

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DOYLE RANDALL PAROLINE, :

4 Petitioner : No. 12-8561

5 v. :

6 UNITED STATES, ET AL. :

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8 Washington, D.C.

9 Wednesday, January 22, 2014

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

14 APPEARANCES:

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

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

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STANLEY G. SCHNEIDER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL R. DREEBEN, ESQ.	
7	On behalf of Respondent United States	15
8	ORAL ARGUMENT OF	
9	PAUL G. CASSELL, ESQ.	
10	On behalf of the Respondent Amy Unknown	33
11	REBUTTAL ARGUMENT OF	
12	STANLEY G. SCHNEIDER, ESQ.	
13	On behalf of the Petitioner	54
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

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

6 Mr. Schneider.

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

10 MR. SCHNEIDER: May it please -- Mr. Chief
11 Justice, and may it please the Court:

12 This is a case about statutory construction.
13 Specifically, under 18 USC 2259, must a victim's --
14 victim's losses be proximally caused by a defendant's
15 offense conduct before a sentencing judge can award
16 restitution? The short answer to the question is all
17 losses must be proximately caused.

18 Eleven courts of appeals and the government
19 agree that this circuit ignored the plain text of the
20 statute and the enumerated enforcement provisions of
21 3664 to craft a restitution scheme where the possession
22 of two images of child pornography resulted in the award
23 of \$3.4 million to Doyle Paroline which was strictly --
24 jointly and severally liable.

25 In my time before the Court, I wish to

1 address, first, why the Fifth Circuit decision is
2 incorrect, and second, why the government's concept of
3 aggregate causation conflicts with its statutory burden
4 of proof 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, and
13 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.

2 There's no argument, I think, that anyone
3 who possesses child pornography knows that the
4 individual depicted is going to feel invaded by that
5 viewing, so there's no issue that the person is hurt.

6 The question is a different one, which is
7 the cause in fact. I think that's what my colleague Sam
8 Alito was talking about. So why do you continue to talk
9 about proximate cause when it's a different concept
10 that's at issue?

11 MR. SCHNEIDER: Well --

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

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

20 And in this situation -- in this case, where
21 the damage model was created six months before the
22 notice is received, then you don't have the relationship
23 between the loss and the conduct or the notice of the
24 conduct. And it's a real problem.

25 But the -- the important consideration in

1 interpretation of the statute is the government's burden
2 of proof under 3664(e).

3 JUSTICE GINSBURG: Why do we -- why would we --

4 JUSTICE KENNEDY: Would you agree -- would
5 you agree that the --

6 CHIEF JUSTICE ROBERTS: Justice Kennedy.

7 JUSTICE KENNEDY: -- the losses here were the
8 proximate result at least of the aggregate actions of
9 all the offenders? Would you go that far?

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

12 JUSTICE KENNEDY: Would -- would you agree
13 that it is the proximate result of the aggregate actions
14 of all the offenders?

15 MR. SCHNEIDER: It would be a harm, but
16 not --

17 JUSTICE KENNEDY: Pardon me. A proximate
18 harm, right?

19 MR. SCHNEIDER: But the problem is when
20 you're dealing with aggregate causation, that conflicts
21 with the statutory burden of proof that the government
22 has, under 3664(e), which is made applicable to the
23 2059, under Section (b)(2), and you'll find 3664(e) at
24 Appendix 22 to our merits brief.

25 The --

1 JUSTICE GINSBURG: Why -- why should we get
2 to that question, when we have what seems to be a clear
3 order from Congress, and it is in 2259(a). It says,
4 "The court shall -- shall order restitution for any
5 offense under this chapter."

6 It sounds like that's a direction that, if
7 there's an offense under this chapter -- which is
8 undisputed, there is -- the court shall order
9 restitution.

10 MR. SCHNEIDER: Only if -- if the losses are
11 the result of the offense because the government's
12 burden of proof is that they must demonstrate, by a
13 preponderance of the evidence, that the losses sustained
14 by the victim are the result of the offense.

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

16 JUSTICE KENNEDY: My question is -- my
17 question is why isn't it -- and you were going to point
18 to the statute -- why isn't it at least the result of
19 the aggregate number -- aggregate offenders?

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

22 JUSTICE KENNEDY: But he is -- he is one of
23 the offenders in the aggregate.

24 MR. SCHNEIDER: He's not -- it's not in the
25 indictment. No one else is in -- is in front of the

1 sentencing judge. The statute 3664(e) and Section
2 (f) -- (b)(3)(F), all talk about "the offense," and "the
3 offense" is normally -- this Court has recognized that,
4 when you talk about "the offense," it's the offense of
5 conviction.

6 JUSTICE KAGAN: Mr. Schneider, on your view,
7 if only one person viewed the pornography, that person
8 would be responsible for the entire damages, but if a
9 thousand people viewed the pornography and the harm was
10 that much greater, nobody would be in -- would be on the
11 hook for restitution.

12 How could that possibly make sense?

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

20 In this case, the district judge carefully
21 weighed the evidence. In this case, --like un -- unlike any other
22 case, there are competing experts that the judge,
23 district judge, played -- acted as a gatekeeper of the
24 forensic science and with the challenge to the
25 methodology that was presented by Amy's experts, the

1 judge left no alternative because there was no
2 explanation.

3 And that methodology -- faulty methodology
4 was part of his decision that he recognized.

5 JUSTICE BREYER: Well, what's the answer,
6 though, to the problem, forgetting this case? There's a
7 problem in child pornography cases. Congress clearly
8 wants restitution. Makes sense to me.

9 But if a thousand people look at it, then
10 each one can say, but I didn't cause more than a tiny
11 fraction at most, and so there virtually is no
12 restitution; right? Now, every one of the thousand says
13 that, truthfully, and so therefore the victim gets no
14 restitution -- opposite of what Congress wanted.

15 But their answer in the lower court was,
16 we'll make each one of those thousand liable for the
17 whole thing. The government's answer is aggregate
18 cause. It's called a concept that they've sort of
19 created, but it's there to answer the problem.

20 What's your answer to the problem?

21 MR. SCHNEIDER: It's a -- it's a very
22 difficult question.

23 JUSTICE BREYER: Yeah, it is.

24 (Laughter.)

25 MR. SCHNEIDER: And -- and the answer is

1 to -- is multifaceted because the government's burden of
2 proof for restitution applies to all restitution
3 statutes. It's the same standard.

4 And you can't carve out one standard of
5 causation for one crime because it's a heinous crime
6 and, as repugnant as child pornography is, the standard
7 of causation has to be the same --

8 JUSTICE BREYER: All right. All right. I
9 suppose that it does. If you have the same problem, you
10 have the same problem. Where there -- you understand.
11 So how -- how do we answer this problem? And the
12 difficulty of saying -- dividing -- the government
13 doesn't find a thousand -- you know, it only finds two
14 or three. And so you're going to be 997 who escape.

15 And those three, what should they pay?
16 What -- should they pay nothing? Should they pay the
17 whole thing? Should we do it somewhere in-between?
18 How -- just restating the problem and -- and you have
19 experience in this field.

20 So what do you really think?

21 MR. SCHNEIDER: Well, in some of the cases,
22 there's evidence that -- of not -- of the victim having
23 knowledge of an individual, and in that case -- those
24 cases, there have been awards of restitution, some of
25 them 3,000, 5,000, 15,000, 30,000. But there's some

1 knowledge and there's some evidence for a judge to base
2 a finding of causation to the award of restitution.

3 And it's a fact-based determination. There
4 has to be some evidence for which the judge makes his
5 determination.

6 JUSTICE ALITO: But your answer is in a
7 large category of cases, and this may be -- these may be
8 the typical cases, where there's a digital image, and
9 it's out there, and you don't even know that there are a
10 thousand people who've seen it. It's impossible to tell
11 how many people have seen it and certainly impossible to
12 see how many people will see it in the future. It -- it
13 exists, and it apparently is impossible to eradicate it.

14 Your answer is that, in those cases, the
15 victim gets nothing. I mean, that's your honest answer.
16 And that may be where the statute points, but I think
17 that's your answer to Justice Breyer's question. The
18 victim gets nothing in those cases because it's
19 impossible to determine what percentage of the harm is
20 attributable to this one defendant's possession of the
21 child pornography.

22 MR. SCHNEIDER: I don't -- and that's not
23 what I'm saying. In the Second Circuit, in Lundquist,
24 was an Amy case where there was a finding of losses and
25 restitution. And the court -- the Second Circuit

1 specifically addressed how to calculate it. It doesn't
2 have to be precise.

3 We're not saying it has to be a precise
4 determination, but there has to be some evidence for
5 which a judge can base a determination that ties the
6 losses in this case to the conduct. Now --

7 JUSTICE SOTOMAYOR: So what exactly -- give
8 me an example of what you're talking about. Now, here,
9 you're saying because she didn't know the name of your
10 defendant, you win because you can't say any harm was
11 caused by him because she didn't know his name, correct?
12 Is that your position?

13 MR. SCHNEIDER: No, Your Honor. My position
14 is that the district judge made a determination as the
15 gatekeeper of the forensic science that the government
16 didn't prove its case.

17 If you look --

18 JUSTICE SOTOMAYOR: So give me an example of
19 how the government in the hypothetical that Justice
20 Alito spoke about and Justice Kagan, you've got -- or --
21 or Justice Breyer.

22 MR. SCHNEIDER: Lundquist is a perfect
23 example, where there are two reports by their expert
24 explaining how the knowledge of -- of an individual of
25 Lundquist affected her treatment, affected her

1 day-to-day life, and their specific report talks about
2 knowledge of the -- this individual.

3 JUSTICE SCALIA: The particular individual?
4 She has to know each individual who -- who has been
5 viewing her rape on -- on these pornographic items that
6 have been distributed widely? She has to know each
7 individual, or she can't be covered?

8 MR. SCHNEIDER: By --

9 JUSTICE SCALIA: The woman has undergone
10 serious psychiatric harm because of her knowledge that
11 there are thousands of people out there viewing her
12 rape, but you say she can't -- why isn't your client at
13 least responsible for some of that?

14 Even without her knowing him, he had two of
15 her pictures. He's one of the thousands of people who
16 viewed -- who viewed her rape. So why can't she recover
17 some amount from him?

18 I mean, the other side says she ought to be
19 able to recover everything from him. You say she ought
20 to be able to recover nothing. What about something
21 in-between? What -- what about figuring out how much
22 of -- of her total psychiatric damage and all the
23 expenses and what-not are attributable to this
24 particular person?

25 MR. SCHNEIDER: Justice Scalia, the answer

1 to your question is -- is multifaceted and --

2 JUSTICE SCALIA: You said that for another
3 question.

4 MR. SCHNEIDER: I understand.

5 JUSTICE SCALIA: Give me one facet.

6 (Laughter.)

7 MR. SCHNEIDER: And Congress dictated that
8 all victims who are identified receive notice, and that
9 notice goes to her lawyer. And in the later cases -- in
10 the recent cases, she's been notified of every single
11 one of those notices that are received, and appropriate
12 counseling has been given in all the later cases.

13 JUSTICE GINSBURG: Let me ask you. You're
14 mentioning this case. There was another case that also
15 involved and came up at the same time, the Wright case,
16 and there was a settlement there, and it was for -- what
17 was the amount of money? The amount of damages in the
18 Wright case?

19 MR. SCHNEIDER: I think, in Wright, it was
20 \$500,000, was the court's order, I believe.

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

24 MR. SCHNEIDER: No.

25 JUSTICE GINSBURG: They're the same?

1 MR. SCHNEIDER: Yes.

2 I'd like to reserve the remainder of my
3 time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE RESPONDENT

8 MR. DREEBEN: Mr. Chief Justice, and may it
9 please the Court:

10 As Justice Breyer indicated, there really
11 are three stark choices before the Court in this case.
12 Paroline's position is that, because of a proximate
13 causation requirement, Amy can obtain nothing in
14 restitution.

15 Amy's position is that, because multiple
16 people have contributed to her single loss, she can
17 obtain the full restitution for all of her losses from
18 every criminal defendant.

19 The government's position is that there is a
20 solution that tort law has developed for providing some
21 restitution for Amy, not the entire restitution that
22 would be owed on account of her entire loss.

23 JUSTICE SCALIA: Yes. Well, now -- not
24 because tort law has developed that, I mean, I frankly
25 don't agree with what you say modern tort law is

1 supposed to allow, and -- and Keeton -- you know,
2 doesn't really establish that that's what the courts now
3 do.

4 But even without agreeing with that, can't I
5 find that that is the system that this statute intended
6 to impose? I mean, we're dealing here with a question
7 of statutory interpretation. So the question is not
8 what does modern tort law allow, but the question is
9 what, reasonably, could Congress have meant by this
10 statute?

11 MR. DREEBEN: I agree with that, Justice
12 Scalia.

13 JUSTICE SCALIA: Because I'm not going to go
14 along with you on -- you know, modern tort law. I think
15 that's nonsense. I don't think it's true.

16 MR. DREEBEN: Okay. The -- the tort law
17 issue is not really all that modern. It dates back to
18 the Restatement (Second) of Torts in Section 443(a).

19 And this Court applied that section in the
20 Burlington Northern case, which was a CERCLA case, to
21 hold that apportionment of the damages was required in a
22 pollution case, where all the pollution had merged into
23 a single --

24 JUSTICE SOTOMAYOR: But how do you square
25 your position with the statutory language? The

1 statutory language requires mandatory restitution order
2 for the, quote, "full amount of the victim's losses."
3 It also forbids courts to -- to decline to issue an
4 order, double negative, but it can't -- a court can't
5 refuse to issue an order on the ground that the victim
6 has been compensated by any other source.

7 It seems to me that that language, as crazy
8 as it seems, to you or -- to you, compels joint and
9 several liability because it's saying any -- all losses,
10 full amount of losses, and you can't offset her
11 compensation from any other sources.

12 MR. DREEBEN: Justice Sotomayor, I think
13 that the key to reading the statutory language is that
14 the definition of "victim" refers to a victim of the
15 offense in this case. So the term "victim" means the
16 individual harmed as a result of a commission of a crime
17 under this chapter.

18 The government's burden of proof in Section
19 3664(e) refers to demonstrating the amount of the loss
20 sustained by a victim as a result of the offense. So it
21 refers to the defendant's offense, not to the collective
22 harm that the --

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

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

2 JUSTICE SOTOMAYOR: -- that their damages
3 have to be the but-for cause.

4 MR. DREEBEN: I hope that the Court will
5 read the "as a result of" language to require causation,
6 but to interpret it in light of the way causation has
7 been understood in the unique circumstances that you
8 have here.

9 JUSTICE SCALIA: Well, you don't deny
10 but-for. I haven't understood your submission to be
11 that there need not be but-for cause here.

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

17 What tort law said is that, if a
18 multiplicity of actors inflict a single harm and one of
19 them comes forward with a reason that, if accepted,
20 would exonerate all of them, then that cannot be a
21 proper test of causation.

22 The proper test is aggregate causation,
23 where the aggregate group of offenders is the but-for
24 cause, and each one of the individuals in that set can
25 be regarded as --

1 CHIEF JUSTICE ROBERTS: But doesn't --
2 doesn't the individual at least cause some harm without
3 regard to the harm caused by the others?

4 MR. DREEBEN: Yes.

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

15 Now, he may say, well, it's kind of unfair
16 to stick me with that, but that's a different question
17 than the aggregate causation issue that you're
18 addressing.

19 If you have expert testimony, and there will
20 be expert testimony on the other side, that says it
21 normally requires counseling for someone, when they find
22 out, without regard to anything else, that an individual
23 has viewed this, why doesn't that require -- or at least
24 allow assessment of the -- the whole amount?

25 MR. DREEBEN: Mr. Chief Justice, that would

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

8 CHIEF JUSTICE ROBERTS: My -- I'm sorry. My
9 hypothetical is not aggregate causation. It is that
10 this individual caused this harm.

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

18 JUSTICE SCALIA: Well, you're -- you're
19 confusing whether there's a specific amount of harm
20 caused with whether it is easy to measure that harm.
21 The -- the tort cases you refer to are cases in which
22 there is a result produced that is not severable. You
23 can't say this person is -- you know, accounts for this
24 much of it, such as pollution, all the pollution there.
25 The stream is polluted.

1 That's quite different from this case
2 where -- where this -- this young woman has been
3 subjected to psychological harm because of thousands of
4 people viewing her rape.

5 Now, this -- she would be subjected to less
6 psychological harm if it was just one person or ten
7 people or a hundred people. In other words, each person
8 increases the amount of her psychological harm. It is
9 severable the way the tort cases you refer to are not.

10 And so why shouldn't the question in this
11 case be simply he caused a certain incremental amount of
12 psychological harm to -- to this woman and he should pay
13 for it and it's up to the district court to decide what
14 the proper amount of that payment ought to be.

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

18 JUSTICE SCALIA: I understand.

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

20 JUSTICE ALITO: Well, is it consistent with
21 human psychology? Are psychologists really able to do
22 this? If it's known that this image has been viewed
23 by -- even if you could figure out how many people have
24 viewed it, and I think, in the age of the Internet
25 that's impossible, but if you knew that it had been

1 viewed by a thousand people, is a psychologist able to
2 say that her knowledge that it has been viewed by a
3 thousand people causes this much harm?

4 And once she learns that it's now been
5 viewed by a thousand and one people, there's a little
6 bit of additional harm or some increment of additional
7 harm, and we can figure out how much that is. Can a
8 psychologist do that?

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

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

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

23 MR. DREEBEN: Justice Ginsburg, the courts
24 have approved several different formulas as not being an
25 abuse of discretion. One camp of courts approves a view

1 in which the government submits the number of people who
2 have been ordered to pay restitution to Amy, and that
3 number is then divided into the total harm, measured by
4 monetary means, that Amy has established. And that
5 provides a starting point.

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

9 JUSTICE GINSBURG: How do you get to the
10 18,000?

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

17 CHIEF JUSTICE ROBERTS: How does that -- I'm
18 sorry.

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

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

24 CHIEF JUSTICE ROBERTS: How does that work
25 for -- go ahead.

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

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

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

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

13 CHIEF JUSTICE ROBERTS: All right.
14 (Laughter.)

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

17 JUSTICE BREYER: Can we with ease say, look,
18 it's very complicated. I can think of some answers, but
19 they're too complicated for me to tell you what they
20 are. And Justice Scalia has a possible answer. Justice
21 Alito, it seemed to me, is pointing out that the second
22 person to look at the thing, if they're only two,
23 probably adds a lot of damage, but the 1000th person
24 compared to 999 is near zero.

25 Now, do we count this defendant as Number 2

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

5 Now, can we say that?

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

8 JUSTICE BREYER: Yes.

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

12 JUSTICE BREYER: But can we say -- can we
13 suggest that the sentencing commission -- you can't
14 order them to do it, of course not.

15 But can we suggest that this is the kind of
16 problem, very difficult, technically several ways to do
17 it, that they can go into this. Is that true, that they
18 could go into it and recommend or perhaps order?

19 MR. DREEBEN: They could recommend a -- an
20 approach. What the sentencing commission actually did
21 was recommend to Congress that it fix it because the
22 disagreements now pertain to the understanding of the
23 statute.

24 Our submission is that there are a variety
25 of 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,
4 and 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,
13 it struck me, when I read your brief, that it said, I
14 don't know why these courts started where they started,
15 whether each violation is worth 1,000 or 5,000 or
16 50,000.

17 And it seems as though somebody just plucks
18 an initial number out of the air and then everything is
19 pegged to that initial number, but that the initial
20 number has nothing in particular behind it or am I -- is
21 it more sensible than that?

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

25 JUSTICE SCALIA: But they're certainly

1 not using your theory. Even though it's not plucked out
2 of the air, they're certainly not using your theory.

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

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

7 MR. DREEBEN: They are using some theory.

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

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

18 And I --

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

21 JUSTICE SOTOMAYOR: I'm not sure what
22 sensible --

23 CHIEF JUSTICE ROBERTS: How do you tell --
24 your model, how does it work if it turns out that the
25 damages are a million dollars, as opposed to \$3.4

1 million? Is it still \$1,200 per offender?

2 MR. DREEBEN: We would, as I indicated,
3 start with a -- a division problem and approximate
4 the -- the number of damages that are allocable to that
5 individual and then adjust it because these defendants
6 are not all identical.

7 JUSTICE GINSBURG: So you start with --

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

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

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

22 MR. DREEBEN: Yes, that's correct, Justice
23 Ginsburg.

24 JUSTICE GINSBURG: So if there's any kind of
25 proportionality, it seems that the possessor of two

1 images should not be responsible for more than the
2 person who perpetrated -- perpetrated this horrendous
3 crime.

4 MR. DREEBEN: Well, his -- his restitution
5 may have been predicated on a very early period, where
6 it was not clear that Amy would be as victimized as she
7 has turned out to be. The very vice of child
8 pornography possession and distribution is that it
9 continually re-inflicts the abuse on the victim, so that
10 she cannot make a fresh start and say it's finally over,
11 I've put this behind me, I can now move on with my life.

12 The continuing re-victimization of her is
13 what justifies and creates the increased harms.

14 JUSTICE GINSBURG: I would like you to, to
15 the extent that you can, to help district judges get a
16 handle on this, what formula should they use and what
17 adjusting factors should they take into account after
18 they have that starting formula?

19 MR. DREEBEN: Justice Ginsburg, the -- the
20 formula that I proposed is the one that the government
21 has been suggesting to district courts around the
22 country.

23 Look at the number of convicted defendants
24 who have been ordered to pay restitution to Amy, divide
25 that into the total harm that the district court finds

1 was the result of the community of child pornography
2 possessors and then adjust it based on the severity of
3 the offense.

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

7 JUSTICE SCALIA: And that's wonderful
8 and -- you know, I -- I want to go along with you. This
9 is a bad guy, and -- and he ought to be punished, and he
10 ought to give restitution, but there is such a thing as
11 due process of law.

12 And what you're saying is -- I have no idea
13 how much he's going to be required to turn over, whether
14 it's going to be -- what was it in this case, \$3
15 million?

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

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

21 MR. DREEBEN: Well, in criminal --

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

1 MR. DREEBEN: Well, Justice Scalia --

2 JUSTICE SCALIA: -- some reasonable amount.

3 MR. DREEBEN: Post Booker --

4 JUSTICE SCALIA: That's just not the way we
5 do law.

6 MR. DREEBEN: -- post Booker, that is what
7 happens in criminal sentencing. District judges have an
8 enormous amount of discretion about how much
9 imprisonment time and fine time to use to apply to a
10 defendant. And there is appellate review that helps
11 establish some norms that can look to sentencing
12 guidelines as starting points.

13 But in criminal sentencing, imprecision and
14 estimation is the order of the day. And when you're
15 dealing with --

16 JUSTICE SCALIA: That's because the statute
17 says so. It says you get from -- you know, 10 to 20
18 years, okay? But the statute here doesn't say -- you
19 know, you'll -- you'll get between this and this,
20 whatever the district judge likes. It doesn't say that.
21 It says you -- you should compensate the victim for
22 what -- for what you've caused her.

23 MR. DREEBEN: But there are two background
24 principles that I think reinforce that a reasonable
25 estimation is better than all or none. The first

1 background principle is that, in criminal restitution,
2 exactitude is not required. Reasonable estimates are
3 the order of the day. Courts have recognized that.

4 And it's reinforced here by the fact that
5 this restitution provision is kind of a crime/tort
6 hybrid. It's criminal sentencing, but it's enacted
7 against the background of compensatory tort law. And in
8 compensatory tort law, reasonable estimates have long
9 been accepted.

10 In the Burlington Northern case that I
11 referred to earlier, the district court made an effort
12 to do some calculations, and then, at the end, he
13 applied a 50 percent "fudge factor" for estimations that
14 reflected possible calculation errors.

15 JUSTICE SCALIA: We have a fudge factor
16 here? Can a -- can a district judge use what he calls a
17 fudge factor -- this is a criminal statute. It's not a
18 tort case.

19 MR. DREEBEN: It is a criminal provision --

20 JUSTICE SCALIA: We're going to be liable
21 for a fudge factor.

22 (Laughter.)

23 MR. DREEBEN: -- that is -- that is placed
24 into criminal sentencing with a goal of both
25 compensating victims and determining that each defendant

1 comes face to face with the fact that that person has
2 inflicted some harm on a particular victim.

3 That's a valuable criminal sentencing
4 purpose, and to the extent that the only thing that
5 courts can do in this situation is attempt reasonable
6 approximations, that will not be exact, it's a better
7 solution than saying nothing, as Paroline would do, or
8 saying Amy -- everything, as Amy would do.

9 That is not proportionate to what the
10 defendant has done, but zero is also grossly
11 disproportionate to what the defendant has done.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Cassell.

15 ORAL ARGUMENT OF PAUL G. CASSELL

16 ON BEHALF OF THE RESPONDENT AMY UNKNOWN

17 MR. CASSELL: Mr. Chief Justice, and may it
18 please the Court:

19 Remarkably, this morning, the other parties
20 have taken a statute that promises Amy she will receive
21 restitution for all of her losses and interpreted it to
22 be a statute that has fudge factors, imprecision,
23 estimation, to produce some kind of an award that, in
24 the government's view, is fair.

25 That's not what Congress provided in this

1 particular statute. Congress answered the question
2 presented. You were asking, Justice Breyer, what's the
3 amount? The text of the statute tells us. It is the
4 full amount. Here, Amy has put forward --

5 JUSTICE BREYER: Why? I mean, the person
6 didn't cause the full amount. I mean, do you think
7 Congress didn't intend -- do they want to have people
8 pay for injury they didn't cause?

9 MR. CASSELL: We disagree with your premise
10 there, with all respect.

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

16 MR. CASSELL: The solution to the point that
17 you're raising, Justice Breyer, is to recognize that
18 Petitioner was a contributing cause to all of Amy's
19 losses.

20 Amy's losses come from a vast, faceless,
21 anonymous crowd of thousands of people scattered around
22 the globe, from Denver to Denmark, who are looking at
23 pictures of her being raped as an eight-year-old girl.
24 And that aggregate group of people all contribute to a
25 loss.

1 And I'm sure that Your Honor is familiar
2 with cases from this Court, for example, the Norfolk &
3 Western case, where asbestos manufacturers all
4 contributed to a particular loss. The result in that
5 case was joint and several liability. Each person who
6 contributed to the loss was on the hook for the damages
7 in their entirety.

8 JUSTICE KENNEDY: So -- so Congress assumed
9 that this defendant could be liable, in part, for other
10 people's crimes?

11 MR. CASSELL: No, Justice Kennedy. What
12 Congress assumed is that he would contribute to a single
13 loss, and then, at that point, he would be
14 responsible --

15 JUSTICE KENNEDY: A single law or loss?

16 MR. CASSELL: I'm sorry. Loss. He
17 contributed to the loss, and it's important to
18 understand --

19 JUSTICE SCALIA: He had two pictures. He
20 did not distribute at all. He was not a distributor,
21 right?

22 MR. CASSELL: That's right.

23 JUSTICE SCALIA: He was just convicted of
24 possessing two pictures. And -- and the statute doesn't
25 even require intentional possession, just knowing

1 possession, right? He could have gotten them by
2 accident. He knew he got them, but he never took them
3 off of his computer, but he's still guilty of the crime.

4 So I -- he's guilty -- he's guilty of the
5 crime. But to sock him for all of her -- all of her
6 psychiatric costs and everything else because he had two
7 pictures of her?

8 Congress couldn't have intended that.

9 MR. CASSELL: Congress did intend that, Your
10 Honor. They said that he is responsible for the full
11 amount of the losses.

12 There's a two-step process here. First, did
13 this particular defendant caused harm to this particular
14 victim? That's the victim definition found in 2259(c).
15 And there are findings of fact by the district court in
16 this case that the defendant, Petitioner, did harm --
17 did harm Amy.

18 And then, at that point, the only question
19 left under this mandatory restitution statute is how
20 much restitution does she get? And Congress has
21 answered that question. She gets the full amount, for
22 five itemized categories of losses, psychological
23 counseling being the most prominent.

24 She's documented, with detailed submissions,
25 that she is going to bear --

1 CHIEF JUSTICE ROBERTS: Well, but
2 responsible for those as a proximate result of the
3 offense.

4 MR. CASSELL: That --

5 CHIEF JUSTICE ROBERTS: The only offense
6 shown here in this case is the possession of the two
7 pictures. So how -- how can all of those amounts be the
8 result of the possession of two pictures?

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

12 CHIEF JUSTICE ROBERTS: Well, you understand
13 the statutory principle, that it says, "any other losses
14 suffered by the victim as a proximate result of the
15 offense," which suggests that the prior losses are also
16 limited as a proximate result of the offense.

17 MR. CASSELL: No, Mr. Chief Justice, and we
18 would ask you to affirm the Fifth Circuit's En Banc
19 decision, which disagreed with that reading. There are
20 numerous canons of statutory construction --

21 CHIEF JUSTICE ROBERTS: Why would-- Why would it make
22 sense to say that he's liable for lost income, whether
23 or not it's a proximate result, but when it comes to
24 other losses suffered by the victim, they have to be the
25 proximate result?

1 MR. CASSELL: There are a number of answers
2 to that question, Mr. Chief Justice. "Any other losses"
3 is potentially open-ended. It includes such things as
4 emotional distress damages that could be potentially
5 uncapped.

6 (A) through (E), however, are all
7 out-of-pocket pecuniary costs. They are defined. And
8 in this case, we have defined, with precision, what the
9 course of lifetime psychological counseling costs will
10 be for Amy.

11 JUSTICE SOTOMAYOR: Does your case fall if
12 we don't buy your argument, if we read into (F)
13 proximate causation?

14 MR. CASSELL: No, Justice Sotomayor --

15 JUSTICE SOTOMAYOR: So why are you wasting
16 time on the argument if you win either way? Tell us
17 without it.

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

25 Proximate cause is a legal shorthand for

1 scope of the risk -- a legal duty. And Congress has
2 defined the legal duty here. For those criminals who
3 commit a serious 10-year Federal felony, the scope of
4 their risk is they will pay the full amount of the
5 psychological counseling costs --

6 CHIEF JUSTICE ROBERTS: Can I get back to --
7 your point was that all of the (A) through (E) is
8 limited, and you don't need -- well, it's not. One of
9 the losses that can be gained -- recovered is lost
10 income.

11 Now, if you take away proximate cause, the
12 argument can be, well, I had to undergo counseling in a
13 particular period, so I wasn't able to get a master's
14 degree in this. Because I didn't get a master's degree,
15 I wasn't able to get a better-paying job, and therefore,
16 I'm entitled to the income from the better-paying job
17 that I would have gotten if I had a master's degree, if
18 I didn't have to take the counseling.

19 Now, unless you limit that by proximate
20 cause, it's entirely open-ended. It's not confined, as
21 you said.

22 MR. CASSELL: Well, there -- you're talking
23 about the problem of but-for causation, then what kind
24 of additional limitation will placed on this.

25 CHIEF JUSTICE ROBERTS: No, no. I'm talking

1 about proximate causation.

2 MR. CASSELL: Right. So there would be an
3 additional cause, which the government argues should be
4 a proximate cause limitation, but there are other
5 limitations that could be attached, and that's what the
6 Fifth Circuit En Banc did. It said, for example, that
7 if Amy suffered a car accident on the way to therapy,
8 that that would not be included.

9 Why? Because, contextually and
10 conventionally, we would not refer to those types of
11 losses as stemming from child pornography. That's
12 proximate cause.

13 JUSTICE SCALIA: Like Justice Sotomayor and
14 like the government here, I think, even if there is a
15 proximate cause requirement, it has been -- it has been
16 met, once you adopt the aggregate offense notion. But I
17 wanted to ask you about Subsection (F).

18 My -- it doesn't seem to me that you --
19 whether or not you read the proximate cause element in
20 (F) into (A), (B), (C), (D), and (E), it seems to me
21 what you have to read into (A), (B), (C), (D), and (E)
22 is the portion of (F) which says, "any other losses
23 suffered by the victim as a result of the offense." "Of
24 the offense."

25 Is it only (F) that is limited to the

1 particular offense, and (A), (B), (C), (D), and (E)
2 means those -- those items that come from anybody else's
3 conviction?

4 MR. CASSELL: No. The linkage -- the
5 particular defendant's conviction comes from Subsection
6 (C). A victim such as Amy has to establish that she's
7 been harmed as a result of this defendant's crime. That
8 establishes -- there's been a reference to aggregate
9 cause. We think the way to look at this would be --

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

12 MR. CASSELL: As a result of this
13 defendant's offense -- we agree that Subsection (C)
14 requires Amy to show that she was victimized by this
15 defendant.

16 JUSTICE KAGAN: But you -- you are not
17 claiming, are you -- or are you? -- that she's been
18 victimized to the tune of 3.4 million, as a result of
19 this particular defendant's offense?

20 MR. CASSELL: We are saying that she -- that
21 the Petitioner in this case, the defendant, contributed
22 to all of the losses that she suffered.

23 JUSTICE KAGAN: Well, contributed to.

24 MR. CASSELL: Yes.

25 JUSTICE KAGAN: But I take it that the point

1 of the government's submission is only contributed to,
2 and now, we have to sort of approximate what the
3 contribution was. And you come in and you say, no, it
4 shouldn't be -- notwithstanding that this particular
5 offense was responsible for only a part, you think the
6 defendant should be liable for the whole.

7 MR. CASSELL: We think that the defendant
8 contributed to all her losses.

9 Let me give you a quick illustration. Next
10 week, when Amy goes to her therapist and is billed \$100,
11 the defendant contributed to all \$100. And of course,
12 all we have when we get to the additional numbers down
13 the road is simply the fact that she's going to be going
14 to therapy, not just next week --

15 JUSTICE KAGAN: I guess I'm just not sure
16 what that means, contributed to \$100. Does that mean
17 she's -- the defendant is responsible for the entire
18 \$100 --

19 MR. CASSELL: Yes.

20 JUSTICE KAGAN: -- as a matter of fact? Or
21 does it mean that the defendant is responsible as a
22 matter of fact for some lesser part of the entire harm?

23 MR. CASSELL: No, the first. He's
24 responsible -- he is a contributing cause of the entire
25 amount.

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

4 MR. CASSELL: He contributed to the entire
5 \$100, just as multiple polluters contribute to
6 asbestosis --

7 JUSTICE KAGAN: Well, that's --

8 JUSTICE SCALIA: So he should contribute to
9 the payment. You're saying he contributed to the harm,
10 but he makes 100 percent of the payment. That doesn't
11 seem to me to make much sense.

12 MR. CASSELL: Well, Justice Scalia, we're
13 pure textualists on this. When you look at the text of
14 the statute, Congress has answered that question.
15 Congress could have written the statute different ways,
16 but they said that she is entitled to recover the full
17 amount of her loss --

18 JUSTICE KAGAN: Well, full amount --

19 JUSTICE SCALIA: They don't say from that
20 person.

21 JUSTICE KAGAN: -- from the particular
22 offense, Mr. Cassell, so that it's the full amount of
23 whatever the particular offense caused. But you're not
24 saying that this Defendant caused the entire 3.4.

25 MR. CASSELL: We're saying he contributed to

1 the entire 3.4 --

2 JUSTICE ALITO: Well, let me give you
3 this --

4 MR. CASSELL: -- along with the other
5 people.

6 JUSTICE ALITO: I'm sorry. I didn't mean to
7 interrupt you.

8 MR. CASSELL: No, I -- you can't
9 disaggregate them, and that's the fundamental problem
10 here. If you look at, for example, our amicus brief
11 with the American professional association involved with
12 the sexual abuse of children, what they say is that you
13 cannot tease out this particular defendant or this
14 particular harm.

15 They all come together to --

16 JUSTICE BREYER: So -- so contributed, also,
17 a person who didn't have a picture of her, but watched
18 other victims.

19 MR. CASSELL: Well, no --

20 JUSTICE BREYER: That person contributed to
21 her, too, because it creates a market for the entire
22 situation. So some limiting principle has to come into
23 play, and the limiting principle that I think people are
24 driving at is, because there's a terrible crime, we
25 don't convict the person who didn't do it, all right?

1 And similarly, because this is a terrible crime, you
2 don't require a person to pay what he didn't cause.

3 Now, that's sort of a principle going on.

4 Now, if you accept that, at least hypothetically, can
5 you give any answer -- I'm afraid you can't and you're
6 going to say --

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

8 JUSTICE BREYER: But answer to what seems to
9 be bothering me and a lot of others is, okay, let's
10 accept the notion of cause, but what is a -- this is
11 called restitution --

12 MR. CASSELL: Yes.

13 JUSTICE BREYER: -- it isn't called fines.
14 And so, given that, what -- how do you do it? How do
15 you distinguish, so she gets some reasonable amount?
16 How do you do it that you're -- I can think of -- we've
17 had about four different suggestions here. But what's
18 your opinion, if you lose on the first? What's the best
19 way to do it?

20 That's what I think people are struggling
21 for -- with.

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

24 JUSTICE BREYER: That's what I suspected you
25 would say.

1 (Laughter.)

2 JUSTICE ALITO: Well, let me give you --
3 Mr. Cassell, let me give you this example. There are
4 pictures like this, and it's known that they are out on
5 the Internet, and so therefore, they are probably always
6 going to be available and who knows how many people are
7 going to view it.

8 And so the first person is caught for
9 possession of some of these pictures and is convicted,
10 and the psychologist testifies that -- you know, my
11 client -- that the victim in this case knows that these
12 things are out there, and there's an unknown -- an
13 unknown quantity of people are going to view it, and my
14 estimate is that the -- the treatment she is going to
15 need for this is going to be \$5 million. All right. Or
16 3 million -- \$3 million, whatever it is.

17 Now, the first person is convicted, so the
18 first person is assessed restitution in the amount of
19 \$3 million, right? But then, shortly after that, ten
20 more people are convicted for possessing the same
21 amount.

22 They all pay nothing because the first
23 person paid everything? That's your answer?

24 MR. CASSELL: That's our answer, and that's
25 exactly what Congress wanted. Congress wanted to take

1 these vulnerable victims, of child pornography crimes,
2 Federal sex offense crimes, and domestic violence, and
3 get them full restitution as quickly and effectively as
4 possible.

5 And then, after that, if there's a need to
6 send an additional message to a defendant, he can be
7 fined up to a quarter of a million dollars or sent to
8 prison for a longer period of time.

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

13 MR. CASSELL: Yes.

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

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

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

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

23 JUSTICE KAGAN: Usually, when we approve
24 joint and several liability, we do so against a
25 background of a functioning system of contribution,

1 where one defendant pays the entire thing, but then can
2 go after --

3 MR. CASSELL: Right.

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

10 MR. CASSELL: We disagree with the premise
11 here. The background principle for intentional
12 tortfeasors is they got stuck with the entire liability
13 jointly and severally. That was the common law
14 approach. Now, if you want to deviate from the common
15 law approach and read a contribution action into the
16 statute, we're certainly not opposed to this.

17 But the overriding goal of Congress, as it
18 always is when they deal with criminal, intentional
19 tortfeasors, is to pay more attention to the victims and
20 less about some notion of distributing losses among
21 criminally culpable defendants.

22 Congress doesn't give you any indication in
23 this statute that they were concerned that one
24 particular defendant might pay more than his, quote,
25 "fair share," or whatever that means. And the

1 fundamental problem with the government's position is
2 that, after four-and-a-half years of litigation, we
3 still don't have any indication as to how much Amy is
4 going to receive in this particular case.

5 What the government proposes to do is to
6 cast district courts adrift, as they have been for the
7 last four and a half years, to look at a variety of the
8 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.

24 Then what you do is you divide by three. I
25 mean, that way, everybody would be treated fairly, and

1 moreover, the victim would at least have a shot at
2 getting --

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

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

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

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

13 MR. CASSELL: A tiny percentage --

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

17 MR. CASSELL: What you're assuming, though,
18 is that there's going to be a steady stream of cases,
19 that criminals aren't going to discover new encryption
20 techniques to keep their nefarious activities secrets.

21 We don't know whether there are going to be
22 convictions next year or the year following. And
23 Congress acted against that understanding and said she
24 recovers the full amount from the very first person, and
25 if she gets her compensation, then she's out of the

1 picture.

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

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

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

25 And it's hardly a surprise to discover, when

1 you look at the Violence Against Women Act, that
2 Congress created a particularly expansive restitution
3 regime for the victims of these particular crimes.

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

10 JUSTICE SCALIA: This is subsequent
11 legislative history? Is that what this is?

12 MR. CASSELL: Some of the members of the
13 Court reviewed --

14 JUSTICE SCALIA: Even those that like
15 legislative history don't like subsequent legislative
16 history.

17 (Laughter.)

18 MR. CASSELL: Well, then, if you want to go
19 the with the textual approach, this is a simple case,
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: No, it's not a
22 simple case. You said, rhetorical exaggeration, every
23 word in the statute leads to that. But the key words
24 don't. The key words are "proximate result of the
25 offense."

1 And it's difficult to argue that the entire
2 amount is a proximate result of the offense of two
3 pictures.

4 MR. CASSELL: Well, what happened was the
5 Petitioner in this case contributed to the entire
6 amount.

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

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

21 JUSTICE GINSBURG: But the point has already
22 been made that it isn't a typical joint tortfeasor
23 situation, where you can seek contribution from people
24 who equally contributed. How would --

25 CHIEF JUSTICE ROBERTS: You can please

1 answer.

2 JUSTICE GINSBURG: How would -- how would
3 the defendant here go about seeking contribution?

4 MR. CASSELL: Well, the defendant would --
5 if there was a wealthy defendant, who was unhappy with
6 the share he'd been ordered to pay, he could simply try
7 to find other wealthy defendants out there and
8 interplead them in some kind of a case.

9 We admit that's going to lead to litigation
10 burdens, that Congress wanted those burdens on guilty
11 criminals, rather than innocent victims.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Schneider, five minutes.

14 REBUTTAL ARGUMENT OF STANLEY G. SCHNEIDER,

15 ON BEHALF OF THE PETITIONER,

16 APPOINTED BY THIS COURT

17 MR. SCHNEIDER: Thank you.

18 This -- this is a criminal sentencing
19 problem. And Congress, in 1996, apparently codified --
20 codified this Court's opinion in Hughey, in creating a
21 burden of proof on the government to demonstrate that
22 the losses sustained by the victim are the result of the
23 offense and created a number of new mandatory
24 restitution statutes that apply, and that doesn't
25 change.

1 So as the reading -- the plain reading of
2 the statute point (59)-- with the government's burden of proof,
3 requires that the government demonstrate that, for
4 example, the medical services losses of the victim of
5 child pornography are caused by -- are the result of the
6 defendant's offense. And that's what Congress intended
7 by adopting -- of 3664(e) and placing it as the
8 enforcement provision of each of the restitution
9 statutes that it created in 1996. It codified Hughey.

10 And what the idea of contribution suggests
11 that convicted sex offenders across the country are
12 going to get together and see who pays what to whom.
13 That's not what Congress intended. This is a sentencing
14 proceeding that requires a particularized,
15 individualized sentence based upon criminal conduct.

16 And that's what -- what the -- what Congress
17 intended when it created all these statutes. The ideal
18 solution is to say, Congress, make each defendant pay
19 \$1,000 per image. That would be -- into a fund for
20 restitution for victims.

21 And that --

22 JUSTICE KENNEDY: Well, you're right back to
23 the question Justice Kagan began, that if you have two
24 offenders, that there's going to be recovery. If you
25 have 1,002, there won't be.

1 MR. SCHNEIDER: There will always be -- if
2 there's two offenders that are caught, you may get
3 restitution from one of them. But if -- but you're
4 looking at what a single judge has to sentence someone.
5 A single judge, like Judge Davis, had one defendant.

6 He didn't have a defendant in Florida or
7 Maine or Oregon to see what that person's background
8 was, doesn't have the benefit of a PSR. He has to look
9 at one person. And in this case, the district court
10 balanced two experts and the methodology that was
11 challenged and simply said, I find she was a victim, I
12 find that she was harmed.

13 But the government didn't meet its statutory
14 burden of proof in this case, and in many other cases,
15 there is losses proved. And there's a difference
16 between harm and loss.

17 In this case, the district court did exactly
18 what the government wanted them to do: Weigh the
19 evidence, listen to the evidence, look at the defendant
20 and see if the government met its burden. And we'd ask
21 the Court to reverse the Fifth Circuit and affirm the
22 district court.

23 Thank you very much.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

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

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A				
able 13:19,20 21:21 22:1 39:13,15 49:13	6:11,13,20 7:19 7:19,23 9:17 18:12,22,23 19:17 20:5,9 34:24 40:16 41:8	50:5	33:6	background 31:23 32:1,7 47:25 48:11 56:7
aboveentitled 1:11 57:2	agree 3:19 6:4,5,12 15:25 16:11 41:13	analysis 22:19	arbitrary 26:23	bad 30:9
absolutely 47:19	agreeing 16:4	anonymous 34:21	arent 28:14 50:19	balanced 56:10
abuse 22:25 29:9 44:12	ahead 23:25	answer 3:16 9:5,15 9:17,19,20,25 10:11 11:6,14,15 11:17 13:25 24:20 25:1,2,2 45:5,8 46:23,24 54:1	argue 17:24 53:1	banc 37:18 40:6
abuses 30:5	air 26:18,23 27:2	answered 34:1 36:21 43:14	argues 40:3	base 11:1 12:5
accept 18:14 45:4 45:10	al 1:6	answers 24:18 38:1	arguing 5:13 17:25	based 30:2 55:15
accepted 18:19 32:9	alito 4:5,14 5:8 11:6 12:20 21:20 22:9 23:14 24:21 44:2,6 46:2 49:11	anticipate 38:19	argument 1:12 2:2 2:5,8,11 3:3,7 5:2 15:6 33:15 38:12 38:16 39:12 54:14	basically 27:12
accident 36:2 40:7	allocable 28:4	anybody 41:2	arrive 22:18	bear 36:25
accords 27:15	allow 16:1,8 19:24 20:1,2	apparently 11:13 54:19	articulate 27:11	beauties 51:2
account 15:22 28:18,20 29:17	alternative 9:1 26:6	appeals 3:18 30:4	asbestos 35:3	began 55:23
accounts 20:23	american 44:11	appear 38:23	asbestosis 43:6	behalf 1:15,18,21 2:4,7,10,13 3:8 15:7 33:16 54:15
act 51:22 52:1,7 53:17,18	amicus 44:10 52:5	appearances 1:14	asked 30:17	believe 14:20
acted 8:23 50:23	amount 13:17 14:17,17 17:2,10 17:19 19:11,12,24 20:3,11,16,19 21:8,11,14 30:16 31:2,8 34:3,4,6,12 36:11,21 39:4 42:25 43:17,18,22 45:15,23 46:18,21 47:10,11 49:13,18 50:24 51:17 53:2 53:6,9	appellate 31:10	asking 34:2 47:20 48:7	benefit 56:8
action 48:15		appendix 6:24	assault 51:23	best 45:18,22
actions 6:8,13		applicable 6:22	assessed 46:18	better 26:4,4 31:25 33:6
activities 50:20		applied 16:19 32:13 53:16	assessment 19:24 20:1,2	betterpaying 39:15 39:16
actors 18:18		applies 10:2	association 44:11	billed 42:10
additional 22:6,6 39:24 40:3 42:12 47:6		apply 6:11 31:9 54:24	assume 38:21	bipartisan 52:5
address 4:1		appointed 1:16 3:9 54:16	assumed 35:8,12	bit 22:6
addressed 12:1		apportionment 16:21 25:7	assuming 50:17	booker 31:3,6
addressing 19:18		approach 22:10,14 25:20,25 48:14,15 51:2,5 52:19 53:12	assured 48:5	bothering 45:9
adds 24:23		approaches 24:16	attached 40:5	breyer 9:5,23 10:8 12:21 15:10 24:17 25:8,12 34:2,5,11 34:17 44:16,20 45:8,13,24 49:19 50:6,9,14
adjust 23:8 28:5 30:2	amounts 37:7	appropriate 14:11 20:6	attempt 33:5	breyers 11:17
adjusted 24:6	amy 1:21 2:10 11:24 15:13,21 19:7 20:12 23:2,4 23:13 29:6,24 30:17 33:8,8,16 33:20 34:4 36:17 37:10 38:10 40:7 41:6,14 42:10 45:23 47:20 49:3 51:7	approve 47:23	attention 48:19 52:4	brief 6:24 22:17 26:13 44:10 49:9 52:5
adjusting 29:17		approved 22:24	attributable 11:20 13:23 20:17	broad 51:20
admit 54:9		approves 22:25	available 19:9 46:6	burden 4:3 6:1,21 7:12 10:1 17:18 54:21 55:2 56:14 56:20
adopt 40:16 51:5		approximate 28:3 42:2	average 19:11 26:11	burdens 54:10,10
adopting 55:7		approximation 27:15	award 3:15,22 11:2 14:22 33:23	burlington 16:20 32:10
adrift 49:6		approximations	awarding 26:9	butfor 5:14 17:24
affirm 37:18 51:3 56:21			awards 10:24	
afraid 45:5				
age 21:24				
aggregate 4:3 6:8				

17:25 18:3,10,11 18:13,23 39:23 buy 38:12	21:9 26:10 35:2 50:18 51:6,23,23 51:24 56:14 cassell 1:20 2:9 33:14,15,17 34:9 34:16 35:11,16,22 36:9 37:4,9,17 38:1,14,18 39:22 40:2 41:4,12,20 41:24 42:7,19,23 43:4,12,22,25 44:4,8,19 45:7,12 45:22 46:3,24 47:13,16,19 48:3 48:10 49:17 50:3 50:8,13,17 52:12 52:18 53:4 54:4 cast 49:6 categories 36:22 category 11:7 caught 46:8 49:22 50:7 56:2 causation 4:3,7,15 6:11,20 10:5,7 11:2 15:13 18:5,6 18:21,22 19:17 20:5,9 38:13 39:23 40:1 cause 4:8,24,24 5:1 5:7,9,16 9:10,18 17:24 18:3,11,13 18:24 19:2 34:6,8 34:18 38:22,24,25 39:11,20 40:3,4 40:12,15,19 41:9 42:24 43:3 45:2 45:10 53:18 caused 3:14,17 4:12,16,16,21 12:11 19:3,9 20:10,12,20 21:11 31:22 34:12,14 36:13 43:23,24 55:5 causes 22:3 cercle 16:20	certain 19:11,12 20:16 21:11 certainly 11:11 25:6 26:25 27:2 47:19 48:16 51:13 certainty 23:13 51:10 challenge 8:24 challenged 56:11 change 54:25 chapter 7:5,7 17:17 charged 7:21 chief 3:3,10 6:6 15:4,8 19:1,5,25 20:8 23:17,24 24:8,12,13 26:2 27:19,23 28:8,14 33:13,17 37:1,5 37:10,12,17,21 38:2 39:6,25 52:21 53:25 54:12 56:24 child 3:22 4:17 5:3 8:15 9:7 10:6 11:21 26:8 29:7 30:1 40:11 47:1 51:22 55:5 children 44:12 choices 15:11 circuit 3:19 4:1 11:23,25 40:6 51:4 56:21 circuits 37:18 circumstances 18:7 city 1:20 claiming 41:17 clear 7:2 29:6 clearly 4:8 9:7 client 13:12 46:11 codified 54:19,20 55:9 colleague 5:7 collected 47:15 collecting 51:8 collective 17:21 18:12	come 30:23 34:20 41:2 42:3 44:15 44:22 50:11 comes 18:19 19:7 22:16 33:1 37:23 41:5 53:17 commission 17:16 25:4,13,20 commit 39:3 common 48:13,14 community 30:1 compared 24:24 compels 17:8 compensate 31:21 compensated 17:6 53:20 compensating 32:25 compensation 17:11 50:25 compensatory 32:7 32:8 competing 8:22 complicated 24:18 24:19 computations 27:14 computer 36:3 concept 4:2 5:9 9:18 concerned 48:23 conclude 20:16 conclusion 21:16 22:11 43:2 concretely 22:13 conduct 3:15 4:12 4:22 5:17,18,19 5:23,24 12:6 55:15 confined 39:20 conflicts 4:3 6:20 confusing 4:24 20:19 congress 7:3 9:7,14 14:7 16:9 25:21 33:25 34:1,7 35:8	35:12 36:8,9,20 39:1 43:14,15 46:25,25 48:17,22 50:23 51:13,16 52:2 53:13 54:10 54:19 55:6,13,16 55:18 consensus 27:12,12 consideration 5:25 considerations 27:11 considering 23:11 consistent 21:16,20 construction 3:12 37:20 contained 4:4 contextually 40:9 continually 29:9 continue 5:8 continuing 29:12 contribute 34:24 35:12 43:5,8 contributed 15:16 35:4,6,17 41:21 41:23 42:1,8,11 42:16 43:4,9,25 44:16,20 53:5,24 contributing 34:18 42:24 contribution 42:3 47:25 48:15 53:23 54:3 55:10 conventional 53:8 conventionally 40:10 convict 44:25 convicted 29:23 35:23 46:9,17,20 50:7 55:11 conviction 8:5 41:3 41:5 convictions 50:22 correct 12:11 24:4 28:22 correctly 49:9 costs 36:6 38:7,9
--	--	--	--	--

<p>39:5 47:22 51:12 couldnt 36:8 counsel 15:4 33:13 54:12 56:24 counseling 14:12 19:11,21 20:14 36:23 38:9 39:5 39:12,18 47:22 51:11 count 24:25 25:1 country 29:22 55:11 course 19:5 25:14 38:9 42:11 court 1:1,12,16 3:9 3:11,25 4:19 7:4,8 8:3 9:15 11:25 15:9,11 16:19 17:4 18:4 20:15 21:13 22:22 25:6 29:25 32:11 33:18 35:2 36:15 38:21 52:13 53:10,15 54:16 56:9,17,21 56:22 courts 3:18 14:20 16:2 17:3 22:23 22:25 23:7 24:5 25:9 26:9,14 28:18 29:21 30:4 30:5 32:3 33:5 49:6 54:20 covered 13:7 51:21 craft 3:21 crazy 17:7 create 53:14 created 5:21 9:19 52:2 54:23 55:9 55:17 creates 29:13 44:21 creating 54:20 credible 20:16 crime 10:5,5 17:16 29:3 32:5 36:3,5 41:7 44:24 45:1 51:21</p>	<p>crimes 35:10 47:1,2 51:21 52:3 criminal 15:18 30:20,21 31:7,13 32:1,6,17,19,24 33:3 48:18 54:18 55:15 criminally 48:21 criminals 39:2 50:19 53:17 54:11 crowd 34:21 culpable 48:21</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 1:8,18 3:1 40:20 40:21 41:1 damage 5:21 13:22 24:23 damages 8:8 14:17 16:21 18:2 20:1 27:25 28:4,11 35:6 38:4 dates 16:17 davis 56:5 day 31:14 32:3 daytoday 13:1 deal 48:18 dealing 5:16,18 6:20 16:6 31:15 dealt 18:13 decide 21:13 decision 4:1 9:4 37:19 decline 17:3 deduct 47:17 defendant 12:10 15:18 24:25 28:9 31:10 32:25 33:10 33:11 35:9 36:13 36:16 41:15,21 42:6,7,11,17,21 43:3,24 44:13 47:6 48:1,24 54:3 54:4,5 55:18 56:5 56:6,19 defendants 3:14</p>	<p>4:21 11:20 17:21 23:12 28:5,14,16 28:17 29:23 41:5 41:7,11,13,19 48:4,21 54:7 55:6 defined 38:7,8 39:2 definition 17:14 36:14 degree 39:14,14,17 demonstrate 7:12 54:21 55:3 demonstrating 17:19 denmark 34:22 denver 34:22 deny 18:9 department 1:18 49:20 depends 8:19 depicted 5:4 deputy 1:17 desperately 51:12 51:18 detailed 36:24 determination 11:3 11:5 12:4,5,14 determine 4:20 11:19 determining 23:15 32:25 developed 15:20,24 deviate 48:14 dictated 14:7 didnt 9:10 12:9,11 12:16 34:6,7,8 39:14,18 44:6,17 44:25 45:2 56:6 56:13 difference 27:20 56:15 different 4:13 5:6,9 19:16 21:1,17 22:10,24 25:10 30:24 43:15 45:17 51:14 difficult 9:22 25:16</p>	<p>38:20 53:1 difficulty 10:12 23:14 digital 11:8 direct 52:4 direction 7:6 directly 20:17 disaggregate 44:9 disagree 34:9 48:10 disagreed 37:19 disagreements 25:22 discover 50:19 51:25 discretion 22:25 30:6 31:8 disproportionate 33:11 distinguish 45:15 distress 38:4 distribute 35:20 distributed 13:6 distributing 48:20 distribution 29:8 distributor 35:20 distributors 28:17 district 4:19 8:20 8:23 12:14 21:13 26:9 29:15,21,25 30:5,23 31:7,20 32:11,16 36:15 49:6 56:9,17,22 districts 25:9 divide 29:24 34:15 49:24 divided 23:3 dividing 10:12 division 28:3 documented 36:24 doesnt 7:15 10:13 12:1 16:2 19:1,2 19:23 24:11 26:3 31:18,20 35:24 40:18 43:10 48:22 54:24 56:8 doing 49:19</p>	<p>dollars 27:25 28:10 47:7 domestic 47:2 51:23 dont 5:22 11:9,22 15:25 16:15 18:1 18:9 20:1 22:20 26:14 38:12 39:8 43:2,19 44:25 45:2 49:3 50:21 52:15,24 double 17:4 47:20 doyle 1:3 3:23 drafted 51:13 drafting 52:6 dreeben 1:17 2:6 15:5,6,8 16:11,16 17:12 18:1,4,12 19:4,25 20:11 21:15,19 22:9,12 22:23 23:11,19 24:4,11,15 25:6,9 25:19 26:6,22 27:3,7,10 28:2,13 28:22 29:4,19 30:16,21 31:1,3,6 31:23 32:19,23 driving 44:24 due 30:11 duty 39:1,2</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e 2:1 3:1,1 4:4 6:2 6:22,23 8:1 17:19 38:6 39:7 40:20 40:21 41:1 55:7 earlier 32:11 early 29:5 ease 24:17 easy 20:20 effectively 47:3 effort 32:11 eightyearold 34:23 either 38:16,18 element 40:19 eleven 3:18</p>
--	--	---	--	--

<p> elses 41:2 emotional 38:4 emphasize 30:6 employment 20:15 en 37:18 40:6 enacted 20:4 32:6 encryption 50:19 enforcement 3:20 55:8 enormous 31:8 entire 8:8 15:21,22 20:2 42:17,22,24 43:3,4,24 44:1,21 48:1,12 51:20 53:1,5 entirely 39:20 entirety 35:7 entitled 39:16 43:16 enumerated 3:20 equally 53:24 equation 18:15 eradicate 11:13 errors 32:14 escape 10:14 esq 1:15,17,20 2:3 2:6,9,12 establish 16:2 31:11 41:6 established 23:4 establishes 41:8 estimate 24:7 46:14 51:3 estimates 32:2,8 estimation 31:14 31:25 33:23 estimations 32:13 et 1:6 everybody 49:15 49:16,25 evidence 7:13 8:21 10:22 11:1,4 12:4 14:22 56:19,19 exact 33:6 exactitude 32:2 exactly 12:7 46:25 </p>	<p> 56:17 exaggeration 52:22 example 12:8,18,23 23:6 35:2 40:6 44:10 46:3 49:11 52:5 53:10 55:4 exists 11:13 exonerate 18:20 expansive 52:2 expect 28:9,9 expenses 13:23 experience 10:19 19:8 experiment 25:10 expert 12:23 19:7 19:19,20 20:12 experts 8:22,25 56:10 explain 4:6 explaining 12:24 explanation 9:2 extent 29:15 33:4 </p> <hr/> <p style="text-align: center;">F</p> <hr/> <p> f 8:2,2 37:10,11 38:12 40:17,20,22 40:25 face 23:13 33:1,1 faceless 34:20 facet 14:5 fact 4:24 5:7 23:21 32:4 33:1 36:15 42:13,20,22 factbased 11:3 factintensive 4:18 factor 32:13,15,17 32:21 factors 28:18 29:17 33:22 49:8,9 facts 4:20 8:19 factual 4:15 fair 33:24 48:25 fairly 49:25 fall 38:11 familiar 35:1 far 6:9 47:14 </p>	<p> faulty 9:3 federal 27:16 39:3 47:2 51:21,23 feel 5:4 felony 39:3 fewer 8:17 field 10:19 fifth 4:1 37:18 40:6 51:4 56:21 figure 21:23 22:7 50:11 figures 49:21,21 figuring 13:21 filing 51:7 finally 29:10 find 6:23 10:13 16:5 19:21 20:12 49:20,21 50:9 54:7 56:11,12 finding 11:2,24 23:21 findings 36:15 finds 10:13 29:25 fine 31:9 34:12 50:14 fined 47:7 fines 45:13 first 3:4 4:1 24:9,12 26:3 27:3 31:25 36:12 42:23 45:18 46:8,17,18,22 49:12 50:24 five 34:15 36:22 54:13 fix 25:21 florida 56:6 following 50:22 forbids 17:3 forensic 8:24 12:15 foreseeability 5:1 forgetting 9:6 formula 22:18,21 24:6 29:16,18,20 formulas 22:24 formulations 25:11 30:5 </p>	<p> forward 18:19 34:4 found 20:16 36:14 four 34:13 45:17 49:7 fourandahalf 49:2 fraction 9:11 frankly 15:24 fresh 29:10 front 7:25 fudge 32:13,15,17 32:21 33:22 full 15:17 17:2,10 34:4,6,12 36:10 36:21 39:4 43:16 43:18,22 45:23 47:3 49:10,10,13 49:18 50:24 51:17 53:9 fully 53:20 functioning 47:25 fund 55:19 fundamental 44:9 49:1 further 22:19 future 11:12 24:3 </p> <hr/> <p style="text-align: center;">G</p> <hr/> <p> g 1:15,20 2:3,9,12 3:1,7 33:15 54:14 gained 39:9 gatekeeper 8:23 12:15 gather 22:17 general 1:17 getting 22:10 50:2 ginsburg 6:3 7:1,15 14:13,21,25 22:12 22:23 23:9,23 24:1,5 28:7,19,23 28:24 29:14,19 47:9,14,17 53:21 54:2 girl 34:23 give 12:7,18 14:5 30:10 42:9 44:2 45:5,23 46:2,3 </p>	<p> 48:22 given 14:12 45:14 globe 34:22 go 5:15 6:9 16:13 23:25 25:17,18 30:8 48:2 52:18 54:3 goal 32:24 48:17 51:16,16 52:8 goes 14:9 42:10 48:8 going 5:4 7:17 10:14 16:13 17:24 27:14 30:13,14,19 32:20 36:25 42:13 42:13 45:3,6 46:6 46:7,13,14,15 49:4 50:7,15,15 50:18,19,21 51:11 53:19 54:9 55:12 55:24 good 50:16 gotten 36:1 39:17 government 3:18 6:21 10:12 12:15 12:19 21:16 22:10 22:16 23:1 29:20 40:3,14 49:5 51:10 54:21 55:3 56:13,18,20 governments 4:2 6:1 7:11 9:17 10:1 15:19 17:18 22:14 33:24 42:1 49:1,9 51:5 55:2 great 23:14 greater 8:10 grossly 33:10 ground 17:5 group 18:23 34:24 52:5 guess 20:15 42:15 43:1 48:7 50:12 guidelines 31:12 guilty 36:3,4,4 54:10 </p>
---	---	---	---	--

guy 30:9	hundred 21:7 28:16	income 37:22 39:10 39:16 51:12	13:12 17:23 19:6 45:13 53:22	26:1,12,25 27:5,8 27:19,21,23 28:7
H	hurt 5:5	incorrect 4:2	issue 4:6,11,15 5:5 5:10 16:17 17:3,5 19:17	28:8,14,19,22,24 29:14,19 30:7,18 30:22 31:1,2,4,16 32:15,20 33:13,17 34:2,5,11,17 35:8 35:11,15,19,23 37:1,5,10,12,17 37:21 38:2,11,14 38:15 39:6,25 40:13,13 41:10,16 41:23,25 42:15,20 43:1,7,8,12,18,19 43:21 44:2,6,16 44:20 45:8,13,24 46:2 47:9,14,17 47:23 48:4 49:11 49:19 50:6,9,14 52:10,14,21 53:21 53:25 54:2,12 55:22,23 56:24
half 49:7	hybrid 32:6	increased 29:13	itemized 36:22	justices 26:2
handinhand 5:15	hypothetical 12:19 20:9	increases 21:8	items 13:5 41:2	justifies 29:13
handle 29:16	hypothetically 45:4	increment 22:6	ive 29:11	K
happen 27:14	I	incremental 21:11	J	kagan 8:6,13 12:20 26:1,12 41:16,23 41:25 42:15,20 43:1,7,18,21 47:23 48:4 55:23
happened 53:4	id 15:2	indicated 15:10 28:2,14 52:7	january 1:9	keep 49:15 50:20
happens 19:14 31:7	idea 27:8 30:12,18 55:10	indicates 51:15	job 25:4 39:15,16	keeton 16:1
hard 25:1	ideal 55:17	indication 48:22 49:3	joint 17:8 35:5 47:24 53:11,15,22	kennedy 6:4,6,7,10 6:12,17 7:16,22 35:8,11,15 41:10 55:22
harm 4:12,13 6:15 6:18 8:9 11:19 12:10 13:10 17:22 18:15,18 19:2,3,8 19:13 20:10,12,19 20:20 21:3,6,8,12 22:3,6,7 23:3 29:25 33:2 36:13 36:16,17 42:22 43:3,9 44:14 53:18 56:16	identical 28:6,15	indictment 7:20,25	jointly 3:24 48:13 53:8	key 17:13 52:23,24
harmed 17:16 41:7 56:12	identifiable 4:21	individual 5:4 8:16 10:23 12:24 13:2 13:3,4,7 17:16 19:2,12,22 20:10 28:5	judge 3:15 8:1,20 8:22,23 9:1 11:1,4 12:5,14 30:23 31:20 32:16 56:4 56:5,5	kind 19:15 25:15 28:24 32:5 33:23 39:23 48:8 53:9 54:8
harms 29:13	identified 14:8	individualized 55:15	judges 27:16 29:15 31:7	knew 21:25 36:2
havent 18:10	ignored 3:19	individuals 18:24	judgment 49:15	know 10:13 11:9 12:9,11 13:4,6 16:1,14 20:23
hear 3:3	illustration 42:9	inflict 18:18	judgments 27:15 47:10	
hed 54:6	im 11:23 16:13 20:8 23:17 27:21 35:1,16 39:16,25 42:15 43:1 44:6 45:5,7	inflicted 33:2	judicial 23:21 27:12	
heinous 10:5	image 11:8 21:22 55:19	information 27:13	jurisdiction 25:10	
help 29:15	images 3:22 19:9 28:15,16 29:1 50:5	initial 26:18,19,19	justice 1:18 3:3,11 4:5,14,23 5:12 6:3 6:4,6,6,7,10,12,17 7:1,15,16,22 8:6 8:13 9:5,23 10:8 11:6,17 12:7,18 12:19,20,21 13:3 13:9,25 14:2,5,13 14:21,25 15:4,8 15:10,23 16:11,13 16:24 17:12,23 18:2,9 19:1,5,25 20:8,18 21:15,18 21:20 22:9,12,23 23:9,14,17,23,24 24:1,5,8,12,13,17 24:20,20 25:8,12	
helps 31:10	immediately 34:12	innocent 54:11	judicial 23:21 27:12	
hes 7:24 13:15 30:13,18 36:3,4,4 37:22 42:23	important 5:25 35:17	innovation 53:10	judgment 49:15	
history 52:11,15,16	impose 16:6 48:7 49:14	instance 26:7	judgments 27:15 47:10	
hit 49:16	imposing 49:15	intend 34:7 36:9	judicial 23:21 27:12	
hold 16:21 20:6	impossible 11:10 11:11,13,19 21:25 27:4 50:10	intended 16:5 36:8 55:6,13,17	jurisdiction 25:10	
honest 11:15	imprecision 31:13 33:22	intentional 35:25 48:11,18	justice 1:18 3:3,11 4:5,14,23 5:12 6:3 6:4,6,6,7,10,12,17 7:1,15,16,22 8:6 8:13 9:5,23 10:8 11:6,17 12:7,18 12:19,20,21 13:3 13:9,25 14:2,5,13 14:21,25 15:4,8 15:10,23 16:11,13 16:24 17:12,23 18:2,9 19:1,5,25 20:8,18 21:15,18 21:20 22:9,12,23 23:9,14,17,23,24 24:1,5,8,12,13,17 24:20,20 25:8,12	
honor 12:13 35:1 36:10 52:20	imprisonment 31:9	intentionally 53:18	judicial 23:21 27:12	
honors 21:19	inbetween 10:17 13:21	internet 21:24 46:5	judgment 49:15	
hook 8:11 35:6	include 24:1,2	interplead 54:8	judgments 27:15 47:10	
hope 18:4 26:22	included 40:8	interpret 18:6	judicial 23:21 27:12	
horrendous 29:2	includes 38:3	interpretation 6:1 16:7	jurisdiction 25:10	
houston 1:15	including 49:8	interrupt 44:7	justice 1:18 3:3,11 4:5,14,23 5:12 6:3 6:4,6,6,7,10,12,17 7:1,15,16,22 8:6 8:13 9:5,23 10:8 11:6,17 12:7,18 12:19,20,21 13:3 13:9,25 14:2,5,13 14:21,25 15:4,8 15:10,23 16:11,13 16:24 17:12,23 18:2,9 19:1,5,25 20:8,18 21:15,18 21:20 22:9,12,23 23:9,14,17,23,24 24:1,5,8,12,13,17 24:20,20 25:8,12	
hughey 54:20 55:9		involved 14:15 23:21 44:11 52:6	judicial 23:21 27:12	
human 21:21		isnt 4:7,14 7:17,18	judicial 23:21 27:12	

22:20 26:12,14 30:8,23,24 31:17 31:19 46:10 50:21 knowing 13:14 19:9 35:25 50:8 knowingly 53:18 knowledge 10:23 11:1 12:24 13:2 13:10 22:2 known 21:22 46:4 knows 5:3 46:6,11	likelihood 49:22 likes 31:20 limit 39:19 limitation 39:24 40:4 limitations 40:5 limited 37:16 39:8 40:25 limiting 44:22,23 linkage 41:4 listen 56:19 literally 51:6 litigation 49:2 54:9 little 22:5 51:8 long 30:25 32:8 longer 47:8 look 9:9 12:17 24:17,22 26:7,8 29:23 31:11 41:9 43:13 44:10 49:7 52:1 56:8,19 looking 34:22 51:6 56:4 looks 8:14 lose 45:18 loss 5:23 15:16,22 17:19 20:17 34:25 35:4,6,13,15,16 35:17 43:17 56:16 losses 3:14,17 4:12 4:13,16,21 5:17 5:19 6:7 7:10,13 8:16,18,19 11:24 12:6 15:17 17:2,9 17:10 33:21 34:19 34:20 36:11,22 37:13,15,24 38:2 39:9 40:11,22 41:22 42:8 45:23 47:22 48:20 54:22 55:4 56:15 lost 37:22 39:9 51:12 lot 24:23 45:9 50:15 lower 9:15	lundquist 11:23 12:22,25 <hr/> M m 1:13 3:2 57:1 maine 56:7 mandatory 17:1 36:19 54:23 manufacturers 35:3 market 44:21 masters 39:13,14 39:17 mathematical 27:14 matter 1:11 4:9 42:20,22 57:2 mean 11:15 13:18 15:24 16:6 17:24 26:12 27:20 34:5 34:6,12 38:24 42:16,21 43:2,3 44:6 49:14,25 means 17:15 23:4 41:2 42:16 48:25 meant 16:9 measure 20:20 measured 23:3 mechanism 48:9 medical 55:4 meet 56:13 members 52:12 mentioning 14:14 merged 16:22 merits 6:24 message 47:6 met 40:16 56:20 methodology 8:25 9:3,3 56:10 michael 1:17 2:6 15:6 middle 22:16,16 million 3:23 27:25 28:1,10,12 30:15 41:18 46:15,16,16 46:19 47:7,11	49:16 mind 51:17 minutes 54:13 model 5:21 27:24 modern 15:25 16:8 16:14,17 moment 24:9 monetary 23:4 money 14:17 30:16 months 5:21 morning 3:4 33:19 move 29:11 multifaceted 10:1 14:1 multiple 15:15 43:5 multiplicity 18:18 <hr/> N n 2:1,1 3:1 name 12:9,11 natural 5:17 near 24:24 necessarily 28:13 need 18:11 39:8 46:15 47:5 49:10 51:18 needs 51:12 nefarious 50:20 negative 17:4 negligent 53:16 never 36:2 new 50:19 54:23 newfangled 53:14 nonsense 16:15 norfolk 35:2 53:10 normally 8:3 19:21 norms 31:11 northern 16:20 32:10 notice 5:22,23 14:8 14:9 notices 14:11 notified 14:10 notion 40:16 45:10 48:20 notwithstanding	42:4 number 7:19 23:1 23:3,11,19 24:25 25:1 26:18,19,20 28:4 29:23 38:1 49:22 54:23 numbers 42:12 50:4,11 numerous 8:14 37:20 <hr/> O o 2:1 3:1 obtain 15:13,17 obviously 38:19 occurred 5:19 offender 28:1 offenders 6:9,14 7:19,23 18:23 55:11,24 56:2 offense 3:15 7:5,7 7:11,14 8:2,3,4,4 17:15,20,21 23:22 30:3 37:3,5,15,16 40:16,23,24 41:1 41:11,13,19 42:5 43:22,23 47:2 52:25 53:2 54:23 55:6 offset 17:10 okay 16:16 31:18 45:9 once 22:4 40:16 ones 26:4,5 opened 38:3 39:20 operates 53:7 opinion 45:18 54:20 opposed 27:25 48:16 opposite 9:14 oral 1:11 2:2,5,8 3:7 15:6 33:15 order 7:3,4,8 14:20 17:1,4,5 25:14,18
--	--	---	---	---

<p>31:14 32:3 49:12 ordered 23:2,12,20 29:24 54:6 oregon 56:7 ought 13:18,19 21:14 30:9,10 outofpocket 38:7 overriding 48:17 52:8 owed 15:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p 3:1 page 2:2 paid 46:23 pardon 6:17 parole 1:3 3:4,23 28:15 33:7 parolines 15:12 18:14 part 9:4 35:9 42:5 42:22 particular 13:3,24 26:20 33:2 34:1 35:4 36:13,13 39:13 41:1,5,19 42:4 43:21,23 44:13,14 48:24 49:4 50:4 52:3 particularized 55:14 particularly 52:2 parties 33:19 parts 38:22 paul 1:20 2:9 33:15 pay 10:15,16,16 21:12 23:2,12,20 28:10,11 29:24 34:8 39:4 45:2 46:22 48:19,24 49:13 54:6 55:18 payment 21:14 43:9,10 pays 48:1 55:12 pecuniary 38:7 pegged 26:19</p>	<p>people 8:9 9:9 11:10,11,12 13:11 13:15 15:16 21:4 21:7,7,23 22:1,3,5 23:1,15,19 24:2,3 34:7,13,14,21,24 44:5,23 45:20 46:6,13,20 49:22 50:5,10 53:23 peoples 35:10 percent 28:11 32:13 43:10 50:12 percentage 11:19 50:13 perfect 12:22 25:25 27:13 period 29:5 39:13 47:8 perpetrated 29:2,2 perpetrator 28:20 person 5:5 7:21 8:7 8:7 13:24 20:6,23 21:6,7 24:10,12 24:22,23 26:3 29:2 33:1 34:5 35:5 43:20 44:17 44:20,25 45:2 46:8,17,18,23 49:12 50:24 56:9 persons 4:12 23:22 56:7 pertain 25:22 petitioner 1:4,16 2:4,13 3:8 34:18 36:16 41:21 53:5 54:15 phrase 51:15 picture 23:21 44:17 51:1 pictures 13:15 23:16 34:23 35:19 35:24 36:7 37:7,8 46:4,9 53:3 piecemeal 51:8 placed 32:23 39:24 placing 55:7</p>	<p>plain 3:19 55:1 play 44:23 played 8:23 please 3:10,11 15:9 33:18 53:25 plucked 27:1 plucking 26:23 plucks 26:17 point 7:17 22:18,21 22:22 23:5,7 34:16 35:13 36:18 38:23 39:7 41:25 53:21 55:2 pointed 23:14 pointing 24:21 points 11:16 31:12 polluted 20:25 polluters 43:5 pollution 16:22,22 20:24,24 pool 24:7 pornographic 13:5 pornography 3:22 4:17 5:3 8:7,9,15 9:7 10:6 11:21 26:8 29:8 30:1 40:11 47:1 51:22 55:5 portion 40:22 position 12:12,13 15:12,15,19 16:25 18:14 21:19 22:15 22:15 49:1 possess 28:16 possessed 28:15 possesses 5:3 8:15 possessing 35:24 46:20 possession 3:21 4:17 5:14 11:20 29:8 35:25 36:1 37:6,8 46:9 possessor 28:25 possessors 28:17 30:2 possible 24:20</p>	<p>32:14 47:4 possibly 8:12 post 31:3,6 potentially 38:3,4 practice 25:3 precise 12:2,3 precisely 49:17 precision 38:8 predicated 29:5 premise 34:9 48:10 preponderance 7:13 presented 4:20 8:25 34:2 pretty 48:5 50:16 principle 32:1 37:13 44:22,23 45:3 48:11 principles 20:4 31:24 prior 37:15 prison 47:8 probably 24:23 46:5 problem 5:24 6:10 6:19 9:6,7,19,20 10:9,10,11,18 25:16,25 28:3 39:23 44:9 49:1 50:3 54:19 proceeding 55:14 process 30:11 36:12 produce 33:23 produced 20:22 professional 44:11 prominent 36:23 promises 33:20 proof 4:4 6:2,21 7:12 10:2 17:18 54:21 55:2 56:14 proper 14:22 18:21 18:22 21:14 proportionality 28:25 proportionate 33:9</p>	<p>propose 22:20 26:7 proposed 22:10 29:20 51:10 proposes 49:5 prosecuted 24:2,3 34:14 prove 12:16 proved 56:15 provide 26:10 provided 33:25 provides 23:5,13 providing 15:20 provision 32:5,19 55:8 provisions 3:20 proximally 3:14 proximate 4:7,8,24 4:25 5:9,16 6:8,13 6:17 15:12 37:2 37:14,16,23,25 38:13,21,24,25 39:11,19 40:1,4 40:12,15,19 52:24 53:2 proximately 3:17 4:16,16 psr 56:8 psychiatric 13:10 13:22 36:6 psychological 19:8 21:3,6,8,12 36:22 38:9 39:5 47:22 51:11 psychologist 22:1,8 46:10 psychologists 21:21 psychology 21:21 punished 30:9 pure 43:13 purpose 33:4 put 29:11 34:4</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quantity 46:13 quarter 47:7 question 3:16 4:15</p>
--	--	--	--	---

4:19 5:6 7:2,16,17 9:22 11:17 14:1,3 16:6,7,8 19:16 21:10 26:2 34:1 36:18,21 38:2,20 38:23 43:14 48:6 48:7 50:10 55:23 quick 42:9 quickly 47:3 quite 21:1 26:22 quote 17:2 48:24 quoted 37:9	recommend 25:18 25:19,21 recover 13:16,19 13:20 43:16 47:21 recovered 39:9 recovers 49:18 50:24 recovery 37:11 47:20 49:10 55:24 refer 20:21 21:9 40:10 reference 41:8 referred 32:11 refers 17:14,19,21 reflected 32:14 refuse 17:5 regard 19:3,22 20:3 regarded 18:25 regardless 19:13 regime 52:3 53:14 53:15 reinflicts 29:9 reinforce 31:24 reinforced 32:4 relationship 5:22 rely 27:12 remainder 15:2 remarkably 33:19 49:8 report 13:1 reports 12:23 represents 23:20 repugnant 10:6 requests 51:4,8 require 18:5 19:10 19:23 20:13 35:25 45:2 required 16:21 24:5 30:13 32:2 requirement 15:13 40:15 requirements 4:25 requires 17:1 19:21 25:7 41:14 55:3 55:14	reserve 15:2 respect 20:13 34:10 respondent 1:19,21 2:7,10 15:7 33:16 responsible 8:8 13:13 19:13 20:7 29:1 35:14 36:10 37:2 42:5,17,21 42:24 43:2 restatement 16:18 restating 10:18 restitution 3:16,21 4:11 7:4,9 8:11,16 8:18 9:8,12,14 10:2,2,24 11:2,25 14:23 15:14,17,21 15:21 17:1 23:2 23:12,20 28:10,21 29:4,24 30:10 32:1,5 33:21 36:19,20 45:11 46:18 47:3 49:12 51:4,8,18,20 52:2 54:24 55:8,20 56:3 result 5:18 6:8,13 7:11,14,18 17:16 17:20 18:5 19:8 20:22 30:1 35:4 37:2,8,14,16,23 37:25 40:23 41:7 41:11,12,18 52:24 53:2 54:22 55:5 resulted 3:22 reverse 56:21 revictimization 29:12 review 31:10 reviewed 52:13 reworking 51:19 rhetorical 52:22 right 6:18 9:12 10:8,8 24:13 26:3 27:9 28:21 35:21 35:22 36:1 40:2 44:25 46:15,19	48:3 50:14 55:22 risk 39:1,4 road 42:13 roberts 3:3 6:6 15:4 19:1,5 20:8 23:17,24 24:8,13 27:19,23 28:8 33:13 37:1,5,12 37:21 39:6,25 52:21 53:25 54:12 56:24 route 21:17 routinely 53:16	science 8:24 12:15 scienter 53:17 scope 39:1,3 second 4:2 11:23 11:25 16:18 24:21 secrets 50:20 section 6:23 8:1 16:18,19 17:18 see 11:12,12 55:12 56:7,20 seek 53:23 seeking 37:11 47:12 54:3 seen 11:10,11 senators 52:6 send 47:6 sense 8:12 9:8 37:22 43:11 sensible 26:21 27:16,22 sent 47:7 sentence 55:15 56:4 sentencing 3:15 8:1 25:3,13,20 31:7 31:11,13 32:6,24 33:3 54:18 55:13 sequence 5:17 serious 13:10 39:3 services 55:4 sessions 20:14 set 18:24 20:6,14 settlement 14:16 severable 20:22 21:9 severally 3:24 48:13 53:8 severe 18:16 severity 30:2 sex 47:2 55:11 sexual 44:12 51:23 share 48:5,25 50:16 54:6 sharing 48:9 shes 14:10 36:24 41:6,17 42:13,17 50:15,15,25 51:11	
R			S		
r 1:17 2:6 3:1 15:6 raising 34:17 randall 1:3 range 26:11 rape 13:5,12,16 21:4 raped 34:23 reaches 21:17 read 18:5 26:13 38:12,21 40:19,21 48:15 49:8 reading 17:13 37:19 55:1,1 real 5:24 reality 26:23 really 10:20 15:10 16:2,17 21:21 22:13 25:2 reason 18:19 24:15 reasonable 22:18 22:21 24:6 25:7 27:15 31:2,24 32:2,8 33:5 45:15 reasonably 16:9 rebuttal 2:11 54:14 receive 14:8 33:20 49:4 received 5:22 14:11 47:10 recognize 34:17 recognized 8:3 9:4 20:5 32:3			s 2:1 3:1 salt 1:20 sam 5:7 saying 10:12 11:23 12:3,9 17:9 30:12 33:7,8 41:11,20 43:9,24,25 says 7:3 9:12 13:18 19:20 31:17,17,21 37:13 40:22 scalia 13:3,9,25 14:2,5 15:23 16:12,13 18:9 20:18 21:15,18 24:20 26:25 27:5 27:8 30:7,18,22 31:1,2,4,16 32:15 32:20 35:19,23 40:13 43:8,12,19 52:10,14 scattered 34:21 scheme 3:21 51:20 schneider 1:15 2:3 2:12 3:6,7,10 4:10 4:18 5:11,15 6:10 6:15,19 7:10,20 7:24 8:6,13 9:21 9:25 10:21 11:22 12:13,22 13:8,25 14:4,7,19,24 15:1 54:13,14,17 56:1		

short 3:16 shorthand 38:25 shortly 46:19 shot 50:1 shouldnt 21:10 42:4 show 41:14 50:4 shown 8:15 37:6 side 13:18 19:20 similar 26:10 similarly 26:7 45:1 simple 52:19,22 simply 21:11 38:23 42:13 47:20 53:14 54:6 56:11 single 14:10 15:16 16:23 18:18 35:12 35:15 51:14,15 56:4,5 situated 26:8 situation 5:20 33:5 44:22 53:23 six 5:21 20:13 sock 36:5 socked 30:19 solicitor 1:17 solution 15:20 33:7 34:16 55:18 somebody 26:17 sorry 20:8 23:18 35:16 44:6 sort 9:18 24:6 26:10 42:2 45:3 sotomayor 4:23 5:12 12:7,18 16:24 17:12,23 18:2 27:21 38:11 38:14,15 40:13 sought 28:10 sounds 7:6 source 17:6 sources 17:11 specific 13:1 20:11 20:19 specifically 3:13 12:1	spoke 12:20 square 16:24 standard 10:3,4,6 stanley 1:15 2:3,12 3:7 54:14 stark 15:11 start 28:3,7 29:10 started 26:14,14 starting 22:18,21 22:22 23:5,6 29:18 31:12 states 1:1,6,12,19 2:7 3:5 statute 3:20 6:1 7:18 8:1 11:16 16:5,10 20:3 25:7 25:23 31:16,18 32:17 33:20,22 34:1,3 35:24 36:19 38:22 43:14 43:15 48:16,23 51:14,15 52:23 53:7 55:2 statutes 10:3 30:20 54:24 55:9,17 statutory 3:12 4:3 6:21 16:7,25 17:1 17:13 37:13,20 56:13 steady 50:18 stemming 40:11 stick 19:16 stream 20:25 50:18 strictly 3:23 struck 26:13 struggling 45:20 stuck 48:12 subjected 21:3,5 submission 18:10 25:24 42:1 submissions 36:24 submits 23:1 submitted 56:25 57:2 subsection 37:10 37:11 40:17 41:5	41:13 subsequent 52:10 52:15 suffered 37:14,24 40:7,23 41:22 suggest 25:13,15 27:9 suggesting 29:21 suggestions 45:17 suggests 37:15 55:10 suppose 10:9 49:11 supposed 16:1 supreme 1:1,12 sure 27:21 35:1 42:15 52:8 53:19 surprise 51:25 suspected 45:24 sustained 7:13 17:20 54:22 swath 51:20 system 16:5 47:25 48:8	testifies 19:7 46:10 testify 20:13 testimony 19:19,20 texas 1:15 text 3:19 34:3 43:13 textual 52:19 textualists 43:13 thank 15:4 33:12 33:13 54:12,17 56:23,24 thats 4:18,19 5:7,10 7:6 8:13 11:15,17 11:22 16:2,15 19:16 21:1,25 25:4 28:22 30:7 30:16,19 31:4,16 33:3,25 35:22 36:14 40:5,11 43:7 44:9 45:3,20 45:24 46:23,24,24 53:9 54:9 55:6,13 55:16 theories 51:9 theory 27:1,2,6,7 therapist 42:10 therapy 40:7 42:14 theres 5:2,5 7:7 8:18 9:6 10:22,25 11:1,8 18:12 20:11,19 22:5 28:24 36:12 41:8 44:24 46:12 47:5 48:6 50:10,18 51:10 55:24 56:2 56:15 theyre 14:25 24:19 24:22 26:25 27:2 27:5 53:19 theyve 9:18 thing 9:17 10:17 24:22 30:10 33:4 48:1,8 things 4:13 38:3 46:12 think 4:10 5:2,7,13	5:15 10:20 11:16 14:19 16:14,15 17:12 18:1 20:2 21:15,24 24:15,18 27:10 31:24 34:6 34:11 38:18 40:14 41:9 42:5,7 44:23 45:16,20 47:11 thousand 8:9 9:9 9:12,16 10:13 11:10 22:1,3,5 thousands 13:11,15 21:3 34:21 51:6,6 three 10:14,15 15:11 49:24 51:21 ties 12:5 time 3:25 14:15 15:3 19:12 31:9,9 38:16 47:8 times 27:11 tiny 9:10 50:12,13 tort 15:20,24,25 16:8,14,16 18:13 18:17 20:4,21 21:9 32:5,7,8,18 tortfeasor 53:22 tortfeasors 48:12 48:19 53:16 torts 16:18 total 13:22 23:3 24:7 29:25 47:11 traditional 53:12 treated 49:25 treatment 5:12,13 12:25 46:14 true 16:15 18:16 25:17 truthfully 9:13 try 54:6 tune 41:18 turn 30:13 turned 29:7 turns 27:24 two 3:22 4:13,25 10:13 12:23 13:14 24:22 28:15,25
--	--	---	---	---

31:23 35:19,24 36:6 37:6,8 53:2 55:23 56:2,10 twostep 36:12 types 26:10 40:10 typical 11:8 53:22	10:22 11:15,18 17:5,14,14,15,20 29:9 31:21 33:2 36:14,14 37:14,24 40:23 41:6 46:11 49:10,18 50:1 54:22 55:4 56:11 victimized 29:6 41:14,18 victims 3:13,14 14:8 17:2 26:8,9 32:25 44:18 47:1 48:19 51:17 52:3 52:9 53:19 54:11 55:20 view 8:6 22:25 33:24 46:7,13 viewed 8:7,9 13:16 13:16 19:10,23 21:22,24 22:1,2,5 23:15 50:5 viewing 5:5 13:5,11 21:4 views 38:20 violation 26:15 violators 24:7 violence 47:2 51:22 51:24 52:1,7 virtually 9:11 vulnerable 47:1 52:9	38:18 40:7 41:9 41:10 45:19,22 49:25 50:8 53:7,8 ways 25:16,25 30:24 43:15 51:14 wealthy 54:5,7 wed 56:20 wednesday 1:9 week 42:10,14 weigh 56:18 weighed 8:21 western 35:3 53:11 weve 45:16 whatnot 13:23 whats 9:5,20 34:2 45:17,18 49:21 whove 11:10 widely 13:6 win 12:10 38:16,18 wish 3:25 woman 13:9 21:2 21:12 women 51:22 52:1 52:7 wonderful 30:7 wont 55:25 word 51:14 52:23 words 21:7 52:23 52:24 work 23:24 24:9,11 24:16 26:3 27:24 world 27:13 worth 26:15 wouldnt 23:23 24:1 24:2 wright 14:15,18,19 14:23 written 43:15	years 31:18 49:2,7 51:3 yesterday 47:16 youd 49:20 youll 6:23 31:19,19 34:13 young 21:2 youre 4:23 5:13 6:20 10:14 12:8,9 14:13 17:24 19:17 20:18,18 30:12 31:14 34:17 39:22 43:9,23 45:5,16 47:11 48:7 50:17 55:22 56:3 youve 12:20 31:22	20 31:17 200 27:16 28:1 2014 1:9 2059 6:23 22 1:9 6:24 2259 3:13 7:3 36:14
U				3
un 8:21 unanimously 53:11 uncapped 38:5 uncle 28:20 undergo 39:12 undergone 13:9 understand 10:10 14:4 21:18 35:18 37:12 understanding 25:22 50:23 understood 18:7,10 undisputed 7:8 unfair 19:15 unhappy 54:5 unique 18:7 united 1:1,6,12,19 2:7 3:4 unknown 1:21 2:10 33:16 46:12,13 unquestionably 18:16 usc 3:13 use 22:22 29:16 31:9 32:16 50:11 usual 48:8 usually 30:19 47:23 utah 1:20				3 2:4 3:23 8:2 10:25 27:25 30:14 41:18 43:24 44:1 46:16 46:16,19 47:11 49:16,23 51:3 30 10:25 33 2:10 3664 3:21 4:4 6:2 6:22,23 8:1 17:19 55:7
			Z	4
			zero 24:24 33:10	
			0	4 3:23 27:25 41:18 43:24 44:1 47:11 443 16:18 47 51:9
			000 10:25,25,25,25 14:20 23:7,10 26:15,15,16 28:21 47:16 49:23 50:4 55:19 002 55:25 04 1:13 3:2 57:1	5
			1	5 10:25 26:15 46:15 50 26:16 28:10 32:13 500 14:20 54 2:13 59 55:2
V	W			6
v 1:5 3:4 valuable 33:3 variety 25:24 38:20 49:7 various 27:11 vast 34:20 vice 29:7 victim 7:14 9:13	want 30:8 34:7 48:14 52:18 wanted 9:14 40:17 46:25,25 54:10 56:18 wants 9:8 38:21 47:20,21 washington 1:8,18 wasnt 39:13,15 wasting 38:15 watched 44:17 way 18:6,13 21:9 27:16 31:4 38:16	work 23:24 24:9,11 24:16 26:3 27:24 world 27:13 worth 26:15 wouldnt 23:23 24:1 24:2 wright 14:15,18,19 14:23 written 43:15	1 1 26:15 28:1 47:16 49:23 55:19,25 10 1:13 3:2 31:17 100 42:10,11,16,18 43:3,5,10 1000 25:1 1000th 24:23 10year 39:3 11 57:1 128561 1:4 3:4 15 2:7 10:25 18 3:13 23:7,10 1996 54:19 55:9	6 28:21
		X		7
		Y		70 50:4 752 47:16
		yeah 9:23 year 20:15 50:22 50:22	2	8
			2 6:23 24:25 28:11 51:3	9
				997 10:14 999 24:24