

# Full Restitution for Child Pornography Victims: The Supreme Court's *Paroline* Decision and the Need for a Congressional Response

Paul G. Cassell\* & James R. Marsh\*\*

How to provide restitution to victims of child pornography crimes has recently proven to be a challenge for courts across the country. The difficulty stems from the fact that child pornography is often widely disseminated to countless thousands of criminals who have a prurient interest in such materials. While the victims of child pornography crimes often have significant financial losses from the crimes (such as the need for long term psychological counseling), it is very difficult to assign a particular fraction of a victim's losses to any particular criminal defendant.

Last spring, the United States Supreme Court gave its answer to how to resolve this issue with its ruling in *Paroline v. United States*.<sup>1</sup> Interpreting a restitution statute enacted by Congress, the Court concluded that in a child pornography prosecution, a restitution award from a particular defendant is only appropriate to the extent that it reflects "the defendant's relative role in the causal process that underlies the victim's general losses."<sup>2</sup> Exactly what this holding means is not immediately clear, and lower courts are currently struggling to interpret it.

This article questions the Court's *Paroline* holding, particularly its failure to offer any real guidance on exactly what amount of restitution district court judges should award in child pornography cases. Members of Congress, too, have doubted the wisdom of the decision, introducing a bill (the Amy and Vicky Act) with strong bi-partisan sponsorship that would essentially overrule *Paroline*.<sup>3</sup> Congress has proposed certain set amounts of restitution for particular child pornography crimes. This approach seems like a good one for providing clarity to district court judges as well as assuring full restitution for child pornography victims. And, as of the drafting of this article, Congress seems likely to adopt this approach, as the Amy and Vicky Act passed the Senate by a resounding 98-0 vote.<sup>4</sup>

---

\* Ronald N. Boyce Presidential Professor of Criminal Law at the S.J. Quinney College of Law at the University of Utah.

\*\* Founder, Marsh Law Firm PLLC. The authors thank Patricia Cassell, Jennifer Freeman, Robert Y. Lewis, and Katie Shipp for helpful suggestions in preparing this article.

<sup>1</sup> *Paroline v. United States*, 134 S. Ct. 1710 (2014).

<sup>2</sup> *Id.* at 1727.

<sup>3</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. (2015).

<sup>4</sup> *Id.*

Part I of this article discusses the need of child pornography victims for restitution, using the story of one woman (“Amy”) as an illustration.

Part II then turns to the legal regime surrounding restitution for such victims, explaining why the current child pornography restitution statute—properly understood—requires that each defendant pay full restitution.

Part III then examines the Supreme Court’s *Paroline* decision rejecting full restitution. Contrary to the views of the Court’s majority, the statute is not best interpreted as limiting a defendant’s responsibility for restitution to his “relative role in the causal process” of contributing to a victim’s losses. To the contrary, this interpretation thwarts Congress’ clear aim of providing generous restitution to child pornography victims.

Finally, Part IV discusses the Amy and Vicky Act, which will simplify the restitution process. By establishing set amounts of restitution that must be awarded in child pornography cases, the legislation will return rationality to the restitution system, reduce the burden on trial courts, and (most importantly) assure victims of child pornography crimes that they will receive the full restitution that they desperately need. Congress should enact, and the President should sign, such legislation rapidly.

#### I. AMY’S VICTIMIZATION

The Supreme Court’s recent *Paroline* decision involved not only the named defendant—Randall Doyle Paroline—but also a victim, a young woman who we will refer to pseudonymously as “Amy.”<sup>5</sup> When she was eight and nine years old, Amy was repeatedly raped by her uncle in order to produce child pornography.<sup>6</sup> The images of her abuse depict Amy being forced to endure vaginal and anal rape, cunnilingus, fellatio, and digital penetration. Amy was sexually abused specifically for the purpose of producing child sex abuse images; her uncle required her “to perform sex acts” requested by others who wanted her images for their own sexual gratification. Amy’s abuser pleaded guilty to production of child

---

<sup>5</sup> The authors are privileged to have represented Amy throughout the federal court system in her effort to obtain restitution, including before the Supreme Court. Unless otherwise attributed, the facts in this Part are taken from Amy’s brief in *Paroline* to the Supreme Court. See Respondent Amy’s Brief on the Merits, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561) [hereinafter Amy’s Merits Br.].

<sup>6</sup> While the legal term “child pornography” is used throughout this article, that term “contributes to a fundamental misunderstanding of the crime—one that . . . leaves the impression that what is depicted in the[se] photograph[s] is [adult] ‘pornography’ rather than images memorializing the sexual assault of children.” U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 8 (2010) [hereinafter DOJ REPORT TO CONGRESS]. See generally PAUL G. CASSELL, JAMES MARSH & JEREMY CHRISTIANSEN, *Not Just “Kiddie Porn”: The Real Harms from Possession of Child Pornography*, in REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCE (forthcoming 2014); PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET (2001).

pornography<sup>7</sup> and in 1999 was sentenced to 121 months in prison. He was also ordered to pay the psychological counseling costs Amy had incurred up to that time, a total of \$6,325.

By the end of her treatment in 1999, Amy was—as reflected in her therapist’s notes—“back to normal” and engaged in age-appropriate activities such as dance lessons. Sadly, eight years later, Amy’s condition drastically deteriorated when she discovered that her child sex abuse images are widely traded on the Internet. The “Misty” series depicting Amy is one of the most widely-circulated sets of child sex abuse images in the world. According to her psychologist, the global trafficking of Amy’s child sex abuse images has caused “long lasting and life changing impact[s] on her.”<sup>8</sup> “Amy’s awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her.”<sup>9</sup> As Amy explained in her own personal victim impact statement, “[e]very day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again.”<sup>10</sup>

The ongoing victimization Amy suffers from the continued distribution and collection of her images will last throughout her entire life. She could not complete college and finds it difficult to engage in full-time employment because she fears encountering individuals who may have seen her being raped as a child. She will also require weekly psychological therapy and occasionally more intensive in-patient treatment throughout her life.

One of the criminals who joined in the collective exploitation of Amy is Doyle Randall Paroline. In 2008, law enforcement agents discovered that he had downloaded several hundred images of young children (including toddlers) engaging in sexual acts with adults and animals. When the agents questioned him about the images, he admitted he had been downloading child pornography for two years. On January 9, 2009, Paroline pleaded guilty to one count of possession of material involving the sexual exploitation of children.<sup>11</sup>

The FBI then sent the images it discovered on Paroline’s computers to the National Center for Missing and Exploited Children (NCMEC). Its analysis revealed that Amy was one of the children victimized in those images. Based on that information, the United States Attorney’s Office notified Amy’s trial counsel that Amy was an identified victim in Paroline’s criminal case. Amy’s counsel then submitted a detailed restitution request on Amy’s behalf, describing the harm she endures from knowing that she is powerless to stop the Internet trading of her child

---

<sup>7</sup> See 18 U.S.C. § 2251(a) (2008).

<sup>8</sup> Joint Appendix vol. I at 81, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12–8561).

<sup>9</sup> *Id.* at 84.

<sup>10</sup> *Id.* at 60.

<sup>11</sup> See 18 U.S.C. § 2252(a)(4)(B) (2012) (made a ten-year felony by 18 U.S.C. § 2252(b)(2) (2012)).

sex abuse images. In her restitution request, Amy sought full restitution of \$3,367,854 from Paroline for lost wages and psychological counseling costs.

On June 10, 2009, the district court sentenced Paroline to twenty-four months in prison. During a later adversarial restitution hearing, Amy's counsel and the Government defended her full restitution request against Paroline's attacks.

On December 7, 2009, the district court issued an opinion declining to award Amy any restitution even though restitution for the "full amount" of a victim's losses is "mandatory" under the child pornography restitution statute, 18 U.S.C. § 2259.<sup>12</sup> The court began by making a factual finding that Amy was a "victim" of Paroline's crime because of his gross invasion of her privacy.<sup>13</sup> Although the district court recognized that a "significant" part of Amy's losses is "attribut[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline,"<sup>14</sup> it nonetheless refused to award her any restitution because she could not prove exactly what losses proximately resulted from Paroline's crime.<sup>15</sup> The district court acknowledged that its interpretation of the child pornography restitution statute rendered it "largely unworkable."<sup>16</sup>

Amy promptly sought review of the district court's denial of her restitution request, employing the appellate review provision found in the Crime Victims' Rights Act (CVRA).<sup>17</sup> Acting quickly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting.<sup>18</sup>

Amy then petitioned for rehearing. On March 22, 2011, the Fifth Circuit unanimously granted Amy's petition and concluded that the district court had "clearly and indisputably erred" in grafting a proximate result requirement onto the restitution statute.<sup>19</sup> Paroline successfully sought rehearing en banc.

On November 19, 2012, the Fifth Circuit en banc held 10-5 that 18 U.S.C. § 2259 does not require a child pornography victim to establish that her losses were the proximate result of an individual defendant's crime in order to secure restitution.<sup>20</sup> The Fifth Circuit concluded that § 2259 creates a system of joint and several liability, which "applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm."<sup>21</sup> After resolving the statutory construction issue in Amy's favor, the Fifth

---

<sup>12</sup> See *United States v. Paroline*, 672 F.Supp. 2d 781, 784–85 (E.D. Tex. 2009) (discussing 18 U.S.C. § 2259(b)(1), (b)(4)).

<sup>13</sup> *Id.* at 785.

<sup>14</sup> *Id.* at 792.

<sup>15</sup> *Id.* at 790.

<sup>16</sup> *Id.* at 793 n.12.

<sup>17</sup> 18 U.S.C. § 3771(d)(3) (2009).

<sup>18</sup> *In re Amy*, 591 F.3d 792, 795 (5th Cir. 2009).

<sup>19</sup> *In re Amy Unknown*, 636 F.3d 190, 193 (5th Cir. 2011).

<sup>20</sup> *In re Amy Unknown*, 701 F.3d 749, 750, 752 (5th Cir. 2012).

<sup>21</sup> *Id.* at 769.

Circuit remanded, directing that “the district court must enter a restitution order reflecting the ‘full amount of [Amy’s] losses’ . . . .”<sup>22</sup>

Paroline sought review in the Supreme Court. Amy agreed that review was appropriate and the Court granted certiorari.

## II. AMY’S ARGUMENTS TO THE SUPREME COURT

In her briefing to the Supreme Court,<sup>23</sup> Amy asked for enforcement of a “mandatory” restitution statute—18 U.S.C. § 2259—promising her that she would receive restitution for the “full amount” of her losses.<sup>24</sup> Amy urged the Court to read § 2259 to achieve Congress’ explicit compensatory aims, not to thwart them.<sup>25</sup> As the Fifth Circuit en banc interpreted the statute, it did not require a child pornography victim to establish precisely what fraction of, for example, her psychological counseling costs are the proximate result of an individual defendant’s crime.<sup>26</sup> Instead, victims like Amy must first establish that they suffered “harm” from a defendant’s child pornography crime.<sup>27</sup> This cause-in-fact link or nexus between an individual’s harm and a defendant’s crime establishes a statutorily-recognized “victim” entitled to restitution for the “full amount” of her losses.<sup>28</sup> Amy pointed out that the district court had made a factual finding that Paroline’s possession of her images harmed Amy.<sup>29</sup>

Amy explained that under the Fifth Circuit’s interpretation, a victim can easily establish the “full amount” of her losses from child pornography.<sup>30</sup> In the district court, Amy provided detailed expert evidence of, for example, the projected costs for psychological counseling she requires due to being a victim of child pornography.<sup>31</sup> Amy argued that these costs are the losses Congress commanded must be awarded as restitution.<sup>32</sup> Amy accordingly urged the Court to affirm the Fifth Circuit’s decision, thereby making Paroline jointly and severally liable for her full losses, along with other defendants convicted in other cases.<sup>33</sup>

Amy further argued that:

---

<sup>22</sup> *Id.* at 774.

<sup>23</sup> *See* Amy’s Merits Br., *supra* note 5.

<sup>24</sup> 18 U.S.C. § 2259(b)(1) (1996).

<sup>25</sup> Amy’s Merits Br., *supra* note 5, at 7.

<sup>26</sup> *In re* Amy Unknown, 701 F.3d 749, 762 (5th Cir. 2012).

<sup>27</sup> *See* 18 U.S.C. § 2259(c) (1996).

<sup>28</sup> 18 U.S.C. § 2259(c), (b)(1) (1996).

<sup>29</sup> Amy’s Merits Br., *supra* note 5, at 15.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 38–51.

the Fifth Circuit’s “practical interpretation” of § 2259 follows applicable tort law principles—i.e., the principles providing ample compensation to victims of intentional torts. Section 2259 applies to serious felonies with stringent mens rea requirements. For such intentional torts committed against vulnerable victims, the common law was never concerned about strict “proximate cause” limitations, but instead imposed broad joint and several liability. When choosing between equalizing the liability of intentional wrongdoers and fully compensating those harmed by wrongdoers, the common law has always sided with victims. Congress wisely did the same thing in enacting § 2259.<sup>34</sup>

Amy also pointed to an important background principle that, in her view, should be in play when interpreting § 2259. Amy emphasized that child pornography possession is not a “victimless” crime, emphasizing that Congress specifically found that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse.”<sup>35</sup> Amy quoted from an earlier Supreme Court decision that “[a] child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography . . . . [I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.”<sup>36</sup>

Amy also noted “the vast machinery” that generates child pornography harms.<sup>37</sup> In enacting laws criminalizing all aspects of child pornography, Congress realized that it had to address every stage of this destructive joint enterprise—countless criminals who together create, distribute, and possess child pornography. The Supreme Court had previously held that “it is difficult, if not impossible, to halt” the sexual exploitation and abuse of children by pursuing only child pornography producers.<sup>38</sup> It was therefore reasonable for Congress to conclude that “the production of child pornography [will decrease] if it penalizes those who possess and view the product, thereby decreasing demand.”<sup>39</sup> Indeed, “[t]he most expeditious if not the only practical method of law enforcement may be to dry up

---

<sup>34</sup> *Id.* at 8.

<sup>35</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 623–24.

<sup>36</sup> *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982). (quoting D.P. Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981) and Ulrich C. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J.A.M. ACAD. CHILD PSYCHIATRY 289, 292 (1980)).

<sup>37</sup> Amy’s Merits Br., *supra* note 5, at 12.

<sup>38</sup> *Ferber*, 458 U.S. at 759–60.

<sup>39</sup> *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990).

the market for this material by imposing severe criminal penalties” on all persons in the distribution chain.<sup>40</sup>

Amy also explained that Congress had previously recognized that those who possess child pornography are inextricably linked to its producers. Congressional findings concerning Chapter 110 declare that “prohibiting the possession and viewing of child pornography will . . . [help] to eliminate the market for the sexual exploitative use of children . . .”<sup>41</sup> Amy cited a recent Justice Department analysis, which reported that “the growing and thriving market for child pornographic images is responsible for fresh child sexual abuse—because the high demand for child pornography drives some individuals to sexually abuse children and some to ‘commission’ the abuse for profit or status.”<sup>42</sup>

Amy also described the mechanisms by which child pornography is so widely distributed. Once a child such as Amy is sexually abused to produce digitized child pornography, the images can be disseminated exponentially worldwide. Peer-to-peer file sharing (commonly called “P2P”) is “widely used to download child pornography.”<sup>43</sup> Two recent law enforcement initiatives “identified over 20 million unique IP [Internet Protocol] addresses offering child pornography over P2P networks from 2006 to August 2010.”<sup>44</sup> The ease with which child pornography can now be downloaded creates “an expanding market for child pornography [that] fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.”<sup>45</sup>

In the case before the Supreme Court, Paroline downloaded several hundred images of toddlers and other children being sexually abused—including two depicting Amy.<sup>46</sup> Paroline was not the only one to do so. The National Center for Missing and Exploited Children had previously identified “at least 35,000 images of Amy’s abuse among the evidence in over 3,200 child pornography cases since

---

<sup>40</sup> *Ferber*, 458 U.S. at 760. Congress did just that by criminalizing child pornography possession. *See, e.g.*, 18 U.S.C. § 2252(a)(4) (2012).

<sup>41</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(12), 110 Stat. 3009–26, 3009–27; *see also* 132 CONG. REC. 33,781 (1986) (statement of Sen. Roth) (“[M]y subcommittee’s investigation disclosed the existence of a seamy underground network of child molesters . . . and it showed that the very lifeblood of this loosely organized underground society is child pornography.”).

<sup>42</sup> Amy’s Merits Br., *supra* note 5, at 11 (citing DOJ REPORT TO CONGRESS, *supra* note 6, at 17).

<sup>43</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 51 (2012), [http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full\\_Report\\_to\\_Congress.pdf](http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf) [hereinafter SENTENCING COMM’N REPORT TO CONGRESS].

<sup>44</sup> *Id.* at 51–52.

<sup>45</sup> *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

<sup>46</sup> Joint Appendix vol. I at 146, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12–8561).

1998 and described the content of these images as ‘extremely graphic.’<sup>47</sup> Amy asked the Court to decide her case against “the sobering reality that Congress needed to respond to a vast, de facto joint criminal enterprise of child pornography producers, distributors, and possessors.”<sup>48</sup>

### III. THE SUPREME COURT’S DECISION

On April 23, 2014, the Court announced its decision in *Paroline*.<sup>49</sup> Justice Kennedy wrote the majority opinion for five members of the Court, rejecting Amy’s arguments. Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented, as did Justice Sotomayor.

Justice Kennedy’s majority opinion first held that § 2259 imposes a proximate cause requirement on victims attempting to recover restitution for their losses. Justice Kennedy began by examining the text of the statute, which provides that child pornography victims receive restitution for the “full amount” of their losses and then defines the full amount as including:

- [A]ny costs incurred by the victim for—
- (A) medical services relating to physical, psychiatric, or psychological care;
  - (B) physical and occupational therapy or rehabilitation;
  - (C) necessary transportation, temporary housing, and child care expenses;
  - (D) lost income;
  - (E) attorneys’ fees, as well as other costs incurred; and
  - (F) any other losses suffered by the victim as a proximate result of the offense.<sup>50</sup>

The majority noted that the “proximate cause” language in the statute made “the interpretive task ... easier” because that language could be read as applying not just in subsection (F) where the language appears, but elsewhere as well.<sup>51</sup> Subsection (F), Justice Kennedy concluded “is most naturally understood as a summary of the type of losses covered—*i.e.*, losses suffered as a proximate result of the offense.”<sup>52</sup> “Restitution is therefore proper under § 2259 only to the extent the defendant’s offense proximately caused a victim’s losses,” Justice Kennedy reasoned.<sup>53</sup>

---

<sup>47</sup> *Id.* vol. II at 352.

<sup>48</sup> Amy’s Merits Br., *supra* note 5, at 12–13.

<sup>49</sup> *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014).

<sup>50</sup> *Id.* at 1720 (citing 18 U.S.C. § 2259(b)(3) (2012)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1721.

<sup>53</sup> *Id.* at 1722.



The majority next turned to the question of how to apply the statute's causation requirements. Justice Kennedy thought that it was "simple enough for the victim to prove the aggregate losses, including the costs of psychiatric treatment and lost income, that stem from the ongoing traffic in her images as a whole."<sup>54</sup> Justice Kennedy called these losses "general losses" and explained that the challenge is determining what part "of those general losses, if any, that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim."<sup>55</sup>

Justice Kennedy then examined whether a "but for" test could be used to identify the losses suffered by a victim as the result of a particular defendant's crime. The difficulty with this approach, however, is that a showing of but for causation cannot be made since "it is not possible to prove that her losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate."<sup>56</sup>

Justice Kennedy next turned to the causation test identified in the *Restatement of Torts* for "[m]ultiple sufficient causal sets" causing an injury—such as when three persons lean on a car and the weight of all three is necessary to propel the car off of a cliff.<sup>57</sup> The Justice explained that such tests "though salutary when applied in a judicious manner, also can be taken too far."<sup>58</sup> He concluded that applying the test here would be taking things "too far," because "[it] would make an individual possessor liable for the combined consequences of the acts of not just 2, 5, or even 100 independently acting offenders; but instead, a number that may reach into the tens of thousands."<sup>59</sup>

For all these reasons, the majority rejected Amy's argument that an individual possessor should be held responsible for all of a victim's losses.<sup>60</sup> But Justice Kennedy also rejected the "anomalous" position that each defendant would be responsible for no restitution at all.<sup>61</sup> Instead, he held that each defendant should pay *some* amount of restitution:

In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1723.

<sup>57</sup> *Id.* (citing RESTATEMENT § 27 cmt. f, at 380-81).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1725.

<sup>60</sup> *Id.* at 1724.

<sup>61</sup> *Id.*

defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses.<sup>62</sup>

Justice Kennedy conceded that “[t]his approach is not without its difficulties,” but thought that district court judges would be able to exercise their discretion to impose appropriate restitution amounts.<sup>63</sup>

Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented from this ruling. The Chief Justice noted the difficulty of deciding what share of Amy’s losses could be attributed to any particular defendant, concluding that “[r]egrettably, Congress provided no mechanism for answering that question.”<sup>64</sup> He examined the majority opinion and determined that it will result in tiny awards for Amy, which will mean “that Amy will be stuck litigating for years to come.”<sup>65</sup> He acknowledged that the majority opinion cautioned against “trivial restitution orders,” but maintained that “it is hard to see how a court fairly assessing this defendant’s relative contribution could do anything else.”<sup>66</sup> The Chief Justice concluded with a call for congressional action:

The Court's decision today means that Amy will not go home with nothing. But it would be a mistake for that salutary outcome to lead readers to conclude that Amy has prevailed or that Congress has done justice for victims of child pornography. The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it.<sup>67</sup>

Justice Sotomayor also dissented, essentially agreeing with Amy on every point. Justice Sotomayor began by arguing that § 2259 creates an “aggregate causation” standard, reading the statute as “offer[ing] no safety-in-numbers exception for defendants who possess images of a child’s abuse in common with other offenders.”<sup>68</sup> Justice Sotomayor found the majority’s interpretation fundamentally flawed because the statute “directs courts to enter restitution not for a ‘proportional’ or ‘relative’ amount, but rather the ‘full amount of the victim’s losses.’”<sup>69</sup> Justice Sotomayor, too, concluded with a call for Congressional action:

---

<sup>62</sup> *Id.* at 1727.

<sup>63</sup> *Id.* at 1729.

<sup>64</sup> *Id.* at 1732 (Roberts, C.J., dissenting).

<sup>65</sup> *Id.* at 1734.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1734–35.

<sup>68</sup> *Id.* at 1737 (Sotomayor, J., dissenting).

<sup>69</sup> *Id.* at 1739.

In the end, of course, it is Congress that will have the final say. If Congress wishes to recodify its full restitution command, it can do so in language perhaps even more clear than § 2259's "mandatory" directive to order restitution for the "full amount of the victim's losses." Congress might amend the statute, for example, to include the term "aggregate causation." Alternatively, to avoid the uncertainty in the Court's apportionment approach, Congress might wish to enact fixed minimum restitution amounts. See, e.g., § 2255 (statutorily imposed \$150,000 minimum civil remedy). In the meanwhile, it is my hope that the Court's approach will not unduly undermine the ability of victims like Amy to recover for—and from—the unfathomable harms they have sustained.<sup>70</sup>

#### IV. THEORETICAL AND PRACTICAL PROBLEMS WITH THE COURT'S DECISION

While Justice Kennedy's opinion can be critiqued on a number of different issues, it is perhaps most badly flawed on two points. First, as a matter of conventional legal theory, the Court fundamentally misunderstood how contributing causation operates in the law. Second, at the practical level, the Court failed to answer the key issue in the case: how much restitution Amy should receive from any individual defendant. This Part explains why the Court's decision misses the mark on both points.

##### *A. Contributing Cause is a Conventional Legal Principle that the Court Should Have Held was Embodied in § 2259.*

Justice Kennedy's opinion expressed skepticism about the extent to which an alternative to "but for" causation has already found a home in American law. But this skepticism is undeserved. To achieve the justifiable overriding social policy goal of providing full restitution to child pornography victims, § 2259 simply adopted the widely-recognized principle of contributing causation.

Justice Kennedy failed to follow a well-recognized principle for construing statutes. In previous decisions, the Court repeatedly refused to construe statutes in ways that would "frustrate Congress's manifest purpose."<sup>71</sup> Section 2259, lower courts had consistently held, was "phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."<sup>72</sup> Section 2259 thus is an integral part of a larger statutory scheme addressing "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms."<sup>73</sup>

---

<sup>70</sup> *Id.* at 1744.

<sup>71</sup> E.g., *United States v. Hayes*, 555 U.S. 415, 427 (2009).

<sup>72</sup> *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999).

<sup>73</sup> *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).

Justice Kennedy's opinion acknowledged the remedial purpose underlying the statute but believed that "Congress has not promised victims full and swift restitution at all costs."<sup>74</sup> Holding individual defendants responsible for all of Amy's loss, he thought, would be "twist[ing] [the statute] into a license to hold a defendant liable for an amount drastically out of proportion to his own individual causal relation to the victim's losses."<sup>75</sup>

But conventional tort law (which is often regarded as a model for criminal restitution) has never tried to limit liability to an individual's "causal relation" to a victim's losses. Instead, tort law has typically considered whether a wrongdoer (i.e., a tortfeasor) has contributed in some way to a larger loss. For example, the American Law Institute has identified contributing cause as a general principle of tort law sufficiently well-established to be included in its restatement.<sup>76</sup> Under American tort law, as explicated by the American Law Institute's *Restatement*:

"[w]hen an actor's tortious conduct is not a factual cause of harm under the standard in § 26 [i.e., independently sufficient or but for causation] only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor's tortious conduct is a factual cause of the harm."<sup>77</sup>

This approach recognizes, for purposes of tort law, that it is often impossible to identify a single "cause" for an event; a fire burning down a house, for example, is caused not only by a match but also by fuel to burn, lack of a downpour, and a fire department being too far away to immediately respond.<sup>78</sup> In determining tort compensation, the proper question is whether the defendant's act is part of a "causal set" producing harm. Paroline effectively conceded he was part of such a set when he acknowledged that "Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse."<sup>79</sup> Of course, the "untold numbers" he was alluding to included him. Convicted defendants like Paroline should not be able to escape responsibility to pay significant restitution by hiding in a crowd.

The *Restatement* notes that well-established tort precedent (pre-dating Congress' 1994 enactment of § 2259) underlies the contributing cause approach. The *Restatement* explains that, for example, "[s]ince the first asbestos case in

---

<sup>74</sup> Paroline v. United States, 134 S. Ct. 1710, 1729 (2014).

<sup>75</sup> *Id.*

<sup>76</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (Am. Law Inst. 2000).

<sup>77</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f, at 381 (Am. Law Inst. 2010) [hereinafter RESTATEMENT].

<sup>78</sup> See *id.* § 27 Reporters' Note cmt. f, at 391 (collecting authorities discussing this point).

<sup>79</sup> Petitioner's Brief on the Merits at 50, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561).

which a plaintiff was successful, courts have allowed plaintiffs to recover from all defendants to whose asbestos products the plaintiff was exposed.”<sup>80</sup> While numerous toxic tort cases illustrate the contributing cause approach, the *Restatement* identifies much deeper roots: “Nuisance cases were the pre-toxic-substances equivalent of asbestos and other such cases, and courts resolved them similarly.”<sup>81</sup> In one Fifth Circuit case from 1951, for example, the Circuit explained that:

According to the great weight of authority where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tortfeasor . . . .<sup>82</sup>

In other words, traditionally in American tort law, an “independent-sufficiency requirement is not followed by the courts . . . . [Instead], the courts have allowed the plaintiff to recover from each defendant who contributed to the . . . injury, even though none of the defendants’ individual contributions were either necessary or sufficient by itself for the occurrence of the injury.”<sup>83</sup>

Justice Kennedy tacitly acknowledged that these tort law principles supported Amy’s position, but maintained that these principles “can be taken too far.”<sup>84</sup> In

---

<sup>80</sup> RESTATEMENT, *supra* note 77, at § 27 Reporters’ Note cmt. g, at 392 (AM. LAW INST. 2010) (citing, e.g., *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076, 1094 (5th Cir. 1973); *Ingram v. ACandS, Inc.*, 977 F.2d 1332, 1340 (9th Cir. 1992); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1073 & n.384 (1988) (collecting authorities).

<sup>81</sup> RESTATEMENT, *supra* note 77, § 27 Reporters’ Note cmt. g, at 393 (citing *Bollinger v. Am. Asphalt Roof Corp.*, 19 S.W.2d 544, 552 (Mo. Ct. App. 1929) (“If there was enough of smoke and fumes definitely found to have come from defendant’s plant to cause perceptible injury to plaintiffs, then the fact that another person or persons also joined in causing the injury would be no defense; and it was not necessary for the jury to find how much smoke and fumes came from each place.”)).

<sup>82</sup> *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205, 212 (5th Cir. 1951) (quoting 38 AM. JUR. *Negligence* § 257 at 946 (1941)); *see also* *Northup v. Eakes*, 178 P. 266, 268 (Okla. 1918) (where “separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.”); *cf.* *The ‘Atlas’*, 93 U.S. 302, 315 (1876) (“Nothing is more clear than the right of a plaintiff, having suffered . . . a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.”).

<sup>83</sup> Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1792 (1985) (discussing various cases).

<sup>84</sup> *Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014).

Justice Kennedy's view, "Congress gave no indication that it intended its statute to be applied in the expansive manner the victim suggests," which would result in holding offenders collectively responsible for "the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact."<sup>85</sup>

Justice Kennedy overlooked the most fundamental reason for interpreting the statute as Amy did: the statute was designed to insure that Amy (and other victims like her) received restitution for the "full amount" of their losses. Nothing in the statute gives any suggestion that Congress was concerned one whit about whether convicted child pornography criminals might have to pay larger restitution awards than they were anticipating. Congress, quite understandably, made a well-supported public policy choice of insuring compensation for child pornography victims over protecting the pocketbooks of their abusers.

In citing various tort law treatises, Justice Kennedy also turned to the wrong pages. He recited passages about *negligent* tortfeasors, overlooking that for *intentional* tortfeasors "[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted . . ."<sup>86</sup> Victims of intentional torts generally do not have to establish a standard proximate cause nexus because "[a]n inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors."<sup>87</sup> Prosser and Keeton agree that "[f]or an intended injury the law is astute to discover even very remote causation."<sup>88</sup> Reiterating these general principles, the *Restatement (Third) of Torts* explains that "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."<sup>89</sup>

In construing § 2259 as a tort-like statute, the applicable principles come from intentional torts, not negligent acts. Congress crafted § 2259 by copying language directly from the restitution statutes for sexual assault and domestic violence.<sup>90</sup> These statutes impose restitution for violent crimes that involve physical invasions of their victims' bodily integrity—obvious intentional torts. Section 2259 likewise provides restitution for intentional torts. It provides restitution for Chapter 110 offenses such as the sexual exploitation of children,<sup>91</sup> selling children,<sup>92</sup> and

---

<sup>85</sup> *Id.* at 1725.

<sup>86</sup> W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 37 (5th ed. 1984) [hereinafter *Prosser & Keeton*].

<sup>87</sup> *Ass'd Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 548 (1983) (Marshall, J., dissenting) (internal citations omitted).

<sup>88</sup> PROSSER & KEETON, *supra* note 86, at 37 n.27 (quoting *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 463 (1925)).

<sup>89</sup> RESTATEMENT, *supra* note 77, § 33.

<sup>90</sup> *See* 18 U.S.C. §§ 2248, 2264 (2012).

<sup>91</sup> 18 U.S.C. § 2251 (2012).

distribution, receipt, and possession of child pornography.<sup>93</sup> These crimes are all felonies containing stringent *mens rea* requirements that a defendant must have acted (at least) “knowingly.”<sup>94</sup> These child pornography *crimes* are thus like intentional torts, including well-established invasion of privacy torts.<sup>95</sup> Accordingly, construing § 2259 as extending liability more broadly for child pornography crimes than standard proximate cause principles would for non-intentional acts, is consistent with, not a departure from, conventional tort theory.

While some jurisdictions have recently made changes to reduce the liability of merely negligent tortfeasors, the new *Restatement* reports that “there is, so far as we are aware, no authority whatsoever for exempting intentional tortfeasors from joint and several liability.”<sup>96</sup> It is generally accepted that “[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799) . . .”<sup>97</sup> This view continues today, as “[n]ot a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified.”<sup>98</sup>

Conventional tort principles for intentional tortfeasors are well illustrated by Professors Harper and James who give the example of “several ruffians [who] set upon a man and beat him, each inflicting separate wounds.”<sup>99</sup> Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each “liable for the whole injury.”<sup>100</sup> Amy is the 21st century victim of these hypothetical attackers. She is “set upon” by digital “ruffians” who are all harming her. Even if her psychological wounds can somehow be viewed as “separate,” conventional tort law demands that all the ruffians be held liable for her “whole injury.”

The Harper and James hypothetical has a very clear real-world parallel, as the Court’s decision interpreting § 2259 will no doubt be applied to the almost word-for-word identical § 2248. Enacted as part of the Violence Against Women Act on the same day as § 2259, § 2248 governs restitution for sexual assaults occurring within federal jurisdiction.<sup>101</sup> The provision thus covers federal crimes involving

<sup>92</sup> 18 U.S.C. § 2251A (2012).

<sup>93</sup> 18 U.S.C. §§ 2252–2252A (2012).

<sup>94</sup> See, e.g., 18 U.S.C. § 2252(a)(4)(B) (2012) (forbidding “knowingly” possessing child pornography).

<sup>95</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 652B (1977) (intentional invasion of seclusion); *id.* § 652D (intentional invasion of privacy); RESTATEMENT, *supra* note 77, § 46 (intentional infliction of emotional distress).

<sup>96</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, *supra* note 76, § 12 Reporters’ Note cmt. b. at 113 (Am. Law Inst. 2000).

<sup>97</sup> *Id.* at 111.

<sup>98</sup> *Id.*

<sup>99</sup> Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L. REV. 761, 776 (1951).

<sup>100</sup> *Id.*

<sup>101</sup> 18 U.S.C. § 2248 (2012).

multiple physical injuries: gang rapes and serial rapes. Consider the case of a victim gang raped by five men on one night or by five men on five sequential nights. The victim then requires medical and psychological care. Under the *Paroline* decision, courts are limited to awarding restitution for each defendant's "proportional share of the harm" or his "relative contribution" to the injuries. This would not only be highly impracticable and intrusive to the victim, but it will invite a "tortfest" because each man can reduce his restitution liability by encouraging other men to join in and rape the victim. Such an approach is morally reprehensible. Moreover, what if law enforcement is able to apprehend only one of the five rapists? On *Paroline's* apportionment theory, the victim will only receive restitution for twenty percent of her losses, rather than the "full amount" promised by Congress. Congress avoided such difficulties by simply commanding that sexual abusers within federal jurisdiction must pay the "full amount" of their victim's losses—a reasonable dictate that the Supreme Court should have followed.

Justice Kennedy should have treated *Paroline* like the gang of ruffians or the gang rapists. *Paroline* voluntarily joined a de facto joint criminal enterprise connecting child pornography producers, distributors, and possessors. Under the common law approach for such joint enterprises, "the act of one is the act of all, and liability for all that is done is visited upon each."<sup>102</sup> *Paroline* did not need to formally conspire with other persons. Instead, "if one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm, a joint tort has been consummated even when there is no prearranged plan."<sup>103</sup> As a joint tortfeasor, *Paroline* would then be liable to pay for "the entire harm," or, as § 2259 puts it, to pay for the "full amount of the victim's losses."

Justice Kennedy's single-minded focus on apportionment seems to stem from the belief that full liability is somehow "disproportionate" to a defendant's crime.<sup>104</sup> But tort law is never proportionate to culpability. A few seconds of inattentive driving can lead to a multi-million dollar wrongful death judgment. A small tap on an eggshell plaintiff can cause a skull to collapse with huge liability. The overarching tort rule is that a wrongdoer takes his victim as he finds her.<sup>105</sup> Justice Kennedy perversely deviated from that rule only because any alleged lack of "proportionality" stems from the fact that Amy has suffered large losses.

The overriding goal for joint and several liability is compensating innocent victims, not spreading losses evenly across culpable defendants. In enacting § 2259, Congress simply decided to place reimbursement ahead of other goals. Such an approach has the undeniable advantage that the risk of a wrongdoer's insolvency "is placed on each jointly and severally liable defendant—the [victim]

---

<sup>102</sup> PROSSER & KEETON, *supra* note 86, at 346.

<sup>103</sup> 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 10.1 at 699 (1956).

<sup>104</sup> *Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014).

<sup>105</sup> RESTATEMENT, *supra* note 77, § 31.



does not bear this risk.”<sup>106</sup> This point is particularly important here because many child pornography criminals are indigent while innumerable others are beyond the reach of law enforcement. The only way for victims to actually obtain restitution for the “full amount” of their losses is by collecting from a handful of solvent defendants. Amy, for instance, has received victim notices in more than 1800 cases since January 2006. She has received restitution awards in approximately 180 cases<sup>107</sup> and has now recovered slightly more than forty percent of the full amount of her losses.<sup>108</sup> Yet more than seventy-five percent of her collections have come from just a single defendant with substantial assets.<sup>109</sup> If Amy were remitted to piecemeal collection of tiny fractional shares of restitution, she will likely face decades of litigation that might never lead to full recovery.

Moreover, Justice Kennedy should have recognized that an unhappy wealthy criminal can seek contribution from other solvent offenders. Attempting to deflect this sensible outcome, Justice Kennedy rejected the possibility, concluding that Amy did not “point to any clear statutory basis for a right to contribution in these circumstances.”<sup>110</sup> It is not clear why Justice Kennedy found this troubling, since on this interpretation, § 2259 simply tracks the traditional common law rule that contribution is unavailable between intentional tortfeasors.<sup>111</sup>

But Justice Kennedy should have recognized a right to contribution if a well-heeled child pornography offender were to ever actually file a contribution lawsuit against another well-to-do offender.<sup>112</sup> A right to pursue a contribution action has been recognized in other restitution settings.<sup>113</sup> Such decisions rest on the fact that

---

<sup>106</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, *supra* note 76, § A18 cmt. a.

<sup>107</sup> Much of the difference between the number of notices and the number of awards is due to the fact that Amy lacked legal counsel in 2006. In 2008, Amy obtained counsel. In 2009, that counsel began litigating selective test cases, initially withdrawing 80% of her restitution claims. Joint Appendix vol. I at 158, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561). Because the case law has developed in the years since, Amy’s counsel now generally pursues all of her restitution claims to their conclusion.

<sup>108</sup> Joint Appendix vol. I at 94, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

<sup>109</sup> See Excerpt of Proceedings, *United States v. Staples*, No. 2:09-CR-14017, (S.D. Fla. 2011) (Doc. 32), 2009 WL 2827204 (ordering the defendant pay “Amy” \$3,680,153 in restitution, jointly and severally with other defendants, for possessing, receiving, and/or disseminating child pornography).

<sup>110</sup> *Paroline*, 134 S. Ct. at 1725.

<sup>111</sup> PROSSER & KEETON, *supra* note 86, at 336 (historically, no contribution action was available to an intentional tortfeasor because the claim would rest “entirely [on] the plaintiff’s own deliberate wrong”).

<sup>112</sup> Of course, such a lawsuit would proceed through legal counsel. As registered sex offenders, child pornography defendants should not have personal contact with each other.

<sup>113</sup> See, e.g., *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (a defendant held jointly and severally liable for a restitution award “may seek contribution from his co-conspirators to pay off the restitution award”).

the Supreme Court has recognized that even if Congress did not expressly create a contribution remedy, “if its intent to do so may fairly be inferred from . . . [other] statutes, an implied cause of action for contribution could be recognized . . .”<sup>114</sup> In enacting § 2259, Congress required that all defendants must pay the “full amount” of a victim’s losses,<sup>115</sup> which itself is a recognition that some defendants might have to pay more than others. Against this backdrop, it would have been fair to infer Congress’ intent to create a system of joint and several liability combined with contribution. As the Fifth Circuit panel opinion explained below:

Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.*, 42 U.S.C. § 9607(a) (CERCLA). It will, however, enable Paroline to distribute “the full amount of the victim’s losses” across other possessors of Amy’s images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.<sup>116</sup>

Justice Kennedy should have concluded that Congress properly created a regime in which innocent crime victims receive “full” restitution, leaving it to guilty defendants to sort out among themselves who will bear the financial burden and by how much.

As a final point, Justice Kennedy was concerned that interpreting § 2259 to impose similar expansive liability might raise a constitutional concern under the Excessive Fines Clause of the Eighth Amendment.<sup>117</sup> This concern, however, is completely misplaced because the Supreme Court “has never actually applied the Excessive Fines Clause to criminal restitution,” as even Paroline himself was forced to concede.<sup>118</sup> Presumably, this is because a “fine” is a “pecuniary criminal punishment or civil penalty payable to the public treasury.”<sup>119</sup> Conversely, a restitution award under § 2259 is payable to the crime victim as compensation for her losses and thus is not a criminal penalty to which the Eighth Amendment even applies.<sup>120</sup>

---

<sup>114</sup> *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981); *see, e.g., Musick, Peeler & Garrett v. Emp’rs Ins. of Wausau*, 508 U.S. 286, 297 (1993) (inferring a contribution action because no evidence suggested it would “frustrate the purposes of the statutory section from which it is derived”).

<sup>115</sup> 18 U.S.C. § 2259(b)(1) (1996).

<sup>116</sup> Joint Appendix vol. II at 347, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

<sup>117</sup> *Paroline*, 134 S. Ct. at 1726.

<sup>118</sup> Petitioner’s Brief on the Merits at 58, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561), 2013 WL 4518605.

<sup>119</sup> *Fine*, BLACK’S LAW DICTIONARY (8th ed. 2004); *see United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998).

<sup>120</sup> Justice Kennedy relied on *Kelly v. Robinson*, 479 U.S. 36 (1986), for the proposition that restitution awards have penal aspects. *Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014). But

B. *The Court's Decision Gives No Real Guidance on What Kind of Restitution Awards Victims Should Receive.*

Justice Kennedy's opinion also fails to provide any real guidance on the key question in the case: how much restitution Amy should receive. Justice Kennedy did not dispute that Amy suffers substantial losses from child pornography crimes. In a key passage in the opinion, however, Justice Kennedy concluded that "a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."<sup>121</sup> Justice Kennedy explained that in making this determination, courts could consider various factors, including:

the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.<sup>122</sup>

Justice Kennedy cautioned that "[t]hese factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders."<sup>123</sup>

In cautioning against "trivial" restitution awards, Justice Kennedy appears to have been responding directly to an argument Amy made in the closing paragraphs of her brief. Amy warned that apportioning restitution among multiple defendants will mean "trivial" restitution for her.<sup>124</sup> Amy explained that her images were, at that time, identified in 3,200 American federal and state criminal cases.<sup>125</sup> She also noted that, unfortunately, these prosecuted federal cases represent just a

---

*Kelly* involved an older restitution statute that was not tailored to victims' losses, *Kelly*, 479 U.S. at 53, and did not give the victim any right to restitution, *id.* at 52. Section 2259, in contrast, mandates an award calculated with reference to a victim's losses, 18 U.S.C. § 2259(b)(3) (1996), and the 2004 Crime Victims' Rights Act now promises victims that they have the "right to full and timely restitution . . ." 18 U.S.C. § 3771(a)(6) (2012).

<sup>121</sup> *Paroline*, 134 S. Ct. at 1727.

<sup>122</sup> *Id.* at 1728 (citing Brief for the United States at 49, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561) 2013 WL 5425148 (which had listed these factors)).

<sup>123</sup> *Paroline*, 134 S. Ct. at 1728.

<sup>124</sup> Amy's Merits Br., *supra* note 5, at 65.

<sup>125</sup> *Id.*

fraction of the child pornography criminals who were harming her because law enforcement can only apprehend a small fraction of those who distribute and possess her images.<sup>126</sup> Amy suggested that assuming law enforcement could even apprehend ten percent of the criminal collectors of her images is a “generous assumption.”<sup>127</sup> Amy further explained that she is harmed not only by child pornography crimes committed in this country, but also by those committed overseas.<sup>128</sup> Amy suggested that a “fair estimate” was that forty-five percent of the child pornography criminals are American.<sup>129</sup>

Based on these figures, Amy surmised that a ballpark estimate of Paroline’s “market share” of Amy’s harm is 1/71,000 and that his restitution obligation to Amy would be a trifling amount: about \$47—calculated by taking the full amount of her losses (\$3,367,854) and then multiplying by 1/3,200 (the total number of cases where her images had been found) and then 1/10 (the ten percent law enforcement apprehension rate) and then 45/100 (the percentage of child pornography criminals who are found in this country).<sup>130</sup>

Chief Justice Roberts’ dissenting opinion addressed these troubling numbers. After recounting the computation, Chief Justice Roberts noted the majority’s disclaimer that trivial awards were inappropriate, but he concluded, “it is hard to see how a court fairly assessing this defendant’s relative contribution could do anything else.”<sup>131</sup>

Since the *Paroline* decision, federal district judges have used a variety of methods to calculate the amount of an appropriate restitution award. One federal district court judge started with approximately 500 restitution awards for “Vicky” and then doubled that number to reflect those who might, in the future, be ordered to pay her restitution.<sup>132</sup> The judge then awarded her restitution in the amount of 1/1000 of her remaining, uncompensated losses and explained that it was reasonable to assign as [the defendant’s] restitution 1/1000 (0.1%) of “Vicky’s” remaining losses.<sup>133</sup> While such approaches generate a specific number that can be entered into a restitution judgment, they hardly qualify as rational or not trivial. One illustration of this problem is the infinite regress outcome. While awarding restitution in the amount of 1/1000 produces a number today, next year the amount could be something like 1/1100 and the year following 1/1200, etc. Of course, the amounts awarded begin to regress towards zero—meaning the victim may never

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Amy’s Merits Br., *supra* note 5, at 65 (citing DOJ REPORT TO CONGRESS, *supra* note 6, at 14 (table regarding domestic vs. international P2P file sharing of child pornography)).

<sup>130</sup> Amy’s Merits Br., *supra* note 5, at 65 & n.19 (calculating  $3,367,854 \times 1/3,200 \times 1/10 \times 45/100 \approx \$47$ ).

<sup>131</sup> *Paroline*, 134 S. Ct. at 1734 (Roberts, C.J., dissenting).

<sup>132</sup> *United States v. Crisostomi*, 31 F.Supp. 3d 361, 365 (D.R.I. 2014).

<sup>133</sup> *Id.*

receive full restitution (particularly when the difficulties of collecting restitution awards are factored in).

Other district courts have declined to award even these small amounts, but have instead decided to award nothing to child pornography victims. Illustrative of this approach is the case of *United States v. Hanlon*,<sup>134</sup> decided less than two months ago in the Middle District of Florida. In that case, the Government had sought restitution for two young female victims: “Vicky” and “Sarah.” Both of these victims had suffered substantial losses which they quantified in a similar fashion to Amy. Nonetheless, the district court declined to award even a single dollar in restitution to either victim. With regard to Vicky, for example, the district court held:

[i]t is reasonably predictable that the Vicky Series will continue to be a staple of the internet among those interested in child pornography. Predicting the number of future convictions and/or restitution orders for crimes contributing to Vicky’s general losses [sic] is virtually impossible, other [sic] to say that if past history is any indication the number will be fairly substantial.<sup>135</sup>

The district court also relied on the fact that the “government has presented no evidence from which the Court can reliably estimate the broader number of offenders involved in possession or distribution of the Vicky Series images.”<sup>136</sup> Of course, these problems will exist in *every* case, meaning that if the *Hanlon* approach is widely followed, Vicky may receive little or no restitution at all.

These cases illustrate an overarching problem of the *Paroline* decision: inevitably under the Court’s vague guidance, restitution awards will vary from case to case and victim to victim, based on little more than a happenstance of how a trial judge decides to approach restitution issues. In a federal criminal justice system committed to equal treatment under the law, such random disparities are troubling.

Problems such as these were well summarized by Chief Judge Anne L. Aiken of the District of Oregon, who joined in asking for congressional action to overturn *Paroline*:

While I, like the [Supreme] Court, am confident of a district court’s ability to implement the causation standard approved in *Paroline*, the results are unlikely to serve the stated purpose of § 2259 and fully compensate victims for their losses. As noted by the dissent, “experience shows that the amount in any particular case will be quite small—the

---

<sup>134</sup> See *United States v. Hanlon*, No. 2:14-cr-18-FtM-29DNF, 2015 WL 310542 (M.D. Fla. Jan. 23, 2015).

<sup>135</sup> *Id.* at \*4.

<sup>136</sup> *Id.*

significant majority of defendants have been ordered to pay Amy \$5,000 or less. This means that Amy will be stuck litigating for years to come.” Such piecemeal results hardly remedy the “continuing and grievous harm” caused by the repeated exploitation of child pornography victims. While I do not necessarily agree with the dissent that “[t]he statute as written allows no recovery,” I certainly agree with the admonition that “Congress [should] fix it.”<sup>137</sup>

Fortunately, some members of Congress have proposed a comprehensive broad-based “fix” for the problem—a subject for the next section of this article.

#### V. THE SOLUTION TO THE PROBLEM: THE AMY AND VICKY ACT

Because of the obvious limitations in the *Paroline* decision, prominent members of Congress have moved to enact legislation to establish a more workable system of restitution for child pornography victims. It is important to remember that restitution for crime victims does not exist in the common law and is created solely by statute. To the extent that *Paroline*'s interpretation of the existing statute fails to provide adequate restitution, Congress is free to change the statute. This Part reviews the proposed legislation introduced in Congress and then explains why it is an improvement over the current regime.

##### A. *The Amy and Vicky Act*

On May 7, 2014, Senators Orrin Hatch (R-Utah) and Chuck Schumer (D-New York) introduced the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014 (referred to here as the “Amy and Vicky Act” or “AVA” for short).<sup>138</sup> When the bill failed to be considered in the 113th Congress, Senators Hatch and Schumer introduced the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015 (AVA) on January 28, 2015.<sup>139</sup> An identical bill was introduced in the House on the same day.<sup>140</sup> On February 11, 2015, in one

---

<sup>137</sup> *United States v. Galan*, No. 6:11-cr-60148-AA, 2014 WL 3474901, at \*2 (D. Or. July 11, 2014) (internal citations omitted).

<sup>138</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. (2014); Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, H.R. 4981, 113th Cong. (2014).

<sup>139</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. (2015).

<sup>140</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, H.R. 595, 114th Cong. (2015).

of the first acts of the 114th Congress, the Senate passed the AVA on a vote of 98-0. The AVA is currently being considered in the House as S. 295 RFH.<sup>141</sup>

The Amy and Vicky Act will establish a more workable restitution regime by establishing fixed amounts of restitution that convicted child pornography defendants must pay. The AVA is a significant improvement over the discretionary regime left in place by the *Paroline* decision and Congress should swiftly enact it.

In the AVA, Congress explicitly recognizes that modern child pornography crimes—which are committed and facilitated by the vast scale and anonymity of the Internet—require new approaches. The AVA begins by recounting important findings concerning the nature of child pornography crimes and the need for restitution for those crimes. Congress re-emphasizes the Supreme Court’s longstanding holding in *Ferber* that “[t]he demand for child pornography harms children because it drives production . . . .”<sup>142</sup> It recognizes the emerging mental health consensus that “[t]he harms caused by child pornography are more extensive than the harms caused by child sex abuse alone because child pornography is a permanent record of the abuse of the depicted child, and the harm to the child is exacerbated by its circulation”<sup>143</sup> and “[v]ictims suffer continuing and grievous harm as a result of knowing that a large, indeterminate number of individuals have viewed and will in the future view images of their childhood sexual abuse.”<sup>144</sup>

Most importantly, the findings emphasize that “[i]t is the intent of Congress that victims of child pornography be fully compensated for [all] *the harms* resulting from *each and every perpetrator* who contributes to their anguish.”<sup>145</sup> Congress specifically recognizes that “[t]he unlawful *collective conduct* of every individual who reproduces, distributes, or possesses the images of a victim’s childhood sexual abuse plays a part in sustaining and aggravating the harms to that individual victim. *Multiple actors independently commit intentional crimes that*

<sup>141</sup> S. 295 RFH (2015) has one minor change from S. 295 as introduced. It adds losses from “sexually explicit conduct (as that term is defined in section 2256)” to the definition of “full amount of the victim’s losses” in Section 3.

<sup>142</sup> S. 295 at § 2(1)

<sup>143</sup> *Id.* § 2(2). See *Statement on the Harm to Child Pornography Victims*, AM. PROF’L SOC’Y ON THE ABUSE OF CHILDREN (Oct. 18, 2013), <http://www.apsac.org/assets/documents/apsac%20statement%20on%20harm%20to%20child%20pornography%20victims%2010.29.13.pdf> (“For the victims, the sexual abuse of the child, the memorialization of that abuse which becomes child pornography, and its subsequent distribution and viewing become psychologically intertwined and each compound the harm suffered by the child-victim . . . . [I]n addition to the effects of child sexual abuse . . . victims of child pornography often experience an exacerbation of harms and/or additional problems. These may include shame, embarrassment, fear of being identified, vulnerability from having their abuse filmed, fear that adults are viewing and being sexual with themselves or other children, and the realization that the image of their abuse will last forever on the internet.”).

<sup>144</sup> S. 295 at § 2(3).

<sup>145</sup> *Id.* § 2(5) (emphasis added).

*combine to produce an indivisible injury to a victim.*<sup>146</sup> This so-called “aggregate harm theory” was rejected by *Paroline* which analyzed the harms from child pornography under outdated and misunderstood legal theories of “proximate result” and a “defendant’s relative role in the causal process.”<sup>147</sup> The AVA addresses the shortcomings in *Paroline*, providing an updated approach firmly rooted in the well-established theories of tort liability discussed earlier in this article.<sup>148</sup>

Based on Congress’s findings about child pornography, the AVA takes three important steps to address the unique nature of child pornography crimes. First, it incorporates the total lifetime harm to the victim from all past, present, and future offenders, including those known, unknown, and unknowable. Second, it requires meaningful and timely restitution. Third, it allows defendants who have paid the full amount of the victim’s losses to spread the restitution cost among themselves.

The AVA does not change the list of pecuniary losses eligible for restitution under current law. It does, however, require courts to compute the lifetime losses for “medical services relating to physical, psychiatric, or psychological care,” “physical and occupational therapy or rehabilitation,” and “lost income.”<sup>149</sup> The AVA also recognizes that the production, distribution, and possession of child pornography are part of a continuum of harm which begins with sexual grooming and sexual abuse. It adds a new subpart which defines “full amount of the victim’s losses” as including “any losses suffered by the victim from any sexual act or sexual contact (as those terms are defined in section 2246) or sexually explicit conduct (as that term is defined in section 2256) in preparation for or during the production of child pornography depicting the victim involved in the offense.”<sup>150</sup> The main reason for including this provision is to capture fully the harm suffered by victims of child pornography crimes.

Once a victim’s full losses are determined, the AVA directs that if a victim is harmed by only one defendant then that defendant must pay “an amount that is not less than the full amount of the victim’s losses.”<sup>151</sup> In the more typical scenario—where a victim is harmed by multiple past, present, and future known, unknown, and unknowable offenders—a judge can award restitution in one of two ways, depending on the circumstances of the case.

---

<sup>146</sup> *Id.* § 2(4) (emphasis added).

<sup>147</sup> *See Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014). In the AVA, Congress specifically rejects *Paroline*’s narrow approach by adopting “an aggregate causation standard to address the unique crime of child pornography and the unique harms caused by child pornography.” S. 295 § 2(6).

<sup>148</sup> *See supra* notes 76-117 and accompanying text.

<sup>149</sup> S. 295 § 3(1).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at § 3(3).



First, the judge can order the defendant to pay “the full amount of the victim’s losses.”<sup>152</sup> Or, second, utilizing judicial discretion, the judge can award certain specified amounts depending on the child pornography offense committed: \$250,000 for offenses involving the production of child pornography, \$150,000 for offenses involving the advertising or distribution of child pornography, or \$25,000 for offenses involving the possession of child pornography.<sup>153</sup> No order of restitution may exceed the full amount of the victim’s losses, insuring that victims are not overcompensated; once a victim has received the full amount of his or her losses, he or she can no longer collect restitution.<sup>154</sup>

Of course, there is a difference between the size of the restitution award imposed against an offender and the payment schedule on which the offender satisfies that award. As with other restitution awards, defendants ordered to pay restitution under the AVA are protected from excessively burdensome payments by other provisions in the federal criminal code, including 18 U.S.C. § 3664—the so-called restitution “enforcement provision.”<sup>155</sup>

Restitution awards under the AVA are subject to § 3664, which gives a trial judge discretion in setting the amount an individual defendant must pay towards his restitution obligation.<sup>156</sup> Even a significant restitution obligation is mitigated by § 3664’s directive to enter a reasonable payment schedule.<sup>157</sup> In setting a payment schedule, a judge must consider all relevant factors, including “(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; (B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant, including obligations to dependents.”<sup>158</sup> Such payments may consist of “a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.”<sup>159</sup> Section 3664 also specifies that defendants can move the court to modify restitution payment orders when there is “any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution.”<sup>160</sup>

The AVA also holds defendants who are ordered to pay the full amount of the victim’s losses “jointly and severally liable” to the victim with all other defendants

---

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Of course, a victim is always free to pursue additional civil litigation to recover losses not covered by criminal restitution.

<sup>155</sup> *See* United States v. Ekanem, 383 F.3d 40, 43 (2d Cir. 2004).

<sup>156</sup> 18 U.S.C. § 3664(a) (2002).

<sup>157</sup> 18 U.S.C. § 3664(f)(1)(B)(2) (2002).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* § 3664(f)(3)(A).

<sup>160</sup> *Id.* § 3664(k).

against whom an identical order of restitution has been entered.<sup>161</sup> This, along with a right of contribution, allows defendants to spread the losses among and between similarly situated defendants.<sup>162</sup> Defendants can bring contribution claims in federal court in accordance with the Federal Rules of Civil Procedure. This will allow courts to allocate payments among defendants using “such equitable factors as the court determines are appropriate so long as no payments to victims are reduced or delayed.”<sup>163</sup>

### B. *Amy and Vicky Act Improvements*

The Amy and Vicky Act significantly improves the convoluted restitution regime left in the wake of the *Paroline* decision. The biggest improvement is the availability of statutorily-determined restitution amounts. Of course, this approach helps victims by assuring that they will receive substantial restitution rapidly, but it also provides significant benefits for everyone involved in the restitution process.

Perhaps most significantly, it simplifies the restitution process for prosecutors, probation officers, and judges. As even a quick perusal of post-*Paroline* court decisions reveals, substantial litigation is occurring over how to apportion restitution losses caused by countless defendants. As noted above,<sup>164</sup> district courts are currently struggling over formulations, and reformulations, based on the so-called *Paroline* factors. The AVA would bring such burdensome litigation to a close.

The AVA also provides certainty to defendants. Right now, the restitution that a defendant will ultimately be ordered to pay is something of a crapshoot, with the ultimate payment dependent on the formula that a trial judge selects. Under the AVA, defendants will know about their potential restitution obligation when they make plea decisions.

One objection that defense advocates may raise to the AVA is that the statutory amount is akin to federal mandatory minimum sentences. Mandatory prison terms have recently and repeatedly come under fire as unduly restricting the ability of judges to craft appropriate sentences.<sup>165</sup> We agree that mandatory minimums can sometimes be draconian and blunt,<sup>166</sup> and so do some of the AVA’s

---

<sup>161</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. § 3(4) (2015).

<sup>162</sup> *Id.* § 3(5).

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* notes 132–134 and accompanying text.

<sup>165</sup> Compare Attorney General Eric Holder Urges Congress to Pass Bipartisan ‘Smarter Sentencing Act’ to Reform Mandatory Minimum Sentences, DEP’T OF JUST. (Jan. 23, 2014), [www.justice.gov/opa/pr/2014/January/14-ag-068.html](http://www.justice.gov/opa/pr/2014/January/14-ag-068.html), with John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311 (2004).

<sup>166</sup> See, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

key sponsors.<sup>167</sup> Although reasonable people can differ on the appropriateness of such mandatory sentences, it is important to understand that the AVA does not specify mandatory *prison* sentences designed to punish offenders. Instead, the AVA is a remedial statute designed to provide compensation that is akin to joint and several liability in civil tort law. No one suggests that a tort defendant who is ordered to pay the full amount of a victim's losses is somehow subjected to a "mandatory minimum." Like joint and several liability, the AVA spreads liability for the full amount of a victim's losses across a wide, and often ever-increasing, number of defendants who all become contributors and payors. Instead of one defendant paying one amount and another defendant paying another amount and still other defendants paying nothing, the AVA requires all defendants to pay something according to their means and in accordance with a reasonable and proportional payment schedule under 18 U.S.C. § 3664. The inherent inequity of the post-*Paroline* ad hoc multi-factor driven approach is replaced by a simple and streamlined statutory assessment, which is below the statutorily established fine.

It is also important to note that the statutory amounts are only imposed when a child pornography victim establishes that her actual losses are greater than the statutory amount. For example, the only reason Amy could be awarded \$150,000 for distribution of her child sex abuse images is that she has actual losses that vastly exceed that amount. Most importantly, once a victim has received compensation for the full amount of his or her total aggregate losses, he or she can no longer seek restitution, and every defendant's restitution obligation for that victim will end.

Such an approach not only ensures that victims are fully compensated for losses that they suffer from child pornography crimes, but also easily complies with constitutional requirements. Criminal defendants can hardly complain about being ordered to pay restitution of \$25,000, or even \$250,000, to a victim when, under well-settled law, they can already be ordered to pay a fine of \$250,000 to the Government.<sup>168</sup> To give money to a victim in an amount which is less than or equal to the amount payable to the federal treasury can hardly be considered cruel and unusual punishment in violation of the Eighth Amendment.

But what about a situation where a single defendant was ordered to pay, by himself, all of a victim's losses? This situation remains nothing more than a law school hypothetical, because the millionaire child pornography defendant has not yet surfaced in a real world case. But to ensure fairness for defendants who have paid very sizable restitution awards, the AVA improves upon existing law by specifically creating a contribution action for defendants who are ordered to pay the full amount of a victim's losses and who have paid at least the statutory amount

---

<sup>167</sup> See, e.g., Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192-95 (1993).

<sup>168</sup> See 18 U.S.C. § 3571(b)(3) (1995) (authorizing a fine of \$250,000 for any felony conviction).

towards their restitution obligation.<sup>169</sup> This provision, along with 18 U.S.C. § 3664, obviates any Eighth Amendment “excessive” fine concerns, since indigent defendants will typically only pay a fraction of the restitution they have been ordered to pay while wealthy defendants will have a contribution action to spread their restitution obligation across multiple defendants. To be sure, it may be burdensome for a rich defendant to track down other defendants in other cases to contribute to restitution payments. But as the Fifth Circuit explained it in its *Paroline* decision, such an approach properly “shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.”<sup>170</sup> It is far better that this burden be borne by a wealthy defendant convicted of child pornography than by (as under current law) innocent victims who may or may not have resources to pursue far flung litigation. This is a legitimate public policy choice by Congress, which does not run afoul of the Eighth Amendment or any due process concerns.

The possibility of a contribution action should be more than enough to dispense with any constitutional question that might theoretically arise under the AVA.<sup>171</sup> A more direct answer to constitutional concerns is that, properly understood, the Eighth Amendment has no bearing at all on criminal restitution issues. Whether or not the Eighth Amendment applies to restitution remains an unsettled issue. Most federal courts have found that restitution is remedial in nature and therefore not subject to Eighth Amendment punishment or “excessive fine” limitations, but a circuit split does exist on this issue.<sup>172</sup> The *Paroline* decision flagged the possibility that large restitution awards could raise constitutional concerns, but did not rule on the issue one way or the other.<sup>173</sup>

The better view on this question is that restitution (at least as provided in the AVA) is not a punitive measure subject to the Eighth Amendment’s Excessive Fines Clause, but rather a compensation designed to restore crime victims.<sup>174</sup> There is an

---

<sup>169</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. § 3(5) (2015).

<sup>170</sup> *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011).

<sup>171</sup> It is also important to recognize that a wealthy defendant who is ordered to pay all of a victim’s restitution will present an “as applied” challenge to the AVA rather than a “facial” challenge. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, any challenge on this issue will lead only to a reduction of a wealthy offender’s restitution award, not general invalidation of the AVA.

<sup>172</sup> Compare *In re Amy Unknown*, 701 F.3d 749, 771–72 (5th Cir. 2012) (en banc) (holding Eighth Amendment not applicable to § 2259 because the purpose of restitution “is remedial, not punitive”), with *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) (“[R]estitution under the [Mandatory Victim Restitution Act (“MVRA”)] is punishment” and subject to Eighth Amendment limitations “because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes.” (internal citation omitted)).

<sup>173</sup> See *Paroline v. United States*, 134 S. Ct. 1710, 1725–26 (2015).

<sup>174</sup> See *United States v. Visinaiz*, 344 F. Supp.2d 1310, 1318–23 (D. Utah 2004) (Cassell, J.); see also Brief of “Vicky” and “Andy” as Amici Curiae in Support of Respondent Amy Unknown,

obvious incongruity in claiming that restitution is a “fine” covered by the Clause because a “fine” is “a pecuniary criminal punishment or civil penalty payable to the public treasury.”<sup>175</sup> Conversely, a restitution award under § 2259 is payable not to the public treasury, but to the crime victim.<sup>176</sup> And the findings that are included in the AVA make clear that these awards are designed not to punish defendants, but rather to ensure “that victims of child pornography [are] fully compensated for all the harms resulting from each and every perpetrator who contributes to their anguish.”<sup>177</sup>

Even if the Constitution’s prohibition on excessive “fines” can somehow be contorted to apply to such situations, a fine is only excessive if “it is grossly disproportional to the gravity of a defendant’s offense.”<sup>178</sup> Child pornography felonies are serious crimes, punishable by lengthy prison terms.<sup>179</sup> Nor can such crimes be called “victimless” crimes. As the Second Circuit recently explained:

The ease with which a person can access and distribute child pornography from his home—often with no more effort than a few clicks on a computer—may make it easier for perpetrators to delude themselves that their conduct is not deviant or harmful. But technological advances that facilitate child pornography crimes no more mitigate the real harm caused by these crimes than do technological advances making it easier to perpetrate fraud, traffic drugs, or even engage in acts of terrorism—all at a distance from victims—mitigate those crimes. If anything, the noted digital revolution may actually aggravate child pornography crimes insofar as an expanding market for child pornography fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.<sup>180</sup>

In sum, the AVA complies with all constitutional requirements and protects individual defendants from being solely responsible for restitution. It creates an easy-to-administer restitution regime that ensures full compensation for victims while reducing the litigation burden for courts. It is thus a significant improvement over the post-*Paroline* regime—a more rational and predictable system than the ad hoc case-by-case regime that *Paroline* confusingly constructed.

---

*Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561) (explaining why restitution is not punitive).

<sup>175</sup> *Fine*, BLACK’S LAW DICTIONARY (8th ed. 2004); see *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998).

<sup>176</sup> 18 U.S.C. § 2259(b)(1) (1996).

<sup>177</sup> Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. § 2(5) (2015).

<sup>178</sup> *Bajakajian*, 524 U.S. at 334.

<sup>179</sup> See, e.g., 18 U.S.C. § 2252(b)(1), (b)(2) (2012).

<sup>180</sup> *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

## VI. CONCLUSION

In this article, we have reviewed the legal issues surrounding restitution for child pornography victims. In our view, the Supreme Court's *Paroline* decision failed to fully implement the congressional mandate that victims receive restitution for the "full amount" of their losses. Congress should move swiftly to ensure full restitution for child pornography victims by enacting the proposed Amy and Vicky Act—a more rational scheme for awarding restitution.

But in closing, it may be useful to remember that the legal issues swirling around restitution decisions have real world consequences for real world people: the defendants who must pay the awards and the victims who need those payments. We are mindful that large restitution awards may have financial consequences for criminal defendants. But the stark fact remains that criminals have a choice—to commit the crime or not to commit the crime. Having voluntarily chosen to commit a crime with serious lifelong financial repercussions, we are unsympathetic to any argument that convicted child pornography criminals should be able to escape providing victims with full compensation.

It is more important to hear the experiences of the innocent victims of these crimes, who desperately need compensation. Recently, Amy eloquently explained her endless struggle—and her need for restitution.<sup>181</sup> Amy first described the pain she feels for the crimes committed against her:

The past eight years of my life have been filled with hope and horror. Life was pretty horrible when I realized that the pictures of my childhood sex abuse were on the Internet for anyone and everyone to see. Imagine the worst most humiliating moments of your life captured for everyone to see forever. Then imagine that as a child you didn't even really know what was happening to you and you didn't want it to happen but you couldn't stop it. You were abused, raped, and hurt and this is something that other people want. They enjoy it. They can't stop collecting it and asking for it and trading it with other people. And it's you. It's your life and your pain that they are enjoying. And it never stops and you are helpless to do anything ever to stop it. That's horror.<sup>182</sup>

Amy then went on to describe how her life improved when restitution became a possibility: "I felt lots of hope when my lawyer started collecting restitution to

---

<sup>181</sup> Marsh Law Firm PLLC, *Amy's Letter Supporting the Amy and Vicky Child Pornography Victim Restitution Improvement Act*, AMY AND VICKY ACT (May 4, 2014), <http://childvictims.us/about-amy-and-vicky/>.

<sup>182</sup> *Id.*

help me pay my bills and my therapist and for a car to drive to therapy and to just try to create some kind of ‘normal’ life. Things were getting better and better.”<sup>183</sup>

Amy, however, was caught in the litigation maelstrom that led up to the Supreme Court case. She explained that “we started having problems with the restitution law. Judges sometimes gave me just \$100 and sometimes nothing at all.”<sup>184</sup> But:

[a]fter a long time and a lot of court hearings all over the country, my case was finally at the Supreme Court. I couldn’t believe how long and how far my case and my story had gone until I was sitting there in the Supreme Court surrounded by so many of the people who have supported me and helped me during these years.<sup>185</sup>

Amy obviously hoped for a favorable Supreme Court decision, not just for her, but for “all the victims like me—who were so young when all these horrible things happened to us—[I hoped we could all] get the restitution we need to try and live a life like everyone else.”<sup>186</sup> But then came the Supreme Court’s ruling, which, for Amy, “was even worse than getting no restitution at all. It was sort of like getting negative restitution. It was a horrible day.”<sup>187</sup>

Amy, however, was excited to learn that members of Congress introduced a bill bearing her name and the name of Vicky (whom Amy met at the Supreme Court argument). She is “hopeful, that Congress can fix this problem once and for all.”<sup>188</sup>

We too are hopeful that the United States House of Representatives will act soon to pass the Amy and Vicky Act. Victims like Amy and Vicky deserve to collect full restitution from those who harm them—something that the restitution statute has long promised in theory but failed to deliver in practice. The Supreme Court in *Paroline* seemed to recognize that its ruling narrowing the restitution that child pornography victims could receive would be a mere placeholder until Congress finally acted. Now that the Senate has passed the Amy and Vicky Act 98-0, the House of Representatives should do the same and make full restitution for child pornography victims a reality. Child pornography victims deserve nothing less.

---

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

