

No. 24-482

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

**BRIEF OF *AMICI CURIAE* RESTITUTION
SCHOLARS SUPPORTING PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are leading restitution scholars Cortney Lollar and Lula Hagos. Professor Lollar is a nationally recognized expert in criminal law, criminal procedure, and remedies, with a focus on criminal restitution. Her scholarship has been published in top law reviews and she has provided case analysis for major media outlets. She has also served as a public defender. Professor Hagos is an Associate Professor of Clinical Law at George Washington University Law School and Director of the Criminal Defense and Justice Clinic. Her scholarship examines the role of restitution within the broader framework of financial punishment in the criminal legal system. She has a decade of experience as a public defender at both the state and federal levels.

Based on their scholarly knowledge on restitution, *amici* submit this brief to urge the Court to reverse the judgment of the Eighth Circuit.

SUMMARY OF ARGUMENT

This case presents a question of critical importance to the administration of criminal justice in the United States: whether the *Ex Post Facto* Clause places any limits on the retroactive financial liability a person can be forced to shoulder as punishment for a previously committed crime.

This brief makes two points essential to understanding why the *Ex Post Facto* Clause applies in these circumstances. *First*, criminal restitution under the Mandatory Victims Restitution Act (MVRA) is not the same as civil restitution, but rather functions as a criminal fine or punitive damages award. *Second*, restitution under the MVRA is punitive by design, as evident from the role

¹ No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

it plays in criminal proceedings, the myriad collateral consequences tied to nonpayment, and the debilitating accrual of interest on restitution awards. These consequences are nonsensical if the restitution award itself is not a punishment.

We urge the Court to side with the Third, Fifth, Sixth, and Eleventh Circuits in holding that restitution under the MVRA is penal and that retroactive application of the MVRA thus violates the *Ex Post Facto* Clause.

ARGUMENT

I. CRIMINAL RESTITUTION IN THE MVRA IS NOT “RESTITUTION” AS THAT TERM IS COMMONLY UNDERSTOOD

Criminal restitution under the MVRA is nothing like civil restitution as that term is widely understood. Civil restitution provides disgorgement or relinquishment of unlawful gains. Criminal restitution under the MVRA often does not. Rather, restitution under the MVRA measures the amount a defendant must pay on the basis of his criminal culpability, disregarding the defendant’s ability to pay and thus the victim’s likelihood of recoupment. So-called “restitution” under the MVRA is thus akin to criminal fines (and other punitive remedies) that have long been held to be subject to the *Ex Post Facto* Clause.

The touchstone of “restitution” as that term is commonly understood is the disgorgement of ill-gotten gains. As the classic Restatement formulation provides, “a person who has been unjustly enriched at the expense of another is required to make restitution to the other.” Restatement (First) of Restitution §1 (1937); *see Restitution*, Black’s Law Dictionary (12th ed. 2024) (“A body of substantive law in which liability is based not on tort or contract but on the defendant’s unjust enrichment.”). Civil restitution is thus a *gains*-based

remedy, in contrast to damages which are *loss*-based. Cortney E. Lollar, *Punishment Through Restitution*, 34 Fed. Sent’g Rep. 98, 98 (2022); *id.* at 99 (citing *United States v. Newman*, 144 F.3d 531, 538-42 (7th Cir. 1998)) (“Historically, restitution only required a person to disgorge their unlawful gains, but these modern restitution statutes also impose an obligation to compensate victims for losses stemming from the crime of conviction.”); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 101 (2014); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1878 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1799 (1992); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. Rev. 201, 205-07 (1996). The law of civil restitution and unjust enrichment is concerned with restoring to the plaintiff that which the defendant unfairly obtained, rather than compensating the plaintiff for her loss. The ultimate goal is to deprive a wrongdoer of ill-gotten gains, preventing one party from being unjustly enriched at another’s expense. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 99 (“Traditionally, in both the civil and criminal contexts, courts used restitution to financially restore a person economically damaged by another’s actions, thereby preventing the unintended beneficiary from being unjustly enriched at the aggrieved party’s expense.”). Civil restitution is thus sometimes described as effectuating disgorgement: It measures the remedy by the defendant’s gain and compels the disgorgement of that gain back to the plaintiff or rightful owner. This serves a corrective justice function by undoing the transfer of value that should not, in fairness, be retained by the defendant. Restatement (Third) of Restitution and Unjust Enrichment §§ 42, 51 (2011).

By contrast, the MVRA in practice does not impose “restitution” of that sort. The statute imposes “restitution” as a proxy for criminal culpability. In that way, MVRA restitution is akin to criminal fines and punitive damages (along with other punitive remedies), which, in sharp contrast to civil restitution, are imposed to punish the defendant for misconduct and deter such conduct by making an example of the wrongdoer. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 101. Unlike civil restitution, criminal fines and punitive damages are similarly tied neither to the plaintiff’s loss nor the defendant’s gain. Instead, they are assessed in view of the defendant’s degree of fault or malice and the need to achieve punishment (often guided by factors like reprehensibility and proportionality). *Id.* at 133; *see also* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 Mich. L. Rev. 2477, 2483 (1997) (“By selecting an affliction of the appropriate form and severity, the community expresses condemnation of the wrongdoer and reaffirms its commitment to the values that the wrongdoer’s own act denies.”).

MVRA “restitution” is expressly *not* about the repayment of ill-gotten gains. *See* 18 U.S.C. § 3664(f)(4)(A)-(B) (“An in-kind payment described in paragraph (3) may be in the form of—(A) return of property; (B) replacement of property”). MVRA restitution is calibrated to the scope of the defendant’s wrongdoing and the full harm caused by the offense. *See United States v. Paroline*, 572 U.S. 434, 459-60 (2014) (explaining factors considered in determining restitution); *United States v. Leahy*, 438 F.3d 328, 337-38 (3d Cir. 2006); Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 101. Unlike a traditional civil restitution or unjust enrichment remedy, restitution under the MVRA compels the offender to *fully repair the damage* caused to victims, even if that amount *exceeds* the offender’s personal

benefit from the crime. Lula A. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. 469, 475 (2025) (“Today, courts have embraced a broad conception of restitution which ostensibly compensates for a range of intangible and noneconomic harms, both present and future.”); Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 132 (similar). And that amount is tied to the victims’ losses, which serves as a proxy for the gravity of the offense and the extent of harm inflicted. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 97, 101; 18 U.S.C. § 3664(f)(1)(A) (“In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses . . .”). But because restitution purports to compensate for the full harm caused by the offense, in practice that has meant defendants are held accountable for a broad range of losses, including uncharged conduct and intangible and potential future losses. In fact, loss is now broadly interpreted to account for conduct where there is no victim or financial loss at all. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 485-86 (“[C]ourts [ordering restitution] also began holding defendants financially accountable for a wide range of conduct beyond the convicted offense ... includ[ing] conduct that is not formally charged, that is without an identifiable victim, and even for which the defendant has been acquitted.”); *id.* (collecting cases); Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 98 (“Even when a victim suffers no financial loss, courts order restitution.”). In this way, MVRA restitution operates like punitive damages in civil law, where the sanction corresponds to the egregiousness of the defendant’s conduct and its consequences for the victim. *Id.* at 101. In other words, both punitive damages and MVRA restitution use the magnitude of harm (and by extension, the defendant’s culpability) as the measure of the financial penalty, rather

than limiting liability to the offender's profit or unjust enrichment.

Congress stated at the time of its enactment that the MVRA reflects goals beyond simply making victims whole. The Senate Report states that mandatory restitution is needed not only to compensate victims but also to ensure offenders “realize[] the damage caused by the offense” and “pay[] the debt owed to the victim as well as to society.” Bridgett N. Shephard, Note, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution As Either A Criminal or Civil Law Concept*, 18 Lewis & Clark L. Rev. 801, 811 (2014) (quoting S. Rep. No. 104-179, at 12 (1996)). The House Report stated that the Act was “an important step forward in ensuring ... accountability for convicted criminals.” H.R. Rep. 104-16, at 4-5 (1995).

Legislative testimony leading up to the MVRA confirms Congress's understanding of criminal restitution's punitive character. The Judicial Conference of the United States had cautioned that because “85 percent of all Federal defendants are indigent,” making restitution mandatory “will not lead to any appreciable increase in compensation to victims of crime.” S. Rep. No. 104-179, at 18. Congress was not dissuaded. In response, the Senate Judiciary Committee explained that it “believe[d] that this position underestimates ... the potential penalogical [sic] benefits of requiring the offender to be accountable for the harm caused to the victim.” *Id.*

Like a criminal fine, restitution under the MVRA is a mandatory part of the sentence in qualifying cases. 18 U.S.C. § 3663A(c)(1) (specifying that mandatory restitution “*shall apply in all* sentencing proceedings” for specified offenses) (emphasis added); Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 475; Lollar,

What Is Criminal Restitution?, 100 Iowa L. Rev. at 103. It is imposed without regard to the defendant's economic circumstances, 18 U.S.C. § 3664(f)(1)(A), reflecting that the sanction is principle-driven rather than tailored to the offender's ability to pay. Punitive damages and criminal fines likewise focus on the need for deterrence and punishment, even if the payment is beyond the defendant's capacity to pay. And a restitution judgment, like a criminal fine, creates a lien in favor of the government and is enforceable by the government for many years after judgment (in the MVRA's case, for 20 years or more). 18 U.S.C. § 3613(c) ("A fine imposed pursuant to ... an order of restitution made pursuant to sections ... 3663A ... is a lien in favor of the United States on all property and rights to property of the person fined...."); see *United States v. Ridgeway*, 489 F.3d 732, 738 (5th Cir. 2007). Restitution obligations are also not dischargeable in bankruptcy, just as criminal fines are not, because they are treated as penalties to promote the State's penal goals. *Kelly v. Robinson*, 479 U.S. 36, 53 (1986). Because it is mandatory, harm-based, nonnegotiable, and enforced like a criminal fine, MVRA restitution is, in substance and effect, a punitive sanction—nothing like civil restitution.

That restitution orders grow out of criminal proceedings, and are imposed as part of a criminal sentence, removes all doubt that they are punitive. Notably, the victim's role in criminal restitution is limited—the victim cannot negotiate away or independently settle a restitution obligation, and the court must impose full restitution regardless of any private agreements. This underscores that the *target* of the sanction is the offender's wrongdoing itself, not simply the victim's loss as a private claim. In fact, courts refuse to allow "privately negotiated end runs around the criminal justice system" in lieu of restitution, precisely

because the State’s interest in punishment and deterrence must be vindicated. Catharine M. Goodwin, *Imposition and Enforcement of Restitution*, *Fed. Probation* 13 (June 2000), <https://bit.ly/4l4Eozs> (quoting *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993)). As the Court explained in *Kelly v. Robinson*, “[b]ecause criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, ... restitution orders imposed in such proceedings operate ‘for the benefit of’ the State.” 479 U.S. at 53. And “[t]he sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.” *Id.*

The constellation of unique collateral consequences tied to the non-payment of criminal restitution further underscores its unique punitive nature—and how it is utterly unlike civil restitution. These collateral consequences can be “profound.” *Hester v. United States*, 586 U.S. 1104, 1106 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting). Most defendants cannot pay restitution orders, Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 477, meaning interest accrues under federal law, *id.* at 491; 18 U.S.C. § 3612(f) (unpaid restitution debt over \$2,500 accrues interest daily unless waived). And given that criminal defendants often cannot pay and have little earning power, the interest on restitution is *itself* punitive. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 495 (noting most incarcerated individuals are indigent); *id.* at 500 (describing the inhibited earnings growth following incarceration). Finally, unpaid interest only adds to a defendant’s criminal restitution debt. Because the consequences of failing to pay accruing interest are essentially identical to the consequences of failing to pay restitution, this interest serves only to further entrench defendants without means in the criminal legal system.

See 18 U.S.C. § 3612 (noting default is possible from unpaid restitution, including unpaid interest); Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 493.

Punitive interest is not the only serious collateral consequence tied to non-payment of restitution. “Failure to pay restitution results in a defendant’s continued disenfranchisement, suspension of her driver’s license, continued court supervision, and constant threat of re-incarceration.” Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 123. Additionally, most states suspend a defendant’s right to serve on a jury, run for public office, and possess a firearm. See, e.g., Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 501; Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 127, 129. Beyond incarceration, unpaid restitution often leads to ongoing supervision and monitoring, effectively extending a person’s punishment long after their sentence has ended. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. at 503. “Each of these is a consequence that typically results from a criminal conviction, and the effects are no different with punitive compensation.” Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. at 123.

Collectively, these statutory mandates, legislative history, and judicial pronouncements demonstrate that MVRA restitution functions far more like a traditional criminal fine or punitive damage—designed to punish and deter wrongdoing—than anything resembling “restitution” as that word is commonly understood.

II. CRIMINAL RESTITUTION IS SUBJECT TO THE *EX POST FACTO* CLAUSE

Given the punitive nature of criminal restitution under the MVRA, the application of the *Ex Post Facto* Clause to MVRA restitution is straightforward.

The Supreme Court has made clear that “if the intention of the legislature was to impose punishment, that ends the inquiry.” *Smith v. Doe*, 538 U.S. 84, 92 (2003). But even if the legislature intended a civil scheme, a court must still determine whether the scheme is “so punitive either in purpose or effect as to negate [the State’s] intention” to deem it civil. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). Although courts “ordinarily defer to the legislature’s stated intent,” “clear[] proof” that the scheme is punitive in its effect will suffice to override that intent and transform a civil label into a criminal penalty. *Id.* (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997); *United States v. Ursery*, 518 U.S. 267, 290 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)).

Here, as detailed above, MVRA restitution is imposed as part of a criminal sentence, serves punitive and deterrent aims, and operates with all the hallmarks of a criminal penalty—including mandatory imposition, disregard for ability to pay, and government enforcement through liens and incarceration. That is more than sufficient to trigger *Ex Post Facto* Clause protection.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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