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## Straying from the Written Path: How the Supreme Court Eviscerated the Plain Meaning of the MVRA's Ninety-Day Deadline Provision and Legislated from the Bench in *Dolan v. United States*

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## NOTES

### Straying from the Written Path: How the Supreme Court Eviscerated the Plain Meaning of the MVRA's Ninety-Day Deadline Provision and Legislated from the Bench in *Dolan v. United States*

#### *I. Introduction*

A statutory interpretation scholar once quipped, “Federal statutes do not come with instructions, but maybe they should.”<sup>1</sup> Such a remark reflects the confused feeling that many members of the legal profession experience when trying to understand the Supreme Court’s method of statutory interpretation.<sup>2</sup> Although members of courts employ various methods to interpret statutes, techniques can generally be broken down into two approaches: textualist and traditional.<sup>3</sup> The textualist approach focuses “on the ‘plain meaning’ of the language of the statute.”<sup>4</sup> The traditional approach considers contextual evidence such as legislative history in addition to a statute’s text, regardless of the presence of any “plain meaning.”<sup>5</sup> The issue of statutory interpretation may be contentious at the best of times, but this tension is magnified when interpreting the Mandatory Victims’ Restitution Act (MVRA)—a statute that represents one of the most aggressive legislative moves to ensure victims’ rights in criminal law.

Passage of the MVRA in 1996 was the legislative pinnacle of the Victims’ Rights Movement, which arose from victims’ frustration over their lack of participation in the criminal justice system, especially as it pertained to offenders.<sup>6</sup> The passage of the MVRA signaled a change in the direction of criminal law at the federal level: restitution would no longer be a form of *punishment*, but would rather be a means for providing *compensation* to

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1. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002).

2. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866 (2008) (noting that “the Court’s practice of treating doctrines of statutory interpretation differently than other legal doctrines with respect to stare decisis is deeply puzzling”).

3. See Rebecca L. Spiro, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103, 104 (2000).

4. *Id.* at 105.

5. *Id.* at 106.

6. Shirley S. Abrahamson, *Redefining Roles: The Victims’ Rights Movement*, 1985 UTAH L. REV. 517, 525-26.

victims of certain crimes.<sup>7</sup> At the heart of the MVRA was the *mandatory* requirement that courts order defendants to pay restitution to their victims for certain crimes.<sup>8</sup> By 2010, several of the United States Courts of Appeals had come to a split in opinion concerning the implications of missing the restitution deadline provision in the MVRA.<sup>9</sup> The Supreme Court confronted this split in *Dolan v. United States*.<sup>10</sup>

In *Dolan*, the Court addressed the issue of whether a trial court is stripped of its authority to order restitution if it misses the MVRA deadline for doing so.<sup>11</sup> The Court classified the restitution deadline provision of the MVRA as a speed-seeking deadline and discussed the purpose of the MVRA and its legislative history, before concluding that missing the deadline does not deprive a court of its authority to enter an order of restitution.<sup>12</sup>

This note argues that the decision reached by the majority in *Dolan* was incorrect. The Court erred by ignoring the plain meaning of the language in the MVRA, which ultimately led the Court to violate the constitutional principle of separation of powers. Part II of this note provides a brief overview of the MVRA and its predecessor, the Victims and Witness Protection Act, as well as a quick overview of the social movement that led to their passage. Part III provides three examples of cases in which the Supreme Court has previously determined the penalty for missing statutory deadlines. Part IV discusses *Dolan* and the Court's rationale for its decision. Part V argues that the majority in *Dolan* erred by ignoring the plain meaning of the language of the MVRA and allowing the legislative intent behind the MVRA to guide the Court's reasoning. Additionally, Part V argues that after straying from the clear text of the MVRA that *requires* a court to order restitution within ninety days of sentencing, the majority erred by refusing to utilize the rule of lenity to clarify any ambiguity that may have existed in the MVRA. In so doing, the Court violated the bedrock constitutional principle

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7. Beth Bates Holliday, Annotation, *Who Is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. FED. 2d 283, 283 (2008).

8. See 18 U.S.C. § 3663A(a)(1) (2000).

9. Compare *United States v. Balentine*, 569 F.3d 801, 807 (8th Cir. 2009) (finding authority for the court to enter restitution past the ninety-day statutory deadline), and *United States v. Cheal*, 389 F.3d 35, 37 (1st Cir. 2004) (same), with *United States v. Farr*, 419 F.3d 621, 626 (7th Cir. 2005) (finding no authority for the court to enter restitution past the ninety-day deadline), and *United States v. Maung*, 267 F.3d 1113, 1122 (11th Cir. 2001) (same).

10. 130 S. Ct. 2533, 2537 (2010).

11. See *id.*

12. See *id.* at 2539.

of separation of powers by legislating from the bench. Finally, Part V argues that the Court made an error by relying too heavily on *Montalvo-Murillo* as a parallel case, implicitly analogizing the *common law* goal of punishing an offender to the MVRA's *legislative* goal of promoting restitution. Part VI concludes this note.

## II. Overview of the MVRA and the Events Leading up to Its Passage

### A. The Victims' Rights Movement

The exact point when the Victims' Rights Movement (VRM) began is not known.<sup>13</sup> During the 1960s and 1970s, however, when Chief Justice Earl Warren and the Supreme Court began issuing opinions that expanded rights for the criminally accused, crime victims and their advocates began rallying for the rights of victims in the system.<sup>14</sup> Today, the VRM has grown into "a legislative movement to codify the 'rights' of crime victims."<sup>15</sup> The VRM is identified with a sense of frustration over the lack of participation victims have in the criminal justice system with respect to the alleged or convicted offender.<sup>16</sup> The VRM's appeal cuts across a wide spectrum of advocates, with supporters of victims' rights coming from a variety of political and economic backgrounds.<sup>17</sup>

Between 1973 and 1983, the VRM's success was readily apparent in the increased number of organizations and agencies dedicated to victims' rights.<sup>18</sup> In 1982, President Reagan commissioned the Task Force on Victims of Crime, which held "public hearings throughout the country, thereby focusing national attention on the problems crime victims suffer."<sup>19</sup> The Task Force found:

[S]omewhere along the way, the system has lost track of the simple truth that it is supposed to be fair and protect those who obey the law while punishing those who break it. Somewhere

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13. LEIGH GLENN, *VICTIMS' RIGHTS* xiii (1997).

14. *Id.*

15. Sara Manauagh, *The Vengeful Logic of Modern Criminal Restitution*, 1 *LAW, CULTURE & HUMAN.* 359, 368 (2005).

16. *Id.* at 370.

17. See Abrahamson, *supra* note 6, at 525-26; see also Edna Erez & Julian Roberts, *Victim Participation in the Criminal Justice System*, in *VICTIMS OF CRIME* 277, 279 (Robert C. Davis, Arthur J. Lurigio & Susan Herman eds., 3d ed. 2007).

18. Abrahamson, *supra* note 6, at 528-29.

19. GLENN, *supra* note 13, at 63.

along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.<sup>20</sup>

With decades of momentum on its side, the VRM achieved what was perceived as a significant victory with the passage of the Victim and Witness Protection Act of 1982.

*B. The Victim and Witness Protection Act (1982)*

In 1982, just as the “plight of the victim, the ‘forgotten person,’” entered the “forefront of the public’s consciousness,”<sup>21</sup> Congress enacted the Victim and Witness Protection Act (VWPA) in an attempt “to address the unmet needs of crime victims.”<sup>22</sup> Specifically, Congress expressed intent to “strengthen existing legal protections for victims and witnesses of Federal crimes.”<sup>23</sup>

The VWPA was a significant step in changing the landscape of criminal punishment. Congress recognized that restitution had played an integral role in the criminal justice system of every culture at every point in time.<sup>24</sup> The principle of restitution, according to Congress, holds that “whatever else the sanctioning power of society does to punish wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.”<sup>25</sup>

Prior to the VWPA, restitution in criminal law was only “an optional condition of probation.”<sup>26</sup> Under the VWPA, however, federal courts were authorized to require restitution independent of probation.<sup>27</sup> The VWPA did not *require* a court to order restitution. Thus, the power to order restitution was discretionary. However, the VWPA did require that when a court

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20. OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME vi (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presidentstskforcprpt/welcome.html>.

21. Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora’s Box – The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 507 (1984).

22. Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90 (1993).

23. S. REP. NO. 97-532, at 9 (1982).

24. *See id.* at 30. *But see* 66 AM. JUR. 2D *Restitution and Implied Contracts* § 1 (2001) (omitting any reference to punishment in discussion of historical definition and nature of restitution).

25. S. REP. NO. 97-532, at 30.

26. Tobolowsky, *supra* note 22, at 91.

27. 18 U.S.C. §§ 3579-3580 (1985).

declines to order restitution, the court must state the reasons for not doing so on the record,<sup>28</sup> which applied pressure to courts to order restitution.

In addition to having discretion in determining whether restitution will be ordered, the judge also had discretion in the amount ordered. The VWPA required judges to consider “the amount of the victim’s loss from the offense, the defendant’s financial resources, and the financial needs and earning ability of the defendant and his or her dependants.”<sup>29</sup> Thus, restitution under the VWPA was not really victim-centered as much as it was contingent upon the defendant’s circumstances and ability to pay.<sup>30</sup>

### C. *The Mandatory Victims’ Restitution Act (1996)*

Addressing concerns that the VWPA left too much discretion to judges in awarding restitution, Congress enacted the Mandatory Victims’ Restitution Act (MVRA) in 1996 to “reflect a fundamental shift in the purpose of restitution from a means of punishment and rehabilitation to an attempt to provide those who suffer the consequences of crime with some means of recouping their personal and financial losses.”<sup>31</sup> Congress noted that “[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, to ensure that [the] offender be held accountable to repay those costs.”<sup>32</sup>

Specifically, the MVRA expands the VWPA in two ways. First, whereas restitution was discretionary under the VWPA, federal courts are *obligated* to order restitution under the MVRA.<sup>33</sup> Second, the MVRA provides that “[i]n each order of restitution, the court *shall* order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.”<sup>34</sup> Thus, while the VWPA allowed a judge to take the defendant’s financial circumstances into consideration when deciding the amount of restitution, such consideration is not permitted under the MVRA. The defendant is *required* to make full restitution to the victim.

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28. *Id.* § 3579.

29. *Id.* § 3580(a).

30. See Mathew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009).

31. Holliday, *supra* note 7, at 283.

32. S. REP. NO. 104-179, at 18 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 930.

33. 18 U.S.C. § 3663A(a)(1) (2000).

34. *Id.* § 3664(f)(1)(A) (emphasis added).

In order to ensure that victims receive full restitution, the MVRA included a provision that extends the time period during which the court may obtain pertinent information concerning the amount of restitution needed:

If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing.<sup>35</sup>

Furthermore, Congress included a safe harbor provision for the discovery of new losses relating to restitution in order to ensure that victims were fully compensated:

If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.<sup>36</sup>

Thus, although there is a deadline for ordering restitution, the MVRA's safe harbor provision ensures that insufficiencies in the amount of restitution ordered could be rectified after the ninety-day deadline expires.

### *III. The Supreme Court's Categorical Approach to Missed Deadline Sanctions*

Prior to *Dolan*, the Supreme Court had already decided several cases relating to penalties for missed statutory deadlines.<sup>37</sup> The Court's analysis in *Dolan* began by determining whether the MVRA deadline is a speed-seeking, claims-processing, or jurisdictional deadline.<sup>38</sup> The following discussion provides an overview of the three deadline cases that the Supreme Court cited in its decision in *Dolan*.

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35. *Id.* § 3664(d)(5).

36. *Id.*

37. *See, e.g.,* *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (ruling that missed jurisdictional deadlines strip a court of its authority to act pursuant to the relative provision); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (ruling that claims-processing deadlines provide relief to parties properly raising the lapsed deadline as a defense before a trial court has reached the merits); *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990) (ruling that missing a "speed seeking" deadline does not strip a court of authority to act).

38. *See Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010).

A. *United States v. Montalvo-Murillo: Speed-Seeking Deadlines*

In *United States v. Montalvo-Murillo*, the Court contemplated the appropriate remedy for a violation of a hearing deadline set by the Bail Reform Act of 1984.<sup>39</sup> The Act provides that:

The judicial officer shall hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community . . . . The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, such person shall be detained . . . . The person may be detained pending completion of the hearing.<sup>40</sup>

United States Customs Agents found approximately 72 pounds of cocaine hidden in Montalvo-Murillo's truck at a New Mexico checkpoint near the international border on February 8, 1989.<sup>41</sup> Montalvo-Murillo agreed to cooperate with Drug Enforcement Agency (DEA) authorities and make a controlled delivery of the cocaine to purchasers in Chicago.<sup>42</sup> The transaction was not completed, however, because the purchasers failed to arrive at the drop point in Chicago.<sup>43</sup>

On Friday, February 10, a transfer hearing for Montalvo-Murillo was held before a Magistrate in the Northern District of Illinois to arrange for the transfer of Montalvo-Murillo back to New Mexico where charges had been filed against him.<sup>44</sup> Montalvo-Murillo was returned to New Mexico that evening.<sup>45</sup>

On Monday, February 13, the Magistrate's office in New Mexico scheduled a detention hearing for Thursday, February 16, which the court, *sua sponte*, ordered to be continued until the next Monday due to a lack of a

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39. *See* 495 U.S. at 713.

40. 18 U.S.C. § 3142(f) (2000).

41. *Montalvo-Murillo*, 495 U.S. at 714-15.

42. *Id.* at 715.

43. *Id.*

44. *Id.*

45. *Id.*



prepared report by the Pretrial Services Office.<sup>46</sup> Because that Monday fell on a holiday, the hearing was actually set for Tuesday, February 21.<sup>47</sup> At the hearing, the Magistrate ordered the release of Montalvo-Murillo with \$50,000 bond and other conditions because he was not deemed to be a flight risk or a danger to the community or persons therein.<sup>48</sup>

The District Court of New Mexico decided on review that, although nothing assured Montalvo-Murillo's appearance or the community's safety, Montalvo-Murillo should be released.<sup>49</sup> The court ruled that "the detention hearing had not been held upon respondent's first appearance as specified by section 3142(f), and that pretrial release on conditions was the appropriate remedy for violation of the statutory requirement."<sup>50</sup> The Tenth Circuit agreed and affirmed the district court's ruling.<sup>51</sup>

The Supreme Court reversed the Tenth Circuit, holding that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged."<sup>52</sup> According to the Court, "[T]here is no presumption or general rule that for every duty imposed upon the court or the government and its prosecutors there must exist some corollary punitive sanction for departures or omission, even if negligent."<sup>53</sup>

Thus, for one type of deadline—speed-seeking deadlines—the Supreme Court ruled that missing the statutory deadline, regardless of the mandatory language used, did not strip a court of any authority to act upon the provision to which the deadline relates.<sup>54</sup>

#### B. *Eberhart v. United States: Claims-Processing Deadlines*

In *Eberhart v. United States*, the Supreme Court considered the remedy for missing the deadline for filing a motion for a new trial pursuant to Rule 33(b)(2) of the Federal Rules of Criminal Procedure.<sup>55</sup> Rule 33(b)(2) provides that "any motion for a new trial grounded on any reason other than

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46. *Id.*

47. *Id.*

48. *Id.* at 715-16.

49. *Id.* at 716

50. *Id.*

51. *Id.*

52. *Id.* at 717.

53. *Id.*

54. *See id.* at 721 (stating "[w]e do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the government into complying with the statutory time limits").

55. *See* 546 U.S. 12, 13 (2005) (per curiam).

newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.”<sup>56</sup>

Eberhart was convicted of conspiracy to distribute cocaine.<sup>57</sup> On the final day for post-trial motions, Eberhart “moved for judgment of acquittal or, in the alternative, for a new trial,” raising as his sole argument that there was a “flaw in the transcript that had been published to the jury.”<sup>58</sup> About six months later, he filed an addendum to support his motion, which listed two additional grounds for relief—“[A]dmission of potential hearsay testimony into evidence, and the District Court’s failure to give a so-called ‘buyer-seller instruction’ to the jury.”<sup>59</sup> The government did not oppose the motion because of its untimeliness, but rather objected on its merits.<sup>60</sup>

The District Court for the Northern District of Illinois awarded Eberhart a new trial, concluding that although none of the three grounds alone, nor any two as a pair, would warrant a new trial, the three arguments taken together warranted a new trial in the interest of justice.<sup>61</sup> The government appealed the ruling, focusing on the untimeliness of Eberhart’s supplemental addendum and arguing that the district court abused its discretion in granting a new trial.<sup>62</sup> The Seventh Circuit reversed the district court, holding that the district court lacked jurisdiction to grant a new trial because the deadline in Rule 33 is a jurisdictional deadline which strips a court of jurisdiction to act once that deadline has lapsed.<sup>63</sup> According to the Seventh Circuit, even amendments to timely filed actions are outside the court’s jurisdiction to entertain.<sup>64</sup>

The Supreme Court reversed the Seventh Circuit,<sup>65</sup> holding that Rule 33 was not a jurisdictional deadline, but rather a claims-processing rule.<sup>66</sup> Claims-processing rules differ from jurisdictional rules in that claims-processing rules “assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.”<sup>67</sup> Jurisdictional rules, on

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56. FED. R. CRIM. P. 33(b)(2) (2005) (amended 2009).

57. *Eberhart*, 546 U.S. at 13.

58. *Id.*

59. *Id.*

60. *Id.* at 13-14.

61. *Id.* at 14.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 20.

66. *Id.* at 19.

67. *Id.*

the other hand, refer to “prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>68</sup>

Thus, *Eberhart* articulated a distinction between jurisdictional deadlines and claims-processing deadlines,<sup>69</sup> ruling that claims-processing deadlines may be missed without sanction as long as neither party asserts the missed deadline issue prior to a decision on the merits.<sup>70</sup>

### C. *Bowles v. Russell: Jurisdictional Conditions*

In *Bowles v. Russell*, the Supreme Court considered the penalty for missing a jurisdictional deadline such as filing a notice of appeal.<sup>71</sup> At issue in the case was Rule 4(a)(6) of the Federal Rules of Appellate Procedure, which reads: “The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered*, but only if all the following conditions are satisfied . . . .”<sup>72</sup>

*Bowles* was convicted of murder in 1999 for his participation in the beating death of Ollie Gipson and sentenced to imprisonment.<sup>73</sup> After an unsuccessful direct appeal, *Bowles* filed a habeas corpus application which was denied on September 9, 2003.<sup>74</sup> Following the date of entry of final judgment, *Bowles* failed to file a notice of appeal within thirty days, but he moved to reopen the appeals period for fourteen days pursuant to Rule 4(a)(6).<sup>75</sup> On February 10, 2004, the District Court for the Northern District of Ohio ordered the appeals period to be reopened, but not for the fourteen days pursuant to Rule 4(a)(6).<sup>76</sup> Rather, the court reopened the period for seventeen days, without explaining any reason for the longer period.<sup>77</sup> *Bowles* filed his notice of appeal within the seventeen days allowed by the court, but after the fourteen days required by Rule 4(a)(6).<sup>78</sup> The Sixth Circuit ruled that it lacked jurisdiction to hear the case because the notice of *Bowles*’ appeal failed to meet the deadline requirements of Rule 4(a)(6),

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68. *Id.* at 16.

69. *See id.*

70. *Id.* at 19.

71. *See* 551 U.S. 205, 206 (2007).

72. FED. R. APP. P. 4(a)(6) (emphasis added).

73. *Bowles*, 551 U.S. at 207.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

noting that such a deadline “is mandatory and jurisdictional” and “not susceptible to equitable modification.”<sup>79</sup>

The Supreme Court agreed with the Sixth Circuit.<sup>80</sup> The Court noted that “the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’”<sup>81</sup> Within constitutional bounds, the Court said, Congress holds the power to determine the subject-matter and class of cases that federal courts may hear.<sup>82</sup> According to the Court, “[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period . . . that limitation is more than a simple ‘claims-processing rule.’”<sup>83</sup>

Thus, *Bowles* suggests that the only type of deadline which strips a court of authority to extend it sua sponte is a jurisdictional deadline.

#### IV. United States v. Dolan

##### A. Statement of the Case

On February 8, 2007, Brian Dolan pled “guilty to a federal charge of assault resulting in serious bodily injury.”<sup>84</sup> The plea agreement stated that the court could order Dolan to pay restitution to his victim.<sup>85</sup> According to the presentence report, however, restitution was not optional—it was required.<sup>86</sup> In spite of this requirement, the court did not recommend an amount of restitution because it lacked sufficient information to do so.<sup>87</sup>

On July 30, 2007, the day of Dolan’s sentencing hearing, the district court judge “sentenced Dolan to 21 months imprisonment along with 3 years of supervised release.”<sup>88</sup> Even though ordering restitution was mandatory, the judge delayed doing so but warned Dolan that such a restitution order would be made in the future.<sup>89</sup> On August 8, the court entered a judgment that

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79. *Id.* at 207-08.

80. *Id.* at 208.

81. *Id.* at 209 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)).

82. *Id.* at 212-13.

83. *Id.* at 213.

84. *Dolan v. United States*, 130 S. Ct. 2533, 2537 (2010).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

stated restitution would not be entered at that time due to a lack of sufficient information regarding the amount owed.<sup>90</sup>

On October 5 (twenty-three days before the MVRA's ninety-day restitution deadline), the probation office "prepared an addendum to the presentence report . . . which reflected the views of the parties, and which the judge later indicated he had received."<sup>91</sup> Within the addendum, the amount of restitution due in the case totaled approximately \$105,000.<sup>92</sup>

The sentencing court scheduled Dolan's restitution hearing for February 4, 2008, almost three months after the MVRA's ninety-day deadline for ordering restitution had lapsed.<sup>93</sup> At the hearing, Dolan argued that the court could no longer order restitution, pointing out that the ninety-day deadline for ordering such restitution had already expired.<sup>94</sup> The court, however, did not find the argument convincing and ordered Dolan to pay restitution.<sup>95</sup> On appeal, the Tenth Circuit affirmed.<sup>96</sup>

Thus, the question before the Supreme Court concerned the remedy for missing the ninety-day deadline to impose restitution under § 3664(d)(5) of the MVRA, given that the text of the statute does not explicitly address the consequences of missing the deadline.

#### *B. The Court's Decision*

The Court began its discussion by noting that the parties did not dispute whether the ninety-day deadline had lapsed, whether the sentencing court had sufficient information to impose restitution prior to the deadline, or whether the court had any reasons for missing the deadline.<sup>97</sup> The only question before the Court was what remedy should be imposed, if any, for missing the ninety-day deadline.<sup>98</sup>

The Court determined the answer by looking to the "statutory language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve."<sup>99</sup> In some cases, according to the Court, the statutory deadline is a "jurisdictional" deadline—one that acts to cut off, for instance, "a court's authority to hear a case, to consider pleadings, or to act

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* at 2538.

98. *Id.*

99. *Id.*

upon motions that a party seeks to file.”<sup>100</sup> In such instances, allowing the deadline to expire results in an absolute bar of the court’s authority to disregard the deadline.<sup>101</sup> Such deadlines cannot be waived or extended for any equitable reasons.<sup>102</sup>

In other circumstances, the Court stated, a deadline is merely a tool for regulating the “timing of motions or claims brought before the court.”<sup>103</sup> Such deadlines are not a limitation on the court’s jurisdiction and may be classified as “claims-processing” rules.<sup>104</sup> The party who seeks the deadline’s protection forfeits that protection unless that party notifies the trial court that the other party missed the deadline.<sup>105</sup> For example, if a party wishes to benefit from the lapsing deadline (e.g., claim that a party lacks the ability to file for a new trial because they missed the deadline for doing so), that party must first have pointed out to the trial court, prior to a decision on the merits, that the deadline was in fact missed.

Finally, the Court noted that in other instances, a deadline “seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or public official of the power to take the action to which the deadline applies if the deadline is missed.”<sup>106</sup>

The Court decided that the ninety-day deadline imposed by the MVRA is a “speed-seeking” deadline and that when the deadline is missed, the court retains the power to order restitution pursuant to the MVRA.<sup>107</sup> The Court considered several factors in reaching this decision.

First, according to the Court, when a statute is silent as to the consequence of failing to comply with a timing provision, “federal courts will not in the ordinary course impose their own coercive sanction.”<sup>108</sup> In this context, a statute’s use of the word “shall” does not automatically bar an authority from taking action once the deadline has lapsed.<sup>109</sup>

Second, the Court considered the “primary weight” of the text and noted that the Act’s importance centers on “imposing restitution upon those convicted of certain federal crimes.”<sup>110</sup> The Court also noted that the MVRA

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100. *Id.* (citing *Bowles v. Russell*, 551 U.S. 205 (2007)).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990)).

107. *Id.* at 2539.

108. *Id.* (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 64 (1993)).

109. *Id.*

110. *Id.*

amended an older provision that permitted, but did not mandate, restitution orders, and emphasized that the wording of the statute mandates full restitution to victims “notwithstanding any other provision of law.”<sup>111</sup>

Third, the Court found that the procedural provisions included in the Act reinforce the primary substantive purpose of the statute to assure full restitution for victims of certain crimes.<sup>112</sup> The Court acknowledged that speed is indeed important, noting that several provisions do provide for timely fact-gathering to decide the proper restitution amount,<sup>113</sup> but decided that the speed sought is primarily for the benefit of the victims and only secondarily for the benefit of the defendant.<sup>114</sup>

The Court also paid close attention to § 3664(d)(5) of the Act, which reads: “If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of the losses in which to petition the court for an amended restitution order.”<sup>115</sup> Because this provision essentially allows a court to change the restitution amount at any point subsequent to the initial restitution order, the Court believed that in conjunction with the Act’s substantive purpose of providing full restitution, the speed sought by the deadline is designed for prompt restitution for the victim and not to provide certainty to defendants as to the amount of restitution.<sup>116</sup>

Fourth, the Court turned its attention to the harm that would be caused to third parties who are not responsible for missing the deadline.<sup>117</sup> Here, the victim of the crime would be deprived of receiving restitution not because *he* failed to meet the deadline, but because the *court* failed to meet the deadline.<sup>118</sup> The threat of such harm that would be imposed by an alternative interpretation of the statute strongly supports the idea that Congress did not intend forfeiture to be the penalty for missing the deadline.<sup>119</sup>

Fifth, the Court noted that it has considered the same issue with similar statutes and has refused to view the lapsing of the deadline as operating as a bar to action by the court.<sup>120</sup> In *Montalvo-Murillo*, the Court ruled that when a judicial officer missed a deadline imposed by the Bail Reform Act of 1984, which mandated that a hearing be held “immediately upon the person’s first

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111. *Id.* (citing 18 U.S.C. § 3664A(a)(1), (f)(1)(A)).

112. *Id.* at 2540.

113. *Id.* at 2539-40 (citing 18 U.S.C. § 3664(d)(1), (d)(5)).

114. *Id.* at 2540.

115. 18 U.S.C. § 3664(d)(5) (2000).

116. *Dolan*, 130 S. Ct. at 2540.

117. *Id.*

118. *See id.*

119. *Id.* (citing *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986)).

120. *Id.* (citing *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990)).

appearance before the judicial officer,” the judicial officer was not required to release the person.<sup>121</sup> Allowing the lapsed deadline to require the release of the detainee would controvert the aim of the Bail Reform Act—namely, preventing the release of dangerous detainees and avoiding the likely commission of crimes.<sup>122</sup>

In the case of the MVRA’s ninety-day deadline, denying the restitution order based on missing the deadline would defeat the Act’s purpose.<sup>123</sup> Also, such a remedy would be disproportionate to any harm inflicted upon the defendant through delay, especially in light of the fact the defendant in this case knew before the ninety-day deadline lapsed that restitution would be ordered.<sup>124</sup>

Sixth, a defendant possesses the ability to mitigate harm caused by a missed deadline, especially if the defendant “obtains the relevant information regarding the restitution amount before the 90-day deadline expires.”<sup>125</sup> Additionally, a defendant worried about missing the deadline may simply point out to the court the potential error, prompting the court to set a timely hearing.<sup>126</sup> In the event the court fails to meet the statutory deadline imposed, the defendant may resort to seeking mandamus.<sup>127</sup>

Because the six considerations just discussed led the Court to determine that the MVRA’s ninety-day deadline is a “speed-seeking” deadline, the Court held that “[t]he fact that a sentencing court misses the statute’s 90-day deadline, even through its own fault or that of the government, does not deprive the court of the power to order restitution.”<sup>128</sup>

### *V. Analysis of the Decision*

#### *A. The Court Eviscerated the Plain Meaning of the MVRA and Legislated from the Bench*

The central issue presented in *Dolan* implicates the bigger issue of statutory interpretation. The Court looked not only to the language of the statute, but also to its legislative purpose, citing the MVRA’s legislative history.<sup>129</sup> Detractors of the Court’s opinion, however, will focus on the

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121. *Id.* (quoting 18 U.S.C. § 3142(f)).

122. *Id.* at 2541 (citing *Montalvo-Murillo*, 495 U.S. at 720).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 2539.

129. *See id.* at 2540 (acknowledging the Court’s use of legislative history to interpret the



words alone of the statutory text, believing that the text is clear enough on its face to render a decision.<sup>130</sup> While resolution of this difference depends on whether one subscribes to the textualist or traditional theory of statutory interpretation, the Court's decision is about much more than how it interprets the statute; it is about whether or not it ultimately legislated from the bench.

The Supreme Court has previously stated that “[g]iven a straightforward statutory command, there is no reason to resort to legislative history.”<sup>131</sup> According to Justice Antonin Scalia, the reason a court should be bound by the text of the statute rather than the legislative purpose of the statute is because “[j]udges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, [judges] are not free to replace it with an unenacted legislative intent.”<sup>132</sup> Justice Scalia’s view of statutory interpretation sits squarely within the bedrock constitutional notion of separation of powers which serves to protect the integrity and independence of the different branches of government.<sup>133</sup> Indeed, even prior to the rise of Justice Scalia as the champion of the textualist school of thought, the Supreme Court wisely stated:

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rule of grammar. . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any *judicial addition* to the language of the statute.<sup>134</sup>

In this case, the majority looked to the purpose of the Act—providing full restitution to crime victims—and to the legislative history of the deadline provision, which they determined to have a speed-seeking intent primarily for the benefit of the victim and only secondarily for the benefit of the defendant.<sup>135</sup> To arrive at that conclusion, the Court used not only the legislative history of the MVRA, but also one of its enacted provisions.<sup>136</sup>

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purpose of ninety-day time limit).

130. *See id.* at 2546 (Roberts, C.J., dissenting) (noting that “the Court runs through a series of irrelevancies that cannot trump the clear statutory text”).

131. *United States v. Gonzalez*, 520 U.S. 1, 6 (1997).

132. *INS v. Cardoza Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

133. *See* 16A AM. JUR. 2D *Constitutional Law* § 239 (2009).

134. *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (emphasis added).

135. *See Dolan*, 130 S. Ct. at 2539-40.

136. *See id.* at 2540.

The Court interpreted § 3664(d)(5), which provides, “If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order,” to mean that Congress intended for restitution to be ordered after the ninety-day deadline has lapsed.<sup>137</sup> The Court then rhetorically asked the dissenters how their interpretation of the MVRA—that missing the ninety-day deadline strips a court of the authority to order restitution—would make any sense in light of the majority’s reading of the statute.<sup>138</sup>

The answer is that Congress not only absolutely intended victims to recoup full and accurately calculated restitution but also foresaw the need for the ability of a court to amend restitution past the ninety-day deadline. Congress anticipated that inaccuracies would occur when deciding the amount of restitution to be ordered. As such, Congress explicitly included in the MVRA a provision that gives a court the power to change the amount of a restitution order; however, that provision requires that the court make an *initial* restitution order that may be amended.<sup>139</sup> By allowing a court to order restitution, for the first time, after the ninety-day deadline has lapsed, the Court has essentially deleted a provision from the MVRA and replaced it with its own judicially created provision, ignoring the plain meaning of the statute as explicitly embodied in § 3664(d)(5), and thereby legislating from the bench.

The majority took legislative intent as *carte blanche* to effectuate the overarching goal of the MVRA, even in the face of a contrary plain reading of the statute that *requires* a timely restitution order. The Supreme Court has already spoken on the issue of allowing legislative intent to run awry in statutory interpretation: “no legislation pursues its purposes at all costs. . . . it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”<sup>140</sup>

In addition to ignoring the plain language of the statute, the majority’s decision may inevitably frustrate the purpose of the deadline provision in the MVRA. The United States Court of Appeals for the Second Circuit, after review of the MVRA’s ninety-day deadline provision, determined that “the purpose behind the statutory ninety-day limit on the determination of victims’ losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful

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137. *Id.*

138. *Id.* at 2544.

139. *See* 18 U.S.C. § 3664(d)(5) (2000).

140. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

dissipation of defendants' assets."<sup>141</sup> By allowing a court to miss the ninety-day deadline for ordering restitution with impunity, the Court opens the door for victims to lose their ability to collect restitution by giving defendants a larger window of time to dispose of their assets.

*B. The Court Ignored the Rule of Lenity and Violated the Separation of Powers*

The Court chose not to follow the plain language of the statute in its interpretation of the MVRA, thus, it willingly waded into the uncertain waters of statutory construction and interpretation. By doing so, the Court ignored default rules of interpretation, thereby violating the constitutional principle of separation of powers. One default rule for interpreting ambiguous criminal statutes is the rule of lenity: "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."<sup>142</sup> Lenity provides that ambiguous criminal statutes are to be interpreted against the government. The rule of lenity, however, is not automatically invoked anytime ambiguity exists; it is invoked only when a "grievous ambiguity or uncertainty in the language and structure of the Act"<sup>143</sup> remains after "seiz[ing] everything from which aid can be derived"<sup>144</sup> and when "such an interpretation can be based on no more than a guess as to what Congress intended."<sup>145</sup> The Court in *Dolan* quickly dismissed Dolan's argument for the application of the rule of lenity and argued that the rule has not been applied "to a statutory time provision in the criminal context" and that the ambiguity was not sufficient to warrant the use of the rule in this context.<sup>146</sup>

Undoubtedly, the Court did not believe that there was any "grievous" ambiguity warranting the rule of lenity's use.<sup>147</sup> Indeed, it is difficult to imagine what type of ambiguity in a deadline provision is grievous enough to warrant the rule of lenity's traditional invocation. The rule has traditionally been invoked to ensure that defendants receive proper notice concerning what acts are prohibited, with a goal of avoiding any "grievous" due process issues while also reinforcing the notion that the judiciary does not share the same legislative powers as the legislature.<sup>148</sup> At least one scholar, however, has

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141. *United States v. Zakhary*, 357 F.3d 186, 191 (2d Cir. 2004).

142. *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

143. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

144. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

145. *Ladner v. United States*, 358 U.S. 169, 178 (1958).

146. *Dolan v. United States*, 130 S. Ct. 2533, 2544 (2010).

147. *See id.*

148. Spiro, *supra* note 3, at 107.

argued that while notice does play a role in statutory interpretation, “actual notice seems less central than does separation of powers.”<sup>149</sup> From the perspective of separation of powers, there may be no more grievous of an ambiguity than one that results in one branch of government encroaching upon the power of another branch, such as the Supreme Court rewriting legislation. Yet this is what the Court in *Dolan* was forced to do by abandoning the straightforward command of the MVRA’s text. The Court forced itself to disregard the express requirement of issuing an *initial* restitution order prior to the deadline and, instead, imposed an optional deadline.

As a statutory canon that favors the politically powerless, the application of the rule of lenity serves the purpose of effectuating clarity in statutes and “elicit[ing] legislative reactions that more precisely indicate which preferences are enactable.”<sup>150</sup> It seems counterintuitive, as a bare matter of legislative intent, for a court to interpret *any* criminal statute in favor of criminal defendants since most legislatures tend to draft such statutes with the intent of punishing criminals.<sup>151</sup> However, by interpreting criminal statutes narrowly, problems are more likely to be addressed by legislative amendments that clarify the statute’s meaning in light of an unfavorable interpretation by a court, thereby maintaining the expected separation of powers between the judicial and legislative branches.<sup>152</sup>

The Court in *Dolan* was also concerned that the rule of lenity previously had not been applied to a criminal statute’s time provision.<sup>153</sup> Yet, such an application of the rule of lenity is not a novel idea. In *United States v. Jolivette*, the United States Court of Appeals for the Sixth Circuit faced the exact issue presented in *Dolan*, namely, whether the lapsed ninety-day deadline in the MVRA strips a court of authority to order restitution.<sup>154</sup> The Sixth Circuit did not apply the rule of lenity because it found the command of Congress present in the plain meaning of the statute, prohibiting a court from ordering restitution past the deadline.<sup>155</sup> It stated, however, that had the intent of Congress not been apparent in a plain reading of the statute, the court

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149. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 64 (1998).

150. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 168 (2008) (emphasis added).

151. *Id.* (stating “[m]ost legislative polities are hostile to criminal defendants”).

152. *Id.* at 169.

153. *Dolan v. United States*, 130 S. Ct. 2533, 2544 (2010).

154. *See generally* 257 F.3d 581 (6th Cir. 2001).

155. *Id.* at 584.

would have “appl[ied] the well-settled rule requiring that any ambiguity in criminal statutes be resolved against the government and in favor of the criminal defendant.”<sup>156</sup>

*Dolan* presented the first opportunity for the Court to apply the rule of lenity to a deadline provision of a criminal statute.<sup>157</sup> Absent a plain textual meaning that clarified that a sentencing court must order restitution within a specified time period, the Court faced an ambiguity as to the consequences of a lapsed deadline. Although the Court sought to clarify the legislative intent of Congress, ambiguity remains as to why Congress would include a mandatory deadline and an additional provision providing for amending a restitution order, if it simply intended for a court to be able to violate the deadline with impunity. Moreover, although the Court recognized that the rule of lenity has never been applied by the Supreme Court to a timing provision, an ambiguity which causes the grievous mistake of not maintaining the separation of powers between the Court and Congress should be enough to invoke the rule of lenity in a deadline case of this nature.

### C. Montalvo-Murillo: *A False Parallel*

One of the weakest aspects of the majority’s opinion in *Dolan* is its reference to, and reliance upon, *United States v. Montalvo-Murillo* as a parallel case.<sup>158</sup> This reliance weakens the *Dolan* opinion not only because of the Court’s use of an arbitrary category for interpreting a statute, but also because the circumstances of *Montalvo-Murillo* do not parallel the circumstances in *Dolan* as well as the majority would like. Specifically, the result in *Dolan* effects a stated legislative goal but does not effectuate any common law goal of punishment in criminal law, while the result in *Montalvo-Murillo* does both.

*Montalvo-Murillo* addressed the appropriate remedy for missing the hearing deadline provision of the Bail Reform Act of 1994.<sup>159</sup> That provision states that a detention hearing “shall be held immediately upon the person’s first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.”<sup>160</sup> The Court explicitly held that

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156. *Id.* (dicta) (citing *Staples v. United States*, 511 U.S. 600, 619, n.17 (1994)).

157. *See Dolan*, 130 S. Ct. at 2544 (noting that no example of the rule of lenity’s application to a time provision of a criminal statute has been provided).

158. *See id.* at 2538 (referencing *Montalvo-Murillo* as an example of a time-related directive); *see also id.* at 2540-41 (comparing the Bail Reform Act time provision with that of the Mandatory Victims’ Restitution Act’s deadline provision).

159. 495 U.S. 711, 713 (1990).

160. 18 U.S.C. § 3142(f) (2006).

“a failure to comply with the first appearance requirement does not defeat the Government’s authority to seek detention of the person charged.”<sup>161</sup> Additionally, the Court emphasized that its ruling was consistent with its interpretation of the purpose of the Bail Reform Act of 1984 “as an appropriate regulatory device to assure the safety of persons in the community and to protect against the risk of flight.”<sup>162</sup>

In *Dolan*, the Court explicitly paralleled its reasoning for effectuating the purpose of the MVRA to that of *Montalvo-Murillo*, saying, “As in *Montalvo-Murillo*, [to hold otherwise] would defeat the basic purpose of the Mandatory Victims Restitution Act.”<sup>163</sup> The majority’s ruling in *Dolan*, however, blatantly parallels the two cases without a close examination of the circumstances in each case and ignores a key difference between them.

The key difference between the decisions in *Montalvo-Murillo* and *Dolan* is that the result in *Montalvo-Murillo* furthers a well-established goal of criminal law writ large, which is to restrain dangerous individuals from harming society,<sup>164</sup> while the result in *Dolan* simply furthers the MVRA’s narrower legislative goal of providing full restitution to victims of certain already-proscribed crimes.<sup>165</sup> Without doubt, the legislative intent is considered by many to be an important factor in interpreting the meaning of a statute,<sup>166</sup> but the Supreme Court has also stated that this factor should not be pursued at all costs.<sup>167</sup>

From the textualist perspective, the decision in *Montalvo-Murillo* runs counter to a plain reading of the text of the Bail Reform Act of 1984 which commands that a detention hearing be held at the first appearance before a judicial officer.<sup>168</sup> The *Montalvo-Murillo* decision, however, at least reinforces the commonly recognized goal and theory of punishment in criminal law: “emphasis is more on the prevention of the undesirable than on the encouragement of the desirable.”<sup>169</sup> By allowing the defendant’s release in the face of a lapsed deadline, the Court would have made a ruling that ran counter to the very foundation of criminal law, which is to protect citizens

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161. *Montalvo-Murillo*, 495 U.S. at 717.

162. *Id.* at 719-20.

163. *Dolan*, 130 S. Ct. at 2541.

164. WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(2) (5th ed. 2010).

165. The purpose of this argument is not to belittle or relegate the role of restitution in the criminal context, but rather to illustrate the difference in circumstances that, in my opinion, should have been taken into account when deciding *Dolan*.

166. *See* 73 AM. JUR. 2D *Statutes* § 61 (2001).

167. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

168. 18 U.S.C. § 3142(f) (2006).

169. LAFAVE, *supra* note 164, § 1.5.

from the unscrupulous. Specifically, such a ruling would have failed to effectuate the criminal law goal of “restraint.”<sup>170</sup> Indeed, states (the traditional arbiters of criminal law) have announced a similar rationale to statutory interpretation, with one court stating:

It is within the province of the court, and, indeed, it is its duty, to render such an interpretation of the laws as will best subserve the ends of justice and the protection of the public, in so far as this may be done in accordance with well-established rules of construction.<sup>171</sup>

The decision announced in *Dolan*, however, does not share the same foundational and factual support that existed in *Montalvo-Murillo*. A legitimate parallel cannot be made. Unlike *Montalvo-Murillo*, the decision in *Dolan* furthers a legislative goal that exists separate from the traditional goals underpinning the foundation and existence of criminal law. By allowing the deadline to lapse without consequences, the Court not only strayed from a plain reading of the language in the MVRA requiring a timely restitution order—mandatory language which Congress chose to use—but the majority’s decision also failed to effectuate any common law goal of punishment central to criminal law.

In *Dolan*, Brian Dolan suffered the consequences of his actions. He was sentenced to a term of imprisonment and had already been released from prison when the district court ordered restitution on April 24, 2008.<sup>172</sup> Thus, the district court imposed its restitution order upon Dolan after he had served his prison sentence.<sup>173</sup> Unlike the Court in *Montalvo-Murillo*, the Court in *Dolan* lacked any broader goals of criminal law to justify its decision to allow legislative intent to override the plain meaning of the MVRA. Unlike *Montalvo-Murillo*, society was neither in danger nor in need of protection from Brian Dolan. Unlike *Montalvo-Murillo*, ignoring the plain meaning of the statute did not serve a broader purpose of criminal law.

### *VI. Conclusion*

Some of the leading scholars on statutory interpretation summed up the state of affairs pessimistically, but accurately, stating, “The hard truth of the matter is that American courts have no intelligible, generally accepted, and

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170. See *id.* § 1.5(a)(2).

171. *Charleston & W.C. Ry. Co. v. Gosnell*, 90 S.E. 264, 267 (S.C. 1916).

172. *Dolan v. United States*, 130 S. Ct. 2533, 2546 (2010) (Roberts, C.J., dissenting).

173. See *id.*

consistently applied theory of statutory interpretation.”<sup>174</sup> Indeed, one current member of the Supreme Court has stated, “Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.”<sup>175</sup> Such state of affairs has led at least one scholar to argue that courts should give a stare decisis effect to a court’s interpretation methodology to provide continuity and predictability within a court system.<sup>176</sup> Yet, lacking consistency is only one effect of failing to have a uniform method of statutory interpretation. The Court’s decision in *Dolan* illustrates a much graver effect of allowing courts to stray too far from the written words in a statute—encroachment upon legislative powers by the judiciary.

In *Dolan*, the Court chose to ignore the plain meaning of the statute’s language and instead embarked on a journey through the legislative history of the MVRA and its ninety-day restitution order deadline in order to arrive at a decision that essentially rewrites the language of the MVRA itself. By doing so, the Court in *Dolan* veered off course from its role as an interpreter of the law and wandered into legislative territory by essentially deleting provisions that Congress explicitly wrote into the MVRA. When the Court chose to ignore the plain meaning of the MVRA’s language, it was forced to enter into a mental exercise of divining the non-enacted intent of Congress. Along the way, the Court ignored default rules for statutory construction and ignored key differences in cases that were essential to its reasoning. By ignoring the plain language of the MVRA and a statutory default rule like the rule of lenity, the Court missed the opportunity to avoid blurring the separation of powers and legislated from the bench.

*Alexander J. Sisemore*

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174. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

175. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14 (1997).

176. *See Foster, supra* note 2, at 1870.