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Criminal Law: The System is Rigged: Criminal Restitution Is Blind to the Victim's Fault—State v. Riggs

Ryan Anderson

CRIMINAL LAW: THE SYSTEM IS RIGGED: CRIMINAL RESTITUTION IS BLIND TO THE VICTIM'S FAULT—*STATE V. RIGGS*

Ryan Anderson†

† JD Candidate, Mitchell Hamline School of Law, 2017; BA Theology, Concordia University, St. Paul, 2006. I would like to dedicate this Note in memory of my friend, Blake James Kemnitz, of St. Charles, Illinois.

I. INTRODUCTION

In *State v. Riggs*, the Minnesota Supreme Court decided whether a trial court may reduce a crime victim's restitution award when the victim was the initial aggressor. The restitution statute, Minnesota Statutes section 611A.045, provides criteria that trial courts must apply when awarding restitution; however, the victim's fault is not listed among the criteria.[1] In *Riggs*, the Minnesota Supreme Court held that Minnesota Statutes section 611A.045 establishes exclusive criteria that prohibits trial courts from considering any non-specified factors;[2] as such, it prohibited consideration of the victim's fault in determining a restitution award.[3]

This Note first reviews the history of criminal restitution and provides a background for understanding Minnesota's restitution law.[4] It then discusses the facts of *Riggs* and examines the parties' arguments and the court's rationale for its decision.[5] Next, it analyzes the Minnesota Supreme Court's decision in the context of Minnesota's case law on restitution and the court's role in interpreting statutes.[6] This Note suggests that the legislature, not the court, must weigh the policy choices in deciding whether Minnesota's restitution law should incorporate the victim's comparative fault, and it concludes that the court correctly interpreted the restitution statute and correctly declined to recognize comparative fault as an aspect of restitution determinations.[7]

1. *See* State v. Riggs, 865 N.W.2d 679, 686 (Minn. 2015).
2. *Id.* at 685–86.
3. *Id.*
4. *See infra* Part II.
5. *See infra* Part III.
6. *See infra* Part IV.
7. *See infra* Part V.

II. A HISTORY OF CRIMINAL RESTITUTION

A. Generally

Criminal restitution is a court order directing an offender to financially compensate his victim for the expenses and losses incurred by the victim as a result of the offender's crime.[8] Restitution typically does not compensate a victim for mental pain and suffering, as might a civil remedy; rather, it only compensates for tangible losses.[9] Thus, the purpose of restitution is compensatory: to make the criminal victim whole again. Yet, restitution may also serve a punitive purpose.[10] Restitution is part of the criminal justice system;[11] it is integrated with criminal sentencing[12] and is commonly ordered at the time of sentencing.[13] Restitution incorporates features of civil law, but it is distinct from civil liability.[14] Unlike a civil remedy, a restitution order acts as a condition of a criminal sentence between the state and the offender and not merely as a settlement or judgment between private individuals.[15] However, the imposition of a restitution order does not necessarily preclude the victim from pursuing additional civil remedies arising from the same incident.[16]

B. Early History

Criminal restitution is an ancient legal concept.[17] Historians trace its emergence to the development of the earliest structured societies and legal codes.[18] For example, restitution was prescribed

8. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984).

9. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.6(c) (4th ed. 2016).

10. *See* 24 C.J.S. *Criminal Law* § 2474 (2016).

11. *See id.* § 2479.

12. *See* Kimberly J. Winbush, Annotation, *Persons or Entities Entitled to Restitution as "Victim" Under State Criminal Restitution Statute*, 92 A.L.R. 5th 35 § 2[a] (2001); 6 LAFAVE ET AL., *supra* note 9.

13. *See* 9 HENRY W. MCCARR ET AL., MINNESOTA PRACTICE SERIES: CRIMINAL LAW AND PROCEDURE § 36:15 (4th ed. 2015).

14. *See* Winbush, *supra* note 12.

15. *See* 24 C.J.S., *supra* note 10, § 2479.

16. *See id.*

17. *See Victim Restitution in the Criminal Process*, *supra* note 8, at 933.

18. *See* Richard E. Laster, *Criminal Restitution: A Survey of Its Past History, in*

in such codes as the Torah, the Code of Hammurabi (ca. 1700 BC), the Code of Lipit-Ishtar (ca. 1875 BC), the Summerian Code of Ur-Nammu (ca. 2050 BC), and the Code of Eshnunna (ca. 1700 BC).[19] Restitution was also a feature of the Roman Law of the Twelve Tribes (ca. 449 BC); the Germanic tribal laws, Lex Salica (ca. AD 496); and early Anglo-Saxon laws in England (ca. AD 600).[20] Within these codes, restitution encompassed both proportional physical retribution (e.g., "eye for eye") and financial compensation to the victim for his losses.[21]

In ancient times, restitution served the joint purposes of safeguarding the community and ensuring justice for the victim.[22] Prior to early legal codes, the victims of crime and the victims' family members often sought private retribution against criminals through violence and retaliation.[23] Restitution offered a structured substitute for such self-help measures and provided an authoritative means to reconcile offender and victim.[24] Criminal restitution thus "protect[ed] the offender from violent retaliation by the victim or the community"[25] and served to maintain and restore community peace and order.[26] Furthermore, an overarching feature of early

CONSIDERING THE VICTIM 19, 19–21 (Burt Galaway & Joe Hudson eds., 1975).

19. Daniel W. Van Ness, *Restorative Justice*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 7, 7 (Burt Galaway & Joe Hudson eds., 1990); *see* Laster, *supra* note 18, at 20–21; *see, e.g.*, *Numbers* 5:6–7 (New King James) ("When a man or woman commits any sin that men commit in unfaithfulness against the Lord, and that person is guilty, then he shall confess the sin which he has committed. He shall make restitution for his trespass in full, plus one-fifth of it, and give it to the one he has wronged.").

20. Van Ness, *supra* note 19, at 7.

21. *See* PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 4 (2d ed. 2010) (comparing *Exodus* 21:23–25, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe," with *Exodus* 21:18–19, requiring the offender to "pay for the loss of his [victim's] time [during his recovery] and [to] have him thoroughly healed").

22. Commentators vary in their assessments of the *primary* purpose of restitution. *Compare Victim Restitution in the Criminal Process*, *supra* note 8, at 933 ("The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community."), *with* Laster, *supra* note 18, at 24 ("[T]he aim of [restitution] . . . was primarily to make the victim whole and secondarily to minimize private revenge.").

23. *See* Laster, *supra* note 18, at 19–20.

24. *See* Van Ness, *supra* note 19, at 8–9.

25. *See Victim Restitution in the Criminal Process*, *supra* note 8, at 933.

26. *See* Van Ness, *supra* note 19, at 8–9; *see also* Laster, *supra* note 18, at 21–22 ("[T]hese codes encouraged settlement or composition between the parties for

restitution was its recognition of the victim's right to receive just compensation for injury.[27] In this way, restitution also codified the victim's right to be made whole.[28]

In its earliest forms, restitution was centered on the victim.[29] This stands in contrast to the state-centered notion of criminal justice that arose during the Middle Ages.[30] Prior to the Middle Ages, beyond a short list of public "criminal" offenses, such as witchcraft, bestiality, and incest,[31] there was not yet a distinction between civil law and criminal law.[32] Most offenses against individuals were resolved through prescribed restitutive measures with the central focus on the victim and the victim's family.[33]

In the eleventh century, as political power consolidated under the crown of England and the reach of government expanded, laws were enacted that changed a number of offenses from crimes against individuals into crimes "against the king's peace."[34] These laws ushered in a new legal era in which the king and the state eventually supplanted the victim as the aggrieved party of particular crimes.[35]

In this new era, criminals were ordered to pay fines directly to the government rather than make restitution to their victims.[36] Because violent offenses were seen as breaches of the king's peace, it was thought that the state was entitled to share in a victim's

harmful acts as serious as homicide, personal injury less than homicide, rape, adultery, and theft . . . . There are benefits . . . in reduction of tension, benefits to the victim in monetary satisfaction, and benefits to the criminal in retrieving his lost security.").

27. *See* Van Ness, *supra* note 19, at 7 ("What we see in ancient cultures is a recognition that it was the victim who was injured by crime, and therefore it was the victim who had the right to be compensated.").

28. *See* TOBOLOWSKY ET AL., *supra* note 21, at 4.

29. *See id.* at 4–5.

30. *See id.* at 5; Van Ness, *supra* note 19, at 7.

31. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5.

32. *See* Laster, *supra* note 18, at 24.

33. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5; Van Ness, *supra* note 19, at 8.

34. *See* WILLIAMSON M. EVERS, THE INDEPENDENT INSTITUTE, VICTIMS' RIGHTS, RESTITUTION, AND RETRIBUTION 7 (1996); TOBOLOWSKY ET AL., *supra* note 21, at 5; Van Ness, *supra* note 19, at 8. *But see* Patrick D. McAnany, *Restitution as Idea and Practice: The Retributive Process*, *in* OFFENDER RESTITUTION IN THEORY AND ACTION 15, 16 (Burt Galaway & Joe Hudson eds., 1977) (placing the emergence of crimes against the "king's peace" in the 16th century).

35. *See* Van Ness, *supra* note 19, at 7–8.

36. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5.

compensation.[37] This change marked the point at which the law began to diverge into separate criminal and civil branches;[38] and accordingly, "the victim's right to compensation was [eventually] incorporated into civil law."[39] As a result, the central standing of the victim, and his right to be made whole through the criminal process, was significantly diminished.[40] Restitution thus became a private civil right of action, untethered from its original restorative purpose.[41] Detached from a victim-centered approach, criminal justice evolved to serve state-centric punitive goals: deterrence, incarceration, and rehabilitation of the offender.[42]

America's criminal justice history mirrors this shift from a victim-centered approach to a state-centered prosecution and punishment of criminals.[43] Prior to the American Revolution, the investigation, apprehension, and prosecution of criminals was largely accomplished through the efforts of private individuals with the assistance of privately-funded investigators, bounty hunters, and constables.[44] The upshot of this privatized system was that upon successful prosecution of the offender, the victim could expect to obtain monetary damages from the offender or to obtain the offender's servitude until the offender satisfied the full value of the damages.[45]

By the start of the American Revolution, the private system of criminal justice had given way to one of public administration.[46] The American government established professional police patrols

37. *See* Laster, *supra* note 18, at 28.

38. *See id.* at 23–24; TOBOLOWSKY ET AL., *supra* note 21, at 5; *Victim Restitution in the Criminal Process*, *supra* note 8, at 933–34.

39. *Victim Restitution in the Criminal Process*, *supra* note 8, at 933–34; *see also* TOBOLOWSKY ET AL., *supra* note 21, at 5.

40. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5; Laster, *supra* note 18, at 28.

41. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5; Laster, *supra* note 18, at 24–25, 28 ("This shift in focus may have resulted in monetary benefits for the king, but it reduced the economic lot of the victim, shifted the aim of the law away from any constructive policy of restitution, and reinforced the concept of harm to society to justify the criminalization of certain 'harmful' acts to individuals."); Van Ness, *supra* note 19, at 8.

42. *See* Laster, *supra* note 18, at 25; Van Ness, *supra* note 19, at 8.

43. *See* TOBOLOWSKY ET AL., *supra* note 21, at 5–6.

44. *See* EVERS, *supra* note 34, at 15–16; TOBOLOWSKY ET AL., *supra* note 21, at 5–6.

45. *See* EVERS, *supra* note 34, at 15–16; TOBOLOWSKY ET AL., *supra* note 21, at 5–6.

46. *See* EVERS, *supra* note 34, at 16; TOBOLOWSKY ET AL., *supra* note 21, at 6.

charged with investigating and apprehending criminals.[47] The government also assumed total responsibility for initiating and prosecuting criminal cases.[48] Criminal sanctions that had at one time directed restitution to crime victims were replaced by imprisonment and fines paid to the government.[49] Over time, the crime victim's role was diminished to that of a witness to the government's prosecution of the case, without regard for personal compensation for their losses.[50] By the mid-nineteenth century, the transfer of restitution into the civil law system was complete.[51]

C. The Victims' Rights Movement and the Re-emergence of Criminal Restitution

The re-emergence of restitution within the criminal justice system began with a renewal of public interest concerns for victims of crime.[52] Historians have traced the origin of this renewed interest to academic works from the 1940s and 1950s about "victimology": the study of the relationship between victims and offenders.[53] As the study of victimology developed, researchers began to identify changes to the criminal justice system that could address the perceived exclusion of crime victims in the system.[54] Among the changes the researchers proposed were restoring restitution to crime victims and increasing the role of the victim during the criminal justice process.[55]

In the 1960s, victimology began to influence public policy. For example, momentum from the renewed interest in crime victims influenced the recommendations of President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice, which his administration established to study criminal justice and make recommendations for systemic changes in response to rising crime rates in the 1960s.[56] The commission published a report in 1967 that recommended proposals to increase victim involvement

47. *See* TOBOLOWSKY ET AL., *supra* note 21, at 6.
48. *See* EVERS, *supra* note 34, at 16; TOBOLOWSKY ET AL., *supra* note 21, at 6.
49. *See* EVERS, *supra* note 34, at 16; TOBOLOWSKY ET AL., *supra* note 21, at 6.
50. *See* TOBOLOWSKY ET AL., *supra* note 21, at 6.
51. *See id.* at 6, 153.
52. *Id.* at 6.
53. *Id.*
54. *See id.* at 7.
55. *Id.*
56. *Id.*

in the criminal process, address crime victims' financial losses, and establish supplemental government-based systems of victim compensation.[57] Although distinct from restitution, implementation of the first state-sponsored crime-victim-compensation programs in the 1960s marked a significant step in reorienting the criminal justice system toward the victim.[58]

During the 1970s and 1980s, support for victims of crime developed into a full-fledged victims' rights movement in America.[59] In response, victim-compensation and victim-assistance programs were established in a majority of states.[60] At the national level, in 1981, President Ronald Reagan recognized the movement by establishing the first National Crime Victims' Rights Week.[61] Then, in 1982, President Reagan created the President's Task Force on Victims of Crime, which was charged with studying criminal victimization and receiving input from victims.[62]

Released in December 1982, the *Final Report* of the Reagan Administration's Task Force on Victims of Crime recommended new federal and state legislation to establish restitution in all criminal cases where the victim sustained financial losses.[63] In 1983, the American Bar Association endorsed the Task Force's recommendation, adding that crime victims should expect sentencing judges "to give 'priority consideration' to restitution as a condition of [the offender's] probation."[64] Additionally, in 1982, Congress enacted the federal Victim and Witness Protection Act (VWPA), which mandated restitution to victims of certain federal crimes.[65] Congress updated the VWPA in 1996 with the Mandatory Victims Restitution Act (MVRA).[66]

57. *Id.*
58. *See id.* at 7–8.
59. *Id.* at 8–10.
60. *Id.* at 9.
61. *Id.* at 10.
62. *See id.* at 7–8.
63. EVERS, *supra* note 34, at 24; TOBOLOWSKY ET AL., *supra* note 21, at 10.
64. EVERS, *supra* note 34, at 24–25.
65. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.
66. Bridgett N. Shephard, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution as Either a Criminal or Civil Law Concept*, 18 LEWIS & CLARK L. REV. 801, 806 (2014) (citing Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227).

Prior to the release of the *Final Report*, only eight states had mandated victim restitution during criminal sentencing.[67] However, after issuance of the report, many states decided to enact or update their criminal restitution statutes.[68] By 1995, twenty-nine states had adopted mandatory or presumptive restitution.[69] Today, every state has enacted criminal restitution statutes to compensate victims of crime.[70]

D. Criminal Restitution in Minnesota

When Minnesota first enacted its criminal restitution statute in 1983, it prescribed very little.[71] Crime victims were to request restitution by providing the court itemized losses and reasons justifying the amount requested.[72] The court, in turn, merely had to make a record of its reasons for granting or denying the requested restitution.[73] The statute neither mandated nor restricted the court's consideration to specific restitution criteria.[74]

Over the next several years, Minnesota's legislature established additional procedural components for determining restitution that controlled courts' discretion. In 1985, the legislature enacted section 611A.045, which, in part, mandated that district courts must consider the "economic loss sustained by the victim as a result of the offense" when calculating the award.[75] Additionally, section 611A.045 established the evidentiary standard, preponderance of the evidence, and placed the burden of proof on the prosecution.[76] Then, in 1989, the legislature added a second criterion for restitution determinations: it mandated that district courts also consider the "income, resources, and obligations of the

67. *See* TOBOLOWSKY ET AL., *supra* note 21, at 153.

68. EVERS, *supra* note 34, at 25; TOBOLOWSKY ET AL., *supra* note 21, at 154.

69. TOBOLOWSKY ET AL., *supra* note 21, at 154.

70. *See* 6 LAFAVE ET AL., *supra* note 9.

71. *Compare* Act of June 6, 1983, ch. 262, § 4, 1983 Minn. Laws 1125, 1127 (codified at MINN. STAT. § 611A.04 (1984)), *with* Act of June 2, 1977, ch. 355, § 6, 1977 Minn. Laws 765, 766 (codified at MINN. STAT. § 609.135 (2016)) (authorizing restitution as a permissible sentence when a district court stays imposition or execution of a felony sentence).

72. § 4, 1983 Minn. Laws at 1127.

73. *See id.*

74. *See id.*

75. Act of May 10, 1985, ch. 110, § 2, 1985 Minn. Laws 305, 306 (codified at MINN. STAT. § 611A.045 (1985)).

76. *Id.*

defendant."[77] The 1989 amendment further clarified the scope of the victim's compensable losses: restitution could be awarded for, but was not limited to, the victim's out-of-pocket losses, medical and therapy costs, replacement wages and services, costs of returning a victim child, and funeral expenses.[78]

In its current form, Minnesota's restitution statute provides two criteria for the trial court's restitution determination. First, the trial court must consider "the amount of economic loss sustained by the victim as a result of the offense."[79] Second, the trial court must consider "the income, resources, and obligations of the defendant."[80] No other criteria or factors are listed.

III. THE *RIGGS* DECISION

A. Facts and Procedure

On May 4, 2012, the eventual victim, D.S., confronted Brandon Riggs at a Kwik Trip gas station in Minnesota City, Minnesota, over the quality of the marijuana that Riggs had previously sold to D.S.[81] Riggs responded by leaving the gas station, and D.S. followed him.[82] After Riggs arrived at Cone Chiropractic in Winona, Minnesota, D.S. followed Riggs into the office entryway and attacked Riggs by punching him in the head.[83] During the ensuing fight, Riggs stabbed D.S. with a knife in the leg and stomach.[84]

The State of Minnesota charged Riggs with second-degree assault and terroristic threats.[85] Riggs initially claimed self-defense.[86] Following a plea agreement, Riggs pled guilty to making terroristic

77. Act of Apr. 4, 1989, ch. 21, § 7, 1989 Minn. Laws 38, 42 (codified at MINN. STAT. § 611A.045 (1989)).

78. *Id.* § 4, 1989 Minn. Laws at 42 (codified at MINN. STAT. § 611A.04 (1989)).

79. MINN. STAT. § 611A.045, subdiv. 1(a) (2016).

80. *Id.*

81. State v. Riggs, No. 85-CR-12-960, 2013 WL 9348661, at *1 (Minn. Dist. Ct. June 7, 2013), *rev'd*, 845 N.W.2d 236 (Minn. Ct. App. 2014), *aff'd*, 865 N.W.2d 679 (Minn. 2015).

82. *Id.*

83. *Riggs*, 845 N.W.2d at 237.

84. *Id.*

85. *Riggs*, 865 N.W.2d at 681.

86. Defendant's Restitution Memorandum at 1, State v. Riggs, No. 85-CR-12-960 (Minn. Dist. Ct. June 7, 2013), 2013 WL 8981222.

threats, and the State dismissed the assault charge.[87] At the plea hearing, Riggs formally waived his right to claim self-defense.[88]

D.S. filed a victim's restitution request, and the State sought $2,973.07 from Riggs for restitution covering D.S.'s employment-related expenses incurred as a result of D.S.'s injuries from the stabbing.[89] Riggs asked the district court to reduce the requested restitution award by half because D.S. was the initial aggressor in the fight.[90] The State argued that the restitution statute, section 611A.045, provided exclusive criteria for determining the amount of restitution and therefore prohibited consideration of the victim's fault in calculating the amount of restitution because it was not an explicit factor in the statute.[91] The relevant portion of section 611A.045 states:

> The court, in determining whether to order restitution and the amount of the restitution, shall consider the following factors:
>
> (1) the amount of economic loss sustained by the victim as a result of the offense; and
>
> (2) the income, resources, and obligations of the defendant.[92]

Over the State's objection, the district court concluded that it could exercise discretion to reduce the amount of the restitution "by apportioning some of the fault for the victim's injuries to the victim if the victim was the aggressor in the conflict."[93] The district court ordered Riggs to pay half of D.S.'s employment-related restitution expenses.[94]

The court of appeals reversed the district court's restitution award on statutory interpretation grounds, concluding that the district court impermissibly considered the victim's fault in reaching its restitution award. The court of appeals construed section 611A.045, subdivision 1(a), to mandate consideration of *only* the explicit factors and not any other factor, including whether

87. *Riggs*, 865 N.W.2d at 681.
88. *Riggs*, 845 N.W.2d at 237.
89. *Riggs*, 865 N.W.2d at 681.
90. *Id.*
91. *Id.* at 681–82.
92. MINN. STAT. § 611A.045, subdiv. 1(a) (2016).
93. *Riggs*, 865 N.W.2d at 682.
94. *Id.*

the victim was the aggressor.[95] The Minnesota Supreme Court granted Riggs's petition for review.[96]

B. The Minnesota Supreme Court Decision and Rationale

Riggs and the State argued for different interpretations of the restitution statute before the Minnesota Supreme Court. First, Riggs contended that the plain language of section 611A.045 "[did] not limit what a court can consider [when determining restitution]; it merely specifie[d] the factors that a court must consider."[97] According to Riggs, had the legislature intended to limit consideration to the specified factors, the statute would have read "shall *only* consider."[98] Under Riggs's approach, the trial court could consider the victim's fault whenever it was relevant to the restitution award. The State countered that the entirety of the restitution statute demonstrated that the legislature used such inclusive language as "may include, but is not limited to" to indicate its intent for consideration of non-explicit factors.[99] According to the State, because section 611A.045 did not contain such language, trial courts must not consider any factor beyond those that are listed.[100]

Addressing Riggs's first argument, the majority concluded that the plain language of section 611A.045, subdivision 1, establishes exclusive criteria and prohibited consideration of any additional factors.[101] The majority supported its conclusion by reviewing the

95. State v. Riggs, 845 N.W.2d 236, 238–39 (Minn. Ct. App. 2014), *aff'd*, 865 N.W.2d 679 (explaining that the omission of a phrase from a statute is presumed to be deliberate and therefore the legislature intentionally eliminated from consideration any factors other than those enumerated to determine the restitution amount).

96. *Riggs*, 865 N.W.2d at 682.

97. Appellant's Reply Brief at 4, State v. Riggs, 865 N.W.2d 679 (Minn. 2015) (No. A13-1189).

98. Appellant's Brief and Addendum, State v. Riggs, 865 N.W.2d 679 (Minn. 2015) (No. A13-1189), 2014 WL 4547916, at *11.

99. Respondent's Brief, State v. Riggs, 865 N.W.2d 679 (Minn. 2015) (No. A13-1189), 2014 WL 5099417, at *9 ("Minnesota Statute[s] 611A.04, subd[ivision] 1(a) states, '[a] request for restitution *may include, but is not limited to,*' followed by a list of a number of factors that qualify as an economic loss resulting from the crime.").

100. *Id.*

101. *Riggs*, 865 N.W.2d at 684–85.

restitution statute "as a whole."[102] The court pointed to section 611A.54, which addresses the state-funded victim reparations program, and instructed the Crimes Victims Reparations Board to consider the "contributory misconduct . . . of a victim" when determining the amount of reparations to provide.[103] The majority concluded that the legislature's choice to expressly include the victim's fault as a factor in the reparations statute but not the parallel restitution statute demonstrates that the legislature intended to create an exclusive list of factors in section 611A.045, subdivision 1.[104]

Second, Riggs argued in the alternative that even if the language in section 611A.045 limits the trial court's consideration to the listed factors only, the phrase "as a result of the offense" requires the district court to assess the causation of the victim's loss, which would necessarily include consideration of the victim's comparative fault, if any.[105] To counter, the State argued that criminal sentencing and civil lawsuits, rather than restitution, are the proper forums to consider a victim's fault.[106] Unlike the restitution statute, the State reasoned, Minnesota criminal sentencing and civil liability statutes expressly provide for consideration of the victim's role in causing a harm.[107] Furthermore, it argued that criminal sentencing and civil lawsuits serve purposes distinct from restitution.[108] According to the State, restitution was created by legislation to serve the special purpose of restoring criminal victims to their prior financial positions.[109] The State claimed that a victim's right to restitution simply attaches upon the defendant's conviction; no additional causation analysis is appropriate.[110]

Although the restitution statute *does* contain language suggestive of a causation analysis, the majority rejected Riggs's alternative argument.[111] The court concluded that the phrase "as a

102. *Id.* at 683.
103. *Id.* at 685 (quoting MINN. STAT. § 611A.54(2) (2014)).
104. *Id.*
105. Appellant's Brief and Addendum, *supra* note 98, at *13–14.
106. Respondent's Brief, *supra* note 99, at *6–8.
107. *Id.* at *7–8.
108. *Id.*
109. *Id.* at *6–7.
110. *Id.*
111. *See* State v. Riggs, 865 N.W.2d 679, 685–86 (Minn. 2015).

result of the offense" simply directs the district court to consider whether the victim's economic losses are the natural consequences of the defendant's crime; the factors leading to the crime, such as an aggressor victim, are immaterial.[112]

Disagreeing with the majority's holding, three justices dissented: Chief Justice Gildea, Justice Page, and Justice Anderson.[113] Justice Page viewed the majority as "speaking out of both sides of its mouth."[114] According to Justice Page, although the majority stated that it would not consider circumstances surrounding the offense when determining a restitution award, the court "necessarily considered the circumstances surrounding 'the offense'" because it "permitt[ed] a restitution award based on [an] *assault*" when Riggs had only been convicted of *terroristic threats*.[115] Justice Page reasoned that based on the majority's opinion, a district court may "consider economic loss resulting from the circumstances surrounding the offense of conviction, i.e., the assault, to determine restitution" and "the circumstances surrounding the assault—including the victim's role as aggressor."[116]

Chief Justice Gildea, joined by Justice Anderson, dissented on different grounds. The Chief Justice argued that courts should apply "traditional causation analysis" to the restitution statute.[117] According to the Chief Justice, the statutory phrase "as a result of the offense" triggers the causation analysis typical of civil cases, which permits the consideration of alternative or multiple causes of the victim's loss—causes which could include the victim's contributory fault.[118] The majority disagreed, reasoning that causation analysis of the victim's fault belongs to negligence law, not restitution calculations in criminal law.[119] The majority cautioned that the language of the statute demonstrates the legislature's choice to expressly incorporate comparative fault into

112. *Id.*
113. *Id.* at 686–88.
114. *Id.* at 688 (Page, J., dissenting).
115. *Id.* (emphasis added).
116. *Id.*
117. *Id.* at 687 (Gildea, C.J., dissenting).
118. *Id.*
119. *Id.* at 686 n.8 (majority opinion).

the context of civil liability and criminal reparations but not restitution; therefore, the court should not disturb that choice.[120]

IV. ANALYSIS

A. *Issues of First Impression*

The issues decided by the Minnesota Supreme Court in *Riggs* were issues of first impression. These issues were: first, whether a district court may consider *only* the two explicit factors in section 611A.045, subdivision 1, when determining restitution,[121] and second, whether the explicit factors of section 611A.045, even if exclusive, nonetheless incorporate consideration of the victim's comparative fault through the causation analysis typically used in civil cases.[122] Of the few Minnesota Supreme Court cases addressing section 611A.045, subdivision 1, a majority of the cases directly concern the application of the two statutory factors: the "economic loss sustained by the victim" and "the ability of the defendant to pay."[123] No previous Minnesota Supreme Court case had addressed whether a trial court could consider the victim's comparative fault or any other non-explicit factors in its restitution determination.[124]

120. *Id.*

121. *Id.* at 684 ("[W]e have not determined whether the two express factors in section 611A.045, subdivision 1, comprise an exclusive list of the factors that a district court may consider when imposing restitution.").

122. *Id.* at 685–86.

123. *See id.* at 683; *see, e.g.*, State v. Caldwell, 803 N.W.2d 373, 391 (Minn. 2011) (concluding that trial court properly considered economic loss of victim and offender's ability to pay despite restitution order's lack of detail); State v. Simion, 745 N.W.2d 830, 844–45 (Minn. 2008) (remanding case to trial court for proper calculation of economic loss of victim in light of past payments by defendant and the return of stolen property); State v. Lindsey, 632 N.W.2d 652, 663–64 (Minn. 2001) (concluding that trial court properly considered offender's ability to pay); State v. Tenerelli, 598 N.W.2d 668, 672 (Minn. 1999) (concluding that victim's healing ceremony is not too attenuated from criminal offense to be covered as an economic loss); State v. Terpstra, 546 N.W.2d 280, 281–84 (Minn. 1996) (concluding that overall economic loss of three victims was established by the preponderance of the evidence at trial despite the jury convicting the defendant of a felony swindle offense against only one of the three victims); State v. Maidi, 537 N.W.2d 280, 285–86 (Minn. 1995) (concluding that the legislature granted courts broad discretion to structure restitution orders that factor in the defendant's ability to pay and that the lower court properly considered those resources in its order).

124. *See Riggs*, 865 N.W.2d at 683–85.

As this Note will explore, the court correctly concluded that the legislature intended the factors listed in 611A.045 to be exclusive and correctly declined to read comparative fault into the statute.[125] First, despite Riggs's argument that the trial court acted within its broad discretion to award or reduce restitution, the legislature has limited the trial court's discretion by enacting the mandatory criteria listed in section 611A.045. As the State argued, the statute contains no suggestion that trial courts may consider any non-explicit factors, such as the victim's fault.[126] The plain language of the statute, the context of surrounding statutes, and the application of interpretive canons support the majority's conclusion that the legislature intended the listed factors in section 611A.045 to be exclusive and limiting on trial courts.

Second, Riggs's alternative argument that comparative fault is incorporated within the existing causation language of the statute fails to account for the fact that comparative fault is generally applicable to only unintentional, negligent actions. Riggs was correct to argue that the language of Minnesota's restitution statute incorporates a causation test reminiscent of civil law; however, as the majority responded, even within civil law, the particular test Riggs argued for—comparative fault—is inapplicable to intentional torts, like battery and assault.[127] Because Riggs engaged in intentional conduct when defending himself from the eventual victim, Riggs's argument essentially asked the court to recognize an inapplicable causation standard—one more appropriate for civil negligence. The following sections of this Note expand on the analysis of each of Riggs's arguments.

B. Discretion of Trial Courts to Make Restitution Determinations

Generally speaking, trial courts in Minnesota are granted broad discretion over restitution awards.[128] Riggs's argument begins with the notion that the trial court acted well within its broad discretion to reduce the victim's restitution award.[129]

125. *Id.; see infra* Sections IV.C–D.

126. *See* Respondent's Brief, *supra* note 99, at *10; *see also* MINN. STAT. § 611A.045 (2016).

127. Kelzer v. Wachholz, 381 N.W.2d 852, 854 (Minn. Ct. App. 1986) (citing MINN. STAT. § 604.01 (1984)) ("Intentional tort actions are not subject to the comparative fault statute.").

128. *See Tenerelli*, 598 N.W.2d at 671 (citing *Maidi*, 537 N.W.2d at 284–86).

129. Appellant's Brief and Addendum, *supra* note 98, at *10–14.

At least one appellate case in Minnesota, *State v. Ehrmantraut*, though unpublished and therefore non-precedential,[130] lends some support to Riggs's argument. In *State v. Ehrmantraut*, the Minnesota Court of Appeals affirmed the trial court's decision to reduce the victim's restitution award because the victim was the initial aggressor.[131] The defendant in the case was convicted of third-degree assault for breaking the victim's jaw after the victim showed up at the defendant's house and started a fight.[132] Like the *Riggs* trial court, the trial court in *Ehrmantraut* reduced the amount of restitution because the victim provoked the conflict that led to his injury.[133] However, unlike *Riggs*, the court of appeals in *Ehrmantraut* simply deferred to the trial court's discretion without addressing the deeper statutory issues involving the limits on trial courts to consider factors outside of the statute, like the victim's fault.[134]

The trial courts in *Riggs* and *Ehrmantraut* departed from precedent because trial courts in Minnesota have generally used their discretionary authority to expand, rather than reduce, restitution awards.[135] The use of discretion to expand restitution awards follows the broad statutory language addressing the victim's expenses and the defendant's ability to pay. For example, in *State v. Maidi*, the Minnesota Supreme Court affirmed a restitution award of $147,251.27 for expenses incurred in rescuing an abducted child, despite the mathematical impossibility of repayment.[136] The court concluded that section 609.26, subdivision 4, which provides restitution for "any expense" incurred in the return of a child, demonstrated the "legislative intent to give wide discretion to the

130. No. A09-880, 2010 WL 2035700 (Minn. Ct. App. May 25, 2010). "Unpublished opinions of the Court of Appeals are not precedential." MINN. STAT. § 480A.08, subdiv. 3(b) (2016).

131. 2010 WL 2035700, at *8 ("Despite some concern about the reasons supporting reduced restitution . . . [w]e . . . do not interpret the restitution adjustment necessarily to contradict the district court's fact finding, but as the district court's discretionary reduction to acknowledge that Malone unreasonably provoked the confrontation to which Ehrmantraut unreasonably responded.").

132. *Id.* at *2.

133. *Id.* at *8.

134. *Id.* (relying on the trial court's wide discretion in electing not to interpret the restitution adjustment, rather than any statutory factors).

135. *See, e.g.*, State v. Tenerelli, 598 N.W.2d 668, 672 (Minn. 1999); State v. Maidi, 537 N.W.2d 280, 285 (Minn. 1995).

136. 537 N.W.2d at 285 (discussing the impossibility of repayment due to the defendant's low hourly wage and the effect of compound interest).

sentencing court when ordering restitution."[137] The *Maidi* court also compared section 611A.045, concerning the defendant's ability to pay, with section 611A.04, which authorizes trial courts to order partial, full, or no restitution.[138] Based on the broad language in each statute, the court concluded that the legislature "intended to give the courts wide flexibility to structure restitution orders that take into account a defendant's ability to pay."[139]

Additionally, in *State v. Tenerelli*, the Minnesota Supreme Court held that a restitution order for repayment of the cost of the victim's Hmong healing ceremony[140] qualified as an appropriate "economic loss" under section 611A.045.[141] The court looked to section 611A.04, which stated that compensable losses "may include, but is not limited to, any out-of-pocket losses resulting from the crime."[142] The court concluded that such language "clearly and unambiguously [left] the decision to award restitution to the discretion of the trial court."[143] The *Tenerelli* court recognized that section 611A.04 gives trial courts "significant discretion" over restitution when it concerns expanding the scope of the victim's expenses.[144]

An important distinction between *Riggs*, *Maidi*, and *Tenerelli* is that the latter cases concern trial courts' broad discretion over the factors already identified in the restitution statute.[145] Minnesota has not recognized a trial court's broad discretion to consider *any* factor when awarding restitution. The *Riggs* trial court exceeded its discretionary authority by considering factors beyond the factors mentioned in the statute. This conclusion is reinforced by the statutory analysis of section 611A.045.

C. *Minnesota Statutes Section 611A.045 Establishes Exclusive Criteria for Determining Restitution*

Upon analyzing section 611A.045, the *Riggs* court correctly decided that the legislature enacted exclusive criteria. The *Riggs*

137. *Id.* at 284.
138. *Id.* at 285–86.
139. *Id.*
140. *Tenerelli*, 598 N.W.2d at 669.
141. *Id.* at 672.
142. *Id.* at 671 (citing MINN. STAT. § 611A.04 (1999)).
143. *Id.* at 672.
144. *Id.* at 671.
145. *See* MINN. STAT. §§ 611A.045, .04 (2016).

court applied statutory interpretation to evaluate section 611A.045 in light of the defendant's claim that the statute did not restrict the trial court from considering unspecified factors in determining restitution.[146]

1. Canons of Statutory Interpretation

The court's primary objective in statutory interpretation is always to "effectuate the intent of the legislature."[147] Restitution cases have reinforced this objective.[148] Questions of statutory interpretation are reviewed *de novo*.[149]

The first step in statutory interpretation is to determine whether a statute is ambiguous.[150] A statute is ambiguous only where it is capable of more than one reasonable interpretation.[151] To determine whether a statute is capable of more than one reasonable interpretation, the court may use a number of interpretative steps.[152] The court first interprets the statute according to the plain and ordinary meaning of its words and the common rules of grammar.[153] The statute is also read with the presumption that all of its words have effect and none are superfluous.[154] The court interprets the statute's meaning in the context of the surrounding statutory sections to avoid conflicting

146. *See* State v. Riggs, 865 N.W.2d 679, 683 (Minn. 2015).

147. MINN. STAT. § 645.16; s*ee Riggs*, 865 N.W.2d at 682; State v. Jones, 848 N.W.2d 528, 535 (Minn. 2014).

148. *See Riggs*, 865 N.W.2d at 682; State v. Caldwell, 803 N.W.2d 373, 382 (Minn. 2011); State v. Gaiovnik, 794 N.W.2d 643, 647 (Minn. 2011); *Tenerelli*, 598 N.W.2d at 671.

149. *See Tenerelli*, 598 N.W.2d at 671 (citing Doe v. Minn. State Bd. of Med. Exam'rs, 435 N.W.2d 45, 48 (Minn. 1989)).

150. *See* State v. Peck, 773 N.W.2d 768, 772 (Minn. 2009).

151. *See* State v. Mauer, 741 N.W.2d 107, 111 (Minn. 2007).

152. *See* MINN. STAT. § 645.08; *Riggs*, 865 N.W.2d at 682–83.

153. *See* MINN. STAT. § 645.08(1); State v. Jones, 848 N.W.2d 528, 535 (Minn. 2014) (citing State v. Fleck, 810 N.W.2d 303, 307 (Minn. 2012)); *Peck*, 773 N.W.2d at 772.

154. *See* MINN. STAT. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions."); State v. Rick, 835 N.W.2d 478, 483 (Minn. 2013) (citing Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)) ("Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant."); Am. Family Ins. Grp. v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000).

interpretations.[155] Lastly, the court applies additional interpretative canons identified in statutes[156] or case law, where relevant.[157]

After applying the interpretive steps, if the court determines that a statute's meaning is clear and unambiguous, it must apply the plain meaning of the statute.[158] The statute's plain meaning is presumed to convey the intent of the legislature.[159] Only where the court concludes that a statute is ambiguous may the court attempt to discern the legislature's intent through statutory construction.[160]

2. *Application of Statutory Interpretation to Riggs's Primary Argument*

The *Riggs* case illustrates the sometimes circuitous nature of statutory interpretation. Two courts looked at the same statute and took different conclusions regarding statutory interpretation: the court of appeals concluded that section 611A.045, subdivision 1, was ambiguous,[161] while the Minnesota Supreme Court concluded

155. *See* Christianson v. Henke, 831 N.W.2d 532, 537 (Minn. 2013) (citing Martin v. Dicklich, 823 N.W.2d 336, 344 (Minn. 2012)) ("Multiple parts of a statute may be read together so as to ascertain whether the statute is ambiguous."); State v. Gaiovnik, 794 N.W.2d 643, 647 (Minn. 2011) (quoting Christensen v. Hennepin Transp. Co., Inc., 215 Minn. 394, 409, 10 N.W.2d 406, 415 (1943)) ("When interpreting statutes, we do not examine different provisions in isolation. Instead, we construe a statute 'as a whole,' and '[w]ords and sentences are understood . . . in the light of their context.'"); *Schroedl*, 616 N.W.2d at 277.

156. *See* MINN. STAT. § 645.08.

157. *See, e.g.*, *Rick*, 835 N.W.2d at 485 ("Under the associated-words canon, when context suggests that a group of words have something in common, each word should be ascribed a meaning that is consistent with its accompanying words."); *see also* Laase v. 2007 Chevrolet Tahoe, 776 N.W.2d 431, 436 (Minn. 2009) (discussing the application of canons of interpretation unless they would defeat the legislature's intent or result in a construction that is repugnant to statute); *Schroedl*, 616 N.W.2d at 278 (citing Erickson v. Sunset Mem'l Park Ass'n, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961)) ("[C]ourts should construe a statute to avoid absurd results and unjust consequences.").

158. *See* State v. Caldwell, 803 N.W.2d 373, 382 (Minn. 2011) (citing MINN. STAT. § 645.16 (2010)).

159. *See* State v. Jones, 848 N.W.2d 528, 535 (Minn. 2014) (citing Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001)).

160. *See Rick*, 835 N.W.2d at 482 (discussing Minnesota Statutes section 645.16 (2012) as listing canons of construction used to determine legislative intent for an ambiguous statute).

161. *See* State v. Riggs, 845 N.W.2d 236, 238 (Minn. Ct. App. 2014), *aff'd*, 865 N.W.2d 679 (Minn. 2015).

that it was not.[162] However, despite the fact that the two courts took different interpretive paths, each arrived at the same final conclusion: the legislature intended the statutory factors to be the exclusive criteria for determining restitution.[163] In reaching their conclusions, both courts applied a similar interpretative principle: omitted phrases are presumed to be intentionally excluded by the legislature.[164]

The presumption that omissions in a statute are intentional is known as the *expressio unius* canon.[165] *Expressio unius* means that the expression of one term implies the exclusion of the omitted term.[166] Courts often look to the canon when deciding whether the language of a statute is exclusive or inclusive of things not expressed.[167] Under the canon, "[w]here a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others."[168] *Expressio unius* is not to be used in a

162. *See Riggs*, 865 N.W.2d at 685.

163. *Id.*; *see also Riggs*, 845 N.W.2d at 239.

164. *See Riggs*, 865 N.W.2d at 685 ("[W]e cannot glean from the Legislature's omission its intention to include an unstated factor."); *Riggs*, 845 N.W.2d at 238 (citing City of Moorhead v. Red River Valley Coop. Power Ass'n, 811 N.W.2d 151, 159 (Minn. Ct. App. 2012)) ("Generally, when the legislature omits something from a statute, we infer that the omission was intentional.").

165. *See* State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011) (citing 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.25 (7th ed. 2007)) ("*Expressio unius* generally reflects an inference that any omissions in a statute are intentional."). The full Latin phrase is *expressio unius est exclusio alterius* ("The expression of one thing is to the exclusion of another."). *See id.*

166. *See id.* (citing *In re* Welfare of J.B., 782 N.W.2d 535, 543 (Minn. 2010); *In re* Common Sch. Dist. No. 1317, 263 Minn. 573, 575, 117 N.W.2d 390, 391 (1962)).

167. *See, e.g.*, *Caldwell*, 803 N.W.2d at 383 (rejecting the inference of *expressio unius* where the list of enumerated terms encompass the allegedly omitted term); Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 457 (Minn. 2006) (accepting the application of *expressio unius* where the contested term is not listed among the various terms); Peterson v. City of Minneapolis, 878 N.W.2d 521, 524–25 (Minn. Ct. App. 2016), *aff'd*, No. A15-1711, 2017 WL 1364085 (Minn. Apr. 12, 2017) (rejecting the inference of *expressio unius* where the phrase "including" prefaces a list of terms).

168. *See* City of Saint Paul v. Eldredge, 788 N.W.2d 522, 525 (Minn. Ct. App. 2010) (quoting Maytag Co. v. Comm'r of Taxation, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944)), *aff'd*, 800 N.W.2d 643 (Minn. 2011). *See generally* MINN. STAT. § 645.19 (2012); Niska v. Clayton, No. A13-0622, 2014 WL 902680, at *9 (Minn. Ct. App. Mar. 10, 2014) (citing *Caldwell*, 803 N.W.2d at 383), *review denied,* (June 25, 2014), *cert. denied*, 135 S. Ct. 1399 (2015).

rote manner; it is highly context-dependent, and interpreting courts must consider whether the statute reasonably expresses all it was meant to prescribe.[169] For statutory lists, *expressio unius* applies when the "items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[170]

Minnesota courts commonly employ *expressio unius* to interpret statutes, yet Minnesota's case law is unclear as to precisely when courts may apply it. Some courts have used *expressio unius* as a guide to interpret the plain meaning of a statute; others have applied it only after finding the statute ambiguous. For instance, the Minnesota Court of Appeals has used *expressio unius* both before and after determining the ambiguity of a statute.[171] Yet, in dicta, the court suggested that *expressio unius* "is only used where it is first

169. *See* Christianson v. Henke, 831 N.W.2d 532, 535 n.3 (Minn. 2013) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012)) (discussing that the application of *expressio unius* is greatly dependent on context and common sense to determine whether the item(s) specified can reasonably be thought to express all that the statute was intended to grant or prohibit).

170. Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen, 778 N.W.2d 380, 384 (Minn. Ct. App. 2010) (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003)).

171. *See In re* Xcel's Request to Issue Renewable Dev. Fund Cycle 4 Requests for Proposals, No. A14-1006, 2015 WL 2341257, at *3 (Minn. Ct. App. May 18, 2015) (labeling *expressio unius* as a canon of construction that applies only if the statute is ambiguous); RSR, Inc. v. Rothers, No. A13-1208, 2014 WL 996874, at *3 (Minn. Ct. App. Mar. 17, 2014) (applying *expressio unius* to interpret list of provisions in Minnesota Statutes section 571.75, subdivision 1, after concluding the statute was ambiguous); *Mountain Peaks Fin. Servs.*, 778 N.W.2d at 384 (applying *expressio unius* as a rule of statutory construction only after concluding the statutory list capable of two reasonable interpretations); BCBSM, Inc. v. Minn. Comprehensive Health Ass'n, 713 N.W.2d 41, 44 (Minn. Ct. App. 2006) (applying *expressio unius* as a rule of construction to determine legislative intent only after concluding the statute was ambiguous). *But see* Persigehl v. Ridgebrook Invs. Ltd. P'ship, 858 N.W.2d 824, 831–34 (Minn. Ct. App. 2015) (analyzing the applicability of *expressio unius* in the process of determining that the statutory list was unambiguous); City of Moorhead v. Red River Valley Co-op. Power Ass'n, 811 N.W.2d 151, 159 (Minn. Ct. App. 2012), *aff'd*, 830 N.W.2d 32 (Minn. 2013) (applying *expressio unius* to interpret the plain language of a four-factor statutory list without first declaring the statute ambiguous); Underwood Grain Co. v. Harthun, 563 N.W.2d 278, 281 (Minn. Ct. App. 1997) (relying on *expressio unius* as a "principle of statutory construction" to reject inserting an omitted phrase into a list of statutory provisions and concluding the statute was unambiguous).

determined that the language is ambiguous."[172] Likewise, the Minnesota Supreme Court has called *expressio unius* a "canon of construction"[173] to be used only if a statute is ambiguous.[174] At other times, however, the court has used *expressio unius* to interpret plain meaning.[175] Nevertheless, the confusion surrounding *expressio unius* ultimately may be a distinction without a difference. Whether *expressio unius* is applied before or after determining the ambiguity of a statute, the conclusion it led to in *Riggs* was well-founded.

In *Riggs*, the court did not specifically announce that it relied on the *expressio unius* canon to reach its conclusion.[176] Indeed, the court staked much of its reasoning on the rules of grammar and past precedent.[177] However, the *expressio unius* principle underlies

172. *See* Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391, 397 (Minn. Ct. App. 2001) (citing Colangelo v. Norwest Mortgage, Inc., 598 N.W.2d 14, 17–18 (Minn. Ct. App. 1999)), *aff'd*, 644 N.W.2d 425 (Minn. 2002).

173. *See* Staab v. Diocese of St. Cloud, 853 N.W.2d 713, 718–19 (Minn. 2014).

174. *See* Billion v. Comm'r of Revenue, 827 N.W.2d 773, 778 (Minn. 2013) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)) (explaining that canons of construction are inapplicable unless a statute is ambiguous).

175. *See* Gams v. Houghton, No. A14-1747, 2016 WL 4536500, at *3–4 (Minn. Aug. 31, 2016) (citing City of Saint Paul v. Eldredge, 800 N.W.2d 643, 648 (Minn. 2011)) (relying on the "maxim that when there is an express enumeration of the persons or things to be affected by a particular provision, 'there is an implied exclusion of others'" in concluding that the statute was unambiguous); Rohmiller v. Hart, 811 N.W.2d 585, 590–91 (Minn. 2012) (quoting Wallace v. Comm'r of Taxation, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971)) (concluding that where a statute identified the class of persons to which its rule applied, the court "cannot supply that which the legislature purposely omits or inadvertently overlooks," and holding that the statute is not ambiguous where the legislature is silent); Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 175, 84 N.W.2d 593, 599–600 (1957) (concluding that the provisions of a contract were exclusive and unambiguous after applying *expressio unius* and declaring that the canon is applicable to statutes as well); *cf. In re* Welfare of J.B., 782 N.W.2d 535, 543 (Minn. 2010) (applying *expressio unius* to interpret the statute as not requiring public defender representation of parents in a juvenile proceeding while later declaring legislative history inapplicable unless a statute is ambiguous). *But see In re* Guardianship of Tschumy, 853 N.W.2d 728, 749–50 (Minn. 2014) (Anderson, J., dissenting) (discussing the applicability of canons of construction, like *expressio unius*, only where the statute is ambiguous).

176. *See generally* State v. Riggs, 865 N.W.2d 679 (Minn. 2015).

177. The *Riggs* court relied on its statutory interpretation in *State v. Hohenwald* for the conclusion that whenever the legislature used the article "the"—as in, "the following factors"—it necessarily intended to create an exclusive list. However, the court's use of *Hohenwald* appears to be dubious because *Riggs* extrapolates *Hohenwald's* analysis from the singular to plural. *Hohenwald* addressed whether the

its analysis. Because *expressio unius* is context-dependent,[178] courts typically test its exclusionary presumption by scanning the surrounding statutory language for any inclusive terms or other indicators that the scope of the statute includes unexpressed items.[179] Likewise, the *Riggs* court announced that, as an interpretive step, it would consider the statute as a whole and interpret section 611A.045 in context with the surrounding statutory provisions.[180] This interpretive step demonstrates the court's use of the *expressio unius* canon.

The *Riggs* court followed the proper analytical steps for testing the *expressio unius* exclusionary presumption against the language of the statute and the surrounding statutory context.[181] The court first looked to section 611A.045 and concluded that there was no inclusive language, such as "the district court shall consider *at least* the following factors" or "among the factors that the district court shall consider are," to indicate that additional factors could be considered.[182] The court then analyzed the surrounding statutes, section 611A.04 (authorizing restitution orders) and section 611A.54 (addressing state-funded reparations for victims of crime).[183] Interpreting section 611A.04, the statute immediately preceding section 611A.045, the court reasoned that the legislature

article "the" provided an exclusive meaning for a single item in a list and not whether the article "the" provided an exclusive meaning over an entire list of factors. *See id.* at 685 (quoting State v. Hohenwald, 815 N.W.2d 823, 830 (Minn. 2012)) ("We held in *Hohenwald* that '[t]he definite article "the" is a word of limitation that indicates a reference to a specific object.'"); *Hohenwald*, 815 N.W.2d at 830 ("The use of the word 'the' before 'criminal proceedings' in Rule 20.01 provides further evidence that the suspension order entered by the district court affected only the case already initiated against Hohenwald by criminal complaint. The definite article 'the' is a word of limitation that indicates a reference to a specific object.").

178. *See* SCALIA & GARNER, *supra* note 169, at 107.

179. *See, e.g.*, Rohmiller v. Hart, 811 N.W.2d 585, 590–91(Minn. 2012); Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 456–57 (Minn. 2006).

180. *See Riggs*, 865 N.W.2d at 683.

181. *See* SCALIA & GARNER, *supra* note 169; *see also Rohmiller*, 811 N.W.2d at 591 (holding that a statute that expressly provided rights for identified category of individuals but was silent as to other categories of individuals was not ambiguous after applying the principle that courts cannot supply words that the legislature has intentionally omitted by examining surrounding statutory provisions for context).

182. *Riggs*, 865 N.W.2d at 684.

183. *Id.* at 685.

used the words "may include, but *is not limited to*" to create an inclusive, rather than exclusive, statutory list.[184] Interpreting section 611A.54, the court concluded that a victim's contributory misconduct is expressly listed as a factor in determining victim reparations.[185]

To the *Riggs* court, the statutory context surrounding section 611A.045 illustrated the language available to the legislature. Had the legislature intended the restitution statute to permit the consideration of additional factors, it would have indicated its intention by using broad or inclusive language such as "includes" or "at least" to introduce the restitution criteria.[186] Based on this context, the *Riggs* court applied the *expressio unius* principle, stating that "[w]ithout more, we cannot glean from the Legislature's omission its intention to include an unstated factor."[187] On that basis, the court found the meaning of the statute unambiguous and exclusive.[188]

Other Minnesota case law discussing statutory interpretation reinforces the court's analysis. For example, in *Nelson v. Productive Alternatives, Inc.*, the parties disputed whether Minnesota Statutes chapter 317A, which grants certain protections for members of nonprofit corporations, also protects against retaliatory termination.[189] The court reviewed the provisions of the chapter and found no language indicative of protection against retaliation.[190] The court then applied *expressio unius* to conclude that the statute demonstrated the legislature's intent to not offer

184. *Id.* (emphasis in original).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 456 (Minn. 2006).
190. *Id.* at 456–57.

such protection.[191] The court held that the legislature, not the court, would have to make any future modifications to the law.[192]

Rohmiller v. Hart is another statutory interpretation case that, like *Riggs*, applied *expressio unius*. In *Rohmiller*, the plaintiff argued that Minnesota Statutes section 257C.08 was ambiguous because it expressly provided minor child visitation rights to a subset of individuals, but it was silent as to the visitation rights of aunts.[193] The court looked to the various provisions of the statute and found that the statute delineated the visitation rights of many categories of individuals and made no mention of aunts.[194] While not specifically announcing application of *expressio unius*, the court relied on its underlying principle: omissions are presumed intentional.[195] The court concluded that the statute was unambiguous and reflected the legislature's intent to not include aunts among those individuals with visitation rights.[196]

Anderson v. Twin City Rapid Transit Co. is a contract interpretation case that also used *expressio unius* to reach the conclusion that terms not expressed should not be acknowledged.[197] In *Anderson*, the parties disputed whether the term "layoff" in their labor agreement also encompassed a "discharge."[198] The court relied on the *expressio unius* exclusionary principle to guide its reasoning that the recognition of discharge would impermissibly modify the contract by creating an unexpressed exception.[199] In a similar fashion, the *Riggs* court

191. *Id.* at 457 ("[W]e abide by the canon of statutory construction 'expressio unius exclusio alterius,' meaning the expression of one thing is the exclusion of another . . . . That is, since the legislature has extensively expressed the rights and privileges of membership in a nonprofit corporation, and since protection from reprisal employment discharge is not among these express protections, we must conclude that the legislature meant not to protect members from such practices.").

192. *Id.*

193. Rohmiller v. Hart, 811 N.W.2d 585, 590 (Minn. 2012).

194. *Id.* at 590–91.

195. *Id.* at 591 (quoting Wallace v. Comm'r of Taxation, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971)).

196. *Id.*

197. *See* Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 175–76, 84 N.W.2d 593, 599 (1957) ("This [exclusionary] rule is applicable to contracts as well as to statutes . . . .").

198. *See id.* at 173, 84 N.W.2d at 597.

199. *See id.* at 175–76, 84 N.W.2d at 599.

declined to recognize comparative fault, in part, because it would impermissibly modify section 611A.045.[200]

A number of statutory interpretation cases demonstrate the type of inclusive language that overcomes the exclusionary presumption of *expressio unius*. Had the *Riggs* court found any such inclusive language surrounding section 611A.045, it would have been justified in reaching a different conclusion. For instance, in *Peterson v. City of Minneapolis*, the Minnesota Court of Appeals declined to apply *expressio unius* to a list of statutory criteria because the statute introduced the criteria using the word "including."[201] This term, according to the court, demonstrated the legislature's intent that the statutory list be non-exclusive.[202] In a similar case, *City of Moorhead v. Red River Valley Co-op*, the Minnesota Supreme Court held that *expressio unius* did not apply to a four-factor statute because the statute introduced the factors using the words "must *include*" and featured a catch-all fourth factor, "other appropriate factors."[203] Finally, the Minnesota Supreme Court, in *State v. Caldwell*, held that the presumption of *expressio unis* is overcome when the supposed omitted term is obviously encompassed by the enumerated terms of a statute.[204] The statute at issue in *Riggs* contained no similarly broad or inclusive language.

In summary, the relevant statutory context reinforces, rather than overcomes, the application of *expressio unius* for interpreting section 611A.045 in *Riggs*. Moreover, section 611A.045 and its surrounding statutes lack any indicators of inclusive language or intent.[205] Furthermore, section 611A.54 provides an additional point of reference where the legislature expressly adopted the victim's contributory fault as a factor in the similar reparations statute.[206] Thus, as the *Riggs* court correctly determined, application of the exclusionary principle leads to the conclusion that the factors listed in section 611A.045 are intentionally exclusive.

200. *See* State v. Riggs, 865 N.W.2d 679, 686 n.8 (Minn. 2015).

201. Peterson v. City of Minneapolis, 878 N.W.2d 521, 524 (Minn. Ct. App. 2016), *aff'd*, No. A15-1711, 2017 WL 1364085 (Minn. Apr. 12, 2017).

202. *Id.* at 524–25.

203. *See* City of Moorhead v. Red River Valley Coop. Power Ass'n, 830 N.W.2d 32, 39 (Minn. 2013).

204. State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011).

205. *See supra* notes 178–85.

206. *See supra* note 180.

D. Minnesota Statutes Section 611A.045 Does Not Incorporate Comparative Fault Causation into Restitution Calculations

This section addresses Riggs's alternative argument. As detailed earlier, Riggs argued that even if the factors listed in the statute are exclusive, the statute's express language still triggers the causation analysis typically used in civil cases, which, in turn, allows consideration of comparative fault.[207]

Riggs was correct to argue that in spite of the statute's exclusive restitution criteria, the language of the statute still requires the trial court to analyze causation in order to determine whether the victim's losses are, in fact, the result of the offender's crime. The pertinent question is: what kind of causation test applies to restitution? Restitution cases in Minnesota make clear that trial courts should apply a causation test reminiscent of the proximate cause test in civil law.[208] Just as the Chief Justice reasoned in her dissent, Riggs asserted that such a causation test necessarily includes the victim's comparative fault.[209] As the following analysis will show, the *Riggs* court rightly recognized that reading comparative fault into the statute was a bridge too far. Before examining Riggs's alternative argument, it is necessary to understand how courts in Minnesota have analyzed and applied causation in the restitution context.

1. Restitution Requires a Proximate Causal Link Between the Victim's Losses and the Course of the Offender's Criminal Conduct

Minnesota's restitution statute does not identify a particular causation test.[210] As previously stated, section 611A.045, subdivision 1(a), simply directs the trial court to determine the value of the economic loss sustained by the victim "as a result of the offense."[211] Section 611A.04 defines the victim's losses in a similar fashion—

207. *See* Appellant's Brief and Addendum, *supra* note 98, at *13–14.

208. *See infra* notes 222–30 and accompanying text.

209. State v. Riggs, 865 N.W.2d 679, 686–87 (Minn. 2015) (Gildea, C.J., dissenting); Appellant's Brief and Addendum, *supra* note 98, at *12.

210. *Compare* MINN. STAT. § 611A.04 (2016), *and id.* § 611A.045, *with* 18 U.S.C. § 2259 (b)(3)(f) (2016) (mandating federal restitution for the losses of sexual exploitation victims sustained "as a proximate result of the offense"). *See also* Paroline v. United States, 134 S. Ct. 1710, 1720 (2014) (holding that 18 U.S.C. § 2259 creates a proximate cause requirement).

211. *See* MINN. STAT. § 611A.045.

compensable losses are the losses "resulting from the crime."[212] Courts have interpreted this language to require the state to prove that the victim's losses are "directly caused by the [offender's criminal] conduct."[213] The Minnesota Court of Appeals has referred to this relationship as a "direct causal link."[214] Applying this standard, the trial judge must ensure that the record establishes a factual basis for the restitution award[215] that connects the victim's loss to the crime.[216]

Under this approach, restitution may be ordered "only for losses directly caused by [the] actions" for which the defendant was convicted.[217] At first glance, it may seem that restitution is allowed only for those losses caused by the *specific* offense for which the defendant is convicted. Indeed, Justice Page focused much of his *Riggs* dissent upon this point.[218] However, from early on, Minnesota courts have taken a broad view of the offender's criminal conduct, in which restitution is appropriate for losses arising from any part of a single course of criminal conduct, regardless of the specific offense of conviction.[219]

212. *See id.* § 611A.04, subdiv. 1(a).

213. State v. Maxwell, 802 N.W.2d 849, 852 (Minn. Ct. App. 2011) (quoting State v. Latimer, 604 N.W.2d 103, 105 (Minn. Ct. App. 1999)); State v. Nelson, 796 N.W.2d 343, 347 (Minn. Ct. App. 2011) (same); *see also* State v. Olson, 381 N.W.2d 899, 901 (Minn. Ct. App. 1986).

214. *See Maxwell*, 802 N.W.2d at 852.

215. *See Latimer*, 604 N.W.2d at 105 (citing State v. Fader, 358 N.W.2d 42, 48 (Minn. 1984)).

216. *See Nelson*, 796 N.W.2d at 347 (citing *Latimer*, 604 N.W.2d at 105).

217. *Id.*; *see also Maxwell*, 802 N.W.2d at 852; *Olson*, 381 N.W.2d at 901.

218. Justice Page argued that the only reasonable plain language interpretation of "offense" from section 611A.045 is the offense of conviction. For support, Page pointed to section 611A.04, a surrounding statute, which conditions restitution on whether the offender is convicted. *See* State v. Riggs, 865 N.W.2d 679, 688 (Minn. 2015) (Page, J., dissenting).

219. *See, e.g.*, State v. Terpstra, 546 N.W.2d 280, 283 (Minn. 1996) (confirming that the total amount of restitution is not limited by the crime of conviction because as long as the defendant is convicted of a related crime and the victim's losses are established by a preponderance of the evidence, the restitution order is proper); *Latimer*, 604 N.W.2d at 105–06 (reversing trial court's restitution order because Latimer's acts were separate from the murder and Latimer could only be ordered to pay restitution for expenses directly caused by Latimer's participation in the concealment of the murder); State v. Esler, 553 N.W.2d 61, 63–65 (Minn. Ct. App. 1996) (reversing the trial court's restitution order because a restitution order for losses arising from multiple offenses must be linked to the crime of conviction by the same behavior); *Olson*, 381 N.W.2d at 900 (affirming the

Case law in Minnesota demonstrates that the causation test for restitution has evolved over time. Initially, courts applied a but-for test to the causal relationship between the victim's losses and the offender's conduct. Eventually, however, courts began to use a causation test similar to the proximate cause test used in civil law.

Prior to *State v. Palubicki*,[220] Minnesota courts assessed the causal link between a victim's loss and the offender's crime using a but-for test.[221] But-for causation means that a later event would not have occurred "but for" the former event.[222] Under but-for causation, the court asked whether, under identical circumstances, the injury would occur absent the offender's crime.[223]

However, the Minnesota Supreme Court rejected but-for causation as the state's causation standard for restitution in *State v. Palubicki*.[224] In *Palubicki*, the trial court granted restitution to the children of a murder victim for their lodging and travel expenses related to attending the defendant's murder trial.[225] Relying on precedent, the state argued that the expenses were the but-for result of the defendant's offense.[226] The defendant urged the court to limit the scope of restitution claims.[227] The court agreed, and in rejecting the but-for test, the court held that a restitution claim "so attenuated in its cause that it cannot be said to result from the

restitution order because the trial evidence directly linked the business's losses to the defendant's burglary and reasoning that if the defendant had been acquitted of a theft involving a separate incident from the burglary, the restitution order would be improper).

220. 727 N.W.2d 662 (2007).

221. *See* State v. Hillbrant, No. A05-820, 2006 WL 2052872, at *6 (Minn. Ct. App. July 25, 2006) (citing *In re* Welfare of D.D.G., 532 N.W.2d 279, 282–83 (Minn. Ct. App. 1995)) ("Minnesota courts apply a but-for analysis when considering whether a victim's economic harm was directly caused by a defendant's criminal conduct."), *abrogated by Palubicki*, 727 N.W.2d 662; State v. O'Brien, 459 N.W.2d 131, 134–35 (Minn. Ct. App. 1990).

222. *But-For Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[But-for cause is] [t]he cause without which the event could not have occurred.—Also termed *actual cause; cause in fact; factual cause*."); *see also* Paroline v. United States, 134 S. Ct. 1710, 1722 (2014).

223. *See* George v. Estate of Baker, 724 N.W.2d 1, 11 (Minn. 2006) (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265 (5th ed. 1984)).

224. *Palubicki*, 727 N.W.2d at 667.

225. *Id.* at 664–65.

226. *Id.* at 667.

227. *Id.* at 666.

defendant's criminal act" violates the statute.[228] Still, applying this standard, the court affirmed the restitution order, concluding that the trial attendance expenses were not too attenuated and were the "direct result of [Palubicki's] crime."[229]

The *Palubicki* holding signified the court's acceptance of "direct cause" rather than but-for cause as the causation standard for restitution in Minnesota.[230] Direct cause, after *Palubicki*, is synonymous with proximate cause in civil law.[231] Proximate cause generally requires, first, the existence of but-for cause, and second, a direct relationship between the injury and the harmful conduct, such that the injury is not so attenuated from the conduct that the injury "is more aptly described as mere fortuity."[232] However, as this Note will discuss in greater detail, contrary to Riggs's argument, proximate cause in the restitution context does not necessarily require the inclusion of comparative fault.

Perhaps because *Palubicki* provided no examples of the types of restitution claims that should be rejected,[233] so far, with rare exception, few restitution awards following *Palubicki* have been reversed because the victim's loss was too attenuated from the defendant's conduct.[234] Post-*Palubicki* cases have applied proximate

228. *Id.* at 667.

229. *See id.*

230. After rejecting but-for causation, the *Palubicki* court used the term, "direct result of," to test the attenuation of the disputed restitution award. *Id.* The term "direct result" is synonymous with proximate cause, as used in civil liability in Minnesota. *See* George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006) (citing 4 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES, CIVIL, CIVJIG 27.10 (4th ed. 1999)) ("Minnesota applies the substantial factor test for causation. The negligent act is a *direc*t, or proximate, cause of harm if the act was a substantial factor in the harm's occurrence." (emphasis added)).

231. *See* 4 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES, CIVIL, CIVJIG 27.10 (6th ed. 2015), Westlaw.

232. *See* Paroline v. United States, 134 S. Ct. 1710, 1719 (2014) (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838–39 (1996)).

233. *See generally Palubicki*, 727 N.W.2d 662.

234. *See* Powell v. State, No. A14-1406, 2015 WL 4393381, at *6 (Minn. Ct. App. July 20, 2015) (ordering partial reversal of restitution order for over-the-counter drugs, improperly included in restitution for prescription costs, as too attenuated). *But see* State v. Rodriguez, 863 N.W.2d 424, 430 (Minn. Ct. App. 2015) (holding restitution for victim's moving expenses not too attenuated because of psychological trauma from defendant's break-in), *review denied*, (July 21, 2015); Martel v. State, No. A14-2156, 2015 WL 4171887, at *4 (Minn. Ct. App. July 13, 2015) (holding restitution for victim's colonoscopy to examine diarrhea symptoms following defendant's indecent exposure not too attenuated); State v. Berkness,

cause to test the restitution award.[235] For example, several unpublished court of appeals cases have held that the victim's loss "must be 'a reasonably foreseeable result of, and [be] directly caused by, [a defendant's] actions.'"[236] Notably, however, neither *Palubicki* nor any restitution case following *Palubicki* specifically addressed the comparative fault of a victim in the proximate direct cause analysis.[237]

In addition to the proximate cause test recognized in *Palubicki*, other restitution cases demonstrate that trial courts may also consider multiple causes in their analysis of the victim's losses.[238] However, as with the *Palubicki* line of cases, no restitution case has gone as far as to recognize the fault of the victim as a potential contributory cause. For example, in *State v. Nelson*, the Minnesota Court of Appeals assessed multiple causes when determining the factual connection between the victim's loss and the offender's conduct.[239] In *Nelson*, a tanning salon employee pled guilty to one misdemeanor for theft from the salon and was ordered to pay restitution.[240] Charges were also brought against three coworkers but later dismissed.[241] The court of appeals modified the restitution order because the order impermissibly included losses that flowed

No. A14-1678, 2015 WL 1608992, at *2 (Minn. Ct. App. Apr. 13, 2015), *review denied,* (June 16, 2015) (holding restitution for victim's medical treatment from bite of defendant's non-immunized dog not too attenuated); State v. Shakibi, No. A14-0242, 2014 WL 6609082, at *3 (Minn. Ct. App. Nov. 24, 2014) (holding that restitution for damage to car driven but not owned by victim not too attenuated from defendant's reckless driving crime); State v. Alford, No. A07-1025, 2008 WL 4006657, at *7 (Minn. Ct. App. Sept. 2, 2008) (holding restitution for fire damage to mobile home from fire set by defendant's brother to cover murder not too attenuated because both participated in the murder); State v. Spann, No. A05-2372, 2007 WL 968421, at *3 (Minn. Ct. App. Apr. 3, 2007) (holding restitution for stolen car, lost due to police auction, not too attenuated from criminal's initial theft of car).

235. *See, e.g.*, *Rodriguez*, 863 N.W.2d at 429 (citing *Palubicki*, 727 N.W.2d at 667); *Berkness*, 2015 WL 1608992, at *2; *Alford*, 2008 WL 4006657, at *7.

236. *Powell*, 2015 WL 4393381, at *3 (quoting State v. Maxwell, 802 N.W.2d 849, 853 (Minn. Ct. App. 2011)); *see also Berkness*, 2015 WL 1608992, at *2; *Shakibi*, 2014 WL 6609082, at *3; *Spann*, 2007 WL 968421, at *3.

237. *See generally Palubicki*, 727 N.W.2d at 662.

238. This point went unacknowledged by the *Riggs* court. *See* State v. Riggs, 865 N.W.2d 679, 679 (Minn. 2015).

239. *See* State v. Nelson, 796 N.W.2d 343 (Minn. Ct. App. 2011).

240. *See id.* at 348.

241. *Id.*

directly from the coworkers' conduct rather than the defendant's conduct.[242]

Additionally, in *State v. Spann*, an unpublished Minnesota Court of Appeals case, the defendant was convicted of car theft and ordered to pay restitution to the victim.[243] Upon recovering the victim's car, the police refused to return it to the victim because he lacked insurance, and the police subsequently auctioned the stolen vehicle and kept the proceeds.[244] At the restitution hearing, the trial judge said to the defendant, "As far as restitution is concerned . . . I'm not going to order that you pay the full purchase price of the car, Mr. Spann. I just don't think it's fair."[245] The court of appeals affirmed the restitution award, reasoning that partial restitution was justified because a portion of the victim's losses may have been caused by the police rather than the defendant.[246]

However, *State v. Miller* presents a counterpoint, suggesting that when in doubt, courts should favor the victim over the defendant in their causation analysis.[247] *Miller* held that the trial court is not required to tie specific losses to the actions of a single defendant where the victim's losses were caused by multiple individuals.[248] In the case, Miller and another individual teamed up to fight and injure a victim and were then convicted and ordered to pay joint restitution.[249] Although the trial court could not determine which specific injuries were caused by Miller, the Minnesota Court of Appeals affirmed the restitution order, holding that the victim's right to restitution outweighed the offender's right not to pay for an injury that may have been caused by another offender.[250] Applied here, *Miller* weighs against Riggs's odds of persuading the court to recognize the victim's role as a contributing cause.

242. *Id.*
243. *See* State v. Spann, No. A05-2372, 2007 WL 968421, at *1 (Minn. Ct. App. Apr. 3, 2007).
244. *Id.*
245. *Id.*
246. *See id.* at *3–4.
247. State v. Miller, 842 N.W.2d 474 (Minn. Ct. App. 2014).
248. *Id.* at 478.
249. *Id.*
250. *See id.*

2. *Application of Causation Analysis to Riggs's Alternative Argument*

Riggs's alternative argument boiled down to his assertion that the victim's loss was not *entirely* the result of his criminal conduct.[251] Although Riggs made a colorable argument that traditional civil-law-style causation analysis, and therefore comparative fault, was encompassed by the statutory term "as a result of the offense," the court wisely declined to read comparative fault into the statute.[252] To succeed, Riggs would have needed to convince the court not only to apply *Palubicki*'s proximate cause but also to take the unprecedented step of recognizing the victim's comparative fault within its causation analysis.

While it is not apparent why the majority declined to apply the proximate cause test recognized by *Palubicki* and other case law, it is unlikely to have made a difference in Riggs's favor. Indeed, rather than test the proximate causal link between the victim's losses and Riggs's crime, the majority appeared to revert back to using the but-for test where any loss arising from the sequence of events involving the defendant's crime is subject to restitution.[253] Nonetheless, it seems likely that under either causation test, Riggs's stabbing of D.S. would be considered both a but-for cause and a proximate cause of D.S.'s injuries. Therefore, even if the *Riggs* court had applied the causation test under *Palubicki*, Riggs's argument still hinged on persuading the court that such "traditional" causation tests necessarily include consideration of the victim's comparative fault.

The traditional causation analysis applicable to Minnesota's civil liability law does incorporate comparative fault; however, it does not follow that criminal restitution is a proper forum for comparative fault simply because restitution also uses a proximate cause test. First, unlike criminal restitution, comparative fault is expressly identified in Minnesota's civil liability statute and

251. *See* State v. Riggs, 865 N.W.2d 679, 687 (Minn. 2015) (Gildea, C.J., dissenting).

252. *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011) (holding that the meaning of a particular term in a statute may encompass additional meanings and terms, even where the statute is otherwise exclusive).

253. *See Riggs*, 865 N.W.2d at 685–86 (majority opinion) (interpreting the phrase "as a result of the offense" to signify consequences that follow naturally from a particular action).

therefore endorsed by the legislature.[254] Second, as the majority recognized, the fatal flaw in the Chief Justice's reasoning in her dissent[255] is that in Minnesota's civil law, comparative fault applies only to actions for negligent conduct, whereas comparative fault is inapplicable to intentionally tortious conduct.[256]

Intentional torts of the kind in which Riggs engaged, like assault or battery, are not subject to Minnesota's comparative fault statute,[257] and contrary to Riggs's requested remedy,[258] civil defendants in those intentional tort cases cannot reduce their damages by seeking to apportion a share of the fault to the victim. Because Riggs committed an intentional act, it is incorrect to argue that because the restitution statute permits "traditional causation analysis" (i.e., proximate cause), it must also permit comparative fault. Even if the court used a civil law approach to assess proximate cause at Riggs's restitution hearing, the victim's comparative fault should have no bearing on the court's holding because the conduct at issue was intentional and not negligent. In a hypothetical civil assault case, the only option available to Riggs would have been to raise an affirmative defense.[259]

254. *See* MINN. STAT. § 604.01 (2016).

255. *See Riggs*, 865 N.W.2d at 686–87 (Gildea, C.J., dissenting) (urging the majority to apply a "traditional causation analysis," which, under Minnesota's civil law, includes the victim's comparative fault).

256. *Id.* at 686 n.8 (majority opinion) (citing Lambrecht v. Schreyer, 129 Minn. 271, 274, 152 N.W. 645, 646 (1915)) ("Contributory negligence is a defense only in cases where the action is founded on the negligence of the defendant. It is not a defense to an action for assault."); *see also* MINN. STAT. § 604.01 ("'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.").

257. Kelzer v. Wachholz, 381 N.W.2d 852, 854 (Minn. Ct. App. 1986) (citing MINN. STAT. § 604.01 (1984)) ("Intentional tort actions are not subject to the comparative fault statute.").

258. *See Riggs*, 865 N.W.2d at 685–86; Appellant's Brief and Addendum, *supra* note 98, at *12.

259. Whether or not Riggs could have raised an affirmative defense at his restitution hearing presents another question. The only appellate case addressing the availability of an affirmative defense in a restitution hearing is an unpublished case, *State v. Graham*. No. C1-02-887, 2003 WL 282470 (Minn. Ct. App. Feb. 11, 2003). The defendant in *Graham* pleaded guilty to shooting and killing a dog and, at the restitution hearing, tried to raise a statutory justification for the killing. *Id.* at *1. The court held that the defendant lost the opportunity to assert an affirmative defense at the restitution hearing by pleading guilty to the underlying crime. *Id.* at *3–4. The *Graham* court reasoned that it would be an absurd result for an offender

Apportionment of fault, or comparative fault, is a civil law concept that is strictly tied to negligence.[260] Because comparative fault does not exist for intentional torts, by arguing that section 611A.045 encompassed comparative fault, Riggs essentially asked the court to recognize a new legal creation. The court rightly declined. To Riggs's point, while section 611A.045 does permit trial courts to assess causation under the proximate cause standard and consider multiple causes, the court should not read in non-existent features of civil liability, unless expressly authorized by the legislature.

E. The Policy Issues Raised by Riggs *Are Properly Deferred to the Legislature*

The Minnesota Supreme Court correctly decided the *Riggs* case under Minnesota's restitution law as it exists today; however, there may be good reason for the legislature to incorporate comparative fault into the restitution statutes in the future. In fact, *Riggs* raises potential public policy considerations that support incorporating comparative fault into restitution—for instance, basic fairness.[261] The few Minnesota trial courts that have reduced restitution awards under circumstances similar to *Riggs* seem to be

to admit guilt in one phase of the criminal proceeding and, in a later phrase, argue the opposite to challenge the restitution order. *See id.* at *3.

Based on the limited amount of non-precedential case law, it would appear that offenders cannot raise affirmative defenses in restitution hearings. The issue would be one of first impression; but Riggs did not argue it, and the court was under no obligation to consider it. In Riggs's case, he waived his right to claim self-defense in the criminal phase when he accepted the plea deal. *See* State v. Riggs, 845 N.W.2d 236, 237 (Minn. Ct. App. 2014), *aff'd*, 865 N.W.2d 679 (Minn. 2015). Then, at his restitution hearing, Riggs called the trial court's attention to the fact that he was not raising an affirmative defense to challenge the restitution order, seemingly to avoid any comparison with *Graham*. *See* Defendant's Restitution Memorandum, *supra* note 86, at 4. In the restitution order, the trial court stated that it did not consider self-defense or any affirmative defense from Riggs in its decision to reduce the restitution award by apportioning some of the fault to the victim. *See* State v. Riggs, No. 85-CR-12-960, 2013 WL 9348661, at *2 (Minn. Dist. Ct. June 7, 2013), *rev'd*, 845 N.W.2d 236 (Minn. Ct. App. 2014), *aff'd*, 865 N.W.2d 679 (Minn. 2015).

260. *See* MINN. STAT. § 604.01, subdiv. 1 (2016).

261. *See, e.g.*, State v. Spann, No. A05-2372, 2007 WL 968421, at *1 (Minn. Ct. App. Apr. 3, 2007) ("As far as restitution is concerned . . . I'm not going to order that you pay the full purchase price on the car, Mr. Spann. I just don't think it's fair.").

motivated by the perceived injustice of ordering full restitution to a victim whose actions unreasonably provoked the chain of events leading to his injury. Compensating such victims does not serve the purpose of restitution, nor does it create the right incentives.

Restitution should discourage, rather than encourage, the type of dangerous conduct in which the *Riggs* victim engaged. By way of example, in an Arizona case, the supervisor of a care center and her employee were transporting three disabled patients in a work van.[262] During the trip, the supervisor provided the driver, her employee, with multiple alcoholic beverages.[263] On the return trip, the driver lost control of the vehicle and rolled it, severely injuring the supervisor and others.[264] The trial court refused to order restitution to the supervisor because she was partially at fault for her own injuries.[265] However, the Arizona Court of Appeals reversed the order because, like the Minnesota statute, Arizona's criminal restitution law did not permit consideration of victim fault.[266] If Arizona's restitution law had allowed for consideration of the victim's fault, the unfair result of a criminally dangerous victim receiving significant mandatory restitution could have been avoided.

Some state legislatures have addressed victim fault within the context of their restitution statutes. Some states permit a victim's comparative fault to be considered during the restitution hearing;[267] other states do not.[268] The states that have recognized comparative fault have generally used explicit or inclusive statutory

262. State v. Clinton, 890 P.2d 74, 74–75 (Ariz. Ct. App. 1995).

263. *Id.*

264. *Id.* at 75.

265. *Id.*

266. *See id.*

267. *See* People v. Millard, 95 Cal. Rptr. 3d 751, 757–59 (Ct. App. 2009); City of Whitefish v. Jentile, 285 P.3d 515, 519 (Mont. 2012) (concluding that the defendant could raise the defense of comparative negligence at the restitution hearing); State v. Laycock, 214 P.3d 104, 113 (Utah 2009) (holding that issues of comparative negligence may be relevant in determining restitution).

268. *See* People v. Johnson, 780 P.2d 504, 507 (Colo. 1989) (holding that the restitution statute does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with comparative negligence and rules applicable to a civil case); State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992) (holding that comparative fault principles do not apply to restitution for criminal acts under Iowa Code chapter 910); State v. Knoll, 614 N.W.2d 20, 25 (Wis. Ct. App. 2000) (holding that the defendant may not "raise contributory negligence as a defense to restitution").

language that clearly authorizes consideration of non-enumerated factors during restitution hearings.[269] For example, at least one state statute enumerates "the contributory misconduct of the victim" as a factor that courts must consider for restitution.[270] Unlike states that authorize comparative fault for restitution, Minnesota's restitution statute lacks similarly explicit or inclusive language.[271]

At the federal level, the crime victim restitution statutes also contain express, inclusive language permitting courts to consider "such other factors as the court deems appropriate."[272] Minnesota's legislature should consider adopting a similarly flexible approach.

Up to this point, Minnesota's legislature has elected not to incorporate comparative fault in its restitution statutes, but it has done so for the Crime Victims Reparations Program. Criminal reparations and criminal restitution serve analogous policy objectives. If Minnesota's legislature was guided by similar public policy considerations,[273] it is not apparent why the legislature decided to include comparative fault in criminal reparations and not in criminal restitution. Perhaps, as some commentators have cautioned, the legislature was concerned that integrating comparative fault with criminal restitution would risk turning restitution hearings into lengthy civil-liability-like mini-trials.[274]

269. *See* CAL. PENAL CODE § 1202.4(d) (West, Westlaw through Ch. 893 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2d Ex. Sess.) ("[T]he court shall consider any relevant factors, including, but not limited to . . . ."); MONT. CODE ANN. § 46-18-243 (West, Westlaw through 2015 Reg. Sess.) ("'Pecuniary loss' means: (a) all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities . . . ."); UTAH CODE ANN. § 77-38a-102(6) (West, Westlaw through 2016 3d Spec. Sess.) ("'Pecuniary damages' means all demonstrable economic injury, whether or not yet incurred, including those which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities . . . .").

270. *See* ME. REV. STAT. ANN. tit. 17-A, § 1325, subdiv. 1 (West, Westlaw through 2015 2d Reg. Sess.).

271. *See* MINN. STAT. § 611A.045 (2016).

272. *See* 18 U.S.C. § 3663(a)(1)(B)(i)(II) (2012).

273. *See* MINN. STAT. § 611A.54, subdiv. 2.

274. *See* Respondent's Brief, *supra* note 99, at *11; Shephard, *supra* note 66, at 820–21 ("In order to account for victim fault in calculating the restitution award, the court would have to create a new post-guilt proceeding. Once the guilt phase of the trial has been concluded, the court would next have to initiate a hearing or proceeding to evaluate fault and determine restitution. This means that the victim would have to return to court to hear and testify about evidence concerning the

However, given the similarities between reparations and restitution, and based on the seemingly unfair but legally correct outcome of the *Riggs* decision, the legislature should revisit the policy choices at work in Minnesota's criminal restitution scheme. In order to discourage dangerous or provocative conduct on the part of potential victims and to ensure fairness for defendants in situations where a victim provokes a conflict, the legislature should consider two options to update restitution.

For one, the Minnesota legislature could incorporate express language allowing comparative fault to be considered in restitution determinations by borrowing the express language from Minnesota's reparations statute. The crime victim reparations statute provides, "reparations shall be denied or reduced to the extent, if any, that the board deems reasonable because of the contributory misconduct of the [victim]."[275] The legislature could incorporate this language from the reparations statute into the restitution statute, section 611A.045, and grant discretion to the trial judge to determine the victim's responsibility and adjust the restitution award accordingly. Under this option, comparative fault—or contributory misconduct, as it is called in section 611A.54—would also be a factor that trial courts would have broad discretion to apply. Statutory recognition of the trial judge's broad discretion over comparative fault would alleviate some of the risk of restitution hearings becoming civil mini-trials.

Alternatively, if the legislature decided that incorporating comparative fault into restitution undermined the traditional relationships in civil law between intentional conduct, negligence, and comparative fault, a second option would be to allow a defendant to avail herself of affirmative defenses.[276] Affirmative defenses should include self-defense and assumption of the risk, even if the defendant pleads guilty or is convicted. These defenses would help to discourage potential victims from provoking fights or

offender's fault and the victim's own fault, essentially creating a mini-trial. The mini-trial would focus on the victim's conduct and alleged fault, which unlike the defendant's conduct, has not been presented to a jury and has not been proven beyond a reasonable doubt. As a result, the mini-trial would juxtapose the victim's alleged fault, which has not been proven, with the defendant's fault that has been proven.").

275. MINN. STAT. § 611A.54, subdiv. 2.

276. *See supra* note 255 and accompanying text.

engaging in dangerous conduct, such as providing alcohol to their drivers.

In the end, these decisions are best left to the legislature. The judiciary has recognized time and again that policy questions are for the legislature to decide.[277] With respect to the restitution statute, the Minnesota Supreme Court has had the occasion to address difficult policy choices and has declined to create exceptions to the statute.[278] Courts must apply the law that the legislature writes.[279] By declining to read comparative fault into section 611A.045,[280] the *Riggs* court rightly deferred to the legislature and achieved its objective to apply the statute as it is written.[281]

V. CONCLUSION

The *Riggs* holding requires that restitution orders be based only on the factors enumerated in section 611A.045, Minnesota's restitution statute. The holding of *Riggs* establishes that a victim's fault may not be considered in determining restitution.[282] Through statutory interpretation, the *Riggs* court correctly concluded that the legislature intended section 611A.045 to be an exclusive list of factors for determining restitution. Furthermore, the court properly deferred to the legislature in declining to read comparative fault into the language of the statute. The policy reasons for or against incorporating comparative fault into criminal restitution are best resolved by the legislature. To discourage the type of dangerous conduct the *Riggs* victim engaged in and to prevent the unfairness that comes from forcing trial courts to reward such behavior, the Minnesota Legislature should consider

277. *See, e.g.*, Laase v. 2007 Chevrolet Tahoe, 776 N.W.2d 431, 440 (Minn. 2009); Haskin v. Ne. Airways, Inc., 266 Minn. 210, 216, 123 N.W.2d 81, 86 (1963) ("The strong considerations of public policy which would justify a change in the law in this regard are for the legislature and not this court to evaluate.").

278. *See* State v. Maidi, 537 N.W.2d 280, 285 (Minn. 1995) (declining to create an exception to the restitution statute despite concern that providing restitution for costs that potentially violated the laws of a sovereign nation presents grave public policy concerns).

279. MINN. STAT. § 645.16; Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 60 (Minn. 2014).

280. *See* State v. Riggs, 865 N.W.2d 679, 685–86 (Minn. 2015).

281. *See id.*; *see generally* MINN. STAT. § 645.16.

282. *Riggs*, 865 N.W.2d at 686.

importing the comparative fault language from Minnesota's criminal reparations statute into its criminal restitution statute.