the victim, foreclosure price can be used to value the property on the date that the title transferred to the victim.

a. *The Third Circuit.* — In *United States v. Himler*, Harry Joseph Himler was convicted of using counterfeit cashier's checks to buy a condominium.[109] He contended that his return of the property sufficed to wipe out any restitution obligation, but the court recognized that the victim, the settlement company, had lost cash (paid to the original owner) and, despite having acquired title to the condominium, might still have suffered a loss.[110] The court affirmed the order of restitution for "$193,833 minus the amount that would eventually be recouped from the future sale,"[111] but it did so explicitly on the basis that it was within the district court's discretion to value the property as of the date of transfer by means of a

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108. See infra notes 154–167 and accompanying text (explaining Seventh Circuit's view of issue and of other circuits' decisions). Arguably, the First Circuit has also joined this view in United States v. Innarelli, 524 F.3d 286 (1st Cir. 2008). But the First Circuit did not consider the precise question at issue in *Robers* and in this Note, since the district court in *Innarelli* had failed to offset restitution at all—a clear error requiring remand. Id. at 294.

109. 355 F.3d 735, 737 (3d Cir. 2004).

110. If Himler had simply defrauded the owner, with no intermediary, a return of the real estate *would* have sufficed to wipe out his restitution obligation under § 3663A(b)(1)(A), because the property he took could be returned. The valuation problem occurs only where the victim has lost cash and recouped real property of uncertain value, a *partial* return of property under § 3663A(b)(1)(B)(ii). See, e.g., United States v. Russo, 166 F. App'x 654, 662 (3d Cir. 2006) (explaining changes in value of property taken are not recognized in any way when return of taken property is practicable).

111. *Himler*, 355 F.3d at 745.

later sale.[112] Indeed, it cited the Ninth Circuit for the proposition that a "'district court abuses its discretion by valuing the property at the time of the final disposition by the victim rather than at the time the victim gained control of the property.'"[113]

While it seems odd to allow a district court to value property on a certain date by means of a later sale, the Third Circuit held it to be within the discretion of the sentencing court to do so.[114] Beyond simple deference, the court also pointed out that had the district court determined the value of the condominium through an appraisal at the time of sentencing, it would likely have been considerably lower than the subsequent sale price of the property.[115] This is the reverse of the more common situation present in *Holley*,[116] *Boccagna*,[117] and *Robers*,[118] and it raises the question of whether the Third Circuit thinks that sale-price valuation is truly correct, or whether it simply treated the appeal in *Himler* as groundless because a reversal could only have harmed the defendant.[119]

b. *The Tenth Circuit.* — In *United States v. James*, the Tenth Circuit considered quite explicitly the choice between fair market value and foreclosure sale price. Torrence James pled guilty to aiding and abetting wire fraud that resulted in the fraudulent purchases of three properties with six separate mortgages.[120] He was ordered to pay restitution to a number of victims, offset in part by the foreclosure and sale of one of the properties that he bought with a fraudulently obtained mortgage.[121] On appeal, James argued that the collateral he returned should have been valued at the "assessed value of the home," while the government argued that "no better measure exists as to . . . actual loss . . . than the sale to a ready, willing, and able buyer in an arm's length transaction."[122]

The court agreed with the Second Circuit that the MVRA's language left the method of valuation vague, and that different methods were rea-

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112. Id.

113. Id. (alterations in *Himler*) (quoting United States v. Lomow, 266 F.3d 1013, 1021 (9th Cir. 2001)).

114. Id. Allowing a subsequent sale price to approximate the value on the date of transfer could be viewed as a legal fiction, but perhaps there is something to the district court's view that "real estate is only worth what you can get for it." Id. (internal quotation marks omitted).

115. Id.

116. See supra notes 94–98 and accompanying text.

117. See supra notes 99–105 and accompanying text.

118. See infra notes 140–153 and accompanying text.

119. Restitution amounts are reviewed for abuse of discretion, see, e.g., *Himler*, 355 F.3d at 745, and it is easy to suppose that an appellate court might be less willing to find an abuse of discretion when no party is likely to benefit from a reversal.

120. 564 F.3d 1237, 1239–41 (10th Cir. 2009).

121. Id. at 1242.

122. Id. at 1244.

sonably within the discretion of the district court.[123] But where the Second Circuit felt that "[i]n most circumstances, fair market value will be the [most apt] measure,"[124] the Tenth Circuit found that "in this case, the foreclosure price method more closely reflects the actual loss [the victim] experienced."[125] It affirmed the methodology of the district court and remanded only to correct a calculation error that the probation officer had made.[126]

Although the outcome in *James* is opposite that in *Boccagna*, the reasoning is similar. Both courts, viewing the language of the statute as unclear, took a flexible approach that deferred to the sentencing court's valuation method, as long as it was aimed at the MVRA's statutory purpose of appropriately compensating the victim.[127] Indeed, the flexibility implied by *James* arguably puts the Tenth Circuit closer to the Second Circuit's treatment of the question than the Seventh Circuit's.[128] Nonetheless, the Third and Tenth Circuits have never approved any use of the fair market value method and, contrary to the Second Circuit, have held that foreclosure price is the most appropriate method of valuation.[129]

c. *The Eighth Circuit.* — In *United States v. Statman*, the Eighth Circuit directly, albeit briefly, addressed the question of valuation methods.[130] Robert Statman, Joel Rund, and Gary Kleinman each pled guilty to one count of conspiracy to commit wire fraud related to loans fraudulently obtained from the Arkansas Development Finance Authority (ADFA) for the purpose of buying a bakery.[131] Rund argued on appeal that the district court had erroneously adopted the government's method of calcu-

123. Id. at 1245–46 (citing United States v. Boccagna, 450 F.3d 107, 114 (2d Cir. 2006)).

124. *Boccagna*, 450 F.3d at 115.

125. *James*, 564 F.3d at 1246.

126. Id. at 1247.

127. As to the statutory purpose, see, for example, Hughey v. United States, 495 U.S. 411, 416 (1990) (noting "ordinary meaning of 'restitution' is restoring someone to a position he occupied"); United States v. Pescatore, 637 F.3d 128, 138 (2d Cir. 2011) ("The purpose of restitution is to compensate victims for their losses."); United States v. Parker, 553 F.3d 1309, 1323 (10th Cir. 2009) (finding purpose of MVRA is "'to ensure that victims . . . are made whole for their losses'" (quoting United States v. Arutunoff, 1 F.3d 1112, 1121 (10th Cir. 1993))); United States v. Coriaty, 300 F.3d 244, 253 (2d Cir. 2002) (concluding MVRA's "statutory focus [is] on the victim's loss and upon making victims whole"); see also supra note 19 (explaining various courts' analyses of statutory purpose).

128. See infra Part II.B.2 (explaining Seventh Circuit's approach).

129. With no cases explicitly rejecting the fair market value method, it is not clear whether these circuits would defer to a district court that used it. But presumably district courts pay attention to the circuits and are unlikely to use another method after a circuit court explicitly approves the foreclosure price method.

130. 604 F.3d 529, 538 (8th Cir. 2010).

131. Id. at 532.

lating restitution, offsetting the ADFA's losses with the sale price of the bakery instead of an assessed fair market value.[132]

The court started by citing *Boccagna* for the proposition that the MVRA leaves valuation methods to the discretion of the district court,[133] and *James* for the proposition that foreclosure price often serves the statute's purpose of making victims whole.[134] Since the language of the statute left the method unclear, the court determined that the district court must choose a method intended to further the statute's purpose.[135] Looking to the circumstances, the court affirmed the use of the foreclosure price method as a "fair and adequate representation of ADFA's loss" satisfying "the overarching goal of the MVRA."[136] The Eighth Circuit has since confirmed its holding in *Statman*, approving the use of foreclosure price most recently in *United States v. Alexander*.[137]

Throughout the court's analysis, there is no discussion of *when* the collateral was supposed to be valued; the Eighth Circuit, like the Second and Tenth Circuits, apparently thinks it clear from the statutory language that the property must be valued as of the date of transfer.[138] Even the Third Circuit, in *Himler*, construed the district court's action (using the subsequent sale price) to have valued the collateral as of the earlier date of transfer.[139] Indeed, the four circuits are essentially in agreement: Since the statutory language does not specify a method for valuing collateral, it is at the discretion of the district court. While the Third Circuit's analysis was not extensive, the Tenth and Eighth Circuits explicitly explained why under the circumstances of *James* and *Statman*, respectively, the method chosen was properly within that discretion; in *Boccagna*, the Second Circuit held the same method, in rather unusual circumstances, to be outside that discretion. The Second Circuit, of course, views fair market value as a "better" method for valuation, as measured by the purpose of the statute, while the Third, Eighth, and Tenth Circuits prefer the foreclosure price method as a default. But all these courts agree that the language is unclear. The Seventh Circuit, on the other hand, sees the language of the MVRA as plain and decisive.

2. *The Seventh Circuit Justifies the Foreclosure Method with a Plain Language Approach.* — The Tenth, Third, and Eighth Circuits acknowledged in their opinions that the defendant has "returned property" when she

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132. Id. at 537.

133. Id. at 538 (citing United States v. Boccagna, 450 F.3d 107, 114–15 (2d Cir. 2006)).

134. Id. (citing United States v. James, 564 F.3d 1237, 1245–47 (10th Cir. 2009)).

135. Id.

136. Id. For a discussion of the statutory purpose, see supra notes 19–20 and accompanying text.

137. 679 F.3d 721, 731 (8th Cir.) (awarding restitution based on foreclosure price of returned collateral), cert. denied, 133 S. Ct. 379 (2012).

138. *Statman*, 604 F.3d at 538.

139. United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004).

turns over collateral to the victim-lender, and framed the issue as how best to value that property. In *United States v. Robers*,[140] the Seventh Circuit had a different conceptual view of "returned" property, although it resulted in the same outcome. The court held that no property was "returned" until the collateral was converted into cash, because money was taken and only money could be "returned."[141] This interpretation of the statute led the court to the conclusion that the plain language required an offset measured by the foreclosure price of the property.[142]

Benjamin Robers pled guilty to conspiracy to commit wire fraud as part of a mortgage fraud scheme.[143] He was sentenced to probation and restitution, and appealed only the calculation of the restitution order; he argued that the district court had erroneously offset the losses of two victims by the sale prices of the two relevant properties instead of using their fair market value when he turned them over.[144] The Seventh Circuit disagreed, basing its decision on "the plain language of the MVRA."[145] Specifically, the court looked to the meaning of "property":

> "The property" for purposes of offset value must mean "the property stolen." The property originally stolen was cash. Some amount of cash is the only way part of the property can be returned[,] . . . not the real estate which serves as collateral. Accordingly, the property stolen is only returned upon the resale of the collateral real estate and it is at that point that the offset value should be determined by the part of the cash recouped at the foreclosure sale.[146]

This conclusion is appealing: The defendant did not take a house from the lender and is arguably unable to "return" a house. Indeed, the court criticized *Smith* and its progeny for illogically depending on *Tyler*, in which a defendant had stolen timber and subsequently returned timber to the victim.[147]

In addition to relying on the plain language of the MVRA, the *Robers* court justified its result as best fulfilling the statute's purpose.[148] The Seventh Circuit agreed with the consensus view that the statute is exclusively concerned with fully compensating victims' losses.[149] Robers, how-

140. 698 F.3d 937 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013).

141. Id. at 939.

142. Id.

143. Id. at 938.

144. Id. at 941.

145. Id. at 939.

146. Id.

147. Id. at 947 ("*Smith*'s reliance on *Tyler* was misplaced because in *Tyler* . . . the exact same property [was returned].").

148. Id. at 943.

149. Id. For other courts' views on the statutory purpose, see supra note 127. A small minority view considering restitution under the MVRA to be concerned with the

ever, argued that the total losses of the lenders on the properties included losses caused by the market crash in addition to any losses proximately caused by his criminal conduct, and that the MVRA required restitution only for the actual loss *he* caused.[150] He blamed the failing housing market for significantly diminishing the value of the houses after he had already turned them over to the lenders.[151] The court essentially brushed off the proximate cause argument by responding that first, the fraud was undoubtedly an actual (i.e., but-for) cause of the properties' diminished value, and moreover, given the statutory purpose, the focus of the calculation was on the actual loss of the victim-lender.[152] Even if the foreclosure sale is below market value, the court reasoned, that price is what the victim-lender recovers, not some theoretical appraised price.[153]

Having settled its interpretation of the MVRA, the court considered other circuits' approaches.[154] It first argued that the Second, Ninth, and Fifth Circuits "improperly treat[ed] the collateral recovered as the property stolen."[155] Indeed, the Fifth Circuit started in both *Reese* and *Holley* from the premise that "cash" was the property taken,[156] but considered

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disgorgement of unjust gains appears to no longer hold any sway. See supra note 19 (noting recent cases rejecting minority view).

150. *Robers*, 698 F.3d at 943. Under the MVRA, the "victim" must be "directly and proximately harmed" by the defendant's conduct. 18 U.S.C. § 3663A(a)(2) (2012). Courts agree that this means that the government must prove that losses were proximately caused by the defendant's conduct. See infra notes 233–251 and accompanying text (explaining proximate causation as limit on restitution). In *Robers*, the defendant argued that the housing market crash caused losses to the lender that his criminal conduct did not "cause." The Seventh Circuit replied that his conduct "actually caused" the loss, 698 F.3d at 943, but essentially made a but-for causation argument.

In fact, *Robers* implicitly acknowledges that it holds defendants strictly liable for certain unforeseeable losses, but justifies this with the rule that a criminal, "not his victims, should bear the risk of market forces beyond his control." Id. at 944. This rule of "criminals are insurers," to paraphrase the court, seems to run against the Seventh Circuit's view that restitution under the MVRA is a "civil remedy." United States v. Martin, 195 F.3d 961, 968 (7th Cir. 1999). Indeed, *Martin* describes the "existence of a causal relation between the defendant's conduct and the loss" as "essential." Id. The *Robers* court seemed to have no problem ignoring the "directly and proximately" language of § 3663A(a)(2) and holding but-for causation sufficient for the recovery of any loss.

151. 698 F.3d at 943 ("Robers then posits that the victims' losses in this case were caused by the collapse of the real estate market and not his fraud.").

152. Id. at 943–44. Perhaps the Seventh Circuit's insistence that Robers was responsible even for losses arguably caused by the housing market is analogous to the "'thin skull' . . . rule of the common law . . . so well established in tort law." Stoleson v. United States, 708 F.2d 1217, 1221 (7th Cir. 1983).

153. See *Robers*, 698 F.3d at 943–44 ("The offset amount . . . is the cash recouped following the disposition of the collateral.").

154. Id. at 946–53.

155. Id. at 946.

156. United States v. Holley, 23 F.3d 902, 915 (5th Cir. 1994); United States v. Reese, 998 F.2d 1275, 1283 (5th Cir. 1993).

the return of "real property that secures such a loan . . . [to] 'constitute a partial return'" of the cash.[157] The Seventh Circuit argued that this approach, unlike its own, failed to give "'the property' a consistent meaning throughout the MVRA."[158]

The Second and Ninth Circuits, by contrast, barely touched on the meaning of "property" and the possibility that returned collateral might not constitute "property . . . returned" under the statute.[159] The Second Circuit addressed the question only in a footnote, mentioning that the government's potential argument "would not be convincing."[160] The Ninth Circuit in *Smith* never mentioned the possibility of the question in the majority opinion,[161] although it formed the core of the partial dissent that the *Robers* court cited as correct.[162]

While the Seventh Circuit criticized the three circuits that it disagreed with for failing to realize their inconsistent use of "property," it failed to mention that the three circuits it agreed with had the *same* view of "property" under the MVRA as the others.[163] As described above in Part II.B.1, *Himler*,[164] *James*,[165] and *Statman*[166] each decided the issue without ever construing returned collateral to not be "property" within the meaning of the MVRA. Yet *Robers* made no mention of the different reasoning, focusing on the fact that it "join[ed] the view of the Third, Eighth, and Tenth Circuits—that the offset value is the eventual cash proceeds recouped following a foreclosure sale."[167]

Indeed, while the Seventh Circuit made reasonable arguments about the correct reading of "property," it failed to address the fact that no other court has agreed with its view of the plain language of the statute.[168] In the end, the court in *Robers* made a bold statement and set itself apart from its sister circuits, leaving two issues in disagreement: In deciding how to value the relevant transferred collateral to offset restitution under the MVRA, 1) does such real property constitute "property . . . re-

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157. *Holley*, 23 F.3d at 915 (quoting *Reese*, 998 F.2d at 1284).

158. *Robers*, 698 F.3d at 943, 946–51.

159. 18 U.S.C. § 3663A(b)(1)(B)(ii) (2012).

160. United States v. Boccagna, 450 F.3d 107, 112 n.2 (2d Cir. 2006).

161. United States v. Smith, 944 F.2d 618, 624–26 (9th Cir. 1991).

162. *Robers*, 698 F.3d at 947 (citing *Smith*, 944 F.2d at 631–32 (O'Scannlain, J., concurring in part and dissenting in part)).

163. Id. at 951–53.

164. See supra notes 109–115 and accompanying text.

165. See supra notes 120–128 and accompanying text.

166. See supra notes 130–136 and accompanying text.

167. *Robers*, 698 F.3d at 939.

168. Id. (noting court "reach[ed] this decision based on the plain language" but not claiming other courts reached similar outcomes on same basis).

turned" within the meaning of the statute, and from there, 2) how should such real property be valued?[169]

III. THE SOLUTION: COURTS SHOULD PRESUME FORECLOSURE PRICE TO BE THE VALUE OF THE RETURNED COLLATERAL

This Note concludes that while fair market value is not an unreasonable way to value collateral to offset restitution, foreclosure price should be the preferred method. Although there are problems with this method, it most accurately approximates victims' actual losses, unless it would award the victim a windfall or the defendant can otherwise show that it is an inappropriate method under the specific circumstances. Part III justifies this proposed solution in two steps.

Part III.A looks to the text of the MVRA. It rejects the Seventh Circuit's reading of "property" (which would require the foreclosure method), but finds that the text does not support one method over another. Part III.B examines how the different valuation methods stand up to the statutory goals of the MVRA. It considers both the goal of fully compensating victims' actual losses and the limiting principles that victims not be overcompensated and that defendants not be held responsible for losses they did not cause. This Note concludes that the statutory purpose provides a strong rationale for using the foreclosure price method as a presumption, rebuttable if a defendant can show that the method would be improper in an individual case.

A. *The Text: "Returned" Property*

Courts agree that statutory interpretation starts, and often ends, with reading the text to find a "plain meaning."[170] This section asks whether the text of the MVRA supports the two positions taken by the Seventh Circuit: that returned collateral is not "property" within the meaning of the statute, and that restitution can only be offset by the cash received at a foreclosure sale. Part III.A.1 concludes that the text does not plainly require the Seventh Circuit's interpretation of "property," which could itself require outcomes bordering on the absurd. Part III.A.2 argues that the text is silent as to whether foreclosure or fair market valuation should be used, and that recourse to statutory purpose is necessary.

1. *The Seventh Circuit's Narrow Reading of "Property" Is Plausible but Not Required by the Text.* — The relevant provision of the MVRA reads:

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169. A possible third question: If one method is superior, should that method be mandatory for district courts, or a default method? This Note argues, in answering the second question, infra notes 208–225 and accompanying text, that there are limitations on the preferred method that require some exceptions to its use, and hence it should be a default method for district courts, infra notes 226–251 and accompanying text.

170. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 626, 652–53 (1990) (noting both textualist and traditionalist judges start by trying to find "plain meaning" of statute).

> The order of restitution shall require that such defendant . . . in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense— (A) return the property . . . or (B) if return of the property is impossible . . . , pay an amount equal to . . . the value of the property . . . less (ii) the value . . . of any part of the property that is returned.[171]

The Seventh Circuit reasons that the word property "always means 'the property stolen,'" and, therefore, when Robers turned the titles over to the victims, he was not *returning* property in any sense.[172] Indeed, the court criticizes the Ninth Circuit's decision in *United States v. Smith* for "ignor[ing] the fact that the property returned was not the property stolen."[173] Judge O'Scannlain, partially dissenting in *Smith*, makes the same point: "Smith cannot return the actual loan proceeds."[174] This view, while seemingly straightforward, raises the immediate question: If the defendant has not returned property, what has she done by turning over the collateral?[175] The MVRA allows for essentially two types of restitution, monetary payment and in-kind payment, which may take the form of either return or replacement of property or "services rendered."[176] Under the Seventh Circuit's narrow reading of "return" of property, the defendant has done none of these, and the court would be required to order restitution in the full loan amount regardless of the value of the collateral.[177] Presumably the *Robers* court would argue that "the cash was *returned* to the victims only when the collateral houses securing the loans were eventually resold."[178] But that requires a meaning of "return" that encompasses a victim's "returning" her stolen cash to herself, by selling a

171. 18 U.S.C. § 3663A(b)(1) (2012).

172. *Robers*, 698 F.3d at 942–43 (arguing alternative interpretation would lead to inconsistencies within statute).

173. Id. at 947.

174. United States v. Smith, 944 F.2d 618, 631 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part).

175. Presumably, the defendant was legally required to return the collateral in some form after defaulting on the mortgage. See Cox, supra note 57, at 697–715 (reviewing remedies of lenders after defaults).

176. 18 U.S.C. § 3664(f)(3)–(4).

177. Indeed, consider the Seventh Circuit's reading as applied to the facts of United States v. Boccagna. 450 F.3d 107, 114–15 (2d Cir. 2006); see also supra notes 99–107 and accompanying text (stating facts of *Boccagna*). It would appear to require that the defendant pay some $18 million in restitution in addition to turning over $20 million worth of property—despite the fact that the victim's loss was only about $20 million. Whether or not this absurd result would be prevented by the windfall principle, see infra notes 226–232 and accompanying text, it demonstrates the problematic logic of *Robers*'s reading of "property."

178. *Robers*, 698 F.3d at 942 (emphasis added). The court assumes that the victim-lender will always resell the house to recoup losses, id., but what if the victim simply doesn't sell (perhaps treating the property as a long-term investment)? How can the court take into account the collateral if it is neither sold nor, in the court's view, "returned" to the victim?

property to which she has full title.[179] Once a victim-lender has title to the collateral, it makes little sense to impose an obligation on the victim-lender to sell that property in order for the defendant to be able to "return" the proceeds of that sale.[180]

This problem is solved if a court treats the return of collateral as a return of the stolen property in another form. In the context of mortgages, every lender is aware that while it is loaning out money, there is some chance that it will end up receiving the collateral in case of a default.[181] The Fifth Circuit followed this logic in *United States v. Reese*: "[W]hen a lender accepts conveyance of the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the 'cash loan proceeds.'"[182] In a sense, acceptance of the collateral implicitly legitimizes the idea that property is being returned in some form.[183] The Seventh Circuit itself, in an earlier case, accepted a defendant's argument that he had returned a portion of stolen money by using it to make improvements in the victim's home.[184] The court described the return of stolen money in the form of home improvements as "no different in principle from taking the money from one of [the victim's] bank accounts and depositing it in another a week later."[185] In addition,

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179. This makes little linguistic sense, as a matter of textual interpretation. Practically, if every case involved a full judicial foreclosure in which the court could control the sale of the collateral, it might be plausible to treat that sale as the moment of return. But the spectrum of foreclosure proceedings and alternative transactions makes it difficult to generalize. See Cox, supra note 57, at 698–715 (reviewing variety of legal regimes and transactions across states).

180. As an example, imagine that a bank takes deed to a house and decides to retain it as a place for company retreats. According to the Seventh Circuit's reading, the defendant would still not have returned any property, and would be ordered to pay restitution in the full amount of the loan. Why should the bank's choice to sell the property be determinative of whether—or when, or how—the victim has returned property?

181. The foreclosure rate reached nearly one percent of all homes in 2008. Cox, supra note 57, at 689.

182. 998 F.2d 1275, 1284 (5th Cir. 1993).

183. The victim may have the choice to accept or reject property offered by the defendant, but cannot accept property and then refuse to include its value in calculating its loss. See United States v. Oren, 893 F.2d 1057, 1066 (9th Cir. 1990) (holding victim of fraud, in accepting gift of land, had been compensated and was not owed further restitution).

184. United States v. Shepard, 269 F.3d 884, 887 (7th Cir. 2001). The defendant and his wife had been living in the victim's home and draining her bank account, using some of the proceeds for home improvements. Id. at 885. In *Robers*, the court attempts to distinguish *Shepard* in part on the fact that the victim in *Shepard* was actually benefiting from the home improvements, while the lenders in *Robers* sought only to recoup money. United States v. Robers, 698 F.3d 937, 945 n.8 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013).

185. *Shepard*, 269 F.3d at 887–88. The prosecutor apparently did not even argue that restitution could not be reduced by the value of the home improvements. Id. at 888 ("The

at least under some circumstances, a victim can reject any attempt to substitute the return of non-stolen property for a part of the restitution award.[186]

At the very least, both interpretations of "property" are reasonable. The Seventh Circuit's more consistent reading of "property" leads to a problematic reading of "return" and some practical difficulties, while a more flexible reading of "property" allows courts to avoid situations where they are compelled to ignore the fact that property has changed hands. And it is worth keeping in mind that, of the seven circuits that have addressed the issue, only the Seventh Circuit refuses to recognize collateral as returned property.[187] Courts should read the statute to allow for the return of property in different forms to prevent significant conceptual and practical problems.

2. *Courts Cannot Choose a Method of Valuation Based on the Text Alone.* — Once a court accepts that the transfer of collateral constitutes a partial return of property, the statute clearly instructs that it be valued as of the date of return.[188] For real property, the date of return appears to be the date "when [the victim] receive[s] title to the property and the corresponding ability to sell it for cash."[189] But besides instructing probation officers to provide sufficient information about victims' losses, and placing the burden on the prosecutor to prove those losses,[190] the MVRA tells courts little about how to go about valuing property in determining restitution. Certainly it mentions nothing about fair market value or foreclosure price.[191] Although the Seventh Circuit describes foreclosure price valuation as required by "the plain language of the MVRA,"[192] the Ninth Circuit conversely has held that "this plain language requires property to

United States does not contend that the change of the property's form—from cash to, say, central air conditioning—precludes a conclusion that the property has been 'returned.'").

186. See, e.g., *Oren*, 893 F.2d at 1066 (holding victim could have chosen to reject land that was offered by defendant in lieu of restitution). Perhaps a lender would seek to reject "substitute" property if, for instance, it believed that the defendant was financially able to pay restitution in cash.

187. See supra notes 69–87 and accompanying text (discussing Ninth Circuit's views on this issue); supra notes 88–98 and accompanying text (same for Fifth); supra notes 99–107 and accompanying text (Second); supra notes 109–118 and accompanying text (Third); supra notes 120–128 and accompanying text (Tenth); supra notes 130–137 and accompanying text (Eighth).

188. 18 U.S.C. § 3663A(b)(1)(B)(ii) (2012).

189. United States v. Smith, 944 F.2d 618, 625 (9th Cir. 1991); accord United States v. Boccagna, 450 F.3d 107, 113 (2d Cir. 2006) (noting parties should produce evidence of value "on the date when title passed" to victim).

190. 18 U.S.C. § 3664(a), (e).

191. §§ 3663A–3664.

192. United States v. Robers, 698 F.3d 937, 942 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013). The Seventh Circuit focuses on the meaning of property, but as noted above, its interpretation of property is not as unambiguous as it would claim. See supra Part III.A.1.

be valued . . . [at] fair market value."[193] Evidently, the language is less "plain" than either court believes.

Indeed, courts that view the language as decisive are ignoring equally plausible alternative readings. The Seventh Circuit, in its insistence that property can only be "returned" in the form of cash, fails to acknowledge the problems caused by this reading or the fact that nothing in the statute explicitly prohibits returning property in another form.[194] The Ninth and Fifth Circuits disregard the fact that multiple methods of valuation are commonly used in different legal contexts.[195] This is a notable omission because, as the Second Circuit notes, "the law recognizes a number of reasonable measures of property value."[196] Indeed, both proposed methods in this disagreement have been approved by the Supreme Court in different situations.[197] A court cannot presume that one method is required or even preferable based solely on a text that is silent on the question.

One solution is to leave the resolution of this problem to the district courts.[198] If different methods of valuation are appropriate under different circumstances, perhaps the district court is best positioned to choose the "measure that best serves Congress's statutory purpose"[199] in a given case. If a circuit uses this approach and allows the district court to choose the best measure under the circumstances, it will then review that decision for abuse of discretion.[200] Rather than find the use of one method over another to be a "clear error,"[201] the appellate court could simply trust the district court's judgment and understanding of the statute.

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193. United States v. Davoudi, 172 F.3d 1130, 1134–35 (9th Cir. 1999).

194. See supra notes 172–186 and accompanying text (discussing Seventh Circuit's refusal to recognize collateral as returned property).

195. See supra notes 69–98 and accompanying text (noting Ninth and Fifth Circuit opinions focus solely on determining proper date of valuation, not on choosing among methods of valuation).

196. United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006).

197. See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 538–39 (1994) (approving foreclosure price method in bankruptcy context); United States v. Cartwright, 411 U.S. 546, 550–51 (1973) (approving fair market value method in tax context).

198. E.g., *Boccagna*, 450 F.3d at 114 ("[T]he law appears to contemplate the exercise of discretion by sentencing courts in determining the measure of value appropriate to restitution calculation in a given case.").

199. Id. at 115.

200. See, e.g., United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004) ("The District Court did not abuse its discretion in setting the amount of restitution it did . . . .").

201. The Ninth Circuit holds that using foreclosure price to value returned collateral is not merely abuse of discretion, but clear error. See, e.g., United States v. Yeung, 672 F.3d 594, 605 (9th Cir. 2012) (finding "district court erred in relying on the value of the collateral when it was sold" in determining restitution).

This, however, is an unsatisfying conclusion. Federal law strives to achieve uniform application.[202] The argument for uniformity is especially strong when defendants are likely to be in different states than their victims, and when one victim might be dealing with multiple similar offenses and orders of restitution.[203] This is often the case with mortgage lenders, who will deal with the recurring problem of mortgage fraud across jurisdictions.[204] While some applications of law are inherently inconsistent, a determination of which method of valuation best fulfills the purpose of the MVRA does not appear to be a highly fact-specific inquiry.[205] Although the text of the statute is unhelpful, appellate courts should be able to determine the most appropriate method (at least in the vast majority of cases) by analyzing the statutory purpose, without leaving the question to the discretion of district courts.[206]

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202. See, e.g., Sup. Ct. R. 10(a) (noting circuit split may provide justification for granting certiorari); Fed. R. App. P. 35(b)(1)(B) (noting circuit split may provide justification for rehearing en banc). See generally Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1568 (2008) ("Ensuring the uniform interpretation of federal law has long been considered one of the federal courts' primary objectives . . . ."). In criminal law, uniformity has been the driving force behind the Federal Sentencing Guidelines. See, e.g., Michael M. O'Hear, The Original Intent of Uniformity in Federal Sentencing, 74 U. Cin. L. Rev. 749, 749–53 (2005) (starting from premise of uniformity as central goal of sentencing reform and exploring different views of uniformity).

203. Mortgage fraud is scattered across the states, see FBI Mortgage Report, supra note 30, at 10 (finding top states for fraud include Florida, California, Illinois, and New York), while centrally located entities like federal agencies and major financial institutions hold the majority of outstanding mortgage debt, see Mortgage Debt Outstanding, Fed. Reserve (June 2013), http://www.federalreserve.gov/econresdata/releases/mortoutstand/mortoutstand20130630.htm (on file with the *Columbia Law Review*) (listing these two categories as holding some $9 trillion of $13 trillion in outstanding mortgage debt in first quarter of 2013).

204. See supra Part I.B (exploring scope of mortgage fraud problem).

205. Contrary to what some courts have stated. See United States v. Statman, 604 F.3d 529, 538 (8th Cir. 2010) (approving district court's method as having "satisfied the overarching goal of the MVRA" under specific circumstances); United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) (holding district court should choose "measure that best serves Congress's statutory purpose" under specific circumstances). These two courts, however, went on to disagree about which method is most likely to fulfill the purpose of the statute, citing reasons which were not unique to the cases but are generally true across mortgage fraud cases. Compare *Statman*, 604 F.3d at 538 (approving foreclosure method by referring to statutory purpose), with *Boccagna*, 450 F.3d at 115 (citing theoretical justifications for primacy of fair market value method). This implies that the question is not one of fact but of law, and should be resolved at the appellate level rather than by trial courts.

206. Although a number of circuits have stated that methodology is within the discretion of the district courts, no circuit has explicitly approved both methods in different cases. This leaves some question as to whether any circuit court seriously believes that both methods are equally viable. See supra Part II.A.3–B.1 (discussing circuits that appear to defer to district courts).

B. *The Statutory Purpose Justifies Primarily Using the Foreclosure Price Method*

Courts agree that the MVRA is intended to fully compensate victims.[207] Part III.B.1 explains why courts should focus on determining the value of the property *to the victim*, and argues that foreclosure price usually accurately approximates that value. Part III.B.2 addresses potential injustice to defendants that the foreclosure price method could produce and discusses two principles that should limit the use of the foreclosure price method: the windfall principle and proximate causation. Defendants should be entitled to invoke these principles to argue that foreclosure price is an inappropriate method in their particular cases.

1. *A Victim-Focused Statute Requires a Victim-Focused Methodology.* — The MVRA's purpose of compensating victims' losses is evident from the face of the statute. The conduct and culpability of the defendant have little or no bearing on restitution.[208] Rather, the "mandate" of the restitution found in § 3663A and the procedural requirements in § 3664 focus exclusively on identifying the victims and their losses.[209] The consensus view of courts is that these provisions make victim compensation the "primary and overarching goal"[210] of the statute.[211] In interpreting each provision, courts must remember that "[t]he 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the victims, not the victimizers.'"[212]

Any form of valuation is an approximation and is likely to err in one direction or another. Appraisals to determine fair market value are always uncertain, especially in a volatile market.[213] On the other hand, the price obtained for property at a foreclosure sale is a one-off occurrence,

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207. See supra note 19 and accompanying text (identifying broad consensus across courts).

208. See 18 U.S.C. §§ 3663A–3664 (2012) (basing restitution on damage, loss, or injury to victim). This is unlike, for instance, the Sentencing Guidelines, which take into account the losses caused by the defendant as part of a broader determination of the appropriate sentence. See, e.g., U.S. Sentencing Guidelines Manual § 2B1.1(b)(1) (2012) (increasing sentence based on dollar amount of loss). The Guidelines are quite specific in their commentary about how to value collateral in mortgage fraud cases. See id. § 2B1.1 cmt. n.3(E). Where the collateral has already been sold, the actual (foreclosure) price is used; where it has not, fair market value is used. Id. But while analogous, the Guidelines cannot be imported into calculation of restitution. E.g., United States v. Davoudi, 172 F.3d 1130, 1135 (9th Cir. 1999) (holding language of MVRA and commentary of Guidelines require different methods of valuation). A beneficial side effect of using the foreclosure price method in restitution, at least where the property has already been disposed of, would be to improve consistency in valuation of losses between restitution and sentencing.

209. §§ 3663A–3664.

210. *Statman*, 604 F.3d at 538 (quoting United States v. Balentine, 569 F.3d 801, 806 (8th Cir. 2009)) (internal quotation marks omitted).

211. See supra notes 19, 127 (collecting agreeing opinions across jurisdictions).

212. *Balentine*, 569 F.3d at 806 (quoting United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999)).

213. See, e.g., supra notes 46–52 and accompanying text (discussing difficulty of accuracy in appraisals).

which may or may not reflect the underlying or "true" value of the property.[214] If the MVRA's procedural mechanisms are intended to protect victims, courts should use whichever method is more likely to err in favor of victims rather than defendants. Because foreclosure price is often well below market value,[215] using it to calculate restitution will systematically favor the victim over the defendant.[216]

Moreover, courts should not make the mistake of trying to calculate the value of property in a vacuum, searching for some "true" value. The value of the returned collateral is only important as part of the larger calculation of the victim's loss.[217] Given that the property must be valued "as of the date the property is returned,"[218] the Ninth Circuit views fair market value as the only way to measure "what the financial institution would have received in a sale as of that date."[219] The court goes on to make the assumption that if a subsequent sale brings less than the court-determined market value, the difference "stems from a decision by the new owners to hold on to the property."[220] The Second Circuit implicitly makes the same assumption when it declares that fair market value is the "measure most apt to serve [the MVRA's] statutory purpose."[221]

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214. See supra notes 57–61 and accompanying text (explaining foreclosure process and effect of timing on valuation). Whether the property is claimed through formal foreclosure or an alternative procedure, the sale price may be higher than the appraised market value, see, e.g., United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004) (noting actual sale was for considerably more than any likely appraisal of fair market value), or far less, see, e.g., United States v. Boccagna, 450 F.3d 107, 110 (2d Cir. 2006) (noting victim transferred property at "essentially nominal prices").

215. See Cox, supra note 57, at 701 ("[F]oreclosure sale rarely brings a market price.").

216. If both alternatives are valid, using the one that favors the victim is analogous to the provision of § 3663A that directs the court to choose the date for valuing the loss so as to maximize the restitution owed to the victim. 18 U.S.C. § 3663A(b)(1)(B) (2012) (directing defendant to "pay an amount equal to *the greater of* (I) the value of the property on the date of . . . loss . . . or (II) the value of the property on the date of sentencing" (emphasis added)).

217. See § 3664(f)(1)(A) (requiring court to order restitution in full amount of victim's loss).

218. § 3663A(b)(1)(B)(ii).

219. United States v. Smith, 944 F.2d 618, 625 (9th Cir. 1991).

220. Id. The court holds, correctly, that the defendant is not responsible for a "business loss," meaning that if a victim-lender recovers property and loses money on its sale because of a poor decision, the defendant is not liable. Id. Of course, it may be quite difficult to tell when a low price is due to a poor decision as opposed to when it merely reflects a weak market, and perhaps victims should get the benefit of the doubt. On the other hand, if courts use the foreclosure price under all circumstances, lenders will have no incentive to obtain a high or even reasonable price for recovered property. See infra notes 229–230 and accompanying text (arguing foreclosure price problematically insures victim-lender against any change in price obtained for property).

221. United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006). The court notes that fair market value is what a seller should be able to get in an arm's-length transaction,

Another interpretation of the foreclosure price method, however, is that it provides an accurate approximation of what the value of the property was to the victim on the date of its return.[222] For a court attempting to determine the "actual loss" of the victim, it is almost certainly more accurate to use the actual foreclosure price that the victim received.[223] Even the Second Circuit is aware that "where collateral is subject to foreclosure proceedings," the fair market value may be less accurate than the actual price.[224] Where a lender is a victim of mortgage fraud, the sale of the collateral is almost always "forced" by circumstances, even if it is not technically a forced sale as part of judicial foreclosure proceedings.[225] As long as the court clarifies that it is properly using the foreclosure price to approximate the actual value to the victim on the date of return, this method most effectively fulfills the purpose of the MVRA.

2. *Limits to the Foreclosure Price Method.* — There are, however, situations where the foreclosure price method is improper. The main circumstances under which it would be unjust to use the foreclosure price are when it would result in overcompensation to a victim (a windfall) and when it would compensate losses that were simply not caused—at least in a proximate, or legal, sense—by the defendant's criminal conduct.

a. *Overcompensation.* — It would be improper and unjust to use the foreclosure price method when it would result in a windfall. The "windfall" principle is well established in the context of the MVRA, not because of statutory language, but as a common-sense limit put in place by every appellate court that has reached the issue.[226] In some cases, like *Boccagna*, the courts can clearly see that the foreclosure price method would result in a windfall.[227] Under circumstances where the victim-lender gives away

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id., which ignores the fact that the statute focuses on victims' *actual* loss and not on the theoretical or expected loss caused by the defendant's conduct.

222. This is in contrast to the legal error of attempting to value the property on some other date, such as the date it was eventually sold. See United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004) (characterizing district court's actions as attempt to value property on date of return rather than improper postponement of valuation to later date).

223. United States v. James, 564 F.3d 1237, 1247 (10th Cir. 2009) ("[C]alculating [the victim]'s actual loss using the foreclosure sale amount more accurately measures its loss than using the property's assessed value.").

224. *Boccagna*, 450 F.3d at 116–17.

225. See Curtis, supra note 57, at 122–26 (discussing foreclosure procedures and alternative processes like "deed in lieu" and "distressed sale"); see also Cox, supra note 57, at 701 (comparing judicial and power of sale foreclosure procedures).

226. See, e.g., United States v. Gordon, 393 F.3d 1044, 1060 (9th Cir. 2004) (rejecting restitution that "goes beyond making [the victim] whole"); United States v. Nucci, 364 F.3d 419, 423 (2d Cir. 2004) ("Nothing in the text of the MVRA explicitly prevents double-recovery . . . . [But] reading the statute to provide recovery in excess of the amount of the loss would be in derogation of the common law . . . ."); United States v. Dawson, 250 F.3d 1048, 1050 (7th Cir. 2001) (agreeing victim was not entitled to restitution greater than loss sustained); United States v. Arutunoff, 1 F.3d 1112, 1121 (10th Cir. 1993) (rejecting "windfall for crime victims").

227. 450 F.3d at 117.

the collateral, it is disposing of the property's value as it wishes and is not entitled to an additional monetary award equal to the value.[228]

Other cases may be less clear-cut. For instance, a victim-lender receives a kind of insurance when a court agrees that restitution will be calculated by the foreclosure price method, if the property has not yet been sold.[229] The lender has no incentive to exert any effort if obtaining a higher price benefits only the defendant. For a victim-lender in a mortgage fraud case, not bearing any downside risk after recovering property would appear to be a kind of windfall. The defendant has returned some amount of property; for her remaining restitution to fluctuate depending on the housing market seems to run counter to the idea of valuing property on set dates, and more generally to the time limits imposed on the restitution process.[230]

Nonetheless, in most situations foreclosure price will not create a windfall for victims. Often the lender will have sold the property before the lengthy criminal process is complete.[231] And many defendants will be unable to actually pay a restitution order in a timely manner, making reliance on the restitution payment risky.[232] At any rate, the courts should presume that foreclosure price is the proper method, and put the burden on defendants to prove otherwise.

b. *Proximate Cause.* — A victim under the MVRA is defined as a person "directly and proximately harmed" by the crime.[233] Courts have, therefore, limited restitution to losses "proximately caused" by the defendant's criminal conduct.[234] Proximate cause has received particular

228. Id. The victim, HUD, had not literally given away the properties at issue, but had sold them for nominal prices. Id. The Second Circuit correctly viewed this as a transparent attempt to have a cake, eat the cake, and be compensated for the loss of the cake.

229. This is insurance against the kind of "business loss" for which the Ninth Circuit thinks defendants should not bear responsibility. See supra notes 218–220 and accompanying text.

230. 18 U.S.C. §§ 3663A–3664 (2012). One provision specifies that the final determination of the victim's losses cannot be more than ninety days after sentencing. § 3664(d)(5). In some situations the foreclosure price might tempt the lender to refuse to sell and claim a judgment of restitution with no offset for the value of the collateral; to determine whether the lender had made a good faith effort to sell would be difficult indeed.

231. See supra notes 56–61 and accompanying text (discussing timing of foreclosure processes).

232. See supra note 17 (noting Congress recognized restitution was often mostly symbolic).

233. § 3663A(a)(2).

234. See, e.g., United States v. Speakman, 594 F.3d 1165, 1172 (10th Cir. 2010) (holding loss was proximately caused "if either there are no intervening causes, or, if there are any such causes, if those causes are directly related to the defendant's offense"). Under perhaps the same principle, the MVRA does not compensate for "consequential" damages, losses flowing indirectly from the defendant's conduct. See United States v. Havens, 424 F.3d 535, 538 (7th Cir. 2005) ("[C]onsequential damages . . . do not qualify as 'losses'

attention in securities fraud,[235] and the securities fraud analysis can guide courts in dealing with mortgage fraud. While victims of mortgage fraud are left with property worth less than their loans, victims of securities fraud are left with securities worth less than their investments. The question of causation, however, is the same, despite the different "media" for the fraud: How much of the lost value was caused by the defendant's fraud?

In securities fraud cases, the stock will generally have lost some value because of fraudulent conduct; but, of course, stocks lose value all the time for reasons totally unrelated to fraud. The question of proximate causation is especially difficult to answer in such cases, because the fluctuations or "noise" in the market may make it difficult to ascribe a loss to one cause or another.[236] When a defendant can show that part of a victim's loss was not caused by the criminal conduct, courts should exclude that portion from an order of restitution.[237] To order restitution for that loss would go beyond the statute's compensatory intent.[238]

In mortgage fraud cases where the appraised fair market value at the time of return is dramatically different than the final foreclosure price, market conditions may be responsible for part of the loss, just as in securities fraud cases.[239] The Seventh Circuit argues that the defendant

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under the MVRA."); United States v. Barton, 366 F.3d 1160, 1167 (10th Cir. 2004) ("[T]he MVRA cannot encompass consequential damages . . . .").

235. See, e.g., Jill E. Fisch, Cause for Concern: Causation and Federal Securities Fraud, 94 Iowa L. Rev. 811 (2009) (exploring causation in securities fraud in civil context).

236. E.g., *Speakman*, 594 F.3d at 1172; see also United States v. Paul, 634 F.3d 668, 676–78 (2d Cir. 2011) (discussing proximate cause in securities fraud case). Analogously, in today's real estate market prices may fluctuate dramatically. See supra notes 53–61 and accompanying text (noting volatility in market).

237. But cf. *Paul*, 634 F.3d at 677–78 (rejecting defendant's argument that loss was caused by decline in value of stock rather than fraudulent conduct). In *Paul*, the defendant had fraudulently secured loans with stock as collateral; the Second Circuit ruled that the decline in the value of the stock was not an intervening cause and that the defendant was fully responsible for the losses. Id. In general, courts seem to relax the requirements of proximate causation in the restitution context, see, e.g., United States v. Marino, 654 F.3d 310, 319 (2d Cir. 2011) (warning against "rigid 'direct' causation standard"), while still requiring something more than but-for causation, see United States v. Vaknin, 112 F.3d 579, 589 (1st Cir. 1997) ("Restitution should not lie if the . . . offense . . . is too far removed, either factually, or temporally, from the loss."), abrogated on other grounds by United States v. Anonymous Defendant, 629 F.3d 68 (1st Cir. 2010). To the extent that restitution parallels civil tort liability rather than criminal sanctions, relaxed causation requirements may be questionable.

238. Restitution would not be a windfall in the sense of making the victim-lender better off than *before* the offense, but it would be a windfall in that it would the make the victim-lender better off than it would have been in the *absence* of the offense, because the market would have caused a loss regardless.

239. In *Paul*, a securities fraud case, the Second Circuit drew on its analysis in United States v. Turk, 626 F.3d 743 (2d Cir. 2010), a mortgage fraud case. 634 F.3d at 677–78. The defendants in *Turk* acquired loans not from banks but from individuals; unlike in most mortgage fraud cases, the mortgages were never actually recorded, and, because of market

should bear any market risk, since she is the wrongdoer.[240] This seems to place the burden of the loss on the defendant without any showing of proximate cause.[241] Similarly, the Second Circuit has rejected the argument that the market, not the defendant, caused part of the loss in a mortgage fraud case; it held that the market only diminished the value of the collateral, but did not decrease the "loss" due to the unpaid loan.[242] This seems to draw an artificial distinction between a mortgage and the collateral that secures it.[243]

There is good reason to think the victim-lender should not be fully insulated from losses due to market fluctuations. The Supreme Court has said that in the context of civil securities fraud claims, a plaintiff must prove that her loss was due to the defendant's fraud and not, for instance, the market.[244] Where a similar question of causation is at issue in a criminal case, there is "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly."[245] Indeed, courts agree that the MVRA does not authorize "consequential" or indirect damages,[246] which seems to be another way of applying a proximate causation requirement. If the touchstone of proximate cause

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conditions, no collateral could be recovered on behalf of the victims. *Turk*, 626 F.3d at 748–49. There was no valuation issue because there was functionally no collateral to value. Id. at 748.

240. *Robers* does correctly point out that real estate is illiquid and inherently risky (in contrast to the Ninth Circuit's claims about being able to sell as soon as the property changes hands). United States v. Robers, 698 F.3d 937, 942 (7th Cir. 2012), reh'g en banc denied, No. 10-3794, 2012 U.S. App. LEXIS 24965 (7th Cir. Nov. 28, 2012), cert. granted, No. 12-9012, 2013 WL 775438 (U.S. Oct. 21, 2013). But this seems to ignore the fact that the statute speaks of victims "directly and proximately harmed," which would seem to limit restitution to losses proximately caused by criminal conduct. 18 U.S.C. § 3663A(a)(2) (2012); see also supra note 150 (discussing proximate cause).

241. The Seventh Circuit found that Robers's fraud "actually caused the losses at issue," but failed to distinguish between the loss (the unpaid mortgage) and the decreased value of the collateral, or to explain why the defendant should insure the value of the collateral, beyond stating its conclusion. *Robers*, 698 F.3d at 943.

242. United States v. Onua, 493 F. App'x 209, 212 (2d Cir. 2012) (holding defendant responsible for full amount of mortgages).

243. Unlike an unsecured loan, no mortgage would exist without collateral, and losses from defaults always depend heavily on the value of the collateral.

244. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 344–46 (2005). The Court cited Prosser and Keeton for the proposition that "losses do 'not afford any basis for recovery' if 'brought about by business conditions or other factors.'" Id. (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 110, at 767 (5th ed. 1984)). *Dura* essentially imported common law tort principles into the area of causation in federal securities fraud. See generally Fisch, supra note 235 (discussing theories of causation in securities fraud).

245. United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) (applying *Dura* principles to loss causation for purposes of sentencing).

246. *Robers*, 698 F.3d at 954; see also, e.g., United States v. Boccagna, 450 F.3d 107, 120–21 (2d Cir. 2006).

is foreseeability,[247] the government should be hard-pressed to make the case that, for instance, the housing crisis was foreseeable. Because the housing crisis was unpredicted and caused so many losses, it seems unreasonable to argue that a defendant is responsible for unexpected losses due to the effect of market fluctuations on that particular property.[248] Yet while the Supreme Court's approach in *Dura* and common law principles would seem to require proof that a victim's losses were not caused by the market, courts appear more willing to apply this principle to securities fraud cases[249] than to mortgage fraud cases.[250]

Although the defendant may have a difficult burden, she should have the opportunity to prove that foreclosure price is an inappropriate method because it captures losses that were not proximately caused by her conduct.[251] Because the statute's purpose is to compensate victims, however, courts should still presumptively use the foreclosure price method. Situations that turn on the windfall principle or proximate cause are likely to be uncommon, and as long as courts are mindful of the dangers of overcompensation, they should start from the default position most favorable to the intended beneficiaries of the statute, the victims.

CONCLUSION

The circuits remain split over how to value returned collateral as an offset against restitution owed in mortgage fraud cases. At heart, the disagreement is one of statutory interpretation. The Seventh Circuit holds that property is not "returned" within the meaning of the statute until

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247. See, e.g., Palsgraf v. Long Island R. Co., 162 N.E. 99, 104–05 (N.Y. 1928) (Andrews, J., dissenting) ("[B]y the exercise of prudent foresight, could the result be foreseen?").

248. See supra notes 46–67 and accompanying text (discussing housing market crash).

249. See, e.g., United States v. Zolp, 479 F.3d 715, 719 (9th Cir. 2007) ("[T]he court must disentangle the underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation of that value due to unrelated causes."); *Rutkoske*, 506 F.3d at 179 ("Many factors cause a decline in share price between the time of the fraud and the revelation of the fraud.").

250. See, e.g., *Robers*, 698 F.3d at 944 ("Robers, not his victims, should bear the risk of market forces beyond his control."). The court points out that "[t]he declining market only became an issue because of Robers's fraud," id., but it seems hard to distinguish this from investors who only bought stock because of the defendant's fraud in a securities case. Indeed, if market volatility is more predictable in securities than real estate, that would appear to militate toward a stricter requirement of showing proximate causation in mortgage fraud cases.

251. The proximate cause and windfall principles are related. A proximate cause argument lays blame for part of the loss on unforeseeable external forces, while a windfall argument often lays blame on the victim for failing (perhaps intentionally) to minimize its own losses. See supra notes 226–230 and accompanying text (explaining possibility that victim would choose option that increases monetary loss if it knew defendant would owe commensurately more restitution).

cash is returned to the victim, and that the foreclosure price method is mandated. The Ninth and Fifth Circuits believe that the statutory command to value the property when it is returned mandates the fair market value method. The remaining circuits view neither method as mandated, and, while expressing preferences, leave the choice to the broad discretion of the district courts. Federal criminal law, however, strives for uniformity where possible.

This Note concludes that the MVRA's statutory purpose should guide courts. The text is inconclusive; neither method is plainly required by the language of the MVRA. The statute's purpose of compensating victims, however, is clearly better served by using the foreclosure price method. There are limits to this method: Sometimes it can grant the victim a windfall or make the defendant responsible for losses beyond those she caused. Courts must be aware of these exceptions, but as a rule should presumptively use the foreclosure price method unless a defendant shows that it would be inappropriate or unjust under the circumstances of the case.

SELECTED BIBLIOGRAPHY

Black's Law Dictionary (9th ed. 2009).

Clemons, Morgan, Restitution for Federal Crimes: Will Mortgage Criminals Pay for the Real Estate Bubble?, 130 Banking L.J. 316 (2013).

Cox, Prentiss, Foreclosure Reform amid Mortgage Lending Turmoil: A Public Purpose Approach, 45 Hous. L. Rev. 683 (2008).

Curtis, Kasey, Note, The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry, 36 W. St. U. L. Rev. 119 (2008).

Eskridge, William N., Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990).

FBI, U.S. Dep't of Justice, Financial Crimes Report to the Public: Fiscal Years 2010–2011 (2011), available at http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011/financial-crimes-report-2010-2011.pdf.

Fed. Home Loan Mortg. Corp. et al., Home Valuation Code of Conduct (2008), available at http://www.fhfa.gov/webfiles/2302/HVCCFinalCODE122308.pdf.

Fin. Crimes Intelligence Unit, FBI, 2010 Mortgage Fraud Report: Year in Review (2011), available at http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010.

Fisch, Jill E., Cause for Concern: Causation and Federal Securities Fraud, 94 Iowa L. Rev. 811 (2009).

Frost, Amanda, Overvaluing Uniformity, 94 Va. L. Rev. 1567 (2008).

Herkenhoff, Kyle F. & Lee E. Ohanian, Foreclosure Delay and U.S. Unemployment (Fed. Reserve Bank of St. Louis, Research Div., Working Paper No. 2012-017A, 2012), available at http://research.stlouisfed.org/wp/2012/2012-017.pdf.

Joint Ctr. for Hous. Studies of Harvard Univ., The State of the Nation's Housing (2008), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2008.pdf.

Keeton, W. Page, et al., Prosser and Keeton on the Law of Torts (5th ed. 1984).

O'Hear, Michael M., The Original Intent of Uniformity in Federal Sentencing, 74 U. Cin. L. Rev. 749 (2005).

Palmer, George E., The Law of Restitution vol. 1 (1978).

Raymond, Margaret, Note, The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment, 84 Colum. L. Rev. 1590 (1984).

S. Rep. No. 104-179 (1995).