CRIMINAL LAW — SECTION 2259 RESTITUTION — SEVENTH CIRCUIT ADDRESSES PROXIMATE CAUSATION REQUIREMENT. — *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012), *reh'g en banc denied*, No. 12-1302 (7th Cir. Feb. 1, 2013).

Under 18 U.S.C. § 2259, federal courts must order defendants convicted of crimes listed under the same chapter to pay restitution for "the full amount of . . . losses" caused to victims of their offense conduct.[1] As § 2259 restitution orders have become increasingly prevalent in recent years,[2] federal courts have inconsistently applied the statute. In particular, the precise method by which a court should causally connect a defendant's conduct to a quantum of losses eligible for restitution has remained ill defined. Recently, in *United States v. Laraneta*,[3] the Seventh Circuit joined several of its sister circuits in addressing the method of quantifying losses caused to a claimant under § 2259. However, in remanding the case for a redetermination of precisely what offense conduct inflicted losses on the claimants, the court confusingly cited divergent approaches regarding how the district court was to quantify restitution for the losses caused in a given circumstance. It should have directed the district court, in the event that the district court found a lack of multiple faults and alternative liability, to tie the quantum of the restitution award causally to the contribution of Laraneta's offense conduct. By failing to give such guidance, the *Laraneta* court missed an opportunity to ameliorate, at least partially, the confusion that federal courts experience in applying § 2259.

As part of the Violence Against Women Act of 1994,[4] Congress included a "Mandatory Restitution for Sex Crimes" section,[5] which requires federal courts to order defendants convicted of offenses under the same chapter to pay restitution for "the full amount of the victim's

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[1] 18 U.S.C. § 2259 (2006). The statute provides in relevant part:

> [T]he court shall order restitution for any offense under this chapter. . . . The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . . For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter . . . .

Id.

[2] For example, the net volume of federal criminal restitution paid by child-pornography offenders under the section has increased dramatically in past years. *Compare* U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2008), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/Table15.pdf (noting 1655 offenders convicted and $3.9 million in restitution and fines paid in the pornography/prostitution offense category), *with* U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2011), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table15.pdf (noting 1849 offenders convicted and $11.6 million in restitution and fines paid in the narrower child-pornography offense category).

[3] 700 F.3d 983 (7th Cir. 2012), *reh'g en banc denied*, No. 12-1302 (7th Cir. Feb. 1, 2013).

[4] Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified in scattered sections of 16, 18, and 42 U.S.C.).

[5] *Id.* § 40113, 108 Stat. at 1904 (codified at 18 U.S.C. §§ 2248, 2259 (2006)).

losses" to those individuals "harmed as a result of" the offense conduct.[6] One offense triggering § 2259 restitution is possession of child pornography.[7] In 2008, following successful prosecutions of child-pornography offenses, the government began notifying those depicted individuals whom it could identify of their ability to claim restitution from defendants under § 2259.[8] Two depicted individuals, pseudonymously designated "Amy" and "Vicky," have sought restitution on hundreds of occasions.[9]

On September 3, 2010, defendant Christopher Laraneta pleaded guilty to seven counts of violating federal child-pornography laws, including possession of child pornography.[10] He was sentenced to thirty years' imprisonment and supervised release for life.[11] Following requests presented to the court on behalf of Amy and Vicky — both depicted in images that Laraneta had possessed — Judge Lozano of the Northern District of Indiana also ordered restitution payments to the victims of $3,367,854 and $965,827.64, respectively.[12] These amounts accounted for the entirety of the claimants' uncompensated losses, for which Laraneta was found jointly liable.[13]

Laraneta appealed both his sentence and the restitution awards. With regard to the latter, Laraneta conceded that the court had correctly quantified the total losses that the claimants had incurred from the circulation of their images on the Internet.[14] However, he argued that the restitution awards could not be assessed against him in the absence of a statutorily required finding of proximate causation between his offense conduct and the losses suffered by the claimants.[15]

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6 18 U.S.C. § 2259.

7 Knowing possession of any "depiction involv[ing] the use of a minor engaging in sexually explicit conduct" transported in interstate commerce is criminalized by 18 U.S.C. § 2252(a)(4)(B).

8 CATHARINE M. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION § 7:26, at 318 (2012).

9 *See* United States v. Faxon, 689 F. Supp. 2d 1344, 1351 (S.D. Fla. 2010) (recounting that Vicky's lawyer "ha[d] submitted approximately two hundred restitution requests in various courts throughout the country," *id.*, and that Amy's lawyer "ha[d] filed some 340 restitution claims in various courts," *id.* at 1353); *see also* Motion for Victim Restitution exhibit 3, United States v. Laraneta, No. 2:10-CR-13 (N.D. Ind. Feb. 13, 2012) (presenting a sixteen-page spreadsheet with district courts' § 2259 restitution awards to Vicky and Amy).

10 Transcript of Change of Plea at 60–61, *Laraneta*, No. 2:10-CR-13 (Sept. 3, 2010).

11 *Laraneta*, 700 F.3d at 984.

12 *Id.* at 984–85.

13 "The judge assessed Vicky's loss as $1,224,697.04, but because she had already recovered $258,869.40 from other defendants, he ordered the defendant to pay only the unpaid balance of $965,827.64. . . . [H]e awarded the entirety of Amy's losses, calculated at $3,367,854 . . . ." *Id.* at 989.

14 *Id.*

15 Reply Brief of Defendant-Appellant Christopher Laraneta at 8–10, *Laraneta*, 700 F.3d 983 (No. 12-1302). On appeal, the United States defended all aspects of the sentence other than the amount of restitution awarded and also challenged Amy's and Vicky's ability to intervene in the appellate proceeding. *Laraneta*, 700 F.3d at 985.

The Seventh Circuit affirmed in part, vacated in part, and remanded in part.[16] Writing for the panel, Judge Posner[17] affirmed the district court's imposition of a deservedly "long" prison sentence, including the district court's consecutive stacking of sentences for discrete possession convictions.[18] Turning to the issue of restitution,[19] the court circumvented the statutory interpretation arguments of the parties,[20] finding that § 2259 included a proximate causation standard.[21] The court then addressed the "more difficult question [of] what 'proximate cause' actually mean[t]" in the instant case.[22]

After a brief survey of the evolution of the concept, the court concluded that proximate causation in practice tends to require a court merely "to have a reason for picking out one causal relation among the many that may have contributed to an untoward event," such that premising liability upon that causal nexus "would have a socially desirable effect."[23] In this case, the Seventh Circuit "[did not] have to get deeper into the proximate-cause briar patch" because, "[b]efore a judge gets to the issue of proximate cause, he has to determine *what* the defendant caused."[24] The government's post-argument submission had suggested that there was "evidence in the record that some of the images uploaded by the defendant may have been of the two girls."[25] Had Laraneta distributed Amy's and Vicky's images to other criminals, he would have been one of many individuals to contribute to the wide dissemination of the claimants' images — the experience of which was the cause of Amy's and Vicky's losses.[26] The court analogized a hypothetical distribution of the images in this context to the

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[16] *Laraneta*, 700 F.3d at 993.

[17] Judge Posner was joined by Judges Sykes and Williams.

[18] *Laraneta*, 700 F.3d at 987. The court also addressed the issue of whether the claimants could directly intervene in the appellate proceeding. After finding that it had "inherent power" to allow intervention at the appellate level, *id.* at 985, the court allowed the restitution claimants to intervene, but only for the purpose of "defend[ing] the award they received in the district court," *id.* at 986.

[19] *Id.* at 988.

[20] Section 2259's last provision states that restitution is to be awarded for "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. § 2259(b)(3)(F) (2006). Faced with an interpretative choice between reading this provision with the "last-antecedent" canon of construction and reading it with the "series-qualifier" canon, the court ruled that it "d[id]n't need to choose," because "there would be no rational basis for omitting [the proximate cause] qualification from the specified losses." *Laraneta*, 700 F.3d at 989–90.

[21] *Laraneta*, 700 F.3d at 990. The district court took the same position. *See* Brief and Required Short Appendix of Defendant-Appellant Christopher Laraneta app. at 22, *Laraneta*, 700 F.3d 983 (No. 12-1302) (Transcript of January 19, 2012, Sentencing Hearing) ("[V]ictims are only entitled to those losses proximately caused by defendant.").

[22] *Laraneta*, 700 F.3d at 990.

[23] *Id.*

[24] *Id.* at 991.

[25] *Id.* at 989.

[26] *See id.* (describing Laraneta as "only one of an unknown number of viewers").

paradigmatic example of "multiple fires of negligent origin": one of multiple faults by different actors, each sufficient in itself to bring about the harm.[27] In such a situation, common law causation doctrine holds that the single instance of wrongdoing would suffice as the "proximate cause" and would warrant joint liability.[28] Thus, were the district court to find on remand that Laraneta had in fact distributed Amy's and Vicky's images, joint liability — and therefore restitution payments in excess of $1 million — would be appropriate.[29] Accordingly, the court remanded for redeterminations of "*what* the defendant caused" and, with it, "the portion [of the claimants' total losses] allocable to the defendant."[30]

In analyzing basic proximate causation doctrine in the § 2259 context, the *Laraneta* court correctly found that joint liability would be appropriate had Laraneta distributed the claimants' images. The court, however, confusingly cited divergent approaches regarding how to allocate liability in the event of the lower court's finding that there was not distribution. In anticipating that Judge Lozano might find only possession, the court should have adopted the rule from *United States v. Monzel*,[31] under which a restitution order requires that a positive contribution to harms be traced from the defendant's offense conduct to a precise quantum of claimants' losses. By endorsing the *Monzel* rule, the court would have not only maintained fidelity to the statute's incorporation of common law causation doctrine, but also brought much-needed consistency to the application of § 2259 within its circuit.

Causation determinations for orders of § 2259 restitution have become an area of some controversy in the years since the government began notifying potential claimants of their ability to claim restitution.[32] Facing restitution claims by Amy and Vicky, district courts have ordered awards of vastly different magnitudes for similar offenses.[33] Some courts have insisted on tying the quantum of a restitu-

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[27] *Id.* at 991 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 347 (5th ed. 1984)) (internal quotation mark omitted).

[28] *See id.* Because liability would be joint but not several, the court ruled that Laraneta could not seek contributions from other convicted defendants in other cases. *See id.* at 992–93.

[29] *Id.* at 992. The court did, however, require that the district court "subtract from Amy's losses to reflect payments of restitution that she ha[d] received in other cases." *Id.* at 993.

[30] *Id.* at 991; *see id.* at 993.

[31] 641 F.3d 528 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011).

[32] *See, e.g.*, Brief and Required Short Appendix of Defendant-Appellant Christopher Laraneta, *supra* note 21, app. at 22 (describing causation requirements for § 2259 as "currently a question on which there is much division among the courts").

[33] *Compare, e.g.*, United States v. Church, 701 F. Supp. 2d 814, 835 (W.D. Va. 2010) (ordering restitution of $100 for possession of child pornography), *with* Judgment at 5, United States v. Gamble, No. 1:10-CR-137-001 (E.D. Tenn. Mar. 24, 2011) (ordering restitution of $1,002,766.85 for possession of child pornography).

tion award for a claimant's losses causally to the defendant's offense conduct.[34] Others have awarded restitution without proof of the marginal contribution of the defendant's individual conduct to a claimant's total loss figure.[35] The proper causal requirements for § 2259 thus remain unsettled.[36]

The Seventh Circuit was correct to see that, were Laraneta to have distributed the claimants' images, the instant case would pose a situation of multiple faults and alternative liability in which Laraneta would be liable for the entirety of the losses.[37] Federal courts' orders of restitution follow from statutory authorization,[38] which in turn defines the courts' power against the background of a traditional definition of restitution as "restoring someone to a position he occupied before a particular event."[39] For this reason, courts understand that § 2259's required connection is one of proximate causation, imported directly from the common law.[40] At common law, a court can attribute full liability to any single wrongdoer when multiple actors collectively bring about harm and, although it is impossible to establish which actors' conduct in fact caused the result, any one actor's

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[34] *See Monzel*, 641 F.3d at 530–31 (describing the district court's opinion).

[35] *See* United States v. Kearney, 672 F.3d 81, 98–100 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013).

[36] *See* Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit at 11–12, Kearney v. United States, No. 12-6574, 2013 WL 1092115 (Mar. 15, 2013) ("[T]he courts are deeply divided as to their application of the proximate cause analysis in non-contact cases . . . where the restitution claimant proffers no evidence of identified losses causally connected to the defendant's specific offense conduct." (footnote omitted)).

[37] *See Laraneta*, 700 F.3d at 991.

[38] *See* United States v. Kennedy, 643 F.3d 1251, 1260 (9th Cir. 2011) ("Because '[f]ederal courts have no inherent power to award restitution,' we may order restitution only when and to the extent authorized by statute." (alteration in original) (quoting United States v. Gossi, 608 F.3d 574, 577 (9th Cir. 2010))).

[39] Hughey v. United States, 495 U.S. 411, 416 (1990) (addressing restitution under the Victim and Witness Protection Act of 1982); *see also Monzel*, 641 F.3d at 536 ("Congress [is] presumed to have legislated against the background of our traditional legal concepts . . . ." (alteration in original) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978)) (internal quotation mark omitted)).

[40] *See Kearney*, 672 F.3d at 96 (recognizing that § 2259 incorporates common law principles of causation); *id.* at 98 (drawing upon the explication of traditional common law doctrine of proximate cause as described in *Prosser and Keeton on Torts*); United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011) ("Congress did not abrogate [the common law doctrine of causation] when it drafted § 2259."). All circuits to address the issue, except the Fifth, award § 2259 restitution to compensate only those losses proximately caused by the offense conduct. *Compare* United States v. Burgess, 684 F.3d 445, 456 (4th Cir. 2012), *Kearney*, 672 F.3d at 96, United States v. Evers, 669 F.3d 645, 659 (6th Cir. 2012), *Aumais*, 656 F.3d at 154, United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999), *and* United States v. Crandon, 173 F.3d 122, 126 (3d Cir. 1999), *with In re* Amy Unknown, 701 F.3d 749, 762 (5th Cir. 2012) (finding that the rule of the last antecedent "limit[s] the phrase 'suffered by the victim as a proximate result of the offense' in § 2259(b)(3)(F) to the miscellaneous 'other losses' contained in that subsection").

behavior was sufficient in itself to bring about the harm.[41] Though Laraneta was not solely responsible for Amy's and Vicky's losses — which resulted from the generalized presence of their images on the Internet — any distribution of the images attributable to Laraneta would have been sufficient in itself to cause dispersion of the images across the Internet.[42] Thus, guiding the lower court to award joint liability for the entirety of losses in such a situation was proper.

However, the court provided unclear guidance regarding what the district court was to do were it to find that Laraneta had not distributed, but had only possessed, the claimants' images. Laraneta was "only one of an unknown number of viewers,"[43] and because possession without distribution would not pose a situation of multiple faults and alternative liability, "joint liability would be inappropriate."[44] But, beyond stating that the claimants' total losses would have to be divided and some subset allocated in correspondence to the discrete act of possession,[45] the Seventh Circuit confusingly cited two divergent paths cleared by sister circuits as examples to be followed on remand if distribution were not found.[46]

On the one hand, Judge Lozano could follow the First Circuit's decision in *United States v. Kearney*,[47] where the court found a proximate causal relation and awarded liability, even as it conceded that no quantifiable relation could be proved between the defendant's offense conduct and any portion of the claimant's total losses.[48] The district court in that case had explicitly found that the defendant's conduct did not positively contribute any precise portion to the claimant's total losses[49] — rather, a figure was drawn from a distribution of previous

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41 *See* KEETON ET AL., *supra* note 27, § 41, at 270–71 (explaining the "special type of situation" of "clearly established double fault and alternative liability"); *see also* Zuchowicz v. United States, 140 F.3d 381, 388 n.6 (2d Cir. 1998) (noting courts' use of the rule of multiple faults and alternative liability).

42 *See Laraneta*, 700 F.3d at 991 (describing how each instance of distribution contributes to the "viral" spread of the claimants' images).

43 *Id.* at 989.

44 *Id.* at 992.

45 *Id.* at 991–92.

46 *Id.* (citing both *Kearney* and *Monzel* for the proposition that the lower court should "redetermin[e] . . . the portion [of claimants' total losses] allocable to the defendant").

47 672 F.3d 81 (1st Cir. 2012).

48 *Id.* at 98 (affirming a restitution order, even though "it is true that [the evidence] does not state that any single additional instance of possession or distribution by itself increases the harm to Vicky").

49 As the district court put it: "[S]uppose Patrick Kearney never existed or never downloaded the image and never viewed it, would [the claimant's] injury be materially any different? I think the answer is probably no. . . . [W]ould her injury be any different? I don't think so." Sentencing at 141, United States v. Kearney, 2009 WL 4591949, No. 08-CR-40022 (D. Mass. Nov. 30, 2009). Scholars have cited *Kearney* as presenting a situation in which a "positive . . . albeit unnecessary" contribution to a harm is categorized as "causal." Jane Stapleton, *Unnecessary Causes*, 129 LAW

§ 2259 awards.[50] On the other hand, Judge Lozano might follow the D.C. Circuit's decision in *Monzel*. There, a district court had ordered a "nominal" award of $5000 to be paid as restitution for a defendant's possession of images of Amy,[51] despite having "'no doubt' that this amount was 'less than the actual harm' Monzel caused Amy."[52] On appeal, the D.C. Circuit found "clear and indisputable error" in the lower court's quantification divorced from an inquiry into the quantum of losses *actually caused* by the defendant's conduct[53]: using a preponderance of the evidence standard, the lower court was then required to use "some principled method" to trace a contributory relation from offense conduct to a precise quantum of claimant's losses.[54]

The Seventh Circuit should have endorsed the *Monzel* path, which more faithfully maintains the integrity of common law causation doctrine and would promote consistency in future § 2259 restitution awards within the circuit. Unlike the *Kearney* rule, under which courts must find liability even in the absence of any contribution to losses, *Monzel*'s requirement of proof of a precise quantitative contribution to losses reproduces the common law's requirement of proof of actual causation for a determination of proximate causation.[55] For example, such a prerequisite rules out awards when it is literally impossible that a defendant contributed to the total losses.[56]

Through the *Monzel* rule's insistence on proof of a quantified contribution of offense conduct to a claimant's losses, the *Laraneta* court

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Q. REV. 39, 43–44, 61 (2013). In that case, however, the First Circuit conceded that no precise contribution to overall harm had been proved. *See Kearney*, 672 F.3d at 98.

[50] *See Kearney*, 672 F.3d at 100 (describing the district court's method of award quantification as one of "averaging the awards Vicky had received in thirty-three other restitution cases, after discarding the highest and lowest values awarded").

[51] United States v. Monzel, 641 F.3d 528, 530 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011).

[52] *Id.* at 530–31 (quoting United States v. Monzel, No. 1:09-CR-243, 2011 WL 10549405 (D.D.C. Jan. 11, 2011)).

[53] *Id.* at 539.

[54] *Id.* at 540.

[55] At common law, actual causation of some quantum of harm is a prerequisite for a finding of proximate causation, unless the court faces a situation of multiple faults and alternative liability. *See* KEETON ET AL., *supra* note 27, § 41, at 264, 270 (explaining that "'[p]roximate cause' . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct," *id.* § 41, at 264, but that multiple fault and alternative liability is the "one special type of situation in which the usual rule [of] the burden of proof as to causation . . . has been relaxed," *id.* § 41, at 270).

[56] The instant case might have been such a situation, because the defendant's offense conduct may have occurred after the quantification of the claimants' harms. *See* Reply Brief of Defendant-Appellant Christopher Laraneta, *supra* note 15, at 13 ("The [claimants'] trauma associated with learning of the circulation of their pictures and the general fear of recognition were . . . established before Mr. Laraneta's acts."); Defendant-Appellant Christopher Laraneta's Reply to Intervenor/Amicus Brief by Amy and Vicky at 6, *Laraneta*, 700 F.3d 983 (No. 12-1302) ("Mr. Laraneta was not a cause of harms determined prior to his act.").

also could have avoided the extreme variability of federal courts' § 2259 awards, at least within the Seventh Circuit.[57] Of course, in instances of possession, if the *Monzel* rule is fastidiously applied, awards would likely converge upon zero. The actual contribution of a precise quantum of loss will be almost impossible to prove and quantify because, beyond the difficulty of quantifying losses in general, when the harms are of a predominantly psychological nature, losses arising from the generalized circulation of images are particularly difficult to attribute to individual defendants.[58]

A convergence on restitution awards of zero in possession cases seems an unacceptable result, given the traumas and attendant losses suffered by depicted individuals. In practice, however, courts choosing between the *Kearney* and *Monzel* rules do not face a tradeoff between fully compensating claimants and maintaining the integrity of common law doctrine by sending claimants home empty-handed. First, from a policy perspective, courts should be less concerned about the ultimate level of compensation awarded to the claimants: multimillion-dollar awards are likely to follow from the joint-liability rule in separate orders following convictions for distribution. Second, if the policy priority is to make claimants whole, the *Kearney* approach would not necessarily be a large step in that direction: in *Kearney* itself the restitution award was only $3800, that is, 1.5% of Vicky's overall losses.[59] Maintaining doctrinal consistency does not require victims to be undercompensated. The tradeoff is rather one between maintaining the integrity of the common law causation doctrine and debasing that doctrine with little benefit to the depicted individuals for whom § 2259 was passed. Faced with such a choice, the court should have definitively endorsed the *Monzel* rule, rather than proposing divergent paths to be followed on remand.

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[57] The federal courts have varied greatly in their applications of § 2259. *See* United States v. Kearney, 672 F.3d 81, 96 (1st Cir. 2012) ("On rather similar facts the circuits have reached different outcomes in applying the proximate cause test, and those outcomes cannot be entirely explained by differences in the facts of record."); United States v. Solsbury, 727 F. Supp. 2d 789, 795 (D.N.D. 2010) ("Opinions from numerous district courts throughout the country are divided with orders ranging from no award of restitution based on lack of causation to awards in excess of $3 million dollars.").

[58] *See* United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) (finding that losses arising from initial abuse and losses arising from possession of images "cannot be separate[d]" in practice (alteration in original)); United States v. Kennedy, 643 F.3d 1251, 1265–66 (9th Cir. 2011) (observing that "no court has yet developed a method for calculating a restitutionary award under § 2259 that comports with the statutory language," *id.* at 1265, and explaining that "the structure established by § 2259 . . . is a poor fit for these types of offenses," *id.* at 1266); *Solsbury*, 727 F. Supp. 2d at 795, 796 n.1 (suggesting congressional consideration of policy alternatives to the "unworkable" requirement of § 2259, *id.* at 796 n.1, because the claimant's losses are "generalized" and "[t]o quantify those losses is an evidentiary nightmare," *id.* at 795).

[59] *Kearney*, 672 F.3d at 100.