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IN THE SUPREME COURT OF THE UNITED STATES

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DOYLE RANDALL PAROLINE, :

Petitioner : No. 12-8561

v. :

UNITED STATES, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 22, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

STANLEY G. SCHNEIDER, ESQ., Houston, Texas; on behalf of Petitioner, appointed by this Court.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent United States.

PAUL G. CASSELL, ESQ., Salt Lake City, Utah; on behalf of Respondent Amy Unknown.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-8561, Paroline v. United States.

Mr. Schneider.

ORAL ARGUMENT OF STANLEY G. SCHNEIDER,
ON BEHALF OF THE PETITIONER,
APPOINTED BY THIS COURT

MR. SCHNEIDER: Mr. Chief Justice, and may it please the Court:

This is a case about statutory construction. Specifically under 18 U.S.C. 2259, must a victim's -- victim's losses be proximally caused by a defendant's offense conduct before a sentencing judge can award restitution. The short answer to the question is all losses must be proximately caused.

Eleven courts of appeals and the government agree that this circuit ignored the plain text of the statute and the enumerated enforcement provisions of 3664 to craft a restitution scheme where the possession of two images of child pornography resulted in the award of \$3.4 million to Doyle Paroline which was strictly, jointly and severally liable.

And my time before the Court was to address

1 first why the Fifth Circuit decision is incorrect, and
2 second, why the government's concept of aggregate
3 causation conflicts with its statutory burden of proof
4 contained in 3664(e).

5 JUSTICE ALITO: Well, before -- before you
6 do that, could you explain why there is an issue of
7 proximate causation here? Why -- why isn't there
8 clearly proximate cause? Why is it -- why does it
9 matter?

10 MR. SCHNEIDER: Well, I think there has to
11 be -- in all restitution cases, the issue is whether or
12 not the person's conduct caused the harm and losses.
13 And harm and losses are two different things.

14 JUSTICE ALITO: Yes. But why -- why isn't
15 the issue here a question of factual causation? What
16 losses proximately caused -- is proximately caused by
17 the possession of child pornography?

18 MR. SCHNEIDER: That's a fact-intensive
19 question and that's what the district court has to
20 determine, whether on the facts presented, there are
21 identifiable losses that were caused by the defendant's
22 conduct and there can be.

23 JUSTICE SOTOMAYOR: It seems you're
24 confusing proximate cause with cause in fact. They are
25 two legal requirements but not the same. Proximate

1 cause is foreseeability. There's no argument, I think,
2 that anyone who possesses child pornography knows that
3 the individual depicted is going to feel invaded by that
4 viewing. So there's no issue that the person is hurt.
5 The question is a different one, which is the cause in
6 fact. I think that's what my colleague Sam Alito was
7 talking about. So why do you continue to talk about
8 proximate cause when it's a different concept that's at
9 issue?

10 MR. SCHNEIDER: Well --

11 JUSTICE SOTOMAYOR: Is her treatment -- I
12 think you're arguing that her treatment has to be a "but
13 for" this possession.

14 MR. SCHNEIDER: I think they go hand in hand
15 because when dealing with proximate cause, would the
16 conduct -- is the losses the natural sequence from the
17 conduct and the result. And what we're dealing with is
18 would the losses have occurred but for the conduct.

19 And in this situation -- in this case where
20 the damage model was created six months before the
21 notice is received, then you don't have the relationship
22 between the loss and the conduct or the notice of the
23 conduct. And it's a real problem. But the -- the
24 important consideration in interpretation of the statute
25 is the government's burden of proof under 3664(e).

1 JUSTICE GINSBURG: Why do we -- why do we --

2 JUSTICE KENNEDY: Would you agree -- would
3 you agree that the -- the losses here were the proximate
4 result at least of the aggregate actions of all the
5 offenders? Would you go that far?

6 MR. SCHNEIDER: Justice Kennedy, the problem
7 with aggregate causation does not apply --

8 JUSTICE KENNEDY: Would -- would you agree
9 that it is the proximate result of the aggregate actions
10 of all the offenders?

11 MR. SCHNEIDER: It would be a harm, but
12 not --

13 JUSTICE KENNEDY: Pardon me. A proximate
14 harm, right?

15 MR. SCHNEIDER: But the problem is when
16 you're dealing with aggregate causation, that conflicts
17 with the statutory burden of proof that the government
18 has under 3664(e), which is made applicable to the 2059
19 under section (b)(2), and you'll find 3664(e) at
20 Appendix 22 to our merits brief. The --

21 JUSTICE GINSBURG: Why -- why should we get
22 to that question when we have what seems to be a clear
23 order from Congress, and it is in 2259(a). It says:
24 "The court shall -- shall order restitution for any
25 offense under this chapter." It sounds like that's a

1 direction that if there's an offense under this chapter,
2 which is undisputed there is, the court shall order
3 restitution.

4 MR. SCHNEIDER: Only if -- if the losses are
5 the result of the offense, because the government's
6 burden of proof is that they must demonstrate by a
7 preponderance of the evidence that the losses sustained
8 by the victim are the result of the offense.

9 JUSTICE GINSBURG: Well, it doesn't --

10 JUSTICE KENNEDY: My question is -- my
11 question is why isn't it -- and you were going to point
12 to the statute -- why isn't it at least the result of
13 the aggregate number -- aggregate offenders?

14 MR. SCHNEIDER: It's on the indictment.
15 Only one person is charged and --

16 JUSTICE KENNEDY: But he is -- he is one of
17 the offenders in the aggregate.

18 MR. SCHNEIDER: He's not -- it's not in the
19 indictment. No one else is in -- is in front of the
20 sentencing judge. The statute 3664(e) and Section (f),
21 (b)(3)(F), all talk about "the offense," and "the
22 offense" is normally -- this Court has recognized that
23 when you talk about "the offense," it's the offense of
24 conviction.

25 JUSTICE KAGAN: Mr. Schneider, on your view

1 if only one person viewed the pornography, that person
2 would be responsible for the entire damages, but if a
3 thousand people viewed the pornography and the harm was
4 that much greater, nobody would be in -- would be on the
5 hook for restitution. How could that possibly make
6 sense?

7 MR. SCHNEIDER: Justice Kagan, that's not
8 what -- there are numerous cases where someone who looks
9 at -- possesses child pornography has been shown to be
10 liable for losses and restitution and some individual
11 cases that it's not. And it's fewer cases than not are,
12 again, no restitution because there's no losses. The
13 losses in -- it all depends on the facts.

14 In this case, the district judge carefully
15 weighed the evidence. In this case, unlike any other
16 case, there are competing experts that the judge,
17 district judge, played -- acted as a gatekeeper of the
18 forensic science and with the challenge to the
19 methodology that was presented by Amy's experts, the
20 judge left no alternative because there was no
21 explanation. And that methodology, faulty methodology,
22 was part of his decision that he recognized.

23 JUSTICE BREYER: Well, what's the answer,
24 though, to the problem, forgetting this case? There's a
25 problem in child pornography cases. Congress clearly

1 wants restitution. Makes sense to me. But if a
2 thousand people look at it, then each one can say: But
3 I didn't cause more than a tiny fraction at most, and so
4 there virtually is no restitution; right? Now, every
5 one of the thousand says that, truthfully, and so
6 therefore the victim gets no restitution -- opposite of
7 what Congress wanted.

8 But their answer in the lower court was:
9 We'll make each one of those thousand liable for the
10 whole thing. The government's answer is aggregate
11 cause. It's called a concept that they've sort of
12 created, but it's there to answer the problem. What's
13 your answer to the problem?

14 MR. SCHNEIDER: It's a -- it's a very
15 difficult question.

16 JUSTICE BREYER: Yeah, it is.

17 (Laughter.)

18 MR. SCHNEIDER: And -- and the answer is
19 to -- multifaceted because the government's burden of
20 proof for restitution applies to all restitution
21 statutes. It's the same standard. And you can't carve
22 out one standard of causation for one crime because it's
23 a heinous crime and, as repugnant as child pornography
24 is, the standard of causation has to be the same --

25 JUSTICE BREYER: All right. All right. I

1 suppose that it does. If you have the same problem, you
2 have the same problem. Where there -- you understand.
3 So how -- how do we answer this problem? And the
4 difficulty of saying -- dividing -- the government
5 doesn't find a thousand. You know, it only finds two or
6 three. And so you're going to be 997 who escape. And
7 those three, what should they pay? What -- should they
8 pay nothing? Should they pay the whole thing? Should
9 we do it somewhere in between? How -- just restating
10 the problem and -- and you have experience in this
11 field. So what do you really think?

12 MR. SCHNEIDER: Well, in some of the cases
13 there's evidence that -- of not -- of the victim having
14 knowledge of an individual and in that case -- those
15 cases, there have been awards of restitution, some of
16 them 3,000, 5,000, 15,000, 30,000. But there's some
17 knowledge and there's some evidence for a judge to base
18 a finding of causation to the award of restitution. And
19 it's a fact-based determination. There has to be some
20 evidence for which the judge makes his determination.

21 JUSTICE ALITO: But your answer is in a
22 large category of cases, and this may be -- these may be
23 the typical cases, where there's a digital image and
24 it's out there and you don't even know that there are a
25 thousand people who've seen it. It's impossible to tell

1 how many people have seen it and certainly impossible to
2 see how many people will see it in the future. It -- it
3 exists and it apparently is impossible to eradicate it.

4 Your answer is that in those cases, the
5 victim gets nothing. I mean, that's your honest answer.
6 And that may be where the statute points, but I think
7 that's your answer to Justice Breyer's question: The
8 victim gets nothing in those cases because it's
9 impossible to determine what percentage of the harm is
10 attributable to this one defendant's possession of the
11 child pornography.

12 MR. SCHNEIDER: I don't -- and that's not
13 what I'm saying. In the Second Circuit in Lundquist was
14 an Amy case where there was a finding of losses and
15 restitution. And the court, the Second Circuit,
16 specifically addressed how to calculate it. It doesn't
17 have to be precise. We're not saying it has to be a
18 precise determination, but there has to be some evidence
19 for which a judge can base a determination that ties the
20 losses in this case to the conduct.

21 JUSTICE SOTOMAYOR: So what exactly -- give
22 me an example of what you're talking about. Now, here
23 you're saying because she didn't know the name of your
24 defendant, you win because you can't say any harm was
25 caused by him because she didn't know his name, correct?

1 Is that your position?

2 MR. SCHNEIDER: No, Your Honor. My position
3 is that the district judge made a determination as the
4 gatekeeper of the forensic science that the government
5 didn't prove its case. If you look --

6 JUSTICE SOTOMAYOR: So give me an example of
7 how the government can -- the hypothetical that Justice
8 Alito spoke about and Justice Kagan, you've got -- or --
9 or Justice Breyer.

10 MR. SCHNEIDER: Lundquist is a perfect
11 example where there are two reports by their expert
12 explaining how the knowledge of -- of an individual of
13 Lundquist affected her treatment, affected her
14 day-to-day life, and their specific report talks about
15 knowledge of the -- this individual.

16 JUSTICE SCALIA: The particular individual?
17 She has to know each individual who -- who has been
18 viewing her rape on -- on these pornographic items that
19 have been distributed widely? She has to know each
20 individual or she can't be covered?

21 MR. SCHNEIDER: By --

22 JUSTICE SCALIA: The woman has undergone
23 serious psychiatric harm because of her knowledge that
24 there are thousands of people out there viewing her
25 rape. But you say she can't -- why isn't your client at

1 least responsible for some of that? Even without her
2 knowing him, he had two of her pictures. He's one of
3 the thousands of people who viewed -- who viewed her
4 rape. So why can't she recover some amount from him?

5 I mean, the other side says she ought to be
6 able to recover everything from him. You say she ought
7 to be able to recover nothing. What about something in
8 between? What about figuring out how much of -- of her
9 total psychiatric damage and all the expenses and
10 what-not are attributable to this particular person?

11 MR. SCHNEIDER: Justice Scalia, the answer
12 to your question is -- is multifaceted and --

13 JUSTICE SCALIA: You said that for another
14 question.

15 MR. SCHNEIDER: I understand.

16 JUSTICE SCALIA: Give me one facet.

17 (Laughter.)

18 MR. SCHNEIDER: And Congress dictated that
19 all victims who are identified receive notice and that
20 notice goes to her lawyer. And in the later cases -- in
21 the recent cases, she's been notified of every single
22 one of those notices that are received. And appropriate
23 counseling has been given in all the later cases.

24 JUSTICE GINSBURG: Let me ask you. You're
25 mentioning this case. There was another case that also

1 involved and came up at the same time, the Wright case.
2 And there was a settlement there and it was for -- what
3 was the amount of money? The amount of damages in the
4 Wright case?

5 MR. SCHNEIDER: I think in Wright it was
6 \$500,000 was the court's order, I believe.

7 JUSTICE GINSBURG: Now, was there something
8 in the evidence there that made it proper to award
9 restitution in the Wright case, but not in this case?

10 MR. SCHNEIDER: No.

11 JUSTICE GINSBURG: They're the same?

12 MR. SCHNEIDER: Yes.

13 I'd like to reserve the remainder of my
14 time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Dreeben.

17 ORAL ARGUMENT OF MICHAEL R. DREEBEN

18 ON BEHALF OF THE RESPONDENT

19 MR. DREEBEN: Mr. Chief Justice, and may it
20 please the Court:

21 As Justice Breyer indicated, there really
22 are three stark choices before the Court in this case.
23 Paroline's position is that, because of a proximate
24 causation requirement, Amy can obtain nothing in
25 restitution. Amy's position is that because multiple

1 people have contributed to her single loss, she can
2 obtain the full restitution for all of her losses from
3 every criminal defendant. The government's position is
4 that there is a solution that tort law has developed for
5 providing some restitution for Amy, not the entire
6 restitution that would be owed on account of her entire
7 loss.

8 JUSTICE SCALIA: Yes. Well, now -- not
9 because tort law has developed that. I mean, I frankly
10 don't agree with what you say modern tort law is
11 supposed to allow, and -- and Keeton, you know, doesn't
12 really establish that that's what the courts now do.
13 But even without agreeing with that, can't I find that
14 that is the system that this statute intended to impose?
15 I mean, we're dealing here with a question of statutory
16 interpretation. So the question is not what does modern
17 tort law allow, but the question is what reasonably
18 could Congress have meant by this statute.

19 MR. DREEBEN: I agree with that, Justice
20 Scalia.

21 JUSTICE SCALIA: Because I'm not going to go
22 along with you on, you know, modern tort. I think
23 that's nonsense. I don't think it's true.

24 MR. DREEBEN: Okay. The -- the tort law
25 issue is not really all that modern. It dates back to

1 the Restatement (Second) of Torts in Section 443(a).
2 And this Court applied that section in the Burlington
3 Northern case, which was a CERCLA case, to hold that
4 apportionment of the damages was required in a pollution
5 case where all the pollution had merged into a single --

6 JUSTICE SOTOMAYOR: But how do you square
7 your position with the statutory language? The
8 statutory language requires mandatory restitution order
9 for the, quote, "full amount of the victim's losses."
10 It also forbids courts to -- to decline to issue an
11 order, double negative, but it can't -- a court can't
12 refuse to issue an order on the ground that the victim
13 has been compensated by any other source.

14 It seems to me that that language, as crazy
15 as it seems to you or -- to you, compels joint and
16 several liability, because it's saying any -- all
17 losses, full amount of losses, and you can't offset her
18 compensation from any other sources.

19 MR. DREEBEN: Justice Sotomayor, I think
20 that the key to reading the statutory language is that
21 the definition of "victim" refers to a victim of the
22 offense in this case. So the term "victim" means the
23 individual harmed as a result of a commission of a crime
24 under this chapter. The government's burden of proof in
25 Section 3664(e) refers to demonstrating the amount of

1 the loss sustained by a victim as a result of the
2 offense. So it refers to the defendant's offense, not
3 to the collective harm that the --

4 JUSTICE SOTOMAYOR: So why isn't that a
5 but-for cause? I mean, if you're going to argue that,
6 you have to be arguing but-for --

7 MR. DREEBEN: I don't think so.

8 JUSTICE SOTOMAYOR: -- that their damages
9 have to be the but-for cause.

10 MR. DREEBEN: I hope that the Court will
11 read the "as a result of" language to require causation,
12 but to interpret it in light of the way causation has
13 been understood in the unique circumstances that you
14 have here.

15 JUSTICE SCALIA: You don't deny but-for. I
16 haven't understood your submission to be that there need
17 not be but-for cause here.

18 MR. DREEBEN: There's collective, aggregate
19 but-for cause. And the way that tort law dealt with
20 this is not to accept Paroline's position that, even if
21 it -- you took me out of the equation, Amy's harm would
22 be very severe. Unquestionably true.

23 What tort law said is that if a multiplicity
24 of actors inflict a single harm and one of them comes
25 forward with a reason that, if accepted, would exonerate

1 all of them, then that cannot be a proper test of
2 causation. The proper test is aggregate causation where
3 the aggregate group of offenders is the but-for cause
4 and each one of the individuals in that set can be
5 regarded as --

6 CHIEF JUSTICE ROBERTS: But doesn't --
7 doesn't the individual at least cause some harm without
8 regard to the harm caused by the others?

9 MR. DREEBEN: Yes.

10 CHIEF JUSTICE ROBERTS: Of course, yes.
11 Now, why isn't it the case -- why can't the -- why can't
12 Amy have an expert that comes in and testifies as a
13 result of their experience that the psychological harm
14 caused by knowing that those images are available to
15 others, have been viewed by someone else, will require,
16 on average, whatever, a certain amount of counseling for
17 a certain amount of time? So that the one individual is
18 responsible for that harm, regardless of what else
19 happens.

20 Now, he may say, well, it's kind of unfair
21 to stick me with that, but that's a different question
22 than the aggregate causation issue that you're
23 addressing. If you have expert testimony, and there
24 will be expert testimony on the other side, that says it
25 normally requires counseling for someone when they find

1 out, without regard to anything else, that an individual
2 has viewed this, why doesn't that require or at least
3 allow assessment of the -- the whole amount?

4 MR. DREEBEN: Mr. Chief Justice, that would
5 allow assessment of some of the damages. I -- I don't
6 think that it would allow assessment of the entire
7 amount, because, again, we regard this -- this statute
8 as enacted against the backdrop of tort law principles
9 that recognized you can have aggregate causation, but
10 it's not appropriate to hold each person in the set
11 responsible for all.

12 CHIEF JUSTICE ROBERTS: I'm sorry. My
13 hypothetical is not aggregate causation. It is that
14 this individual caused this harm.

15 MR. DREEBEN: If there's a specific amount
16 of harm caused and if Amy could find an expert who would
17 testify to that respect and it would require, say, six
18 counseling sessions and it would set her back in
19 employment for a year, then I guess a court could, if it
20 found that credible, conclude that a certain amount of
21 loss is attributable directly.

22 JUSTICE SCALIA: Well, you're -- you're
23 confusing whether there's a specific amount of harm
24 caused with whether it is easy to measure that harm.
25 The -- the tort cases you refer to are cases in which

1 there is a result produced that is not severable. You
2 can't say this person is -- you know, accounts for this
3 much of it, such as pollution, all the pollution there.
4 The stream is polluted. That's quite different from
5 this case where -- where this -- this young woman has
6 been subjected to psychological harm because of
7 thousands of people viewing her rape.

8 Now, this -- she would be subjected to less
9 psychological harm if it was just one person or ten
10 people or a hundred people. In other words, each person
11 increases the amount of her psychological harm. It is
12 severable the way the tort cases you refer to are not.
13 And so why shouldn't the question in this case be simply
14 he caused a certain incremental amount of psychological
15 harm to -- to this woman and he should pay for it and
16 it's up to the district court to decide what the proper
17 amount of that payment ought to be.

18 MR. DREEBEN: Justice Scalia, I think that
19 is consistent with the conclusion that the government
20 reaches, although we take a different route to it --

21 JUSTICE SCALIA: I understand.

22 MR. DREEBEN: -- than Your Honor's position.

23 JUSTICE ALITO: Well, is it consistent with
24 human psychology? Are psychologists really able to do
25 this? If it's known that this image has been viewed

1 by -- even if you could figure out how many people have
2 viewed it, and I think in the age of the Internet that's
3 impossible, but if you knew that it had been viewed by a
4 thousand people, is a psychologist able to say that her
5 knowledge that it has been viewed by a thousand people
6 causes this much harm? And once she learns that it's
7 now been viewed by a thousand and one people, there's a
8 little bit of additional harm or some increment of
9 additional harm and we can figure out how much that is.
10 Can a psychologist do that?

11 MR. DREEBEN: Justice Alito, that is why the
12 government has proposed a different approach to getting
13 to the same conclusion.

14 JUSTICE GINSBURG: Mr. Dreeben, I would
15 really like you to tell us concretely what the
16 government's approach would be. That is, we have all is
17 one position, nothing is another position, and the
18 middle. The government comes down in the middle and
19 what I gather from your brief, you say there should be a
20 reasonable formula to arrive at a starting point for
21 further analysis.

22 So, I don't know what you propose as a
23 starting point. What is a reasonable formula that the
24 Court should use for its starting point?

25 MR. DREEBEN: Justice Ginsburg, the courts

1 have approved several different formulas as not being an
2 abuse of discretion. One camp of courts approves a view
3 in which the government submits the number of people who
4 have been ordered to pay restitution to Amy, and that
5 number is then divided into the total harm, measured by
6 monetary means, that Amy has established. And that
7 provides a starting point.

8 So, for example, in this case, that starting
9 point would be around \$18,000, and then courts can
10 adjust that.

11 JUSTICE GINSBURG: How do you get to the
12 18,000?

13 MR. DREEBEN: By considering the number of
14 defendants who have been ordered to pay restitution to
15 Amy, because that provides some certainty in the face
16 of, as Justice Alito pointed out, the great difficulty
17 in determining how many people have actually viewed
18 these pictures --

19 CHIEF JUSTICE ROBERTS: How does that -- I'm
20 sorry.

21 MR. DREEBEN: -- the number of people who
22 have been ordered to pay to restitution represents a
23 judicial finding that, in fact, her picture is involved
24 in that person's offense.

25 JUSTICE GINSBURG: And so it wouldn't --

1 CHIEF JUSTICE ROBERTS: How does that work
2 for -- go ahead.

3 JUSTICE GINSBURG: It wouldn't include the
4 people who are not prosecuted and it wouldn't include
5 the people who in the future are prosecuted.

6 MR. DREEBEN: That is correct. And some
7 courts, Justice Ginsburg, have therefore required that
8 the formula be adjusted to make some sort of reasonable
9 estimate of the total pool of violators. And so I --

10 CHIEF JUSTICE ROBERTS: Can I ask you one --
11 just one moment. How does that work for the first
12 person?

13 MR. DREEBEN: It doesn't work very well for
14 the first person, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: All right.

16 (Laughter.)

17 MR. DREEBEN: And for that reason, I think
18 there are other approaches that do work.

19 JUSTICE BREYER: Can we with ease say, look,
20 it's very complicated. I can think of some answers, but
21 they're too complicated for me to tell you what they
22 are. And Justice Scalia has a possible answer. Justice
23 Alito, it seemed to me, is pointing out that the second
24 person to look at the thing, if they're only two,
25 probably adds a lot of damage, but the 1000th person

1 compared to 999 is near zero.

2 Now, do we count this defendant as Number 2
3 or do we count him as Number 1000? Very hard to answer,
4 no answer really. But can we say, we can't answer how
5 you do this in practice. Leave it to the sentencing
6 commission. That's their job. Now, can we say that?

7 MR. DREEBEN: The Court can certainly say
8 that the statute requires reasonable apportionment --

9 JUSTICE BREYER: Yes.

10 MR. DREEBEN: -- and the districts courts
11 have jurisdiction to experiment with different
12 formulations.

13 JUSTICE BREYER: But can we say -- can we
14 suggest that the sentencing commission -- you can't
15 order them to do it, of course not. But can we suggest
16 that this is the kind of problem, very difficult,
17 technically several ways to do it, that they can go into
18 this. Is that true, that they could go into it and
19 recommend or perhaps order?

20 MR. DREEBEN: They could recommend a -- an
21 approach. What the sentencing commission actually did
22 was recommend to Congress that it fix it because the
23 disagreements now pertain to the understanding of the
24 statute. Our submission is that there are a variety of
25 ways to approach this problem. None is perfect.

1 JUSTICE KAGAN: Well, could you say more
2 about that? You said that the Chief Justice's question
3 was right, that it doesn't work for the first person and
4 you said there are better ones. What are the better
5 ones?

6 MR. DREEBEN: The alternative that I would
7 propose in that instance is to look at other similarly
8 situated child pornography victims and take a look at
9 what district courts have been awarding to those victims
10 in similar types of cases and provide some sort of an
11 average range.

12 JUSTICE KAGAN: But, you know -- I mean, it
13 struck me when I read your brief that it said, I don't
14 know why these courts started where they started,
15 whether each violation is worth 1,000 or 5,000 or
16 50,000. And it seems as though somebody just plucks an
17 initial number out of the air and then everything is
18 pegged to that initial number, but that the initial
19 number has nothing in particular behind it or am I -- is
20 it more sensible than that?

21 MR. DREEBEN: I hope that it's not quite as
22 arbitrary as plucking it out of the air, but the reality
23 is --

24 JUSTICE SCALIA: No, but they're certainly
25 not using your theory. Even though it's not plucked out

1 of the air, they're certainly not using your theory.

2 MR. DREEBEN: On the first one it's
3 impossible to --

4 JUSTICE SCALIA: Yes. So they're using some
5 theory.

6 MR. DREEBEN: They are using some theory.

7 JUSTICE SCALIA: And you have no idea what
8 that is and can't suggest one, right?

9 MR. DREEBEN: I think that sometimes they
10 articulate various considerations and other times they
11 rely on basically a consensus, a judicial consensus that
12 in a world in which perfect information and mathematical
13 computations are not going to happen, a reasonable
14 approximation that accords with the judgments of 200
15 other Federal judges is a sensible way to do this.

16 CHIEF JUSTICE ROBERTS: But that makes no --
17 I mean, how do you tell the difference --

18 JUSTICE SCALIA: I'm not sure what
19 sensible --

20 CHIEF JUSTICE ROBERTS: How do you tell --
21 your model, how does it work if it turns out that the
22 damages are a million dollars as opposed to \$3.4
23 million? Is it still \$1200 per offender?

24 MR. DREEBEN: We would, as I indicated,
25 start with a -- a division problem and approximate

1 the -- the number of damages that are allocable to that
2 individual and then adjust it because these defendants
3 are not all identical.

4 JUSTICE GINSBURG: So you start with the --

5 CHIEF JUSTICE ROBERTS: So you would
6 expect -- you would expect the defendant in a case where
7 the restitution sought is a million dollars to pay 50
8 percent of what he would pay if the damages were \$2
9 million.

10 MR. DREEBEN: Not necessarily, because as I
11 indicated, Mr. Chief Justice, the defendants aren't all
12 identical. Mr. Paroline possessed two images. Some
13 defendants may possess a hundred images. Some
14 defendants may be distributors as well as possessors,
15 and courts have taken those factors into account.

16 JUSTICE GINSBURG: What about taking into
17 account that the perpetrator, the uncle, that the
18 restitution was something like \$6,000; right?

19 MR. DREEBEN: Yes, that's correct, Justice
20 Ginsburg.

21 JUSTICE GINSBURG: So if there's any kind of
22 proportionality, it seems that the possessor of two
23 images should not be responsible for more than the
24 person who perpetrated this horrendous crime.

25 MR. DREEBEN: Well, his -- his restitution

1 may have been predicated on a very early period where it
2 was not clear that Amy would be as victimized as she has
3 turned out to be. The very vice of child pornography
4 possession and distribution is that it continually
5 re-inflicts the abuse on the victim so that she cannot
6 make a fresh start and say it's finally over. I've put
7 this behind me. I can now move on with my life. The
8 continuing re-victimization of her is what justifies and
9 creates the increased harms.

10 JUSTICE GINSBURG: I would like you to, to
11 the extent that you can, to help district judges get a
12 handle on this. What formula should they use and what
13 adjusting factors should they take into account after
14 they have that starting formula?

15 MR. DREEBEN: Justice Ginsburg, the formula
16 that I proposed is the one that the government has been
17 suggesting to district courts around the country. Look
18 at the number of convicted defendants who have been
19 ordered to pay restitution to Amy, divide that into the
20 total harm that the district court finds was the result
21 of the community of child pornography possessors, and
22 then adjust it based on the severity of the offense.

23 Courts of appeals have said that other
24 formulations are also not abuses of the district court's
25 discretion, and I would emphasize --

1 JUSTICE SCALIA: And that's wonderful and,
2 you know, I -- I want to go along with you. This is a
3 bad guy and -- and he ought to be punished and he ought
4 to give restitution, but there is such a thing as due
5 process of law. And what you're saying is -- I have no
6 idea how much he's going to be required to turn over,
7 whether it's going to be -- what was it in this case, \$3
8 million?

9 MR. DREEBEN: That's the amount of money
10 that Amy has asked for.

11 JUSTICE SCALIA: I have no idea what he's
12 going to be socked with, and that's not what we usually
13 do with criminal statutes.

14 MR. DREEBEN: Well, in criminal --

15 JUSTICE SCALIA: You just can't say leave it
16 up to the district judge, you know, and they all come
17 out different ways, but who cares, it's -- you know, so
18 long as it's within some --

19 MR. DREEBEN: Well, Justice Scalia --

20 JUSTICE SCALIA: -- some reasonable amount.

21 MR. DREEBEN: Post Booker --

22 JUSTICE SCALIA: That's just not the way we
23 do law.

24 MR. DREEBEN: -- post Booker, that is what
25 happens in criminal sentencing. District judges have an

1 enormous amount of discretion about how much
2 imprisonment time and fine time to use to apply to a
3 defendant. And there is appellate review that helps
4 establish some norms that can look to sentencing
5 guidelines as starting points. But in criminal
6 sentencing, imprecision and estimation is the order of
7 the day. And when you're dealing with --

8 JUSTICE SCALIA: That's because the statute
9 says so. It says you get from, you know, 10 to 20
10 years, okay? But the statute here doesn't say, you
11 know, you'll -- you'll get between this and this,
12 whatever the district judge likes. It doesn't say that.
13 It says you -- you should compensate the victim for
14 what -- for what you've caused her.

15 MR. DREEBEN: But there are two background
16 principles that I think reinforce that a reasonable
17 estimation is better than all or none. The first
18 background principle is that in criminal restitution,
19 exactitude is not required. Reasonable estimates are
20 the order of the day. Courts have recognized that. And
21 it's reinforced here by the fact that this restitution
22 provision is kind of a crime tort hybrid. It's criminal
23 sentencing, but it's enacted against the background of
24 compensatory tort law. And in compensatory tort law,
25 reasonable estimates have long been accepted.

1 In the Burlington Northern case that I
2 referred to earlier, the district court made an effort
3 to do some calculations and then at the end, he applied
4 a 50 percent fudge factor for estimations that reflected
5 possible calculation errors.

6 JUSTICE SCALIA: We have a fudge factor
7 here? Can a -- can a district judge use what he calls a
8 fudge factor? This is a criminal statute. It's not a
9 tort case.

10 MR. DREEBEN: It is a criminal provision.

11 JUSTICE SCALIA: We're going to be liable
12 for a fudge factor.

13 (Laughter.)

14 MR. DREEBEN: -- that is -- that is placed
15 into criminal sentencing with a goal of both
16 compensating victims and determining that each defendant
17 comes face to face with the fact that that person has
18 inflicted some harm on a particular victim. That's a
19 valuable criminal sentencing purpose, and to the extent
20 that the only thing that courts can do in this situation
21 is attempt reasonable approximations that will not be
22 exact, it's a better solution than saying nothing, as
23 Paroline would do, or saying Amy -- everything, as Amy
24 would do. That is not proportionate to what the
25 defendant has done, but zero is also grossly

1 disproportionate to what the defendant has done.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Cassell.

5 ORAL ARGUMENT OF PAUL G. CASSELL

6 ON BEHALF OF THE RESPONDENT AMY UNKNOWN

7 MR. CASSELL: Mr. Chief Justice, and may it
8 please the Court:

9 Remarkably, this morning, the other parties
10 have taken a statute that promises Amy she will receive
11 restitution for all of her losses and interpreted it to
12 be a statute that has fudge factors, imprecision,
13 estimation, to produce some kind of an award that in the
14 government's view is fair.

15 That's not what Congress provided in this
16 particular statute. Congress answered the question
17 presented. You were asking, Justice Breyer, what's the
18 amount? The text of the statute tells us. It is the
19 full amount. Here, Amy has put forward --

20 JUSTICE BREYER: Why? I mean, the person
21 didn't cause the full amount. I mean, do you think
22 Congress didn't intend -- do they want to have people
23 pay for injury they didn't cause?

24 MR. CASSELL: We disagree with your premise
25 there, with all respect.

1 JUSTICE BREYER: Well, if you think he
2 caused the full amount, fine. But I mean, immediately
3 you'll say at least they have four other people that
4 they prosecuted for this, and those people caused it
5 just as much. And so let's divide it by five.

6 MR. CASSELL: The solution to the point that
7 you're raising, Justice Breyer, is to recognize that
8 Petitioner was a contributing cause to all of Amy's
9 losses. Amy's losses come from a vast faceless
10 anonymous crowd of thousands of people scattered around
11 the globe from Denver to Denmark who are looking at
12 pictures of her being raped as an eight-year-old girl.
13 And that aggregate group of people all contribute to a
14 loss.

15 And I'm sure that Your Honor is familiar
16 with cases from this Court, for example the Norfolk &
17 Western case where asbestos manufacturers all
18 contributed to a particular loss. The result in that
19 case was joint and several liability. Each person who
20 contributed to the loss was on the hook for the damages
21 in their entirety.

22 JUSTICE KENNEDY: So Congress assumed that
23 this defendant could be liable in part for other
24 people's crimes?

25 MR. CASSELL: No, Justice Kennedy. What

1 Congress assumed is that he would contribute to a single
2 loss, and then at that point he would be responsible --

3 JUSTICE KENNEDY: A single law or loss?

4 MR. CASSELL: I'm sorry. Loss. He
5 contributed to the loss, and it's important to
6 understand --

7 JUSTICE SCALIA: He had two pictures. He
8 did not distribute at all. He was not a distributor,
9 right?

10 MR. CASSELL: That's right.

11 JUSTICE SCALIA: He was convicted of
12 possessing two pictures. And the statute doesn't even
13 require intentional possession, just knowing possession,
14 right? He could have gotten them by accident. He knew
15 he got them, but he never took them off of his computer,
16 but he's still guilty of the crime.

17 So I -- he's guilty, he's guilty of the
18 crime. But to sock him for all of her -- all of her
19 psychiatric costs and everything else because he had two
20 pictures of her? Congress couldn't have intended that.

21 MR. CASSELL: Congress did intend that, Your
22 Honor. They said that he is responsible for the full
23 amount of the losses. There's a two-step process here.
24 First, this particular defendant caused harm to this
25 particular victim. That's the victim definition found

1 in 2259(c). And there are findings of fact by the
2 district court in this case that the defendant,
3 Petitioner, did harm -- did harm Amy.

4 And then at that point the only question
5 left under this mandatory restitution statute is, how
6 much restitution does she get? And Congress has
7 answered that question. She gets the full amount, for
8 five itemized categories of losses, psychological
9 counseling being the most prominent. She's documented
10 with detailed submissions that she is going to bear --

11 CHIEF JUSTICE ROBERTS: Well, but
12 responsible for those as a proximate result of the
13 offense.

14 MR. CASSELL: That --

15 CHIEF JUSTICE ROBERTS: The only offense
16 shown here in this case is the possession of the two
17 pictures. So how -- how can all of those amounts be the
18 result of the possession of two pictures?

19 MR. CASSELL: The language you have quoted,
20 Mr. Chief Justice, is from Subsection (F). Amy is not
21 seeking any recovery under Subsection (F).

22 CHIEF JUSTICE ROBERTS: Well, you understand
23 the statutory principle that it says "any other losses
24 suffered by the victim as a proximate result of the
25 offense," which suggests that the prior losses are also

1 limited as a proximate result of the offense.

2 MR. CASSELL: No, Mr. Chief Justice, and we
3 would ask you to affirm the Fifth Circuit's en banc
4 decision, which disagreed with that reading. There are
5 numerous canons of statutory construction --

6 CHIEF JUSTICE ROBERTS: Why would it make
7 sense to say that he's liable for lost income, whether
8 or not it's a proximate result, but when it comes to
9 other losses suffered by the victim, they have to be the
10 proximate result?

11 MR. CASSELL: There are a number of answers
12 to that question, Mr. Chief Justice. "Any other losses"
13 is potentially open-ended. It includes such things as
14 emotional distress damages that could be potentially
15 uncapped. (A) through (E), however, are all
16 out-of-pocket pecuniary costs. They are defined. And
17 in this case, we have defined with precision what the
18 course of lifetime psychological counseling costs will
19 be for Amy.

20 JUSTICE SOTOMAYOR: But aren't those all if
21 we don't buy your argument, if we read into (F)
22 proximate causation?

23 MR. CASSELL: No, Justice Sotomayor.

24 JUSTICE SOTOMAYOR: So why are you wasting
25 time on the argument if you win either way? Tell us

1 without it.

2 MR. CASSELL: I think we win either way, and
3 obviously I have to anticipate that there may be a
4 variety of views on this very difficult question. But
5 let's assume that the Court wants to read proximate
6 cause into other parts of the statute where it does not
7 appear. At that point, the question simply becomes what
8 do we mean by proximate cause?

9 Proximate cause is a legal shorthand for
10 scope of the risk, a legal duty. And Congress has
11 defined the legal duty here. For those criminals who
12 commit a serious 10-year Federal felony, the scope of
13 their risk is they will pay the full amount of the
14 psychological counseling costs --

15 CHIEF JUSTICE ROBERTS: Can I get back to --
16 your point was that all of the (A) through (E) is
17 limited, and you don't need -- well, it's not. One of
18 the losses that can be gained -- recovered is lost
19 income. Now, if you take away proximate cause, the
20 argument can be, well, I had to undergo counseling in a
21 particular period, so I wasn't able to get a master's
22 degree in this. Because I didn't get a master's degree,
23 I wasn't able to get a better-paying job, and therefore
24 I'm entitled to the income from the better-paying job
25 that I would have gotten if I had a master's degree if I

1 didn't have to take the counseling.

2 Now, unless you limit that by proximate
3 cause it's entirely open-ended. It's not confined as
4 you said.

5 MR. CASSELL: Well, there -- you're talking
6 about the problem of but-for causation. Then what kind
7 of additional limitation will placed on it.

8 CHIEF JUSTICE ROBERTS: No, no. I'm talking
9 about proximate causation.

10 MR. CASSELL: Right. So there would be an
11 additional cause, which the government argues should be
12 a proximate cause limitation, but there are other
13 limitations that could be attached. And that's what the
14 Fifth Circuit en banc did. It said, for example, that
15 if Amy suffered a car accident on the way to therapy,
16 that that would not be included. Why? Because
17 contextually and conventionally we would not refer to
18 those types of losses as stemming from child
19 pornography. That's proximate cause.

20 JUSTICE SCALIA: Like Justice Sotomayor and
21 like the government here, I think, even if there is a
22 proximate cause requirement, it has been -- it has been
23 met, once you adopt the aggregate offense notion. But I
24 wanted to ask you about Subsection (F). My -- it
25 doesn't seem to me that you -- whether or not you read

1 the proximate cause element in (F) into (A), (B), (C),
2 (D), and (E), it seems to me what you have to read into
3 (A), (B), (C), (D), and (E) is the portion of (F) which
4 says "any other losses suffered by the victim as a
5 result of the offense" -- "of the offense."

6 Is it only (F) that is limited to the
7 particular offense, and (A), (B), (C), (D), and (E)
8 means those -- those items that come from anybody else's
9 conviction?

10 MR. CASSELL: No. The linkage -- the
11 particular defendant's conviction comes from Subsection
12 (C) a victim such as Amy has to establish that she's
13 been harmed as a result of this defendant's crime. That
14 establishes -- there's been a reference to aggregate
15 cause. We think the way to look at this would be --

16 JUSTICE KENNEDY: And is that another way of
17 saying as a result of this defendant's offense?

18 MR. CASSELL: As a result of this
19 defendant's offense. We agree that Subsection (C)
20 requires Amy to show that she was victimized by this
21 defendant.

22 JUSTICE KAGAN: But you are not claiming,
23 are you -- or are you? -- that she's been victimized to
24 the tune of 3.4 million as a result of this particular
25 defendant's offense?

1 MR. CASSELL: We are saying that she -- that
2 the Petitioner in this case, the defendant, contributed
3 to all of the losses that she suffered.

4 JUSTICE KAGAN: Well, contributed to.

5 MR. CASSELL: Yes.

6 JUSTICE KAGAN: But I take it that the point
7 of the government's submission is only contributed to
8 and now we have to sort of approximate what the
9 contribution was. And you come in and you say, no, it
10 shouldn't be -- notwithstanding that this particular
11 offense was responsible for only a part, you think the
12 defendant should be liable for the whole.

13 MR. CASSELL: We think that the defendant
14 contributed to all her losses. Let me give you a quick
15 illustration. Next week when Amy goes to her therapist
16 and is billed \$100, the defendant contributed to all
17 \$100. And of course all we have when we get to the
18 additional numbers down the road is simply the fact that
19 she's going to be going to therapy, not just next
20 week --

21 JUSTICE KAGAN: I guess I'm just not sure
22 what that means, contributed to \$100. Does that mean
23 she's -- the defendant is responsible for the entire
24 \$100 --

25 MR. CASSELL: Yes.

1 JUSTICE KAGAN: -- as a matter of fact, or
2 does it mean that the defendant is responsible as a
3 matter of fact for some lesser part of the entire harm?

4 MR. CASSELL: No, the first. He's
5 responsible, he is a contributing cause of the entire
6 amount.

7 JUSTICE KAGAN: I -- I guess I'm -- when I
8 say responsible I don't mean as a legal conclusion. I
9 mean did the defendant cause the entire \$100 of harm?

10 MR. CASSELL: He contributed to the entire
11 \$100, just as multiple polluters contribute to
12 asbestosis --

13 JUSTICE KAGAN: Well, that's --

14 JUSTICE SCALIA: So he should contribute to
15 the payment. You're saying contributed to the harm, but
16 he makes 100 percent of the payment. That doesn't seem
17 to me to make much sense.

18 MR. CASSELL: Well, Justice Scalia, we're
19 pure textualists on this. When you look at the text of
20 the statute, Congress has answered that question.
21 Congress could have written the statute different ways,
22 but they said that she is entitled to recover the full
23 amount of her loss --

24 JUSTICE KAGAN: Well, full amount --

25 JUSTICE SCALIA: They don't say from that

1 person.

2 JUSTICE KAGAN: -- from the particular
3 offense, Mr. Cassell, so that it's the full amount of
4 whatever the particular offense caused. But you're not
5 saying that this Defendant caused the entire 3.4.

6 MR. CASSELL: We're saying he contributed to
7 the entire 3.4 --

8 JUSTICE ALITO: Well, let me give you
9 this --

10 MR. CASSELL: -- along with the other
11 people.

12 JUSTICE ALITO: I'm sorry, I didn't mean to
13 interrupt you.

14 MR. CASSELL: No, I -- you can't
15 disaggregate them, and that's the fundamental problem
16 here. If you look at, for example, our amicus brief
17 with the American professional association involved with
18 the sexual abuse of children, what they say is you
19 cannot tease out this particular defendant or this
20 particular harm. They all come together to --

21 JUSTICE BREYER: So -- so contributed also a
22 person who didn't have a picture of her but watched
23 other victims.

24 MR. CASSELL: Well, no --

25 JUSTICE BREYER: That person contributed to

1 her too, because it creates a market for the entire
2 situation. So some limiting principle has to come into
3 play, and the limiting principle that I think people are
4 driving at is because there's a terrible crime, we don't
5 convict the person who didn't do it, all right? And
6 similarly, because this is a terrible crime, you don't
7 require a person to pay what he didn't cause.

8 Now, that's sort of a principle going on.
9 Now, if you accept that, at least hypothetically, can
10 you give any answer -- I'm afraid you can't and you're
11 going to say --

12 MR. CASSELL: No, I'm --

13 JUSTICE BREYER: But answer to what seems to
14 be bothering me and a lot of others is, okay, let's
15 accept the notion of cause, but what is a -- this is
16 called restitution --

17 MR. CASSELL: Yes.

18 JUSTICE BREYER: -- it isn't called fines.
19 And so, given that, what -- how do you do it? How do
20 you distinguish so she gets some reasonable amount? How
21 do you do it that you're -- I can think of -- we've had
22 about four different suggestions here. But what's your
23 opinion, if you lose on the first? What's the best way
24 to do it? That's what I think people are struggling
25 for -- with.

1 MR. CASSELL: The best way to do it is to
2 give Amy the full amount of her losses in this case.

3 JUSTICE BREYER: That's what I suspected you
4 would say.

5 (Laughter.)

6 JUSTICE ALITO: Well, let me give you --
7 Mr. Cassell, let me give you this example. There are
8 pictures like this and it's known that they are out on
9 the Internet, so therefore they are probably always
10 going to be available and who knows how many people are
11 going to view it. And so the first person is caught for
12 possession of some of these pictures and is convicted
13 and the psychologist testifies that, you know, my
14 client -- that the victim in this case knows that these
15 things are out there and there's an unknown -- an
16 unknown quantity of people are going to view it and my
17 estimate is that the -- the treatment she is going to
18 need for this is going to be \$5 million. All right. Or
19 \$3 million, whatever it is.

20 Now, the first person is convicted, so the
21 first person is assessed restitution in the amount of
22 \$3 million, right? But then shortly after that ten more
23 people are convicted for possessing the same amount.
24 They all pay nothing because the first person paid
25 everything? That's your answer?

1 MR. CASSELL: That's our answer, and that's
2 exactly what Congress wanted. Congress wanted to take
3 these vulnerable victims, child pornography crimes,
4 Federal sex offense crimes, and domestic violence, and
5 get them full restitution as quickly and effectively as
6 possible. And then after that, if there's a need to
7 send an additional message to a defendant, he can be
8 fined up to a quarter of a million dollars or sent to
9 prison for a longer period of time.

10 JUSTICE GINSBURG: What about at least the
11 amount of the judgments she has already received? The
12 total amount, I think, was 3.4 million that you're
13 seeking?

14 MR. CASSELL: Yes.

15 JUSTICE GINSBURG: And she has so far
16 collected how much?

17 MR. CASSELL: As of yesterday, 1,752,000.

18 JUSTICE GINSBURG: Would you at least deduct
19 that from the --

20 MR. CASSELL: Certainly. Absolutely. No,
21 we're not asking for double recovery. Amy simply wants
22 to be made whole. She wants to recover her
23 psychological counseling costs and her losses.

24 JUSTICE KAGAN: Usually when we approve
25 joint and several liability we do so against a

1 background of a functioning system of contribution where
2 one defendant pays the entire thing, but then can go
3 after --

4 MR. CASSELL: Right.

5 JUSTICE KAGAN: -- other defendants and be
6 pretty well assured that he gets their share. Now,
7 here, there's nothing like that and the question -- I
8 guess the question is you're asking us to impose that
9 kind of system without the usual thing that goes along
10 with it, which is a sharing mechanism.

11 MR. CASSELL: We disagree with the premise
12 here. The background principle for intentional
13 tortfeasors is they got stuck with the entire liability
14 jointly and severally. That was the common law
15 approach. Now, if you want to deviate from the common
16 law approach and read a contribution action into the
17 statute, we're certainly not opposed to that. But the
18 overriding goal of Congress, as it always is when they
19 deal with criminal, intentional tortfeasors, is to pay
20 more attention to the victims and less about some notion
21 of distributing losses among criminally culpable
22 defendants.

23 Congress doesn't give you any indication in
24 this statute that they were concerned that one
25 particular defendant might pay more than his, quote,

1 "fair share," whatever that means. And the fundamental
2 problem with the government's position is that after
3 four and a half years of litigation, we still don't have
4 any indication as to how much Amy is going to receive in
5 this particular case. What the government proposes to
6 do is to cast district courts adrift, as they have been
7 for the last four and a half years, to look at a variety
8 of the factors, including, remarkably, if we read the
9 government's brief correctly, one of the factors is the
10 need to get the victim full -- full recovery.

11 JUSTICE ALITO: In my example, suppose that
12 the first person, who has a restitution order for the
13 full amount, seems unlikely ever to be able to pay that.
14 Does that mean that they -- you would impose the same --
15 keep imposing the same judgment on everybody else, so
16 everybody would be hit with \$3 million?

17 MR. CASSELL: Precisely, until -- until the
18 victim recovers the full amount.

19 JUSTICE BREYER: Well, what about doing --
20 what you'd say is make the department, you can find out
21 figures, you could find out from figures what's the
22 likelihood that X number of people will be caught. And
23 say it's 3 out of 1,000. Then what you do is you divide
24 by three. I mean, that way everybody would be treated
25 fairly, and moreover, the victim would at least have a

1 shot at getting --

2 MR. CASSELL: But the problem is in this
3 particular case the numbers show that at least 70,000
4 people have viewed Amy's image.

5 JUSTICE BREYER: And how many -- how many
6 are going to get caught and convicted?

7 MR. CASSELL: We have no way of knowing.

8 JUSTICE BREYER: Well, you can find out.
9 There's no -- it's not an impossible question for people
10 to come in and use the numbers and figure it out. My
11 guess would be a very tiny percent.

12 MR. CASSELL: A tiny percentage.

13 JUSTICE BREYER: All right, fine. Then
14 she's going to get a lot of her -- THEN she's going to
15 get from each one a pretty good share, only --

16 MR. CASSELL: What you're assuming, though,
17 is there's going to be a steady stream of cases, that
18 criminals aren't going to discover new encryption
19 techniques to keep their nefarious activities secrets.
20 We don't know whether there are going to be convictions
21 next year or the year following. And Congress acted
22 against that understanding and said she recovers the
23 full amount from the very first person, and if she gets
24 her compensation, then she's out of the picture.

25 And one of the beauties of our approach is

1 that we estimate within 2 to 3 years, if you affirm the
2 Fifth Circuit, her restitution requests will be done.
3 If you adopt the government's approach, you could be
4 looking at literally thousands and thousands of cases
5 where Amy will have to -- will have to be filing
6 piecemeal restitution requests, collecting as little as
7 \$47 under some of the calculation theories that the
8 government has proposed, and there's no certainty that
9 she's ever going to get the psychological counseling
10 costs that she desperately needs and the lost income.

11 Now, certainly Congress could have drafted
12 the statute in different ways, but every single word or
13 every single phrase of this statute at least indicates
14 to you that Congress had one goal and one goal alone in
15 mind, that is that victims get the full amount of
16 restitution that they desperately need.

17 And we're not talking here about reworking
18 an entire restitution scheme for the broad swath of
19 Federal crime. We're talking about three crimes covered
20 by the Violence Against Women Act, the child pornography
21 cases, Federal sexual assault cases, and domestic
22 violence cases.

23 And it's hardly a surprise to discover when
24 you look at the Violence Against Women Act that Congress
25 created a particularly expansive restitution regime for

1 the victims of these particular crimes. And we would
2 direct your attention, for example, to the bipartisan
3 amicus brief of a group of senators who were involved in
4 the drafting of the Violence Against Women Act, and they
5 indicated that their overriding goal here was to make
6 sure that these vulnerable victims --

7 JUSTICE SCALIA: This is subsequent
8 legislative history? Is that what this is?

9 MR. CASSELL: Some of the members of the
10 Court reviewed --

11 JUSTICE SCALIA: Even those that like
12 legislative history don't like subsequent legislative
13 history.

14 (Laughter.)

15 MR. CASSELL: Well, then if you want to go
16 the with the textual approach, this is a simple case,
17 Your Honor.

18 CHIEF JUSTICE ROBERTS: No, it's not a
19 simple case. You said, rhetorical exaggeration, every
20 word in the statute leads to that. But the key words
21 don't. The key words are "proximate result of the
22 offense." And it's difficult to argue that the entire
23 amount is a proximate result of the offense of two
24 pictures.

25 MR. CASSELL: Well, what happened was the

1 Petitioner in this case contributed to the entire
2 amount.

3 And then the way the statute operates is a
4 very conventional way. He becomes jointly and severally
5 liable for the full amount. That's not some kind of
6 innovation. This Court, for example, in the Norfolk and
7 Western case unanimously said that joint and several
8 liability is the traditional approach.

9 And so what Congress has done here is not
10 create some newfangled regime. It has simply taken a
11 joint and several liability regime that this Court has
12 routinely applied against negligent tortfeasors and
13 said, when it comes to criminals who act with scienter,
14 act knowingly or intentionally and cause harm, that
15 they're going to have to make sure that the victims are
16 fully compensated.

17 JUSTICE GINSBURG: But the point has already
18 been made that it isn't a typical joint tortfeasor
19 situation where you can seek contribution from people
20 who equally contributed.

21 CHIEF JUSTICE ROBERTS: Please answer.

22 JUSTICE GINSBURG: How would -- how would
23 the defendant here go about seeking contribution?

24 MR. CASSELL: Well, the defendant would --
25 if there was a wealthy defendant who was unhappy with

1 the share he'd been ordered to pay, he could simply try
2 to find other wealthy defendants out there and
3 interplead them in some kind of a case. We admit that's
4 going to lead to litigation burdens, that Congress
5 wanted those burdens on guilty criminals rather than
6 innocent victims.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Schneider, five minutes.

9 REBUTTAL ARGUMENT OF STANLEY G. SCHNEIDER,
10 ON BEHALF OF THE PETITIONER,
11 APPOINTED BY THIS COURT

12 MR. SCHNEIDER: Thank you. This -- this is
13 a criminal sentencing problem. And Congress in 1996
14 apparently codified -- codified this Court's opinion in
15 Hughey in creating a burden of proof on the government
16 to demonstrate that the losses sustained by the victim
17 are the result of the offense and created a number of
18 new mandatory restitution statutes that apply. And that
19 doesn't change.

20 So as the reading -- the plain reading of
21 the statute points -- with the government's burden of
22 proof requires that the government demonstrate that, for
23 example, the medical services losses of the victim of
24 child pornography are caused by -- are the result of the
25 defendant's offense. And that's what Congress intended

1 by adopting -- of 3664(e) and placing it as the
2 enforcement provision of each of the restitution
3 statutes that it created in 1996. It codified Hughey.

4 And what the idea of contribution suggests
5 that convicted sex offenders across the country are
6 going to get together and see who pays what to whom.
7 That's not what Congress intended. This is a sentencing
8 proceeding that requires a particularized,
9 individualized sentence based upon criminal conduct.
10 And that's what -- what the -- what Congress intended
11 when it created all these statutes. The ideal solution
12 is to say, Congress, make each defendant pay \$1,000 per
13 image. That would be -- into a fund for restitution for
14 victims. And that --

15 JUSTICE KENNEDY: Well, you're right back to
16 the question Justice Kagan began. That if you have two
17 offenders, that there's going to be recovery. If you
18 have 1,002, there won't be.

19 MR. SCHNEIDER: There will always be -- if
20 there's two offenders that are caught, you may get
21 restitution from one of them. But if -- but you're
22 looking at what a single judge has to sentence someone.
23 A single judge, like Judge Davis, had one defendant. He
24 didn't have a defendant in Florida or Maine or Oregon to
25 see what that person's background was. Doesn't have the

1 benefit of a PSR. He has to look at one person. And in
2 this case, the district court balanced two experts and
3 the methodology that was challenged and simply said, I
4 find she was a victim. I find that she was harmed.

5 But the government didn't meet its statutory
6 burden of proof in this case, and in many other cases
7 there is losses proved. And there's a difference
8 between harm and loss. In this case, the district court
9 did exactly what the government wanted them to do.
10 Weigh the evidence, listen to the evidence, look at the
11 defendant and see if the government met its burden.

12 And what we'd ask the Court to reverse the
13 Fifth Circuit and affirm the district court. Thank you
14 very much.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 11:04 a.m., the case in the
18 above-entitled matter was submitted.)

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