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CHILD EXPLOITATION RESTITUTION FOLLOWING THE PAROLINE v. UNITED STATES DECISION

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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CHILD EXPLOITATION RESTITUTION FOLLOWING THE *PAROLINE v. UNITED STATES* DECISION

THURSDAY, MARCH 19, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Gohmert, Chabot, Poe, Buck, Bishop, Jackson Lee, and Conyers.

Staff Present: (Majority) Allison Halataei, Parliamentarian & General Counsel; Sarah Allen, Counsel; Alicia Church, Clerk; (Minority) Joe Graupensperger, Counsel; Vanessa Chen, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will be in order. Without objection, the Chair will be authorized to declare recesses at any time due to votes on the House floor.

Let me see, we are due to have votes sometime between 10:05 and 10:15, and then another series of votes at 11:45. It is the Chair's intent not to resume the hearing after the second series of votes, so we will have to go over there to vote, come on back, and then resume the hearing. So this is kind of going to be the rocket docket.

The Chair will withhold his opening statement, and at this time ask unanimous consent to have all opening statements be placed in the record. If either the full Committee Chair or the Ranking Member, Ms. Jackson Lee, want to give an opening statement, which the Chair will discourage, they may do so.

The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. I will put my statement in the record. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. Mr. Chairman, thank you for your courtesies. I will put in my statement, which I intend to have revised, and you

have given me a great opportunity. I will ask unanimous consent for that statement to be placed in the record.

Mr. SENSENBRENNER. Without objection, all Members' opening statements will be placed in the record. And the Chair will remember that you have——

Mr. CONYERS. You didn't ask me.

Mr. SENSENBRENNER. Oh, I didn't see you. The gentleman from Michigan?

Mr. CONYERS. I am going along with the crowd here this morning.

Mr. SENSENBRENNER. Bless you.

We have a very distinguished panel today, and I will begin by swearing you all in, if you would please rise.

Please raise your right hand. Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record show that all the witnesses answered in the affirmative.

Let me give a brief introduction of all of the witnesses, and ask unanimous consent that the full introduction be placed in the record.

[The information referred to follows:]

Witness Introductions:

Ms. Jill E. Steinberg

Ms. Jill E. Steinberg serves as the National Coordinator for Child Exploitation Prevention and Interdiction at the United States Department of Justice.

Previously, Ms. Steinberg served as an Assistant United States Attorney in the Northern District of Georgia where she handled the investigation and prosecution of violent crimes, including those involving the exploitation of children. She won the United Stated Attorney Award in 2011 for her work on child exploitation cases. She also served as an Attorney Advisor within the Department's National Security Division.

Ms. Steinberg received her undergraduate degree from the University of Georgia and her law degree from Duke University.

The Honorable Paul Cassell

The Honorable Paul Cassell is an Endowed Chair at the University of Utah College of Law. Professor Cassell received a J.D. from Stanford University, where he was president of the

Stanford Law Review. He clerked for then-Judge Antonin Scalia and for Chief Justice Warren Burger. He also served as an Associate Deputy Attorney General and as an Assistant U.S. Attorney.

In 2002, Professor Cassell was confirmed to serve as a U.S. District Court Judge for the District of Utah, a position he held until resigning in 2007 to return to teaching law.

In 2014, Professor Cassell argued on behalf of a crime victim, Amy, before the United States Supreme Court in *Paroline v. United States.*

Professor Jonathan Turley

Professor Jonathan Turley is the Shapiro Professor of Public Interest Law at the George Washington University Law School. Professor Turley is a nationally recognized legal scholar, who has written extensively in areas ranging from constitutional law to legal theory to tort law.

Professor Turley received his Bachelors of Arts Degree from the University of Chicago and his Juris Doctor from Northwestern University.

Mr. Grier Weeks

Mr. Grier Weeks is the executive director of the National Association to Protect Children, which he helped establish in 2004. This organization is the first national lobby dedicated exclusively to child protection. Since then Mr. Weeks has crafted legislation and lobbied and testified before Congress and state legislatures numerous times.

Mr. SENSENBRENNER. Jill Steinberg serves as the national coordinator for Child Exploitation Prevention and Interdiction at the United States Department of Justice.

The Honorable Paul Cassell is an endowed chair of the University of Utah College of Law. Professor Cassell received a J.D. from Stanford, which shows that he is a person of great intellect, and he also makes good choices.

Professor Jonathan Turley is the Shapiro Professor of Public Interest Law at George Washington University Law School.

And Grier Weeks is the executive director of the National Association to Protect Children, which he helped establish in 2004.

Without objection, all the witnesses' statements will be placed in the record in full. Each witness will be asked to summarize their testimony in 5 minutes or less. You all know what the red, yellow, and green lights mean.

Ms. Steinberg, you are first.

TESTIMONY OF JILL STEINBERG, NATIONAL COORDINATOR FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, U.S. DEPARTMENT OF JUSTICE

Ms. STEINBERG. Chairman Goodlatte, Ranking Member Conyers, Chairman Sensenbrenner, Ranking Member Jackson Lee, and distinguished Members of the Subcommittee, I would like to thank you for the leadership that you have taken in addressing restitution for child pornography victims. On behalf of the Justice Department, I look forward to working closely with you on this issue.

Every day, individuals around the world advertise, distribute, and access child pornography. These images of child sexual abuse are moved from computer to smart phone to tablet to cloud storage and back, seamlessly crisscrossing international borders without detection. When sexually explicit images of children become actively traded, those victims necessarily are implicated in hundreds of cases all over the country and across time.

In this way, these victims are unique among crime victims. Because of the mechanics of the crime committed against them, they continually suffer harm caused by countless individuals all over the country and the world.

Like all crime victims, victims of child pornography are entitled to full and timely restitution as provided by law, including restitution for losses that arise from the collection and distribution of their images.

In 2009, for the first time, a victim came forward and sought restitution not just from the person who produced and initially shared those images, but from the subsequent individuals who collected and traded those images. Soon, Federal prosecutors across the country were seeking restitution in collection and distribution cases for child pornography victims. For the most part, prosecutors were successful in obtaining restitution orders for those victims.

Despite the department's overall effort and success in obtaining restitution orders for these victims, there were some hard-fought losses. Some courts struggled to determine whether a defendant proximately caused a victim's loss. If a defendant was one of thousands of individuals who harmed a victim, some courts found that he could not have proximately caused her losses because those

losses essentially would be the same if he had not committed the crime. On that logic, some courts denied restitution.

Others demanded a showing as to how much an individual defendant incrementally increased a victim's loss, which imposed a generally insurmountable evidentiary burden.

Among courts that awarded restitution, many courts grappled with how much that restitution should be. Although most awards clustered in the range of $1,000 to $5,000, courts adopted numerous different approaches to come up with that number.

These two issues were brought to the Supreme Court in *Paroline v. United States* last term. In its majority opinion, the Court found that the unique issue of imposing restitution in child pornography cases required the use of a less demanding causal standard. The majority opinion concluded that in these types of child pornography cases, a court 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.

Paroline has substantially improved the department's ability to obtain restitution orders for these victims. Since *Paroline*, the department has obtained approximately 160 restitution orders in approximately 60 Federal districts across the country. In that time, we are not aware of any district court judge denying a restitution order in these kinds of cases because of the failure of proof on the

Causation issue. Instead, courts can focus on how much restitution should be ordered.

Although *Paroline* has significantly improved the department's ability to obtain restitution in these kinds of cases, legislation is still needed to improve our ability to help these victims. Current data tells us that there are over 8,500 children who have been identified in images of child pornography. Yet as of yesterday, when we found out about one additional victim who is asking for restitution, there are only 16 victims seeking restitution in child pornography distribution, receipt, and possession cases in Federal court.

The department believes that the reason so few seek restitution is because the process of litigating claims in hundreds of cases around the country over many years is simply too burdensome, and we can do better.

The department urges Congress to create an alternative system that allows victims of the distribution and collection of child pornography to obtain some measure of restitution without enduring litigation.

Under this system, child pornography defendants would be required to pay a special assessment, in addition to any restitution that they might owe. The special assessment would go into a fund. Victims of these types of child pornography cases could then choose whether to present their full restitution claim in court, as they do now, or to avail themselves of a onetime source of administrative compensation.

This two-track process is meant to ameliorate the structural impediments that we believe deters victims from coming forward now while preserving the option of obtaining full restitution for those who wish to do so.

Thank you for your continued consideration of this issue. The department looks forward to working with Congress to find the best means to advance an important cause of putting restitution in the hands of these victims.

[The prepared statement of Ms. Steinberg follows:]

Department of Justice

STATEMENT OF

JILL STEINBERG
NATIONAL COORDINATOR FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED

"CHILD EXPLOITATION RESTITUTION FOLLOWING THE *PAROLINE V. UNITED STATES* DECISION"

PRESENTED
MARCH 19, 2015

Statement of
Jill Steinberg
National Coordinator for Child Exploitation Prevention and Interdiction
Before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security and Investigations
United States House of Representatives
Entitled
"Child Exploitation Restitution Following the *Paroline v. United States* Decision"
March 19, 2015

Chairman Sensenbrenner, Ranking Member Jackson Lee, and distinguished members of the Subcommittee, I would like to thank you for the leadership you have taken in addressing restitution for child pornography victims. On behalf of the Justice Department, I look forward to working closely with you to address the needs of these victims. I also want to thank you for this opportunity to speak to you today about what the Justice Department is doing to obtain restitution for child pornography victims.

Every day, individuals around the world advertise, distribute, transport, receive, possess, and access child pornography. These images of child sexual abuse are moved from computer to smart phone to tablet to cloud storage and back, seamlessly and instantly crisscrossing international borders without detection. When sexually explicit images of children become actively traded, those victims necessarily will be implicated in hundreds of otherwise unrelated cases all over the country and across time. In this way, victims of the trade and circulation of child pornography are unique among crime victims. Because of the mechanics of the crime committed against them, they continually suffer harm caused by countless individuals all over the country and the world. As the Supreme Court first recognized in *New York v. Ferber*, 458 U.S. 747, 759 & n.10 (1982), child pornography permanently records the sexual abuse of the victims, and its continued existence and circulation causes continuing harm by haunting those children in future years.

Like all crime victims, victims of child pornography are entitled to full and timely restitution as provided by law, including restitution for losses caused by the collection and distribution of these images. In 2009, for the first time, a victim sought restitution, not from the individual who sexually

abused her and produced and shared the images, but from all those individuals who traded and collected those images.

Soon, federal prosecutors across the country were seeking restitution for the small handful of child pornography victims pursuing restitution in federal courts in possession, receipt and distribution cases. For the most part, prosecutors were successful in obtaining restitution for these victims. For example, for the victim known as Amy, prosecutors obtained 188 orders of restitution in 64 different federal districts from 2009 through 2013. For another victim known as Vicky, prosecutors obtained 470 orders of restitution in 73 different federal districts from 2009 to 2013.

Despite the Department's overall success in obtaining orders of restitution for these victims, there were some hard-fought losses along the way. In particular, some courts struggled to determine whether an individual defendant proximately caused a victim's losses. If a defendant was only one of thousands who harmed the victim, then some courts indicated that he could not be said to have caused her losses, because those losses would be essentially the same if that particular defendant had never committed the crime. On that logic, some courts simply denied the restitution requests. Others demanded a showing as to how much an individual defendant's crime incrementally increased the victim's losses, imposing a generally insurmountable evidentiary burden.

Among courts that awarded restitution, many grappled with how to determine how much the defendant should pay to the victim. Although most of the awards clustered in the range of $1,000 to $5,000, courts adopted many different methods to calculate the restitution amount. Some courts would divide the victim's restitution claim by the number of defendants convicted of offenses involving her image, others would average the awards to date, others would use percentages, and others would simply determine what they felt would be reasonable. There was no single methodology employed by all district courts.

These two issues were brought to the Supreme Court last term in *Paroline v. United States*, 134 S.Ct. 1710 (2014). In that case, the defendant had been convicted of possession of child pornography in 2009. Among the images he possessed were two of the victim known as Amy. Although the district court observed that "Amy was harmed by Paroline's possession of Amy's two pornographic images," it also found that there was no evidence

to "show the portion of these losses specifically caused by Paroline's possession of Amy's two images." As such, the court denied the restitution request. *United States v. Paroline*, 672 F.Supp.2d 781, 791-93 (E.D. Tex. 2009).

The case eventually arrived in the Supreme Court. After finding that the statute required proof of proximate causation for all the categories of losses referenced in the statute, the court summed up the problem this way:

> In this case … a showing of but-for causation cannot be made … From the victim's perspective, Paroline was just one of thousands of anonymous possessors. … [I]t 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. … Even without Paroline's offense, thousands would have viewed and would in the future view the victim's images, so it cannot be shown that her trauma and attendant losses would have been any different but for Paroline's offense.

Paroline, 134 S.Ct. at 1722-23 (internal citations omitted).

To resolve this dilemma, the court adopted the less demanding aggregate causation standard, noting that:

> alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy.

Id. at 1724. Therefore, the Court concluded that:

> 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 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.

Id. at 1727.

The Court then considered how district courts might determine the amount a given defendant should pay a victim in restitution. To provide guidance, the Court cited to a number of factors courts might consider, including "the number of past criminal defendants found to have contributed to the victim's general losses; ... 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." *Id.* at 1728.

There is substantial evidence that *Paroline* is helping victims today by substantially improving the Department's ability to obtain restitution orders on their behalf. In the ten months since *Paroline* was decided, the Department has obtained almost 160 restitution orders in nearly sixty federal districts. Since *Paroline*, we are not aware of any district court judge denying a restitution request in a child pornography possession, receipt or distribution case for insufficient proof of causation. The aggregate causation standard is easily understood and applied. Therefore, proving causation is no longer an obstacle to obtaining restitution in these child pornography cases. With courts able to easily dispatch with the question of whether restitution should be ordered, they can focus on applying the *Paroline* factors to determine how much should be ordered.

Although *Paroline* has significantly improved the Department's ability to obtain restitution in these types of child pornography cases, this is still an area where legislation is needed to improve our ability to help these victims. Current data tells us that there are over 8,500 children who have been identified in images of child pornography. Yet as of today, there are only fifteen victims seeking restitution in child pornography distribution, receipt, and possession cases in federal court. The Department believes that

the reason that so few of these victims are exercising their right to restitution is because the process of litigating claims in hundreds of cases around the country over the course of years is simply too burdensome. In addition, there is an apparent significant barrier to entry that victims of these types of child pornography offenses must overcome simply to get in the door. Of the fifteen victims seeking restitution, all but one first hired an attorney to manage the process. Many obtained psychological and economic experts, who prepared lengthy (and likely costly) reports, to help prepare their claims. Thus, victims face challenges with respect to both getting the process started and seeing it through.

We can do better. The Department urges Congress to create an alternative system to allow victims of the distribution and collection of child pornography to obtain some measure of compensation without having to endure litigation. Under this system, child pornography defendants would be ordered to pay a special assessment in addition to any restitution they may owe. The special assessment would go into a fund. Victims of these types of child pornography offenses could then choose whether to present their full restitution claims in court, as is currently done, or to obtain a one-time payment of administrative compensation. To obtain administrative compensation, victims would have to show only that they are a victim of this type of child pornography offense. Once that finding is made by a district court, the victim would receive a fixed amount of compensation. Victims who opt to litigate their restitution claim would be ineligible to obtain compensation from the fund. Victims who obtain compensation from the fund could later seek restitution for losses incurred since receiving compensation. This two-track process is meant to ameliorate the structural impediments that are preventing victims from coming forward, while preserving the option of obtaining full restitution for those who wish to do so.

We would welcome the opportunity to work with Congress on such a legislative approach. In the meantime, the Department has had an opportunity to review S. 295/H.R. 595, the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015. The Department thanks Congress for its attention on this issue.

The Department's view is that for any legislation to make a meaningful impact, it must address the structural barriers that are preventing a vast number of victims from obtaining any measure of compensation. We

urge Congress to consider an approach that would provide victims of child pornography offenses of this kind with a choice: use a simple method to obtain a fixed amount of compensation, or pursue restitution in individual cases under the standards set forth in the *Paroline* decision. The introduced legislation would amend 18 U.S.C. § 2259, the child pornography restitution statute, in a few ways. First, it would eliminate the proximate causation requirement from the statute, except with respect to the catch-all category of losses. As noted above, proving proximate causation has not been a problem since *Paroline* announced the aggregate causation standard for these cases, and prosecutors now routinely prove that a child pornography defendant caused a victim's harm.

Of greater concern, however, is that any legislation must adhere to the *Paroline* Court's instruction that a proximate cause requirement serves "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." 134 S.Ct. at 1719 (citation omitted). In fact, the Court regarded proximate cause as so elemental that the Court noted in dicta: "Even if § 2259 made no express reference to proximate causation, the Court might well hold that a showing of proximate cause was required. Proximate cause is a standard aspect of causation in criminal law and the law of torts. Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one." *Id.* at 1720. Thus, the introduced legislation's removal of the proximate causation element invites litigation without providing any attendant benefits.

The legislation also amends the definition of "full amount of the victim's losses" to include "losses suffered by the victim" from sexual activity committed "in preparation for or during the production of child pornography depicting the victim involved in the offense." To the extent that this would require child pornography collectors and distributors to be responsible for losses caused by the producer, this would be contrary to traditional notions about causation as it would require defendants to be liable for losses incurred before they committed their crimes, which they could not have factually caused, even under an aggregate causation theory. We note that in *Paroline*, the Supreme Court counseled that district courts begin their restitution calculations by determining the amount of loss suffered solely from the "continuing traffic" in the images. 134 S.Ct. at 1728. The Court went on to express serious reservations about holding a distributor or

collector of child pornography responsible for all of the victim's "general losses" caused by the activity, even suggesting that such an approach might run afoul of the Eighth Amendment. *Id.* at 1724-26. We are sensitive to the fact that it may be difficult in certain cases to disaggregate losses that are attributable to the production of the material from losses that are attributable to the trade of the material. But we do not see that evidentiary challenge as being insurmountable, nor as being so great as to depart from the Supreme Court's guidance concerning the scope of restitution. Again, the inclusion of this provision poses a litigation risk, which would further delay restitution making its way to the victims.

S. 295/H.R. 595 then offers two procedures, one that applies in cases where the victim was harmed by one defendant, and one that applies in cases where the victim was harmed by multiple defendants. The Department proposes dividing the cases differently. Our experience tells us that the challenge arises not from the number of defendants, but whether or not they are joined in a single case. A conspiracy to produce child pornography may involve ten defendants, but they could be prosecuted jointly. In such a situation, traditional restitution procedures can easily be applied to divide liability among the multiple defendants. Where the difficulty arises is when defendants are prosecuted in otherwise unrelated cases, at different times, in different districts. That situation is unique to cases involving the possession, receipt and distribution of child pornography. Therefore, to the extent legislation is going to propose different procedures for different types of cases, we suggest there be one for production cases and one for these types of cases.

In cases where the victim is harmed by more than one defendant, the legislation also provides guidance on how much a defendant should pay the victim. The bill offers two alternatives: The court can order the defendant to pay the full amount of the victim's losses, or some apportioned amount that cannot go below certain floors. With respect to apportionment, the Department agrees that it would be helpful to provide minimum restitution amounts. The Department also agrees that a sliding scale should be used so that different minimum amounts apply depending on the nature of the offense.

For defendants who are ordered to pay the full amount of the victim's losses, the legislation provides that each such defendant "shall be jointly and severally liable to the victim with all other defendants against whom an

order of restitution is issued … in favor of such victim." On the surface, this may seem appealing because it would allow a victim to collect all her restitution quickly from a defendant with sufficient financial resources, leaving all the defendants the burden of sorting out contribution among themselves. However, because restitution operates in the context of the criminal justice system, it must comport with constitutional principles about sentencing. For its part, the *Paroline* Court was deeply skeptical about holding a single defendant liable for having caused all of the victim's losses. 134 S.Ct. at 1724-26. At best, according to the Court, a right of contribution among defendants "*might* mitigate *to some degree* the concerns [such an] approach presents." *Id.* at 1725 (emphasis added). As the Court said, holding a defendant liable for the full amount of a victim's losses without a legal or practical means for seeking contribution is an "approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment." *Id.* at 1726.

The Court's reference to a practical means of obtaining restitution is important. For the right of contribution to alleviate the constitutional concerns noted by the Supreme Court, it must be practicable and effective. While this legislation creates a right of contribution, it is unclear how it would work in practice. How can one court order a defendant to be jointly and severally liable with another defendant who is going to commit his crime years from now in a different state? Furthermore, any defendant who wants to seek contribution must do so without a right to an attorney and, most likely, while imprisoned. Identifying possible contributors will be challenging because the federal criminal justice system is decentralized, and does not track information based on the victim's name. If very few defendants are ordered to pay the full amount of the victim's losses, then there will be a negligible contribution pool. All these issues may be further aggravated by the impact of the proposed legislation's five-year statute of limitations on a defendant's ability to seek contribution.

Without a solution to these practical issues, we caution against implementing a regime that would hold a defendant accountable in a criminal sentencing proceeding for losses that he did not cause, and that he could not reallocate to a vast class of other, unknown defendants in other, unrelated cases through contribution actions. Creating a scheme that would likely generate protracted and difficult litigation would not serve the intent of Congress to provide victims with prompt and certain recovery. It is also unnecessary. Joint and several liability in a criminal case is not needed to

reach all the assets a defendant may have: victims could always maximize their recovery by initiating civil suits against defendants.

For these reasons, we recommend Congress consider an approach along the lines that the Department has suggested.

Closing

I appreciate the opportunity to share information with you about some of the challenges that the Department sees concerning restitution in child pornography cases and the efforts we have undertaken in this area. I look forward to continuing to work with Congress as it crafts practical, meaningful legislation that is consistent with Supreme Court precedent and that ensures that victims are able to obtain the restitution they deserve with some degree of certainty. Thank you for holding this important hearing and I look forward to answering any questions the Committee may have.

Mr. SENSENBRENNER. The Chair hears bells in the distance, which means that we have to go to vote. Before recessing the hearing, the Chair asks unanimous consent to include in the record a statement by Linda Krieg, the acting CEO of the National Center for Missing and Exploited Children, on this subject.

Without objection, so ordered.

[The information referred to follows:]

Statement by
Linda Krieg, Acting Chief Executive Officer
The National Center for Missing and Exploited Children

Hearing on
"Child Exploitation Restitution Following the Paroline v. United States Decision"

March 19, 2015

Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
Judiciary Committee
U.S. House of Representatives

Chairman Sensenbrenner, Ranking Member Jackson Lee and Members of the Subcommittee, I am pleased to submit this written statement on behalf of The National Center for Missing and Exploited Children.

As Acting Chief Executive Officer of The National Center for Missing and Exploited Children ("NCMEC"), we are reminded daily of the harmful and devastating impact of child sexual exploitation. We commend you for holding this hearing to examine the critical issue of restitution for child pornography victims.

NCMEC was created as a private, non-profit organization in 1984 and designated by Congress to serve as the national clearinghouse on issues relating to missing and exploited children. NCMEC provides services to families, private industry, law enforcement, victims, and the general public to assist in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC performs 22 functions, several of which relate to assisting victims of child pornography.

NCMEC has multiple programs to assist law enforcement, families, child victims, and the professionals who serve them on cases of sexually exploited children. Our Exploited Children Division has two core programs to facilitate the reporting of child sexual abuse content and help identify current child victims and prevent future victimization—the CyberTipline® and the Child Victim Identification Program® ("CVIP").

CyberTipline

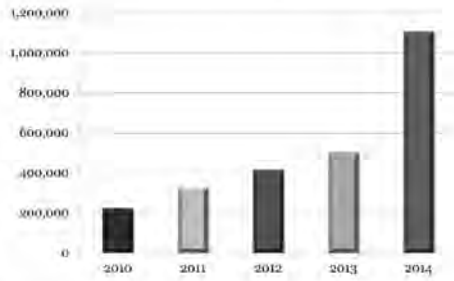
NCMEC's CyberTipline is the national mechanism for members of the public and electronic service providers to report suspected child sexual exploitation. In the 16 years since the CyberTipline was created, more than four million reports of suspected child sexual exploitation

have been made to the CyberTipline in eight different categories, including the possession, manufacture and distribution of child pornography.

The reports are reviewed by NCMEC staff who examine the content, use publicly-available resources to add related information, and then make the reports available to law enforcement in appropriate jurisdictions for potential review and investigation. Reports are triaged continuously to ensure that reports of children who may be in imminent danger get first priority.

The number of reports received through the CyberTipline continues to increase exponentially each year. In 2014, the CyberTipline received over 1.1 million reports—double the number received the year before—and, in the first two and a half months of 2015, the CyberTipline has already received more than 800,000 reports.

Volume of CyberTipline Reports



One reason for this dramatic increase is that child pornography is an international crime and there is a worldwide proliferation of child sexual abuse images and videos being sent via the internet between offenders across the globe. Once distributed in this manner, it is impossible to eradicate all copies.

Child Victim Identification Program (CVIP)

NCMEC's CVIP serves as the central U.S. repository for information related to child victims depicted in sexually exploitive images and videos. Its dual mission is to: (1) provide information relevant to child pornography investigations; and (2) assist in the identification of child victims depicted in the images. CVIP staff use NCMEC's Child Recognition and Identification System ("CRIS") to review copies of child sexual abuse images and videos taken into custody by law enforcement and submitted to NCMEC to determine which image or video files include child

victims previously identified by law enforcement.[1] If it appears a child in an image or video was previously identified by law enforcement, CRIS generates a Child Identification Report that includes information on the series[2] and contact information for the law enforcement agency that originally identified the child. Importantly, CVIP staff can also provide law enforcement with information on images and videos that depict children who remain unidentified.

Since CVIP was established in 2002, NCMEC has reviewed more than 138 million child sexual abuse images and videos at the request of law enforcement, and CRIS now contains information on over 8,600 child victims who have been identified by law enforcement. NCMEC continues to work with law enforcement on cases involving the thousands of child victims who have yet to be identified and/or recovered, and there are new victims every day.

The number of images forwarded to CVIP for review continues to increase dramatically. In 2014, CVIP staff processed in excess of 4,612 requests from law enforcement comprising more than 28 million images and videos. There was an 18 percent increase in files reviewed by CVIP between 2013 and 2014; and, last month alone, CVIP staff processed nearly 3.3 million child sexual abuse images and videos for review.

Of particular concern are actively traded series of child abuse images. Actively traded series comprise a group of sexually abusive photos of one or more children together that NCMEC has seen in five or more CyberTipline reports and/or CVIP case review requests from law enforcement.

Through NCMEC's work on these series, alarming statistics have emerged. For example, NCMEC is aware that some series have been circulated hundreds of thousands of times—this means that images and videos depicting this child's abuse are being sent repeatedly to offenders around the world. Additionally, NCMEC has also obtained information concerning the relationship of the abuser to the child victim in actively traded series. This information demonstrates that the majority of the abuse is committed by an individual known to the child victim. Of the child victims who have been identified by law enforcement, 77% were victimized by an adult they knew and/or trusted.

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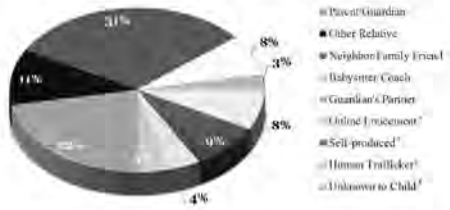
[1] NCMEC knows which children are identified and when their images are being traded and/or viewed by offenders only if we are informed by law enforcement. NCMEC has no independent means to make an assessment of how widely a child pornography series is seen or traded.

[2] Offenders often name a collection or "series" of child sexual abuse images and/or videos taken of a single or multiple child victims over a period of time. A series typically includes abusive and non-abusive images of the child victim(s).

Actively Traded: Relationship of Exploiter to Child[1]



Further, of the identified victims whose images are actively traded, about half of the victims are boys (41%) and half are girls (59%). Sixty-four percent of these series depict prepubescent children; an additional 9% depict infants and toddlers; and 27% depict pubescent children.[3] In addition, a review of the actively traded series reveals the kind of sexual abuse most often depicted in the images and videos including oral copulation (44%), anal and/or vaginal penetration (52%), manual stimulation (60%), bondage and/or sado-masochism (11%), and urination and/or defecation (11%).[4]

Growth in Collection and Trading of Images

NCMEC's experience indicates that the number of images being collected and traded by offenders worldwide continues to expand exponentially, and these images include graphic and violent abuse and feature young children, including infants. Despite criminal and civil efforts to stem its tide, child pornography remains a pervasive and growing problem.

In recent years, the demand for and trade of child sexual abuse images has been increasingly facilitated by technological advances, including the increased use of digital recording devices, more storage capacity, and faster Internet speeds. The ready availability of digital cameras (with no need for an outside photo developer), recording devices, and smart phones has facilitated the creation of new child sexual abuse images and videos, while increased storage capacity and faster Internet speeds have permitted offenders to view and share larger numbers of photos and

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3 The term "prepubescent" is used to describe any child who does not show signs of sexual maturation whereas the term "pubescent" is used to describe children who show signs of sexual maturation – often these are middle or high school-age children.

4 Data reflects actively traded, identified series as classified by NCMEC as of December 31, 2014. The percentages do not sum to 100 because some series contain images depicting content in multiple categories.

videos—with some offenders having collections containing tens of thousands of images and videos. In particular, the growing popularity of "peer-to-peer" file sharing, which permits direct, anonymous file-sharing between two or more users without cost to either user, has made distribution a common aspect of child pornography offenses. Collectively, these technological changes have facilitated offenders' ability to create, possess, and distribute ever-larger volumes of child pornography.

Child pornography is a market-driven crime that always demands the production of new content, thus encouraging continued production of images by the direct exploitation and abuse of vulnerable children. The high demand for child pornography leads individuals to sexually abuse children and "commission" the abuse for profit or status among other offenders. Child pornography offenders span all geographic, professional, educational, and income levels.

As these images continuously proliferate and are traded online, child pornography victims suffer a perpetual invasion of their privacy and re-victimization as new offenders seek personal gratification from viewing the child's rape and sexual abuse. It is simply impossible to ensure the removal of images and videos of the victim's abuse from an unknown offender's personal collection and prevent their continued distribution on the Internet. Thus, once an image of a child's sexual abuse is placed online, that image remains and can be viewed and traded perpetually.

Offenders who possess child pornography images perpetuate the ongoing harm to child victims. Indeed, each notification to a child victim that a new offender has been arrested for possessing images of his or her abuse further exacerbates a victim's psychological injuries. NCMEC believes it is critical to ensure prosecutors and law enforcement have adequate tools to combat those who engage in the online sexual exploitation of children for their personal gratification. It is crucial that children whose sexual abuse images are distributed online can receive adequate recovery for the harm they continue to suffer.

Every individual who views, possesses, creates or distributes child pornography contributes to the grave harm suffered by child victims. Restitution can never undo the damage these victims have suffered, but it can provide necessary funds for them to receive therapy and compensate them for the entirety of their losses. The full cost of the harm suffered as a result of the global trafficking of child sexual abuse images should be on the shoulders of the guilty perpetrators and not the innocent victims.

Thank you for the opportunity to provide you and the Committee with our views on the impact of this horrible crime. We look forward to continuing to work with you, the Committee and other Members of Congress on ways to ensure restitution is available for victims of child exploitation.

Mr. SENSENBRENNER. Pursuant to the previous order, the Subcommittee stands in recess. Members are advised to come back as soon as the last vote in this series is taken.

[Recess.]

Mr. SENSENBRENNER. The Subcommittee will be in order.

Professor Cassell?

TESTIMONY OF THE HONORABLE PAUL G. CASSELL, RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW, S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

Mr. CASSELL. Thank you. Mr. Chairman, and distinguished Members of the Subcommittee, I am pleased to be here today to testify in support of legislation to expand restitution for child pornography victims.

As the Subcommittee is aware, last April, the Supreme Court handed down its decision in *Paroline v. United States*. The case involved a young victim of Federal child pornography crimes, Amy. She had a documented restitution claim for significant psychological counseling costs, costs that were attributable to the crimes of literally thousands of criminals scattered across the country.

The Supreme Court's 5-to-4 decision interpreted a restitution statute enacted by Congress and held that an order of restitution is only appropriate to the extent that it reflects the defendant's relative role in the causal process underlying the victim's financial losses.

Exactly what this holding means is not completely clear, and lower courts are currently struggling to implement the Court's holding. But even the Supreme Court itself seemed to recognize that Congress would need to amend the restitution statute. Chief Justice Roberts, joined by Justices Scalia and Thomas, noted that the majority opinion would result in tiny restitution awards to Amy, and that Congress should have the chance to "fix it."

Justice Sotomayor, too, called for a congressional response, explaining that, in the end, it is Congress that will have the final say. She specifically suggested that Congress might amend the statute, for example, to include the term "aggregate causation" or to set minimum restitution amounts.

Following up on the specific suggestions in the dissenting opinions, the proposed Amy and Vicky act would specifically mandate the use of an aggregate causation standard in making restitution determinations. The Amy and Vicky act would also simplify apportionment issues by establishing fixed minimum restitution amounts, $25,000 for possession crimes, $150,000 for distribution crimes, and $250,000 for production crimes.

It is important to note that none of these amounts exceeds the current maximum fine amount, $250,000, and it is hard to understand how ordering restitution that goes to victims in amounts equal to or less than what can already go to the government could be found objectionable by anyone.

The view that Congress should step in and amend the child pornography restitution statute appears to be widely shared. On today's panel, all four of us have provided testimony calling for changes to the statute. Mr. Weeks and I both support the Amy and

Vicky act. The Justice Department, too, has advocated setting minimum restitution amounts, calling such a change to be helpful. And Professor Turley supports amendments to provide for minimum restitution awards for those who produce or distribute child pornography.

This broad support for changes to the statute is also reflected in the resounding 98-to-nothing vote that the Senate gave in passing the act, as well as 43 endorsements from attorneys general.

In my written testimony, I explained at length how the act is consistent with well-settled principles of tort law, which hold that intentional wrongdoers, like the criminals involved here, must shoulder the burden of paying for harms to which their wrongful actions contribute.

But rather than end with a law professor's explication of tort theory, I want to conclude my remarks with the words of a courageous young woman whom I have had the great privilege to represent in courts across the country, including the United States Supreme Court.

My client Amy is seated in the hearing room today, along with two other victims of child pornography crimes, whom I will refer to has Alice and Aurora. They are available to meet with the Committee or the Committee staff after today's hearing.

But each of them have asked me to convey to the Subcommittee the endless trauma that they endure. As Amy explained to me, "Imagine that you were abused, raped, and hurt, and this is something that other people want. They enjoy it, and it is you. It is your life and it is your pain that they are enjoying. And it never stops, and you are helpless to do anything ever to stop it. That is horror."

This Subcommittee can never go back and erase the horrors that Amy and others like her have already suffered. But moving forward, it can put in place a workable statute that would provide restitution from convicted criminals who have contributed to their pain.

The House should hear Amy's plea and join the Senate in passing the Amy and Vicky act. Victims of child pornography crimes deserve nothing less than full and speedy restitution.

Thank you.

[The prepared statement of Mr. Cassell follows:]

STATEMENT

OF

PAUL G. CASSELL

RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW

S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME

ON

THE NEED FOR IMPROVING RESTITUTION FOR VICTIMS OF

CHILD PORNOGRAPHY CRIMES AFTER *PAROLINE V. UNITED STATES*

ON

MARCH 19, 2015

WASHINGTON, D.C.

Mr. Chairman and Distinguished Members of the Subcommittee:

I am pleased to submit testimony in support of expanded restitution for victims of child pornography crimes, particularly as provided in Senate Bill 295.

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 on this issue with its ruling in *Paroline v. United States.*[1] 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."[2] Exactly what that holding means is not immediately clear, and lower courts are currently struggling to interpret the Supreme Court's ruling.

In my testimony today, I question the *Paroline* holding and particularly its failure to offer any real guidance on exactly what amount of restitution district court judges should be awarding victims in child pornography cases. Members of Congress, too, have doubted the wisdom of the decision, introducing a bill – the Amy and Vicky Act or "AVA" for short – with strong bi-partisan support. The AVA would essentially void the *Paroline* decision by reworking the restitution

[1] 134 S.Ct. 1710 (2014).
[2] *Id.* at 17267.

statute. The AVA provides certain set amounts of restitution for particular child pornography crimes. This approach is a proper because it will provide clarity to district court judges as well as assuring full restitution for child pornography victims. It is my hope that the House will adopt this approach. It may be relevant to note that the Senate has seen the wisdom of such an approach, as it recently passed the AVA by a resounding 98-0 vote.

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

Part II 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 – as Amy argued to the Supreme Court.

Part III then recounts the Supreme Court's 5-4 decision in *Paroline*, noting that several justices wrote opinions calling for additional congressional action to provide both clarity and full compensation to crime victims.

Part IV critiques the *Paroline* decision. I will argue, contrary to the views of the Court's narrow majority, that child pornography restitution awards should not be limited to a defendant's "relative role in the causal process" of harming victims. To the contrary, this interpretation thwarts Congress' clear aim of providing generous restitution to child pornography victims.

Part V discusses the Amy and Vicky Act, which would simplify the restitution process. By establishing set restitution amounts that district courts would award in child pornography cases, the legislation would return rationality to the restitution system, reduce the burden on trial courts, and most important assure victims of child pornography crimes that they will receive the full restitution that they desperately need. Congress should rapidly enact, and the President should sign, such legislation.

Finally, Part VI discusses some other complementary changes that Congress could make to other bodies of law to help protect crime victims. First, Congress should provide appropriations for legal clinics to help crime victims protect their rights in court. Second, Congress should create a supplemental compensation fund for victims of child pornography crimes. Third, Congress should amend the Crime Victims' Rights Act to assure full appellate review of victims' claims. And fourth, Congress should pass a constitutional amendment protecting victims' rights.

Before turning the substance of my testimony, I wanted to briefly provide the Subcommittee with some background about my qualifications. I am the Ronald N. Boyce Presidential Professor of Criminal Law at the University of Utah S.J. Quinney College of Law and a former U.S. District Court Judge from the District of Utah (2002 to 2007). I am an author of *Victims in Criminal Procedure* (North Carolina Academic Press 2010) (co-author with Doug Beloof and Stephen Twist). I have been working on crime victims' right issues for more than twenty years, frequently representing crime victims in court on a pro bono basis. I have represented "Amy" and "Vicky" in numerous court cases around the country, including arguing on behalf of Amy through the Appellate Legal Clinic at the University of Utah S.J. Quinney College of Law in the United States Supreme Court in the *Paroline* case.[3]

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 whom I will refer to here

[3] My co-counsel before the Supreme Court was James Marsh, an experienced crime victim's attorney and founder of the Children's Law Center. Marsh is currently the founding partner of the Marsh Law Firm PLLC (New York, NY). Since 2008, he has represented Amy in her quest to obtain restitution and provided invaluable assistance in helping me prepare this testimony.

pseudonymously as "Amy."[4] When she was eight and nine years old, Amy was repeatedly raped by her uncle in order to produce child pornography.[5] 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 pornography[6] 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. Sadly, eight years later, Amy's condition drastically deteriorated when she learned that her child sex abuse images were 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." "Amy's awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her." As Amy explained in her own, personal victim impact statement, "Every 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."

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[4] Unless otherwise attributed, the facts in this Part are taken from Amy's brief in *Paroline* to the Supreme Court. *See* Respondent Amy's Br. on the Merits, *Paroline v. U.S.*, No. 12-8561 (Nov. 13, 2013) (hereinafter "Amy's Merits Br.").

[5] While I will use in this testimony the legal term "child pornography," 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 Michigan Univ. Press 2015); Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (2001).

[6] *See* 18 U.S.C. § 2251(a).

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, he pleaded guilty to one count of possession of material involving the sexual exploitation of children.[7]

The FBI then sent the images to the National Center for Missing and Exploited Children (NCMEC). Its analysis revealed that Amy was one of the children victimized in these 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 these 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 24 months in prison. During a later adversarial restitution hearing, Amy's counsel and the Government defended her full restitution request against Paroline's attacks.

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[7] *See* 18 U.S.C. § 2252(a)(4)(B), made a ten-year felony by 18 U.S.C. § 2252(b)(2).

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.[8] 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. 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],"[9] it nonetheless refused to award her any restitution because she could not prove exactly what losses proximately resulted from Paroline's crime. The district court acknowledged that its interpretation of the child pornography restitution statute rendered it "largely unworkable."[10]

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).[11] Acting quickly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting.[12]

Amy then petitioned for rehearing. On March 22, 2011, a unanimous panel of the Fifth Circuit 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.[13] Paroline successfully sought rehearing en banc.

On November 19, 2012, the Fifth Circuit en banc held 10 to 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

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[8] *See United States v. Paroline*, 672 F.Supp.2d 781, 784-85 (E.D. Tex. 2009) (*discussing* 2259(b)(1) & (b)(4)).
[9] 672 F.Supp.2d at 792.
[10] *Id.* at 793 n.12.
[11] 18 U.S.C. 3771(d)(3).
[12] *In re Amy*, 591 F.3d 792 (5th Cir. 2009).
[13] *In re Amy*, 636 F.3d 190 (5th Cir. 2011).

individual defendant's crime in order to secure restitution.[14] The Fifth Circuit concluded section 2259 creates a system of joint and several liability which "applies well in these circumstances, where victims like Amy are harmed by defendants who have collectively caused her a single harm." After resolving the statutory construction issue in Amy's favor, the Fifth Circuit remanded, directing that "the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses'. . . ."[15]

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

II. AMY'S ARGUMENTS TO THE SUPREME COURT.

In her briefing to the Supreme Court,[16] 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.[17] Amy urged the Court to read section 2259 to achieve Congress's explicit compensatory aims, not to thwart them. 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 is the proximate result of an individual defendant's crime. Instead, victims like Amy must first establish that they suffered "harm" from a defendant's child pornography crime.[18] 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.[19] Amy pointed out that the district court had made a factual finding that Paroline's possession of her images harmed Amy.[20]

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[14] *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012).
[15] *Id.* at 774.
[16] *See* Respondent Amy's Br. on the Merits, *Paroline v. U.S.*, No. 12-8561 (Nov. 13, 2013).
[17] 18 U.S.C. § 2259(b)(1).
[18] *See* 18 U.S.C. § 2259(c).
[19] 18 U.S.C. § 2259(c) & (b)(1).
[20] Amy's Merits Br. at 15.

Amy explained that under the Fifth Circuit's interpretation, the victim establishes the "full amount" of her losses from child pornography. In the district court, for example, Amy had provided detailed, expert evidence of the projected costs for psychological counseling she requires due to being a victim of child pornography. These costs are the losses Congress commanded must be awarded as restitution, Amy argued. Amy accordingly urged the Court to affirm the Fifth Circuit decision, thereby making Paroline jointly and severally liable for her full losses along with other defendants convicted in similar cases.[21]

Amy further argued that the Fifth Circuit's "practical interpretation" of section 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. Amy contended that Congress wisely did the same thing in enacting section 2259. [22]

Amy also pointed to an important background principle that, in her view, should be in play when interpreting section 2259. Amy emphasized that child pornography possession was not a "victimless" crime, emphasizing that Congress had 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."[23] 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. . . . It is the fear of

[21] *Id.* at 38-51.
[22] *Id.* at 35-37.
[23] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 623, 624.

exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions."[24]

Amy also pointed to "the vast machinery" that generates child pornography harms.[25] In enacting laws criminalizing all aspects of child pornography, Congress realized that it had to address every stage of this sordid 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.[26] 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."[27] Indeed, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties" on all persons in the distribution chain.[28]

Amy also noted that Congress had previously recognized that child pornography possessors are inextricably linked to child pornography producers. Congressional findings concerning child pornography crimes explain that "prohibiting the possession and viewing of child pornography will . . . [help] to eliminate the market for the sexual exploitative use of children. . . ."[29] Amy cited a recent Justice Department analysis reported that "the growing and thriving market for child pornographic images is responsible for fresh child sexual abuse—

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[24] *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

[25] Amy's Merit Br. at 12.

[26] *Ferber*, 458 U.S. at 759-60.

[27] *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990).

[28] *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).

[29] Pub. L. No. 104-208, §121(12), 110 Stat. 3009-27 (1996); *see also* 132 Cong. Rec. 33781 (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.").

because the high demand for child pornography drives some individuals to sexually abuse children and some to 'commission' the abuse for profit or status."[30]

Amy also explained 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. Peer-to-peer file sharing (commonly called "P2P") is "widely used to download child pornography."[31] 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."[32] 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."[33]

In the case before the Supreme Court, Paroline downloaded several hundred images of toddlers and other children being sexually abused—including two depicting Amy.[34] Paroline was not the only one to do so. The National Center for Missing and Exploited Children had previously found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998 and described the content of these images as "extremely graphic."[35] 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.[36]

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[30] Amy Merit's Br. at 11 (*citing* DOJ Report to Congress, supra note 5, at 17).

[31] U.S. Sentencing Commission, Report to the Congress: Federal Child Pornography Offenses 51 (2012) (hereinafter "Sentencing Comm'n Report to Congress").

[32] *Id.* at 51-52.

[33] *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

[34] *Paroline v. United States*, No. 12-8561, J.A. at 146.

[35] *Id.* at 352.

[36] Amy's Merits Br. at 12-13.

Unfortunately for Amy, the Justice Department did not support her position in the Supreme Court. Instead, it appears that political appointees in the Department made the decision to reverse course from the position advanced by career prosecutors in the trial court – i.e., reverse the position that Amy was entitled to full restitution. As a result, before the Supreme Court, the Department took the position that Amy was only entitled to some (unspecified) partial award of restitution.[37] The Department refused to say in its pleadings how much Amy should receive in restitution.

Paroline took the position that Amy was entitled to no restitution at all.

III. THE SUPREME COURT'S DECISION.

On April 23, 2014, the Court announced its decision in *Paroline*.[38] Justice Kennedy wrote the central 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 section 2259 imposed 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 child pornography victims with restitution for the "full amount" of their losses and then defines the full amount as including:

> any 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.[39]

Justice Kennedy noted that the existence of "proximate cause" language in the statute made "the interpretive task is easier" because that language could be read as applying not just in subsection

[37] *See* Br. for the U.S. at 42-49, *Paroline v. United States*, No. 12-8561.
[38] *Paroline v. United States,* 134 S. Ct. 1710, 1721 (2014).
[39] 18 U.S.C. § 2259(b)(3).

(F) where the language appears, but elsewhere as well.[40] 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."[41] He reasoned "[r]estitution is therefore proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses."[42]

Justice Kennedy next turned to the question of how apply the causation requirements that existed under the statute. He concluded 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."[43] Justice Kennedy called these losses "general losses" and explained that the difficult question 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."[44]

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, was that a showing of but-for causation could not 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."[45]

Justice Kennedy next turned to the causation test identified in the *Restatement of Torts* for "[m]ultiple sufficient causal sets" causing an injury – as when three persons lean on a car and the weight of all three is necessary to propel the car off of a cliff.[46] The Justice thought that such

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[40] 134 S. Ct. at 1720.
[41] *Id.* at 1721.
[42] *Id.* at 1722.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1723.
[46] *Id.* at 1724.

tests "though salutary when applied in a judicious manner, also can be taken too far."[47] He concluded that applying the test here would take restitution 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."[48]

For all these reasons, Justice Kennedy rejected Amy's argument that an individual possessor should be held responsible for all of a victim's losses. But Justice Kennedy also rejected the "anomalous" position that each defendant would be responsible for no restitution at all.[49] Instead, Justice Kennedy 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 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."[50] 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.[51]

Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented from the majority's ruling. The Chief Justice noted the difficulty of deciding what share of Amy's losses could be attributed to any particular defendant, but added that "[r]egrettably, Congress provided

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[47] *Id.*
[48] *Id.* at 1725.
[49] *Id.* at 1724.
[50] *Id.* at 1727.
[51] *Id.* at 1729.

no mechanism for answering that question."[52] He examined the majority opinion, concluding that it would result in tiny awards for Amy, which would mean "that Amy will be stuck litigating for years to come."[53] He acknowledged that majority opinion had cautioned against "trivial restitution orders," but thought that "it is hard to see how a court fairly assessing this defendant's relative contribution could do anything else."[54] 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."[55]

Justice Sotomayor also dissented, essentially agreeing with Amy on every point. Justice Sotomayor began by arguing that section 2259 created 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."[56] 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 for the 'full amount of the victim's losses.'"[57]

Justice Sotomayor, too, concluded with a call for Congressional action:

> 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

[52] *Id.* at 1732 (Roberts, C.J., dissenting).
[53] *Id.* at 1734 (Roberts, C.J., dissenting).
[54] *Id.* (Roberts, C.J., dissenting).
[55] *Id.* at 1734-35 (Roberts, C.J., dissenting).
[56] *Id.* at 1737 (Sotomayor, J., dissenting).
[57] *Id.* at 1739 (Sotomayor, J., dissenting).

> 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.[58]

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

While Justice Kennedy's opinion could be critiqued on a number of different issues, it is most flawed on two points. First, as a matter of conventional legal theory, the Court fundamentally misunderstands 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 should Amy receive. 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 Section 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. In service of the goal of providing full restitution to child pornography victims, section 2259 simply adopted a widely-recognized principle of contributing causation.

Justice Kennedy failed to heed a well-recognized principle for construing statutes. In previous decisions, the Court had repeatedly refused to construe statutes in ways that would "frustrate Congress's manifest purpose."[59] 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."[60] Section 2259 thus interlocks with

[58] *Id.* at 1744 (Sotomayor, J., dissenting).
[59] *See, e.g.*, *United States v. Hayes*, 555 U.S. 415, 427 (2009).
[60] *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999).

other laws addressing "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms."[61]

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."[62] 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."[63]

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 conventionally has looked to whether a wrongdoer (i.e., a tortfeasor) has contributed in some way to a larger loss. For example, the American Law Institute itself has identified contributing cause as a general principle of tort law sufficiently well-established to be included in its restatement. Under American tort law, as explicated by the American Law Institutes *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."[64] This approach recognizes that for purposes of tort law it is never possible 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 fuel to burn, lack of a downpour, and a fire department being too far away to immediately respond.[65] In determining tort compensation, the proper question is whether

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[61] *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).
[62] *Paroline*, 134S.Ct. at 1729.
[63] *Id.*
[64] ALI, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27 cmt. f, at 381 (hereinafter cited as Restatement).
[65] *See Restatement* § 27 cmt. f, Reporters' Note at 391 (collecting authorities discussing this point).

the defendant's act is part of a "causal set" producing harm. Before the Supreme Court, Paroline effectively conceded he was part of such a set. Paroline 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."[66] 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 section 2259) underlies the contributing cause approach. The *Restatement* explains that, for example, "[s]ince the first asbestos case in which a plaintiff was successful, courts have allowed plaintiffs to recover from all defendants to whose asbestos products the plaintiff was exposed."[67] 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."[68] 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

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[66] *Paroline v. U.S.*, Petitioner's Br. at 50.

[67] *Restatement* § 27 cmt. g, Reporters' Note at 392 (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)).

[68] *Restatement* § 27 cmt. g, Reporters' Note 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.")).

the other tortfeasor. . . .'"[69] In other words, traditionally in American tort law, an "independent-sufficiency requirement is not followed by the courts. . . . [Instead], 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."[70]

Justice Kennedy seemingly acknowledged that these tort law principles supported Amy's position, but thought that the principles "can be taken too far."[71] In Justice Kennedy 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."[72]

Justice Kennedy overlooked the most fundamental reason for reading 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 gave priority to ensuring compensation for child pornography victims over protecting the pocketbooks of their abusers.

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[69] *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205, 212 (5th Cir. 1951) (*quoting American Jurisprudence*)); *see also Northrup 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.").

[70] Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1792 (1985) (discussing various cases).

[71] *Paroline*, 134 S.Ct. at 1725.

[72] *Id.*

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. . . ."[73] 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."[74] Legal scholars Prosser and Keeton agree that "[f]or an intended injury the law is astute to discover even very remote causation."[75] 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."[76]

In construing section 2259 as a tort-like statute, the applicable principles come from intentional torts, not negligent acts. Congress crafted section 2259 by copying language directly from the restitution statutes for sexual assault and domestic violence.[77] 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,[78] selling children,[79] and distribution, receipt, and possession of child pornography.[80] These crimes are all

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

[74] Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 547-48 (1983) (Marshall, J., dissenting) (citations omitted).

[75] *Prosser & Keeton*, *supra* note 73, at 37 n.27 (internal quotation omitted).

[76] *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 33 (2010) (hereinafter "*Restatement (Third): Harms*").

[77] *See* 18 U.S.C. §§ 2248 & 2264.

[78] 18 U.S.C. § 2251.

[79] 18 U.S.C. § 2251A.

[80] 18 U.S.C. § 2252 & 2252A.

felonies containing stringent *mens rea* requirements that a defendant must have acted (at least) "knowingly."[81] These child pornography *crimes* are thus like intentional torts, including well-established invasion of privacy torts.[82] Accordingly, construing section 2259 as extending liability more broadly for child pornography crimes than standard proximate cause principles would for non-intentional acts would have been 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."[83] 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). . . ."[84] 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."[85]

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."[86] Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each "liable for the whole injury." Amy is the 21st century victim of these hypothetical attackers. She is "set upon" by digital "ruffians" who are all harming her. Even if

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[81] *See, e.g.*, 18 U.S.C.§ 2252(a)(4)(B) (forbidding "knowingly" possessing child pornography).

[82] *See, e.g., Restatement (Second) of Torts* § 652B (1977) (intentional invasion of seclusion); *id.* §652D (intentional invasion of privacy); *Restatement (Third): Harms* § 46 (intentional infliction of emotional distress).

[83] *Restatement (Third) of Torts: Apportionment of Liability* § 12 at 113.

[84] *Id.* at § 12, Reporters' Note cmt. b, at 111.

[85] *Id.*

[86] 2 Fowler Harper & Fleming James, *The Law of Torts* 1124 (1956).

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 section 2259 will no doubt be applied to the almost word-for-word identical Section 2248.[87] Enacted as part of the Violence Against Women Act on the same day as section 2259, section 2248 governs restitution for sexual assaults occurring within federal jurisdiction. The provision thus covers federal crimes involving 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 will be 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 would invite a "tortfest" because each man could reduce his restitution liability by encouraging other men to join in and rape the victim. Such an approach would be morally reprehensible. Moreover, what if law enforcement is able to apprehend only one of the five rapists? On *Paroline*'s apportionment theory, the victim would only receive restitution for 20% 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 command 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

[87] 18 U.S.C § 2248.

each."[88] 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."[89] As a joint tortfeasor, Paroline would then be liable to pay for "the entire harm," or, as section 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.[90] 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.[91] Quite perversely, Justice Kennedy deviated from that rule only because Amy had suffered large losses.

The overriding goal for joint and several liability is compensating innocent victims, not spreading losses evenly across culpable defendants. In enacting section 2259, Congress 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] does not bear this risk."[92] 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

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[88] Prosser & Keeton, *supra* note 73, at 346.
[89] 1 Harper & James, *supra* note 86, at 699.
[90] 134 S.Ct. at 1726.
[91] *Restatement (Third): Harms*, supra note 76, at § 31.
[92] *Restatement (Third): Apportionment*, supra note 83, § A18 cmt. a.

restitution awards in approximately 180 cases[93] and has now recovered slightly more than 40% of the full amount of her losses. Yet more than 75% of her collections have come from just a single defendant with substantial assets.[94] If Amy were remitted to piecemeal collection of tiny fractional shares of restitution, she would likely face decades of litigation that might never lead to full recovery.

Moreover, Justice Kennedy should have recognized that an unhappy wealthy criminal would be able to seek contribution from other solvent offenders. Attempting to deflect this sensible possibility, Justice Kennedy rejected the possibility, concluding that Amy did not "point to any clear statutory basis for a right to contribution in these circumstances."[95] It is not clear why Justice Kennedy found this troubling, as on this interpretation section 2259 simply tracks the traditional common law rule that contribution is unavailable between intentional tortfeasors.[96]

But Justice Kennedy should have recognized the possibility of a contribution action, if a well-heeled child pornography offender were to ever actually file a contribution lawsuit against another well-to-do offender.[97] A right to pursue a contribution action has been recognized in other restitution settings.[98] Such decisions build on the fact that the Supreme Court has recognized that even if Congress has not expressly created a contribution remedy, "if its intent to do so may fairly be inferred from . . . [other] statutes, an implied cause of action for contribution

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[93] Much of the difference between the number of notices and 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. Because the case law has developed in the years since, Amy's counsel now generally pursues all of her restitution claims to their conclusion.

[94] *See United States v. Staples*, No. 2:09-CR-14017, doc. 32 (S.D. Fla. 2011).

[95] 134 S.Ct. at 1725.

[96] *Prosser & Keeton*, *supra* note 73, 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").

[97] 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.

[98] *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").

could be recognized. . . ."[99] In enacting section 2259, Congress required that all defendants must pay the "full amount" of a victim's losses,[100] 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's 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.[101] 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."[102] 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.

As a final point, Justice Kennedy was concerned that interpreting section 2259 to impose similar expansive liability might raise a constitutional concern under the Excessive Fines Clause of the Eighth Amendment. 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.[103] Presumably this is because a "fine" is a "pecuniary criminal punishment or civil penalty payable to the public treasury."[104] Conversely, a

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[99] *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981); see, e.g., *Musick, Peeler & Garrett v. Employers 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").

[100] 18 U.S.C. § 2259(b)(1)

[101] *See, e.g.*, 42 U.S.C. § 9607(a) (CERCLA).

[102] *In re Amy*, 636 F.3d 190, 206 (5th Cir. 2011).

[103] *Paroline v. United* States, Petitioner's Br. at 58.

[104] *Black's Law Dictionary* 664 (8th ed. 2004); *see United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998).

restitution award under section 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.[105]

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 should Amy receive. Justice Kennedy did not in any way dispute that Amy had suffered 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."[106] Justice Kennedy explained that 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."[107] 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."[108]

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[105] This issue is discussed at greater length in Part V.B, *infra*. Justice Kennedy relied on *Kelly v. Robinson*, 479 U.S. 36 (1986), for the proposition that restitution awards have penal aspects. 134 S.Ct. at 1734. But *Kelly* involved an older restitution statute that was not tailored to victims' losses, *id.* at 53, and did not give the victim any right to restitution, *id.* at 52. 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).

[106] *Id.* at 1727.

[107] *Id.* at 1728 (*citing* Brief for the United States, which had listed these factors).

[108] 134 S.Ct. at 1728.

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 had warned that apportioning restitution among multiple defendants would mean "trivial" restitution for her.[109] Amy explained that her images have been identified in 3,200 American federal and state criminal cases. She also noted that, unfortunately, these prosecuted cases represent just a few 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. Amy suggested that assuming that law enforcement could catch even ten percent of the criminal viewers her images would be a "generous assumption."[110] Amy further explained that she was harmed not only by child pornography crimes committed in this country, but also by those committed overseas. Amy suggested that a "fair estimate" was that 45% of the child pornography criminals are American.[111]

Based on these figures, Amy suggested 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 10% law enforcement apprehension rate) and then 45/100 (the percentage of child pornography criminals who are found in this country).[112]

Chief Justice Roberts' dissenting opinion picked up directly on these numbers. After recounting the computation, Chief Justice Roberts noted the majority's disclaimer that trivial

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[109] Paroline v. United States, Amy's Merits Br. at 65.
[110] *Id.*
[111] *Id.* (*citing DOJ Report to* Congress at 14 (table regarding domestic vs. international P2P file sharing of child pornography).
[112] 3,367,854 x 1/3,200 x 1/10 x 45/100 ≈ $47.

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."[113]

Since the *Paroline* decision, federal district judges have used a variety of means to calculate the size of the 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. The judge then awarded her restitution in the amount of 1/1000 of her remaining, uncompensated losses, explaining that it reasonable to assign as [the defendant's] restitution 1/1000 (0.1%) of "Vicky's" remaining losses.[114] While such approaches generate a specific number that can be entered into a restitution judgment, they hardly qualify as rational. One illustration of the problem is the infinite regress problem. 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 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*,[115] 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 that "[i]t is reasonably predictable that the Vicky Series will continue to be a staple of the internet among

[113] 134 S.Ct. at 1734 (Roberts, C.J., dissenting).
[114] *United States v. Crisostomi,* CR 12-166-M, 2014 WL 3510215 (D.R.I. July 16, 2014).
[115] *See United States v. Hanlon*, No. 2:14-cr-18-FtM-29DNF, 2015 WL 310542 (M.D. FL. Jan. 23, 2015).

those interested in child pornography. Predicting the number of future convictions and/or restitution orders for crimes contributing to Vicky's general loses is virtually impossible, other to say that if past history is any indication the number will be fairly substantial."[116] 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."[117] Of course, these problems will exist in *every* case, meaning that if the *Hanlon* approach is widely followed, then Vicky (and other victims like her) may receive little or no restitution at all.

These cases illustrate an overarching problem of *Paroline*: under the vague guidance from the Court, restitution awards will inevitably 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 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."[118]

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[116] *Id.* at *4.
[117] *Id.*
[118] *United States v. Galan*, 6:11-CR-60148-AA, 2014 WL 3474901 (D. Or. July 11, 2014).

Fortunately, some members of Congress have stepped in to try to fix the problem – a subject for the next section of this testimony.

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

Because of the obvious problems with the *Paroline* decision, prominent members of Congress in both political parties have already 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 act. This Part reviews the proposed legislation introduced in Congress and then explains why it is a vast improvement over the current regime.

A. The Provision of 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 ("AVA").[119] 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 on January 28, 2015.[120] An identical bill was introduced in the House on the same day. On February 11, 2015, in one of the first acts of the 114th Congress, the Senate passed the AVA by a vote of 98-0. The AVA is currently being considered in the House as S. 295 RFH.[121]

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

[119] S. 2301 (2014). An identical bill was introduced in the House on June 26, 2014 as H.R. 4981.
[120] S. 295 / H.B. 595.
[121] S. 295 RFH 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.

significant improvement over the discretionary regime left in place by the *Paroline* decision and should be swiftly enacted.

The AVA explicitly recognizes that modern child pornography crimes—which are 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. The AVA re-emphasizes the Supreme Court's longstanding holding in *Ferber* that "the demand for child pornography harms children because it drives production."[122] It recognizes the emerging mental health consensus that "the harms from 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"[123] and "victims 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."[124]

Most important, 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."[125] Congress specifically recognizes that "[t]he unlawful *collective conduct* of every individual who reproduces, distributes, or possesses the

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[122] S. 295, § 2(1).

[123] S. 295, § 2(2). *See* American Professional Society on the Abuse of Children Statement on the Harm to Child Pornography Victims (adopted Oct. 18, 2013) ("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…in 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."). Of course, in saying that a victim who has suffered two crimes has suffered more than an identically-situated victim who has suffered one crime, S. 295 is not creating any hierarchy of victimization. Instead, S. 295 is simply recognizing the additional trauma that stems from child pornography crimes following initial sexual abuse. It should be noted that S. 295 is endorsed by many leading crime victims' organizations. *See* note 139 *infra* and accompanying text.

[124] S. 295, § 2(3).

[125] S. 295, § 2(5) (emphasis added).

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 combine to produce an indivisible injury to a victim.*"[126] This so-called "aggregate harm theory" was rejected by *Paroline*, which analyzed the harms from child pornography under the misapplied legal theories of "proximate cause" and "a defendant's relative role in the causal process."[127] 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 testimony.[128]

Based on congressional 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, in the rare case where a defendant has paid the full amount of the victim's losses, he may spread the restitution cost to other offenders.

The AVA does not change the list of pecuniary losses eligible for restitution under current law. It does, however, require that courts compute the "lifetime losses" for "medical services relating to physical, psychiatric, or psychological care," "physical and occupational therapy or rehabilitation," and "lost income."[129] The AVA also recognizes that the production, distribution, and possession of child pornography are part of a continuum of harm, which begins with "grooming" and then physical 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

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[126] S. 295, § 2(4) (emphasis added).

[127] *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).

[128] *See* Part IV.B, *supra*.

[129] S.B. 295, § 3(1).

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."[130] 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 have been 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." [131] In the more typical scenario – where a victim is harmed by multiple past, present, and future offenders, known, unknown, and unknowable – a judge can award restitution in one of two ways, depending on the circumstances of the case.

First, the judge can order the defendant to pay "the full amount of the victim's losses." 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.[132] No order of restitution may exceed the full amount of the victim's losses, ensuring that victims are not overcompensated; once a victim has received the full amount of her losses, she may no longer collect restitution.[133]

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

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[130] *Id.*
[131] S.B. 295, § 3(3).
[132] *Id.*
[133] *Id.* Of course, a victim is always free to pursue additional civil litigation to recovery losses not covered by criminal restitution.

excessively burdensome payments by other provisions in the federal criminal code, including18 U.S.C. § 3664 – the so-called restitution "enforcement provision."

Restitution awards under the AVA are subject to section 3664, which gives a trial judge discretion in setting the amount an individual defendant must pay towards his restitution obligation. Even a significant restitution obligation is mitigated by section 3664's directive to enter a reasonable payment schedule.[134] 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."[135] 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." 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.[136]

The AVA also holds defendants who have been ordered to pay the full amount of the victim's losses "jointly and severally liable" to the victim with all other defendants against whom an identical order of restitution has been entered.[137] This, along with a right of contribution, allows defendants to spread the losses among and between similarly situated defendants.[138] Contribution claims can be brought in federal court in accordance with the Federal Rules of Civil Procedure and allows courts to allocate payments among defendants using "such equitable

[134] 18 U.S.C. § 3664(f)(1)(B)(2).
[135] 18 U.S.C. § 3664(f)(1)(B).
[136] 18 U.S.C. § 3664(k)
[137] S. 295, § 3(1).
[138] S.B. 295, § 3(3).

factors as the court determines are appropriate so long as no payments to victims are reduced or delayed."

B. Amy and Vicky Act Improvements

The Amy and Vicky Act significantly improves the 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. Presumably this is why the AVA is supported by leading crime victims organizations, including the National Center for Missing and Exploited Children, the National Organization for Victim Assistance, the National Crime Victim Law Institute, the National Center for Victims of Crime, and the National Task Force to End Sexual and Domestic Violence Against Women. Last October, the bill was endorsed by the attorneys general of 43 states, including 22 Republicans and 21 Democrats.[139]

But the AVA also provides significant benefits for others involved in court proceedings concerning restitution. Perhaps most significant, it simplifies the restitution process for prosecutors, probation officers, and judges. As even a quick perusal of court decision post-*Paroline* reveals, substantial litigation is occurring over how to apportion restitution losses caused by countless defendants. As noted above,[140] district courts are currently struggling 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 gamble, with the restitution amount

[139] Floor Statement of Senator Hatch on S. 295 (Feb. 4, 2015).
[140] *See* Part IV.B *supra*.

dependent on the formula that a trial judge selects. Under the AVA, defendants will know at the time that they make plea decisions what kind of restitution obligations they will be facing.

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 come under fire as unduly restricting the ability of judges to craft appropriate sentences.[141] I agree that mandatory minimums can sometimes be draconian and blunt,[142] and so do some of the AVA's key sponsors.[143] But because reasonable people can differ on the appropriateness of such mandatory sentences, it is important to understand that the AVA does not specify mandatory *prison* sentence designed to punish offenders. Instead, the AVA is a remedial statute designed to provide compensation that is akin to joint and several liability in tort law. No one suggests that a tort defendant who is ordered to pay the full amount of a victim's losses is 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 approach is replaced by a simple and streamlined statutory assessment.

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. The

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[141] Attorney General Eric Holder Urges Congress to Pass Bipartisan 'Smarter Sentencing Act' to Reform Mandatory Minimum Sentences, Department of Justice Office of Public Affairs, Jan. 23, 2014, available online at www.justice.gov/opa/pr/2014/January/14-ag-068.html; Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense,* 18 Notre Dame J.L. Ethics & Pub. Pol'y 311 (2004).

[142] *See, e.g.*, Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1 (2010).

[143] *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).

only reason victims such as Amy, for example, could be awarded $150,000 for distribution of their images is that they have actual losses that vastly exceed that amount. And most important, once a victim has received compensation for the full amount of their losses, she can no longer seek restitution and every subsequent 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 $150,000 to a victim when, under well-settled law, they can already be ordered to pay a fine of $250,000 to the Government.[144] To give the same amount of money to a victim as has long been allowed to be transferred 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, since the millionaire child pornography defendant has not yet surfaced in a real world case. But to ensure fairness for the theoretical defendant who ends up paying a very sizable restitution award, the AVA improves upon existing law by specifically creating a contribution action for a defendant who has been ordered to pay the full amount of a victim's losses and who has paid at least the statutory amount towards his restitution obligation.[145] 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

[144] *See* 18 U.S.C. § 3571(b)(3) (authorizing a fine of $250,000 for each felony conviction).
[145] S.B. 295, § 5.

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."[146] It is far better that this burden by borne by a wealthy convicted child pornography offender than by (as under current law) innocent victims who may or may not have resources to pursue far-flung litigation.

The possibility of a contribution action should be more than enough to dispense with any constitutional question that might theoretically arise under the AVA.[147] 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 agreed that restitution is remedial in nature and therefore not subject to Eighth Amendment punishment or "excessive fine" limitations, but a circuit split exists on this issue.[148] 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.[149]

The better view on this question is that restitution (at least as provided in the AVA) is not a punitive measure subject to the Eight Amendment's Excessive Fines Clause, but rather is compensation designed to restore crime victims.[150] There is an obvious incongruity in claiming

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[146] 636 F.3d at 201.

[147] It is also important to recognize that a wealthy defendant being ordered to pay all of a victim's restitution would 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 problem in this area would lead only to a reduction of a single wealthy offender's restitution award, not general invalidation of the AVA.

[148] *Compare, e.g.*, *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." (citation omitted)).

[149] *See* 134 S.Ct. at 1725-26.

[150] *See United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1318–23 (D. Utah 2004) (Cassell, J.). *See also* Amicus Brief of Vicky and Andy, *U.S. v. Paroline*, No. 12-8561 (explaining why restitution is not punitive). Because the AVA is not punitive, it can also be applied retroactively to defendants who have already committed their crimes.

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."[151] Conversely, a restitution award under section 2259 is payable not to the public treasury, but to the crime victim. 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."[152]

Even if the Constitution's prohibition on excessive "fines" could 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."[153] Child pornography felonies are serious crimes, punishable by lengthy prison terms.[154] 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.[155]

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

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See, e.g., *United States v. Nichols*, 169 F.3d 1255, 1280 (10th Cir. 1999) (applying the Mandatory Victim Restitution Act retroactively to the sentencing of Terry Nichols, one of the Oklahoma City bombers).

[151] *Black's Law Dictionary* 664 (8th ed. 2004); *see United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998).

[152] S.B. 295, § 2(1).

[153] *Bajakajian*, 524 U.S. at 334.

[154] *See, e.g.*, 18 U.S/C. § 2252(b); 18 U.S.C. § 2252A(b).

[155] *United States v. Reingold*, 731 F.3d 204, 215-16 (2d Cir. 2013).

burdens on prosecutors, defendants, courts, and victims. It is thus a significant improvement over the post-*Paroline* regime—a more rational and predictable system than the ad hoc case-by-case system that *Paroline* confusingly commanded.

VI. OTHER VALUABLE EFFORTS TO HELP CRIME VICTIMS.

While I have been invited to testify specifically about restitution issues after the Supreme Court's recent decision in *Paroline*, I trust that the Subcommittee will not mind if I briefly discuss some other legislative steps that could be taken to benefit victims of not only child pornography crimes but all federal crimes.

A. Expanding Funding for Crime Victims Legal Clinics and Other Victim Support Services.

Perhaps the single most useful thing that could be done immediately to help crime victims in the federal system would be to re-establish funding for crime victims' legal clinics. Legal representation for crime victims with important rights at stake is the critical missing piece to effectively implementing the Crime Victims' Rights Act (CVRA).

In 2004, Congress passed the CVRA, 18 U.S.C. § 3771, which was designed to be a "broad and encompassing" statutory bill of rights for crime victims.[156] With broad, bipartisan support, Congress not only established a series of victims' rights (including a right to restitution[157]) but also created remedies for the violation of these rights. Critically, when passed, the CVRA also authorized appropriations to ensure that victims of crime could access a lawyer to help protect their rights. Access to legal services is necessary to truly protect rights, for as the Supreme Court has recognized:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated

[156] *See* 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statements of Sen. Feinstein and Sen. Kyl).
[157] 18 U.S.C. § 3771(a)(6) (a crime victim has the right "to full and timely restitution as provided in law").

> layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings.[158]

Immediately after the CVRA was enacted, a number of crime victims' legal clinics were established around the country with the CVRA's federal funding. The National Crime Victim Law Institute (NCVLI), located at Lewis & Clark Law School, helped to lead the effort to secure counsel for victims in criminal cases. NCVLI oversaw development and operation of a national network of victims' rights legal clinics, which provided free legal services to victims in criminal proceedings. What started as five clinics was at its peak a network of twelve clinics operating in Arizona, California, Colorado, Idaho, Maryland, New Jersey, New Mexico, New York, Oregon, South Carolina, Washington, D.C., and my own home state of Utah. Sadly, as funding under the CVRA ceased, legal protection of victims' rights across the country greatly constricted, and several of these clinics have been forced to close. The result has been that crime victims in the vast majority of states must often turn to pro bono attorneys to try to secure protection of their rights. Unfortunately the ability of victims to secure pro bono legal representation is haphazard.

Legal counsel is particularly needed for victims of child pornography crimes. As my lengthy testimony may have illustrated, achieving full restitution inevitably raises complex legal issues. Crime victims' clinics play a vital role in that effort.

I want to share the story of a young man, a Utah resident who uses the name "Andy." When he was between the ages of seven and twelve, Andy was sexually abused by a trusted adult and family friend. Dr. David Corwin, the University of Utah child psychologist who examined him, said (based on 30 years of experience with child sexual abuse victims) that the images and videos of Andy's abuse were the most disturbing he had ever seen. According to the FBI, the images and videos created from Andy's abuse are one of the most widely-distributed boy series

[158] *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

in the country. The FBI reports that Andy is a named victim in more than 800 federal child pornography cases.

Andy's efforts to secure full restitution are being led by the Utah Crime Victims Legal Clinic – one of the clinics established by the CVRA's funding.[159] The clinic has begun submitting restitution claims on Andy's behalf around the country. Unfortunately, because of some of the complexities swirling in the wake of *Paroline*, he has been granted restitution in only 24 of the 101 cases in which he requested it. And has collected anything at all in only two cases.

Andy has written a letter to support the Amy and Vicky Act. He asked that he not be forced to spend decades trying to recover minuscule amounts of restitution from hundreds, if not thousands, of defendants all over the country. His words are worth listening to: "My images may never be taken off the Internet and may always be circulating around the country. At least with this congressional change, I can start to heal, learn how to handle my circumstances, and re-build my life."[160]

Fortunately, Andy's voice is being heard through the capable attorneys and paralegals of the Utah Crime Victims Legal Clinic. But unfortunately, the vast majority of child pornography victims have been unable to secure restitution largely because they lack legal counsel. Congress should expand the legal clinics for crime victims beyond the current handful that exist. Without attorneys, the rights promised to victims in the CVRA – including notably the right to full and timely restitution – will too often be illusory.

Of course in some cases, prosecutors have been able to fill the gap by advocating for victims' rights. But prosecutors represent the Government – not victims – and accordingly are sometimes unable (or even unwilling) to press victims' claims. For example, while the

[159] I am pleased to note that the clinic is capably directed by one of my former students from the University of Utah College of Law, Heidi Nestel.

[160] *Quoted in* Remarks by Senator Hatch on the Introduction of S. 295 (Feb. 4, 2015).

Department of Justice has in some cases sought restitution for child pornography victims, it does not appear to have taken the lead in advising victims about their right to secure restitution. Andy, for example, was not aware of his ability to seek more expansive restitution until he received that advice from the Utah victims clinic.

Remedying this situation is relatively simple. All that is required is to re-establish the funding for victims clinics that the CVRA originally promised. Fulfilling that promise is not overly costly. Fifteen years of experience securing legal services for victims of crime reveals two data points. First, according to the National Crime Victim Law Institute, a single legal clinic adequately staffed can serve an area with a population of approximately 6,000,000. Second, again according to NCVLI, adequate staffing to protect victims' rights in such an area requires two to three experienced lawyers and support staff, costing approximately $500,000 annually. Using these data points, combined with the most recent census data, reveals that creating access to legal services in all 50 states, the District of Columbia, and each territory, would cost approximately $37,000,000 annually. (For comparison, the federal defenders annual budget is $1,000,000,000, and of course many additional defense counsel are privately retained.) This is a small price to ensure that all victims in this country – including victims of federal child pornography crimes – have meaningful rights, such as the right to full restitution.

B. A Simplified Fund for those Without Legal Counsel.

Another idea that is under discussion is establishing a fund to help provide an additional option for compensation for child pornography victims. For example, in its testimony today the Justice Department proposes an "alternative system" that would allow victims to by-pass restitution litigation and receive a one-time payment of administrative compensation.[161] Under

[161] Statement of Jill Steinberg, U.S. Dept. of Justice, Before the Crime Subcomm. of the House Judiciary Committee at 5 (Mar. 19, 2015).

this proposal, a victim would apparently go to a District Court for a finding that he or she is a victim of a federal child pornography offense. At that point, the victim would receive "a fixed amount of compensation."[162] A victim would have the option of either pursuing conventional restitution or compensation from a fund.

The Justice Department's overall concept is appropriate: crime victims are, by definition, better off if they have two options (restitution or a compensation fund) rather than just one (restitution). I did want to note my disappointment, however, the Justice Department did not provide any real details about its idea, much less proposed legislation. The Justice Department first floated the idea of a fund to crime victims' advocates more than five years ago If the Department is serious about this idea, it needs to move from the concept stage to an actual proposal.

The Committee should also be aware that the Department has been litigating *against* Amy and Vicky (and other victims) in the Supreme Court and elsewhere. That has raised suspicion in some quarters that the Department wants to use a fund (which it would apparently administer) as a means of preventing child pornography victims from obtaining full restitution with their own counsel. I was, accordingly, happy to read in the Department's testimony that it is specifically committing to allowing victims to choose *either* to pursue restitution from defendants or compensation from the fund. My sense remains that given the inevitable financial limitations that would constrain a compensation fund, many child pornography victims would be better off pursuing restitution through their own legal counsel. But having an option is always a good thing.[163]

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[162] *Id.*

[163] The Department's testimony suggests that "[v]ictims who opt to litigate their restitution claim would be ineligible to obtain compensation from the fund." *Id.* It is not clear why this either/or requirement exists. A simpler approach would be to say that any victim who received compensation from the fund would have to offset that

With regard to the financing for such a fund, a natural source is the criminals convicted of child pornography offenses. Such criminals could be fined a certain amount (i.e., $5000), with the resulting collections turned over to the fund. Of course, it is important that any such fine not interfere with the ability of victims to collect restitution. Existing federal law already provides that a judge shall not impose a fine where doing so would "impair the ability of the defendant to make restitution."[164] And existing federal law further provides that when payments are received from a convicted criminal, they shall be applied first to restitution before being used to satisfy "other fines, penalties, costs and other payments."[165] This priority for restitution makes considerable sense, because individuals who have been harmed by a crime should be made whole by a defendant before the Government collects any money.

With these points out of the way, I applaud the general idea of a compensation fund for child pornography victims. Many states, including my home state of Utah, have crime victim reparations funds.[166] But the extent to which victims of child pornography crimes can access those state funds is unclear. Congress should consider creating a victim compensation fund at the federal level. It is well known that Congress has already created one such fund: the compensation fund for victims of the 9/11 terrorist attacks.[167] But the concept could be expanded to other crimes as well. Child pornography crimes seem like a good place to start.

Two issues question surrounding such a fund are: (1) who would be able to access it, and (2) how much would each victim be able to receive in compensation? With regard to the first

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amount from restitution later obtained. *Cf.* 18 U.S.C. § 3664(j)(1) (providing that any civil award for losses will be offset by restitution received).

[164] 18 U.S.C § 3572(b).

[165] 18 U.S.C. § 3612(c).

[166] *See* http://www.crimevictim.utah.gov/.

[167] *See* the Air Transportation Safety and System Stabilization Act (ATSA), Pub. L. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 note). *See generally* Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167 (2004); Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DePaul L. Rev. 627 (2004).

question, the Justice Department appears to envision a "finding . . . made by a district court" that a person is a victim of a federal child pornography crime.[168] This approach raises simultaneous concerns about its narrowness and its breadth.

On the one hand, if the problem the Department seeks to address is a victim unable to find legal counsel to pursue a restitution claim, it is difficult to understand how such a victim will be able to go to district court to secure a judicial "finding" that she is a victim entitled to access the fund. If the Department's aim is ensuring that victims do not need to hire attorneys to seek compensation, requiring an in-court finding of victim status is a poor way to achieve it.[169]

At the same time, the Subcommittee should be aware that the current federal child pornography statutes cover a broad range of offenses. As another witness appearing before the Committee today has explained, millions of children are in danger of being photographed in sexually explicit positions by criminals using smart phones.[170] If such images are transmitted in "means of interstate commerce" (i.e., through the internet), those children are all potential victims of a federal child pornography crime.[171] Providing substantial compensation for all child pornography victims who might be eligible to receive it could be challenging.

The issue of who is a "victim" eligible for compensation ties directly into the question of how much would such a victim be eligible to receive. Victims like Amy, Vicky, and Andy have quantified their losses as being substantial through the use of psychological experts in their restitution requests. For victims asking for compensation from a fund without such expert, it is unclear how quantification of losses would occur.

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[168] Statement of Jill Steinberg, U.S. Dept. of Justice, Before the Crime Subcomm. of the House Judiciary Committee at 5 (Mar. 19, 2015).

[169] *Cf.* Marilyn Tobocman, *Human Trafficking in our Backyard: What Can Lawyers Do?*, 61 Fed. Lawyer 16 (2014) (arguing that pro bono lawyers are needed to help trafficking victims secure crime victim compensation).

[170] Statement of Grier Weeks U.S. Dept. of Justice, Before the Crime Subcomm. of the House Judiciary Committee at 3 (Mar. 19, 2015).

[171] *See, e.g.*, 18 U.S.C. § 2252(a)(4).

In raising these issues, I am only attempting to encourage that any fund be created in the most expansive and constructive way possible. Clearly there are substantial needs for restitution for child pornography victims, and legislation developing a fund could be a good supplemental way to address those needs. But a fund is a complementary idea to the Amy and Vicky Act, not a competitive one, and will require additional work to develop the details. The Amy and Vicky Act is ready for immediate enactment.

C. Improving the Crime Victims' Rights Act.

Congress should also consider amendments to the Crime Victims' Rights Act (CVRA) to strengthen the ability of crime victims to protect their rights. An area of particular concern is the availability of appellate review for crime victims whose claims have been denied by the trial court. The CVRA specifically provides that crime victims can petition the Courts of Appeals for review of their claims. In its four-year review of the effectiveness of the CVRA, the General Accounting Office (GAO) noted that the Courts of Appeals have applied differing standards of review to crime victims' petitions.[172] Some Courts of Appeals have taken a very restricted view of how to evaluate those petitions, reviewing merely for "clear and indisputable error" as with a mandamus petition.[173] But a number of others Courts of Appeals have given crime victims

[172] GAO, Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act 73-75 (Dec. 2008).

[173] *See, e.g.*, *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008); *United States v. Fast*, 709 F.3d 712 (8th Cir. 2013).

ordinary appellate review.[174] Ordinary appellate review is what Congress intended, as the legislative history to the CVRA makes clear.[175]

The standard-of-review obstacle has confronted Amy (and other child pornography victims) as they have attempted to secure their right to restitution in appellate courts. In the *Paroline* case, for example, after Amy's claim for any restitution had been denied by the district court, she sought review in the Fifth Circuit. Two judges on a three-judge panel concluded that Amy was not entitled to any appellate relief, relying on the restricted availability of appellate review for crime victims: "Despite the government's contrary position . . . , the district court did not 'so clearly and indisputably abuse[ ] its discretion as to compel prompt intervention by the appellate court.'"[176]

Amy then sought rehearing. This time the Fifth Circuit agreed that Amy had shown a legal error requiring mandamus relief in this one particular case. But the Fifth Circuit panel noted that such a narrow standard of review might extend "to victims a mere formality, given the traditionally narrow scope of mandamus relief."[177] The Fifth Circuit's later en banc ruling reached a similar conclusion.[178]

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[174] *See, e.g.*, *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005) (In light of Congress' recognition that crime victims would routinely be seeking such review, "[i]t is clear, therefore, that a [crime victim] seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus"); *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006) ("The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.").

[175] 150 Cong. Rec. 7295 (statement of Sen. Feinstein) ("This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of [her] rights by a trial court to the court of appeals." (emphasis added)). *See generally* Paul G. Cassell, *Protecting Crime Victims' Rights in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 Denv. U.L. Rev. 599 (2010).

[176] *In re Amy*, 591 F.3d 792, 795 (5th Cir. 2009). Judge Davis dissented, explaining that "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation." *Id.* at 797.

[177] *In re Amy Unknown*, 636 F.3d 190, 197 (5th Cir. 2011).

[178] *In re Amy Unknown*, 701 F.3d 749, 773-74 (5th Cir. 2012).

Congress should amend the CVRA to make clear what Congress has always intended: that crime victims should have not the mere formality of deferential appellate review but rather the same appellate protections as other litigants. One formulation for how this can be accomplished is found in a bill currently pending before the Senate concerning human trafficking, S. 178. It provides: "In deciding such application [for relief under the CVRA], the court of appeals shall apply ordinary standards of appellate review."[179]

While Congress is amending the CVRA to fix the appellate review standard, it should also make two other important changes. First, Congress should extend to victims "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution." Such a change is needed in light of a recent case in which the Justice Department has asserted that it need not inform child sexual assault victims when it reaches a plea bargain or non-prosecution agreement with a sex offender.[180] Second, Congress should also extend to victims the "right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice." This would help inform victims – including child pornography victims – of a broader array of rights than are found just in the CVRA. Both of these proposals are currently found in legislation pending before Congress, including both Senate and House bills.[181]

D. A Constitutional Amendment Protecting Crime Victims' Rights.

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[179] S. 178, § 13(c).

[180] *See generally* Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed*, 104 J. Crim. L. & Criminology 59 (2014) (discussing *Does v. United States*, 817 F.Supp.2d 1337 (S.D. Fla. 2011)).

[181] On the Senate side, Senator Feinstein (who along with Senator Kyl was the original co-sponsor of the CVRA) has helped to press for such language to amend the CVRA. The language is currently found in the Senators Portman and Feinstein's "Combat Human Trafficking Act" (S. 140) as well as in Senator Cornyn's "Justice for Victims of Trafficking Act" (S. 178). On the House side, Representative Poe's "Justice for Victims of Trafficking Act" (H.R. 181 and H.R. 296) has these amendments, along with H.R. 1201 introduced by Representatives Granger and Bass.

Finally, the most far-reaching and important step that the Congress could take to protect crime victims' rights would be to send to the States for ratification the Victims' Rights Amendment ("VRA"). Over the last two decades, members of Congress have repeatedly proposed passage of the VRA, which would extend to all crime victims a series of constitutional rights, including the right to be notified of court hearings, the right to attend those hearings, and the right to speak at particular court hearings (such as hearings regarding bail, plea bargains, and sentencing). The case for the VRA has been discussed at length elsewhere.[182] In 2012 and 2013, for example, I submitted testimony to this Committee supporting the VRA.[183]

A favorable Senate Judiciary Committee Report admirably explains why a constitutional amendment is needed to protect all crime victims in this country:

> The U.S. Supreme Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." Morris v. Slappy, 461 U.S. 1, 14 (1983). Yet in today's world, without protection in our Nation's basic charter, crime victims are in fact often ignored. As one former prosecutor told the Committee, "the process of detecting, prosecuting, and punishing criminals continues, in too many places in America, to ignore the rights of victims to fundamental justice." Senate Judiciary Committee Hearing, April 23, 1996, statement of Steve Twist, at 88. In some cases victims are forced to view the process from literally outside the courtroom. Too often victims are left uninformed about critical proceedings, such as bail hearings, plea hearings, and sentencings. Too often their safety is not considered by courts and parole boards determining whether to release dangerous offenders. Too often they are left with financial losses that should be repaid by criminal offenders. Too often they are denied any opportunity to make a statement that might provide vital information

[182] *See, e.g.,* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment,* 1999 Utah L. Rev. 479; Paul G. Cassell, *The Vicdtims' Rights Amendment: A Sympathetic, Clause-by Clause Analysis,* 5 Phoenix L. Rev. 301 (2012); Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint,* 5 PHOENIX L. REV. 341 (Apr. 2012); Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things,* 1999 UTAH L. REV. 369; Victoria Schwartz, Recent Development, *The Victims' Rights Amendment,* 42 Harv. J. on Legis. 525 (2005); Rachelle K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims' Rights Amendment,* 16 Notre Dame J.L. Ethics & Pub. Pol'y 207, 219-20 (2002); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim,* 14 ARIZ. J. INT'L & COMP. L. 839, 856-58 (1997). *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 713-28 (3d ed. 2010) (reviewing the issues surrounding the VRA).

[183] *See* Statement of Paul G. Cassell, before the Subcomm. on the Constitution and Civil Justice of the House Judiciary Comm. (Apr. 25, 2013); Statement of Paul G. Cassell, before the Subcomm. on the Constitution and Civil Justice of the House Judiciary Comm. (Apr. 26, 2012).

> for a judge. Time and again victims testified before the Committee that being left out of the process of justice was extremely painful for them. One victim even found the process worse than the crime: "I will never forget being raped, kidnaped, and robbed at gunpoint. However my disillusionment [with] the judicial system is many times more painful." President's Task Force on Victims of Crime, Final Report 5 (1982).[184]

It is important to emphasize that the VRA draws broad bi-partisan support. It was first endorsed, for example, by President Clinton; his successor, President Bush, likewise supported the VRA.[185]

Today's hearing has considered some important steps to help improve the treatment of child pornography victims who are seeking restitution for their losses. But however laudable such steps may be, the overarching fact remains that crime victims will remain second-class citizens in America's criminal justice system until they have constitutional protection. Attorney General Reno explained this point nicely when she noted that "[e]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the State level for the past twenty years, and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights."[186] Congress should give serious consideration to providing all crime victims in this country full constitutional protection of their rights to participate in the criminal justice process.

CONCLUSION

In this testimony, I have reviewed the legal issues surrounding restitution for child pornography victims, explaining why the Supreme Court's *Paroline* decision failed to fully

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[184] S. Rep. 108-191 at 6-7 (2003).
[185] *Id.* at 7-8.
[186] Statement of Attorney General Reno at 64, Senate Judiciary Comm. (April 16, 1997).

implement the congressional command 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.

But in closing, it may be useful to recall 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 desperately need those payments. I am mindful that large restitution awards have financial consequences for criminal defendants. But the stark fact remains that the criminals had a choice – to commit the crime or not to commit the crime. Because such criminals have voluntarily chosen to commit a crime with serious financial repercussions, I am unsympathetic to any argument that they should be able to leave victims without full compensation.

It is more important to hear the plea of the innocent victims of these crimes, who desperately need restitution. Amy has recently eloquently explained her plight – and her need for restitution.[187] 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.

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 help me pay my bills and my

[187] http://www.childlaw.us/amys-letter-supporting-the-amy-and-vicky-child-pornography-victim-restitution-improvement-act-of-2014/.

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."[188]

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."[189] 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."[190]

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." 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."[191]

Amy, however, was excited to learn that members of Congress had introduced a bill bearing her name and the name of Vicky (whom Amy met at the Supreme Court argument). Amy said she was "hopeful, that Congress can fix this problem once and for all."[192]

I, too, am hopeful that Congress 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

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[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*

pornography victims could receive would be a mere placeholder until Congress finally acted. Congress should act and put full restitution theory into actual practice. Child pornography victims deserve nothing less.

Mr. SENSENBRENNER. Thank you very much.

Professor Turley?

TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY

Mr. TURLEY. Thank you, Chairman Sensenbrenner, Ranking Member Jackson Lee, Members of the Subcommittee. It is a great honor to appear before you to discuss this important issue of restitution for child exploitation in the aftermath of the *Paroline* decision.

Even though I have taught tort law for decades, and practiced in the area of criminal defense, I have to say, this is the most challenging question I have faced when called before a Committee of Congress.

In my view, the Supreme Court was correct when it struck down the prior system, which contained a well-intentioned but ill-conceived model for relief for these victims. The problem, as I explain in my written testimony, is not with the core culprits of these crimes. For them, the restitution is fairly clear and conventional. The problem is with that group of culprits that are accused of viewing or possession of these images.

As the Supreme Court itself said on page 24 of the opinion, the prior system pushed traditional concepts of tort and criminal law to "the breaking point." And I certainly agree with that.

There are no advocates of child pornography here today. There are no such advocates in this debate. We all agree that these are horrendous crimes. More importantly, we agree that these victims need restitution and relief, and that too few of them are receiving that. So no one was doing a victory lap when the Supreme Court struck down the prior system.

I thought it was a sad moment, because I believed before the opinion that it was unnecessary litigation, that the system was flawed and that it could have been avoided, and that, more importantly, these victims could have gotten the relief that they deserve.

It is important to remember that even though the decision was 5-4, there were eight Justices that felt that restitution could not be awarded under the prior system. And of the circuits, there was not much of a split. There was just one circuit that said restitution of this kind could be granted. Ten said that it could not because of these core principles of proximate causation, joint and several liability, and other controversies.

So we are not here to vent about the opinion but to try to learn from it. I think there are things that could be learned from it, and I believe that the Committee could make this a better system to better assist these victims.

While I agree with the Supreme Court decision, I thought the most unfortunate aspect, and Paul has indicated this as well, is that the guidelines given to lower courts are not very helpful. They are pretty opaque, in fact, as to what lower courts are supposed to do to find a figure of restitution. You end up with sort of a Goldilocks figure. They want it to be not too big, not too small, but just right. That is not going to help out these courts. These judges will be left with this sort of Sisyphean task of trying to find a way to fit this round peg into a square hole. I think that is the problem.

That is the reason I suggest in my testimony that the Committee consider the creation of a compensation fund. I call it tentatively "RAISE." That RAISE fund would follow previous funds created, including the International Terrorism Victim Expense Reimbursement Fund. But also it would track this approach in tort cases, mass tort cases, as well as settlement cases in areas like the BP oil spill, the 9/11 Victim Compensation Fund.

I go through the benefits of this fund. I think that the current system is insane, to have each of these victims have to go through this process, hire attorneys, have judges try to reinvent the wheel in every single case in finding a figure.

So I recommend the fund for various reasons. One is that it is fair. It would guarantee fair and equitable distribution to victims.

Second, it would reduce legal fees, because you would have a fund that would be able to administer this process. It would reduce court costs so that judges would not be faced with what is clearly a very difficult task.

It would also end the race to the courthouse. You wouldn't have the problem of people getting first into a case, possibly tapping out a defendant to the possible disadvantage of other victims.

It would also reduce information and transactional costs, and guarantee a more consistent and perhaps increased number of orders for victims. As was previously said, we have 8,500 victims here, but if you take a look at how many of the victims have received compensation, it is ridiculously small.

So the question for the Committee is, are you going to have a retort to the Supreme Court or reform? I think the Senate bill is more of a retort. It does not really take from the opinion what it could.

I will end simply by noting Archimedes once said very famously that if you give me a lever long enough and a fulcrum to place it on, I can move the world. The question here is the lever. I think Congress made the wrong decision, and this would give you a new lever and would give victims a better life.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University

"Child Exploitation Restitution Following the Paroline Decision"

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

2141 Rayburn House Office Building

March 19, 2015

I. INTRODUCTION

Mr. Chairman, and members of the Subcommittee on Crime, Terrorism, and Homeland Security, my name is Jonathan Turley and I am a law professor at the George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss restitution for child exploitation in the aftermath of the *Paroline* decision. The subject of today's hearing represents the convergence of my academic and professional work in torts, constitutional, and criminal law. Frankly, the issue of restitution for child pornography is one of the most difficult that I have faced as an academic – at least with regard to possession offenses. We all agree on our objective in seeking compensation for these victims, including from possessors of child pornography. It is the means rather than the ends that makes this a challenging legal controversy. There is an obvious temptation to see if minimal or cosmetic changes might put this law over the legal lines for courts. However, marginal changes will inevitably embroil courts, and more importantly victims, in needless and prolonged litigation.

In my view, the years of litigation culminating in the recent Supreme Court case were the result of a well-intentioned but ill-conceived model for relief for these victims. On its face, the issue would not appear particularly challenging. The law provides at 18 U. S. C. §2259(a) that a district court "shall order restitution for any offense" under Chapter 110 of Title 18, including crimes related to the sexual exploitation of children and child pornography. Specifically, Section 2259 states that courts must grant restitution and order defendants "to pay the victim . . . the full amount of the victim's losses as determined by the court." *Id. at* §2259(b)(1).[1] The problem is not with the core culprits in these crimes: the people who commit the underlying the filming and distribution of those images. For those cases, the direct causal link between the victim and the criminals are clear and conventional. The difficulty arises in the application of such liability for the viewing or possession of these images. It is not a question of culpability but the basis for apportionment in determining restitution. The resulting litigation pushed doctrines like joint and several liability (and concepts like indivisibility of harm and proximate causation) well beyond their workable limits. Even putting aside the original demands for the liability of the "full" amount of restitution for possessors, the sheer number of viewers and possessors make divisibility of damages a task that becomes practically impossible. The end result can be arbitrary in setting a figure for the contribution of individual viewers among millions. The decision by the Supreme Court barring full restitution under joint and several liability theories affords Congress an opportunity to

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[1] Congress also established that, under Section 2259(b)(2), that "[a]n order of

take an alternative and, in my view, a more sensible route for achieving the worthy ends of victim compensation.

Any discussion of restitution in an area like child pornography is obviously laden with passion and emotion. There are no advocates of child pornography on this panel or in this debate. We all start from the same foundational presuppositions. Indeed, at the outset, it may be most useful to state what we agree upon before addressing differences in our approaches to this problem. First, there is no question that child pornography remains one of the most heinous crimes under the criminal code.[2] Second, there is no question that the victims of child pornography continue to be victimized with the distribution and possession of images from their abuse.

There are also legal presuppositions that are generally, but not necessarily uniformly held. First, restitution was originally not designed as a punitive measure.[3] It is generally used to recompense for losses or damages. There are separate provisions that impose punishment in terms of incarceration and criminal fines. It is important in torts and criminal law to maintain the function of restitution in compensating for harm or injury. Restitution is a vital concept in these areas and has been carefully tailored to

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[2] Indeed, the Supreme Court reflected our shared disgust with the crime and the fact that the nature of this crime guarantees that it will continue to haunt and harm the victims:

> "The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her."

Paroline, supra, at 1717.

[3] Clearly there are those who disagree with the clear division of restitution and punitive measures. *See, e.g.*, Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93 (2014).

allow for equitable and consistent payments to victims. Obviously, criminal restitution has a punitive element designed to convey the cost and gravity of various crimes. However, it has generally been tethered to the actual damages caused by particular felons. Second, the prior system of joint and several liability – allowing for full recovery of restitution even from possessors – cannot be reinstated through legislation in its prior form since it was declared unlawful by the Court. Moreover, it cannot be sustained without some adjustment in accord with the recent ruling of the Supreme Court. I previously criticized the restitution approach that led to the decision in *Paroline v. United States*, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014).[4] While the decision itself is hardly a model of clarity, it is notable that eight justices agreed that the prior system was unsustainable and that restitution must be firmly grounded in traditional notions of causation and proportionality. For this reason, I have considerable reservations with the Senate proposed legislation, which sheds more heat than light on this problem. Rather than attempt to craft legislation to satisfy the objections laid out in *Paroline*, the Senate legislation makes more rhetorical rather than legal changes on critical points fueling this controversy. Congress should make the difficult but necessary decisions to guarantee a stable and sensible system for restitution for victims.

The progression of *Paroline* through the courts presents a telling record of a flawed foundation for recovery under the prior law. Judges and justices struggled unsuccessfully to find terra firma in the imposition of restitution demands on possessors.

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[4] *See, e.g.*, Jonathan Turley, *Court Orders Former Pfizer Executive to Pay $200,000 to Woman Photographed as a Child While Being Sexually Abused*, Feb. 24, 2009; *see also* John Schwartz, *Child Pornography, and an Issue of Restitution*, New York Times, Feb. 2, 2010; Karen Duffin, *New Frontiers In The Child Porn Law, National Public Radio*, Jan. 24, 2014.

This confusion was manifest around the country among the different circuits. In my view, the problem rests with the basic concept of restitution for possessors and that this confusion (and litigation) will continue with the Senate bill. I do not see how this continuing controversy advances the interests of victims or the legal system as a whole. For that reason, I support consideration of an alternative approach that would move beyond this unpromising restitution model and would establish a new compensation fund for assisting victims.

II. THE *PAROLINE* LITIGATION AND THE CONFUSION OVER CAUSATION.

I am assuming that the purpose of this hearing is not to vent disagreement with the Supreme Court's decision but to discuss the broad outlines for an alternative restitution system that would pass constitutional muster. While the vote of the Court was 5-4, the dissenting opinion by Chief Justice Roberts with Justices Antonin Scalia and Clarence Thomas maintained that restitution was categorically barred. Only Justice Sotomayor appeared to believe that restitution could be granted to the victim. Moreover, only one federal circuit ruled that full restitution could be ordered without the establishment of conventional proximate causation. Ten circuits agreed that such proximate causation had to be established.[5]

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[5] The circuits differed on the imposition of a proximate causation standard under § 2259. Four circuits applied traditional principles of causation from tort and criminal law. *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel*, 132 S. Ct. 756 (2011), *on appeal after remand*, No. 12-3093 (oral argument scheduled May 10, 2013); *United States v. Burgess*, 684 F.3d 445, 456–57 (4th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States v. Benoit*, 2013 WL 1298154, at *15 (10th Cir. Apr. 2, 2013). Two relied on general statutory interpretation to impose causation standards. *United States v. Kennedy*, 643 F.3d 1251, 1261–62 (9th Cir. 2011) (petition for cert. filed, No. 12-651); *United States v. McDaniel*, 631 F.3d 1204, 1208–9 (11th Cir. 2011). Three circuits offered variations, including the

The *Paroline* decision ultimately reflected the long-standing criticism of academics, including myself, that the restitution in the case lacked a viable proximate causal foundation. That opinion has already been discussed in detail so I will only discuss its most salient elements.

After his conviction in 2009 for possessing 280 images of child pornography, Doyle Randall Paroline was ordered to pay most of nearly $3.4 million in restitution for a victim identified only as "Amy." Two of the 280 images showed Amy being sexually abused by her uncle when she was eight years old. Paroline had no direct role in that abuse or the creation of the child pornography. As a possessor, Paroline challenged the imposition of the large restitution amount.

The case was ultimately heard by the United States Court of Appeals for the Fifth Circuit, which upheld the restitution. In successive decisions, however, the court deeply fractured on the question of causation and gave conflicted accounts of core concepts of joint and several liability. In the second appellate review of the case, a Fifth Circuit panel overruled earlier decisions and found that Amy would not have to prove traditional proximate causation and ordered the district court "to enforce the restitution award ... by all ... available means, [including] joint and several liability."[6] The court relied on a loose analogy to the joint and several liability system under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) but offered a highly uncertain view of the doctrine. It noted that "holding wrongdoers joint and

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use of an aggregate showing for proximate causation. *United States v. Evers*, 669 F.3d 645, 658–59 (6th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 94–95 (1st Cir. 2012); *United States v. Fast*, 709 F.3d 712, 721–22 (8th Cir. 2013). The Seventh Circuit allowed for full recovery but excluded possession offenders. *United States v. Laraneta*, 700 F.3d 983, 990–92 (7th Cir. 2012).

[6] *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011).

severally liable is no innovation" given the indivisible harm in the case.[7] Yet, it then ordered the lower court to determine divisible amounts of harm for the purposes of apportionment.

The Fifth Circuit then reexamined the case en banc and again the judges fractured on how to deal with restitution in a case of a possessor.[8] The en banc decision corrected the confusion over indivisible harm by ruling that § 2259 did not require proximate causation to be shown by Amy. As a victim, it declared that she was entitled to full restitution as part of indivisible harm under a traditional joint and several liability approach. This approach was contested by Judge W. Eugene Davis in dissent.[9] Davis offered an alternative approach, one which treated the case as a type of collective causation by multiple actors in torts.[10] Judge Davis maintained that there had to be some effort at allocating or apportioning damages among the different actors – avoiding the extreme result by the majority.

The Fifth Circuit stood alone in its extreme position on causation, though the dissenting judges showed that this position was heavily contested. As noted earlier, ten other circuits required more traditional proximate causation to be shown.

When the case went to the United States Supreme Court, it again fractured the Court as justices struggled to find a way to thread this restitution needle in a case of a possessor. The result was near unanimity that the Fifth Circuit was wrong and that a proximate causation nexus had to be established with allocation of individual

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7 *Id.*

8 *In re Amy Unknown III*, 697 F.3d 306, 330 (5th Cir. 2012).

9 For full disclosure, I had the honor of clerking for Judge Davis on the Fifth Circuit after law school.

10 *See id.* at 331-36 (Davis, J., dissenting).

responsibility by the defendant. Writing for Justices Samuel A. Alito, Jr., Stephen G. Breyer, Ruth Bader Ginsburg, and Elena Kagan, Justice Kennedy held that there had to be a showing of proximate causation by this defendant for injuries and the court would have to establish a comparative figure based on that harm. Writing for Justices Antonin Scalia and Clarence Thomas, Chief Justice Roberts took a more categorical approach and found that no restitution was possible under the statute. Only Justice Sotomayor appeared to view full restitution as appropriate under an aggregate causation approach.

The majority was correct in its rejection of the Fifth Circuit approach and its reaffirmation of the requirement of proximate causation. However, the application of restitution in a possession case still produced confusion as the Court tried to offer guidance to the lower courts. While the majority appeared confident that lower courts could figure it out, the record in this case disproved any such notion. The record was littered with failed efforts to force the square peg of restitution into the round role of a possession case. The guidance offered to lower courts promises only continuing confusion as to where to draw the line on restitution. Kennedy told lower court judges to consider factors, including but not limited to, the overall pool of individuals responsible in past cases for this ongoing injury; a projection of the number of future contributors including those who would not likely be identified; the number of images that individual possessed; and "other facts relevant to the [convicted individual's] relative causal role."[11]

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[11] Justice Kennedy specifically left lower courts with the following as guidance: "There are a variety of factors district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise algorithm for determining the proper restitution amount at this point in the law's development. Doing so would unduly constrain the decision makers closest to the facts of any given case. But district courts might, as a starting point, determine the amount of the victim's losses caused by the

However, the Court then simply called for a type of Goldilocks estimate: something not too high and not too low but just right. The Court stressed that "[t]hese factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders."[12] This leaves lower courts with the Sisyphean task of establishing a single harm of apportioned contribution of one viewer among millions of past and future viewers of a given image. While the imposition of full restitution against such a viewer or possessor was rightfully rejected as "excessive," this approach promises to be arbitrary in any final calculation. As indicated in my criticism before the ruling, I agree with Chief Justice Roberts when he wrote in dissent that "[b]y simply importing the generic restitution statute without accounting for the diffuse harm suffered by victims of child pornography, Congress set up a restitution system sure to fail in cases like this one. Perhaps a case with different facts, say, a single distributor and only a handful of possessors, would be susceptible of the proof the statute requires."[13]

The majority in *Paroline* can be credited in bringing some clarity in the rejection of the joint and several liability approach as well as the requirement of a more traditional

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> continuing traffic in the victim's images … then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses. These could include 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."

Paroline, supra, at 1728.

12 *Id.*

13 *Id.* at 1733 (Roberts, C.J., dissenting).

proximate causation showing. The Court balked at the notion of a possessor being forced to carry all or most of a restitution figure. However, in the end, the majority was still faced with the same intractable problem of restitution in possession cases. The character of this crime makes such calculations more metaphysical than legal. Before the Congress continues along the same maddening path, I hope that it will consider a modest alternative that could produce great benefits for both victims and the court system as a whole.

III. THE AMY AND VICKY CHILD PORNOGRAPHY VICTIM RESTITUTION IMPROVEMENT ACT OF 2014

The introduction of Senate Bill 2301, *The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014*, just two weeks after the decision would continue the ill-conceived approach that has led to such disarray among the trial and appellate courts for years. Indeed, the bill seems more a retort than a reform of critical parts of the federal law. This may be the intent of Congress and it certainly has every right to assert its own institutional powers in triggering further confrontations over restitution. However, I do not see why such a course is good for victims when a less controversial system is available, as discussed in the next section.

The Senate bill continues to hold possessors potentially liable for "the full amount of the victim's losses" despite the contrary view of the Supreme Court that such fines could be viewed as constitutionally excessive. The Excessive Fines Clause of the Eighth Amendment would likely be raised in such cases. While these fines are paid to victims, not the government, the Court has indicated that it would view the Clause as triggered by the fact that it comes "at the culmination of a criminal proceeding and requires conviction

of an underlying crime."[14] It is certainly true that the new legislation allows defendants to seek contribution, a missing factor noted by the Court in *Paroline*.[15] However, the allowance for contribution is a largely meaningless guarantee in this context. It is extremely unlikely that the vast majority of defendants will have the ability to seek such contribution from the thousands, or even millions, of viewers of such material, particularly while incarcerated. Moreover, there remains the issue of proportionality in such fines.[16]

Under the Senate bill, Section 2259 would be amended to still include Section 2252 among those subject to orders for "the full amount of the victim's losses," as set out in paragraph 2 (A). Section 2252 includes anyone who "knowingly receives" such material. The bill states that a defendant must pay "the full amount of the victim's losses" or at least $250,000 for production, $150,000 for distribution, or $25,000 for possession. That secondary option reflects the different culpability among different classes of defendants in these cases between distributors and possessors. Yet possessors can still be liable for the full amount. In my view, this recognition should lead to a different approach, laid out below, that would more completely separate these two groups of targeted defendants.

Finally, the law still applies joint and several liability to "[e]ach defendant against

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[14] *United States* v. *Bajakajian*, 524 U. S. 321, 328, (1998); *see also Paroline, supra*, at 1726.

[15] *Paroline, supra*, at 1726 ("The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution.").

[16] *Id.* ("there is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances.").

whom an order of restitution is issued under paragraph (2)(A) shall be jointly and severally liable to the victim with all other defendants against whom an order of restitution is issued under paragraph (2)(A) in favor of such victim." The use of joint and several liability will remain highly problematic so long as possessors are included under paragraph (2) (A). The use of joint and several liability is far less controversial when applied to the more defined and causally connected group of original actors in the filming and distribution of these images.

This law offers more of a formula for restitution, including a provision for contribution, that would clearly bring the law closer to the mark for the Supreme Court. Indeed, the imposition of concrete fines in paragraph (2) (B) is a step forward in bringing greater definition to this process for trial courts. Yet it retains the most controversial elements of the prior law and will likely end up back in the courts for a new round of protracted litigation. Without predicting the outcome of such challenges, I believe that it would be far wiser to rethink the approach of Congress. The Senate bill is a striking example of what economists call "path dependence." An initial approach can become hardened in our assumptions, creating threshold conditions that limit the options in addressing problems. There can be a conceptual or political resistance to setting aside the initial reliance on such structuring doctrines like joint and several liability. If we want a stable and efficient system, we need to be willing to examine why the prior system caused such confusion and litigation. Simply put, we need a new path to the same objective.

IV. AN ALTERNATIVE APPROACH TO COMPENSATING VICTIMS OF SEXUAL EXPLOITATION

If we step back from the facts of *Paroline*, we may be able to discern a different approach to this problem. Once again, we can start with a couple of presuppositions that would likely garner wide support. First, full restitution is clearly warranted against those who produce or distribute child pornography. Accordingly, the type of high restitution figures contained in the Senate bill are not particularly problematic for such direct actors who are justifiably the subjects of high sanctions in terms of both incarceration and restitution. Second, there should be no question that the replication and continued distribution of these images represent continuing harm. The high levels of restitution do not represent a conversion into punitive measures because they represent high levels of harm. Finally, these direct actors should pay restitution directly to their victims and those victims should have the priority claim on their assets in any restitution proceeding.

Once these actors are removed, we are left with possessors. This class of actors has caused the utter confusion in the lower courts and most recently in the Supreme Court. It is not a lack of sympathy for the victims which has produced this chaos but the technological reality of the Internet. With endless replication of these images, this system will never work in a way that is both equitable and predictable. Restitution determinations for this group simply defy a consistent and coherent approach.[17] However, that does not mean that we cannot create a system to afford relief to these victims. I

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[17] This is a distinction drawn by the Seventh Circuit in *United States* v. *Laraneta*, 700 F. 3d 983, 992 (7th Cir. 2012) (agreeing to full restitution for distributors "But if the defendant in this case is not responsible for the viewing of the images of Amy and Vicky by even one person besides himself, joint liability would be inappropriate.").

believe that we can create a system to deliver such relief in a far more equitable fashion while reducing both litigation fees for victims and administrative costs for courts.

I believe that Congress should remove the class of possessors from the restitution provisions entirely.[18] Instead, Congress should create a victim's fund and impose more standard criminal fines on possession offenses. Such an approach would shed the prior ill-conceived restitution model and use a fund model that has succeeded in other areas. A victim compensation fund could be created where possessors of child pornography would be subject to set fines to be paid into a central fund that would then guarantee even and equitable distribution to the victims. Such funds already exist and were created precisely to allow for such benefits in distribution to victims such as the International Terrorism Victim Expense Reimbursement Fund (ITVERP).[19] Indeed, such funds have been created for decades to distribute payments to victims in mass tort cases and settlements from Agent Orange to asbestos. More recent examples include the BP Oil Spill Liability Trust Fund and the 9/11 Victim Compensation Fund. These funds reduced the expenditure of funds on litigation and accordingly increased the amount of money actually going to victims. Direct restitution would then be available from core actors in a given case while fund compensation would be available to all victims from possessors.

The premise of such a fund would be on the recovery of individuals. This fund, which I tentatively have called "RAISE"[20] would bring a number of clear benefits:

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[18] Congress could obviously decide to use such a fund for all violators, including distributors, to simplify the system further. What I would not support is to use the fund in cases of the original actors responsible for these vile films. Victims should be able to recover directly from those who directly harmed them and produced these images.

[19] 42 U.S.C.A. § 10603c.

[20] The name, Recovery Assistance for Individual Sexual Exploitation (RAISE), serves to emphasize that such a fund need not be limited to minors. While the vast

1. *Fairness.* It would be the first nationally coordinated program guaranteeing a fair and equitable distribution of support to victims. This would allow a single, centralized office to track the payments to all registered victims to avoid under or over compensation problems.

2. *Reduced Legal Fees.* A fund would reduce the need for victims to retain lawyers and litigate over restitution – resulting in a reduction of actual support due to the payment of legal fees and costs.

3. *Reduced Judicial Administrative Costs.* Rather than have hundreds of courts trying to make the difficult and time-consuming determinations of apportioned damages in possession cases, all claims would go to a single office with the experience and resources to process such claims.

4. *Ending the Race to the Courthouse.* There would no longer be an advantage for those victims who have retained counsel and who are the most active in seeking compensation from cases.

5. *Reduction of Information and Transactional Costs.* A fund would allow for a single resource for victims to reduce information and transactional costs in learning of new cases with potential recovery for victims. The identification and collection would be done by the fund while victims would only have to establish their identity and harm from exploitation.

6. *Consistent Orders of Relief for Victims.* The United States Sentencing Commission found that "Of 1,922 child pornography cases in the federal court system in

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majority of beneficiaries would be victims of child pornography, the fund could also compensate pornography created without consent of adults including rape videos or photographs.

2013, no fine or restitution was ordered in 1,423 of those cases."[21] This, however, may reflect the intractable problems associated with the prior restitution system and the disinclination of courts to impose what they consider arbitrary or excessive orders for restitution. This system would offer a more concrete approach to fines and would also assure courts that the distribution of such funds will be addressed in an equitable and consistent way.

If a fund were created, possessors would pay a set criminal fine for possession of images. One possibility would be to simply create a range of fines for courts to consider in the specific context of a case. An alternative would be to place a specific figure on each image of child pornography found in the possession of a defendant, as the Senate bill does. A third option would be to refer the precise fine levels to the United States Sentencing Commission to determine. While such guidelines may be discretionary after *Booker*, we have seen that courts generally follow such guidelines and would likely do so in this area. Indeed, I expect courts would be relieved to have such clarity in an area of such long-standing confusion.

Regardless of the option selected for setting fines, I would also recommend that any new law afford judges some discretion in dealing with defendants who have differing levels of culpability. One of the realities of Internet pornography is that some defendants are found to have downloaded hundreds or even thousands of images in a single click. There is a considerable difference between bulk downloads of pornography which contain a small number of such images as opposed to the intentional searching and

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[21] James R. Marsh, *Federal Criminal Restitution for Child Victims*, ABA Journal, Oct. 28, 2014.

acquisition of child pornography. While no possession of child pornography is *de minimus*, courts should be able to tailor fines to reflect the level of culpable conduct.

Finally, a fund would create an option for courts ordering fines in non-child pornography cases. In some cases, courts are faced with ill-gotten gains or the need for fines that are not part of a restitution determination. In such cases, courts will sometimes order payments to charities or not-for-profit organizations as part of plea agreements (or settlements in civil cases). A fund like RAISE would be a worthy choice for such fines. It is not clear how much money would be generated in a national victim's fund but such judicial orders could augment the fund for the benefit of these victims.

V. CONCLUSION

Archimedes once said "[g]ive me a lever long enough and a fulcrum on which to place it, and I shall move the world." The instant controversy is the type of problem that unites all legislators as well as academics in seeking the right means to make a real change in this world. For these victims, a stable and equitable system for compensation can change their world. Thus far, we have collectively failed to supply them with such a system. It comes down to a question of the right lever. In my view, the prior approach was the wrong lever and only served to prolong litigation and ultimately deny restitution.

Rather than react defensively to the Supreme Court decision, I believe it would be wise of Congress to listen not just to the concerns of these justices but to the dozens of lower court judges who have to deal with the criminal cases in this area. Much of the prior system can be retained while a better system can be developed for possessors. The result would be a more equitable and stable system for victim compensation. It would sharply reduce litigation and, in my view, offer victims faster and greater compensation

on average. To put it simply, we can find a better lever that can make for better lives for these victims.

Thank you again for the honor of appearing today before you and I am happy to address any questions that you may have on my testimony.

Mr. SENSENBRENNER. Thank you very much, Professor.
Mr. Weeks?

TESTIMONY OF GRIER WEEKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION TO PROTECT CHILDREN

Mr. WEEKS. Thank you, Chairman Sensenbrenner, and distinguished Members of the Committee. I am a Grier Weeks with Protect. We are a pro-child, anticrime membership association. We have been working on this issue, in particular, with Congress and in the States since 2006.

Child pornography is a massive black market in the United States. The market demand can only be supplied in one way, and that is through the additional rape and torture of children. Many of those children, if not most, are toddlers or elementary school age, and they have no idea that their nightmare is not over when the assaults stop.

There are somewhere on the order of 5 million known video and images of children being abused today. There has been over 8,000 victims identified.

I think it is important for you to understand, as policymakers, that the vast majority of those victims have not been identified through any concerted national effort. They have been identified in the normal course of law enforcement investigations. And this is a serious shame, I think.

If you ask law enforcement their best estimates for how many victims there are out there, it will always tend to be in the tens of thousands. We think that about 50,000 is a very safe estimate for how many victims are out there.

But I want to point out there is a much larger iceberg there. We know that there are over 1 million people in this country sexually preying on children. That means that there are millions of child victims, and every one of those kids is in danger of having a camera or smart phone pointed at them and becoming a victim of child pornography.

The Amy and Vicky act, if drafted properly, and I am not here as a legal expert, would be a fix to part of the problem. I want to say that victims, survivors, transcenders, really, of abuse, like Amy and Vicky, who have really gone to great lengths in their lives to go fight to make the predators accountable, are national heroes. And they need a solution.

I want to also say that there has been some suggestion that if there were a victim restitution compensation fund, that the victims have to choose that or go to court. I think the spirit of the crime victims' rights act is that you have the right to confront the person who abused you or committed the crime against you, to be heard, and to exact some measure of justice. I do not think we can say to people, well, you forfeited that right because you availed yourself of help from a government fund.

In 2014, our organization compiled a report on the state of affairs in all 50 States with crime victim compensation funds. The author Susan Nelson found that 44 States and the District of Columbia either do not allow or make it very difficult for victims to recover damages from these funds.

In New York, for example, if you are a victim of a frivolous lawsuit, you are eligible for compensation. But if you are a victim of child sexual exploitation, you are not.

The problem cannot be solved piecemeal, state-by-state. The fact is that the vast majority of victims are never going to hire an attorney, never going to put themselves through the ordeal of recounting what happened to them, in the courtroom. We need a Federal solution. We need a Federal fund.

Unlike virtually any other crime on the books, a victim in Ohio may have simultaneous perpetrators in 49 other States. We support a dedicated Federal crime victim compensation fund that should be at the Department of Justice. The Office for Victims of Crime is the natural home for this fund, as they already oversee the Crime Victims Fund.

It should utilize money from a special assessment on child sexual exploitation crimes. We should make the perpetrators pay for this. And they should be graduated based on seriousness of offense.

It will need to be reconciled, if the justice for victims of trafficking act were to make it out of the Senate. It needs to be reconciled with that.

The fund should be seeded up front, I believe, with funds from the Crime Victims Fund, which now has a staggering balance of about $9 billion. That will be more than recouped over the years.

It really should be user-friendly. It is just inhumane to ask victims to come forward with a shoebox full of receipts for everything that has happened to them since they were 8 years old.

Finally, I want to say that we can't just worry about yesterday's victims. We have to think about today's victims. There are only so many special assessments and fines that can be piled on. If a special assessment is created, a portion should go to law enforcement, I would say as much as 50 percent. That will grow the fund for all victims concerned, but it also is the only way of ensuring that we are not just helping those brave survivors who have gotten strong and stepped forward to fight for their rights. We are also protecting the 5 year olds, the 8 year olds today who desperately need to be rescued, and that is law enforcement.

Thank you.

[The prepared statement of Mr. Weeks follows:]

TESTIMONY OF GRIER WEEKS
EXECUTIVE DIRECTOR,
NATIONAL ASSOCIATION TO PROTECT CHILDREN
Before the
U.S. HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
On the subject of
CHILD EXPLOITATION RESTITUTION

MARCH 19, 2015

Chairman Goodlatte, Ranking Member Conyers and distinguished members, thank you for the opportunity to testify here today.

I am Grier Weeks, Executive Director of the National Association to Protect Children, also known as PROTECT. We were established in 2002 as a bipartisan, pro-child, anti-crime membership association. We have worked with Congress on the issue of child sexual exploitation since 2006, through hearings and legislation.

We have also been active on the issue of child exploitation and abuse in over a dozen states since 2006, focusing in recent years primarily on securing resources for law enforcement to interdict child exploitation. We began calling for restitution for victims of child sexual exploitation in 2006.[1] We also work with the U.S. Department of Homeland Security and the U.S. Special Operations Command on the H.E.R.O. Child-Rescue Corps program, which trains wounded warriors to enter law enforcement careers combatting child exploitation.

Child pornography[2], the creation and distribution of crime scene images of child rape and abuse, is a massive black market in the United States. It is a market driven by demand that can only be supplied one way: through the rape and abuse of more children.

Those children—many (if not most of them) toddlers and elementary school students—will not understand that their nightmare isn't over when the assaults stop.

There are somewhere on the order of five million images and videos of child pornography known to law enforcement today.[3] Estimates are that over 8,000 victims have been identified.[4] Virtually all of these children were identified in the normal course of law enforcement investigations, not through any concerted national effort.

The fact is, no one knows—or could know—how many children are actually victims of the child pornography market, because until about two years ago, there was no serious effort even being made to find out.[5] Now that the ICE Cyber Crimes Center (C3) has established its Project Vic, an effort is materializing, but it has yet to be properly funded.[6]

However, if you ask law enforcement experts for their best estimates of how many child pornography victims there are pictured in known images, their counts tend to be in the tens of thousands. Based on discussions with the most knowledgeable experts, we believe that at least 50,000 victims is a safe estimate.[7]

Please understand that 50,000 victims is only the tip of a much larger iceberg. Law enforcement is drowning in the fight against child sexual exploitation, without the funding to investigate more than two percent of leads or access large parts of the hidden Internet.

To put the full magnitude of this crisis in context, there are over 800,000 "registered sex offenders" in the United States, representing just those who were detected, convicted, tagged and released.[8] A major study done in 2011 found that 90 percent of them had victims under 18 and 70 percent had victims under age 14—and the average offender age was 44.[9]

So it would be entirely conservative to project that there are well over a million adults preying on children sexually in the U.S. right now, which means *millions* of victims. Every one of those children is in danger of being photographed by a smart phone or digital camera.

In February, the U.S. Senate passed the "Amy and Vicky Child Pornography Victim Restitution Improvement Act" (S. 295), and that legislation is now before the House. If drafted properly—and I am not here as a legal expert—it would be a partial fix to federal law in the wake of the Supreme Court's *Paroline* decision, allowing victims of child pornography to secure restitution in court. Those like Amy and Vicky, who have transcended their abuse as children and fight today to make predators pay are true heroes, and Congress should give them access to justice.

However, Congress should also be aware that the vast majority of victims will never hire attorneys and go to court for financial restitution. Anecdotal information suggests the total number of plaintiffs who have pursued this route to date is less than a dozen or two. For most child sexual abuse and exploitation survivors, their abuse remains a painful, anxiety-and-trauma-triggering, area of their life. Few are willing to relive it in court proceedings.

Victims should have a right to a remedy through the courts, and the system should work if they decide to exercise it. But they should not be required to do this.

In 2014, PROTECT compiled a report on child pornography victims' access to crime victim compensation funds in all 50 states.[10] Author Susan Nelson found that 44 states and the District of Columbia either do not allow or make it very difficult for these victims to recover their damages from crime victim compensation funds. In New York, victims of frivolous lawsuits are eligible for victim compensation, but victims of child sexual exploitation are not.[11]

As a result, most adults who learn that perpetrators have been arrested with their images have nowhere outside of court to go for the costly toll of their damages.

The ultimate answer is two-pronged. We do need states to address their barriers to compensation for victims of child sexual exploitation crimes. Federal legislation to

strengthen requirements for participation in the federal Crime Victim Fund, along with model legislation, could hasten state action.

However, this problem will not be solved piecemeal, state-by-state. Essentially every online child pornography crime *is a federal offense*. Federal prosecutions make up a large percentage of all cases nationally. And unlike virtually any other crime on the books, a child sexual exploitation victim in Virginia may have simultaneous perpetrators in 49 other states.

In addition to the multi-state nature of this crime, the greatest legal expertise on child sexual exploitation crimes, prosecution, asset forfeiture and victim restitution is concentrated at the U.S. Department of Justice's Child Exploitation and Obscenity Section (CEOS). A federal approach is clearly warranted.

We support a dedicated, federal crime victim compensation fund at the Justice Department's Office of Victims of Crime. OVC is the natural home for this Fund, as it already oversees the federal Crime Victims Fund.

The Fund should utilize monies from a new special assessment on child sexual exploitation crimes, created by federal statute. Those fines should be as substantial as possible and graduated by seriousness of offense. The statutory language should require collection of this fine before restitution is paid to a single party.

The Fund should be seeded with money from the existing Crime Victims Fund, which reported a staggering balance of $9 billion as of September 2014, in part due to a Congressionally imposed cap on expenditures.[12] Those initial CVF monies will be more than replaced over time.

Parenthetically, it is important to note that while the proposed Justice for Victims of Trafficking Act of 2015, also before this House, does many good things, its provision for a special assessment and fund for both trafficking and child pornography crimes should be amended so as not to conflict with this new fund, and to prevent diverting monies from child pornography victims to anti-trafficking NGOs. This legislation was drafted in good faith in the absence of a special assessment and fund for child pornography victims and its sponsors have indicated a willingness to amend.

As for the administration of the Fund, it must be set up from the start to be victim-friendly. These crimes will have occurred many years, possibly decades, prior to a claim being made by an adult. The damages—whether to mental and physical health, education or income potential—will not always be distinct and measurable.

Compensation should not be reimbursement-based. Victims should be allowed to use compensation funds for whatever it is they need in life. It would be inhumane to force victims to show up with a shoebox full of receipts that are somehow expected to quantify the damages suffered since they were 8-years-old.

Finally, our goal should not just be restitution for *yesterday's* victims. While we are "making the predators pay," some portion of the new special assessment, perhaps 50 percent, should be set aside to fund the rescue of *today's* victims by law enforcement.

These funds should go to at least four law enforcement entities on a pro rata basis, determined by the number of child pornography arrests each makes annually: the Internet Crimes Against Children task force program, U.S. Homeland Security Investigations, the FBI and the U.S. Postal Inspections Service. They should be narrowly restricted for use in child exploitation investigation, forensics and prosecution, including training and equipment for same, and recipients of these monies should have to report annually to Congress on how funds were used, including the number of arrests, prosecutions and victims identified, if any. No funds should be diverted to nonprofit corporations or other "service" providers.

If we fail to use some of these funds for law enforcement, we are helping *the strongest fraction* of victims, while consigning the youngest and most endangered to further hell, expecting perhaps that decades from now they might come forward as adults seeking restitution payments.

I hope that yesterday's victims will join us in this call. It would be a noble legacy for them, making them protectors of children today.

Of course, by increasing funding to law enforcement, we will ensure that the Fund will grow bigger, faster. More arrests will lead to more prosecutions and more income in the victim compensation fund for everyone.

PROTECT believes that our most sacred obligation is the protection of children from harm. Thank you for the opportunity to testify, and thank you for making this your priority.

FOOTNOTES

[1] See, "Raising the Stakes for Child Pornography, PROTECT's Exclusive Interview with Andrew Vachss," February 2006

[2] I use the term "child pornography" throughout this testimony in an effort to be clear and avoid terms that may not be readily understood. "Child abuse imagery" or "child abuse crime scene recordings" are more accurate descriptions.

[3] Although the National Center for Missing and Exploited Children publicizes that it has reviewed over "132 million images and videos" through its Congressionally-funded CVIP program, this includes many known images reviewed thousands of times. The U.S. Sentencing Commission estimated over five million known images and videos in circulation worldwide in a 2012 report. This conforms to anecdotal estimates provided to PROTECT by law enforcement experts.

[4] A precise number should be available from NCMEC's Child Victim Identification Program (CVIP), which tracks known victims, as reported by law enforcement or determined by NCMEC.

[5] By federal statutory authorization, the National Center for Missing and Exploited Children (a private nonprofit corporation) was made a "central repository" for child pornography images and in 2002 established its Child Victim Identification Program (CVIP). Law enforcement submits seized images and videos to CVIP and CVIP tracks known victims, assisting prosecutors in making cases. However, most of these identified victims are discovered in the process of routine law enforcement investigations and reported to NCMEC from the field. NCMEC has not mounted a substantial program to identify the children found in images and videos in its repository, which has become a source of frustration to many in law enforcement. When asked by PROTECT why NCMEC

had not launched a serious victim identification effort of its own, a senior NCMEC official stated that it did not have funding to do so (NCMEC received over $34 million in federal grants and contracts in 2013). However, after years of deferring to the powerful NCMEC, the ICE Cyber Crime Center began filling the vacuum in recent years with its Project Vic, a program that combines training, technology and investigations to systematically identify child victims.

[6] Lack of proper funding to the ICE Cyber Crime Center (C3) and programs like its Project Vic is a major reason for the HERO Act of 2015, which would authorize C3 and its component units.

[7] If estimates of five million known images and videos are roughly correct, that would be an average of 100 images per victim.

[8] State registry counts compiled by National Center for Missing and Exploited Children, December 2014.

[9] "Who are the people in your neighborhood? A descriptive analysis of individuals on public sex offender registries." Ackerman, Harris, et al. International Journal of Law and Psychiatry, May-June 2011.

[10] "Grading the States: The Need for a Federal System of Compensation to Victims of Child Pornography." National Association to Protect Children. To be published in 2015.

[11] N.Y. Exc. Law § 621

[12] OVC website. http://www.ovc.gov/about/victimsfund.html

Mr. SENSENBRENNER. Thank you very much, Mr. Weeks.

I will recognize myself for 5 minutes. It will be kind of more of a list of concerns than a question, although I may have one or two at the end.

Everybody here wants to make those who perpetrate and distribute child pornography pay and pay dearly. We all know that there is a lot of money in it, and this is criminal money. We ought to make those who attempt to make a lot of money and get caught really have the book thrown at them, and it is not just jail time.

The second issue is how we compensate people who have been the victims of child pornography. The *Paroline* decision talks a lot about that and comes to the conclusion that the current statute is defective.

The third point is, how do we compensate the victims, how much, what they have to show to be compensated, and whether it is proper to call this restitution when it might go beyond the restitution that is necessary to actually deal with the psychological damage that is done to people who are victims of child pornography.

This is kind of something that is all mixed up. The *Paroline* case, in my opinion, shows very clearly that Congress got it wrong when it passed the trafficking statute Section 2259 of the Criminal Code. This time we have to do it right, because there will be a further *Paroline*-type case that makes it all the way up to the Supreme Court. And if we don't do it right, in a few years, we will be back right from the start.

It appears from the testimony that Amy and Vicky's law is a good start, but it doesn't do it right completely. With all these concerns that have been raised by the witnesses today, let me ask you, Professor Cassell, how you think Amy and Vicky's law can be strengthened in a way that we don't have to respond to a Supreme Court decision years down the road.

Mr. CASSELL. Thank you, Mr. Chairman. I think you make a very good point. The Amy and Vicky act is a good start and should be the first step in the process. But there are obviously additional steps that can be taken, and I list some of those in my testimony.

One of the key things is the Crime Victims' Rights Act, which I know you were instrumental in helping to pass about 10 years ago. One of the problems there is that there was initially appropriation made for crime victims' legal representation that has since disappeared. So I think that would be the number one thing Congress could do, to reestablish the funding that was part of the Crime Victims' Rights Act. That would provide legal representation for victims on restitution issues and every other issue that they have.

There were also some other things that could be done to strengthen the Crime Victims' Rights Act, such as ensuring proper appellate review of crime victims' claims.

I think it is certainly worth discussing the idea of a fund, but what has been interesting for me is the Justice Department, who we had to litigate against in the Supreme Court on these issues, threw out the idea of a fund 5 years ago. Well, here they are today still talking about it, but when is the department actually going to put something forward that is specific?

The Amy and Vicky act is something specific. It is legislation that has passed the Senate, and it would make a real-world dif-

ference for Amy, Vicky, and many other victims around the country. I think that is the thing that has to happen.

Mr. SENSENBRENNER. With all due respect to our colleagues on the other side of the Capitol, there are a lot of bills that pass the Senate that we have to fix up. This is a case where we have to do it right the first time, because if we don't do it right the first time and try to take a bow and say, "Guess what, folks? We have solved this problem," when we really know we didn't, I think we are just deceiving the American public, knowing that further litigation is going to result in an inconclusive decision by the Supreme Court, which will make a lot of the victims of this type of crime very frustrated and very unhappy.

I think that Amy has indicated that on the record after this all went up to the Supreme Court, where eight of the nine Justices said that under the current statute, no restitution was possible.

I guess what I would like to say is that I am concerned that if the shoebox full of receipts, using Professor Turley's testimony, ends up resulting in a pittance and a slap on the wrist, and having a minimum amount of restitution damages, I am concerned that that would raise some Eighth Amendment problems that we really don't need to be adding to the whole business of things that have to be solved.

So I am going to say I am very, very eager and willing to work with everybody who has an oar in the water. But remember, the goal is to do it right, not to do something where people can take a bow on the Sunday morning talk shows and then being embarrassed that their law has been struck down because it is wrong or because it is not specific enough.

With that, I will call on the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

And I appreciate the witnesses.

Let me ask Professor Turley, does the Eighth Amendment prohibition against excessive fines apply to restitution statutes in criminal cases?

Mr. TURLEY. Thank you. It is wonderful to appear again before you, sir.

The Supreme Court actually touched on this and said that restitution, even though it is traditionally not a punitive measure, can trigger the Eighth Amendment because it is part of the criminal process. They touched on it lightly on the opinion that this can conflict as an excessive fine under the Eighth Amendment.

I think that most of the opinion is directed at the origins of these doctrines of proximate causation in torts, where the court is saying, look, this just doesn't fit. What you are trying to do here with possessors, and I think that is the key here, that if you want to fix this thing, I think that you need to separate who are the targets.

When it comes to those core individuals, the ones that do the filming and distribution, I don't see a serious problem, even with Senate bill. But the Senate bill replicates many of the problems that the Supreme Court identified. In some respects, it is a cosmetic change. I think that is how it will be viewed by some of the Justices.

Where I think we have our issue, what makes this difficult, are with possessors and fitting it into a restitution scheme. The Chairman was addressing that as well.

So the answer, sir, is yes, excessive fines can run afoul of the Eighth Amendment. In fact, it was raised by the Supreme Court. But you can actually get on to terra firma, if you just take a different approach to this issue. I think that, frankly, this was just the wrong path to take with that group of individuals. You can get to the same place. You can actually get to the same relief, but you can do it in a way that will avoid all of this litigation.

It is sort of like when a patient goes to the doctor and says, "Doc, when I do this, it hurts." And the doctor says, "Stop doing that." I think that is the problem here, that you are using the wrong means for that class of defendants.

Mr. CONYERS. Ms. Steinberg and Professor Cassell and Mr. Weeks, are you in general agreement with the response that has been made so far?

Mr. CASSELL. I am not. I think the Eighth Amendment does not apply at all to restitution awards. Restitution awards do not punish criminals. They provide compensation to victims.

I litigated that issue in the 10th Circuit in the Oklahoma City bombing case on behalf of 169 families and many others who were trying to get a very large restitution award entered against Terry Nichols so he couldn't go sell a book or do something like that and profit from his horrible crime.

The issue went to the 10th Circuit, and the 10th Circuit said restitution does not punish criminals. It is compensation. So some of the other constitutional restraints that may apply in other settings, when Congress sets mandatory minimums or things like that, simply do not apply.

The other key thing to remember about the Amy and Vicky act, today, a possessor of child pornography can be ordered to pay $250,000 to the government. The Amy of Vicky act says to a possessor, well, let's not send money to the government. Let's send $25,000 to a victim.

If you can send $250,000 to the government, it is hard for me to imagine how any court in the land would say, well, $25,000 to a victim is cruel and unusual punishment.

Mr. CONYERS. Any other comments on this?

Mr. WEEKS. Congressman, I would like to respond.

Mr. CONYERS. Mr. Weeks?

Mr. WEEKS. My opinion on the constitutional question wouldn't be expert enough to be valuable to you, but I do want to emphasize that possessors, the so-called simple possessors, must be held accountable. They are commissioning the rape of children.

Mr. CONYERS. Now, finally, I have been pursuing an attempt to get nondeterrent minimums struck from the Criminal Code for a considerable period of time. I think I am gaining steam. Couldn't we drop that and let's leave it in the court's discretion, rather than us trying to write in whatever feelings we happen to have on the day this legislation comes up?

Who would like to try that?

Mr. TURLEY. I will take a stab at it. I actually, in my testimony, encourage the Committee, in whatever it does, to allow some ele-

ment of discretion for trial courts to make qualitative decisions in cases. There are no de minimis possession of child pornography cases, in my view. That is, they are all serious. But there are great variations.

And these trial courts are in an excellent position—they are the boots on the ground—to make decisions. None of these courts are going to be sympathetic to these defendants.

But I think that what the Committee itself has to accept is if you look at the record of *Paroline*, it is riddled with broken courts, fractured courts trying to use the system, the approach, that I think is replicated by the Senate with regard to possessors. It is really only with possessors that courts fractured on trying to use the system.

So I think it would be a good idea to have a discretionary component, but also to use an alternative approach to avoid another round of litigation.

Mr. CONYERS. I thank you all.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Ohio, Mr. Chabot?

Mr. CHABOT. Thank you, Mr. Chairman. Thank you for holding this very important hearing.

I want to thank all our witnesses here today for devoting much of their time and their lives to an issue which is absolutely critical, the exploitation of children, particularly over the Internet. It is incredible how prevalent it is, how many children have been injured.

I have been on the Judiciary Committee, this is my 19th year now. Henry Hyde had introduced the victims of crime constitutional amendment some years before I got here. And after a while, he was so busy with so many issues, being Chair of the full Committee, that he turned to me to handle it. And for years, I was the principal sponsor of the victims constitutional amendment.

Unfortunately, we never got it passed. It is very hard to pass a constitutional amendment, as Professor Turley knows. We did pass some legislation, and oftentimes it was a victims bill that was attached to some other larger bill that in a CR went through. So it was hard to focus.

It wasn't a CR this time, but in any event——

Mr. SENSENBRENNER. No, I stuck it on something the Senate wanted.

Mr. CHABOT. Okay.

But, procedurally, oftentimes, you never know what you actually accomplish, because it is in a 2,000-page bill somewhere. But the bottom line is, a lot of us have been involved in this for a long time.

There is a debate around here. Oftentimes, you hear about we prefer, conservatives, in particular, prefer to have the States doing what they can and us not to get involved in it, if we don't really need to.

So I guess my question would be for you, Mr. Weeks, mainly, but anyone can comment on it, if they want. You mentioned the States. Some of them have victims' compensation funds and most don't apply to, I guess, minors exploited on the Internet. But this is a case where it may happen in one State and then because these people apparently deal with each other all over the place, it can be in all 50 States.

So make your best argument, if you would, for the record, as to why this is an area, really, we should have Federal involvement and a Federal victims' compensation fund of some sort.

Mr. WEEKS. Sure. Congressman, we work in probably a dozen States so far. We have worked on the legislative level. And one of the things we want most to see is States taking responsibility, taking the lead on this issue.

However, virtually every single case of online-facilitated child pornography trafficking is a Federal crime because of the commerce clause. So you have that. You also have a very large percentage of all prosecutions are federally done, so you have that as well. There is also a very large international component.

I think that here in the States, law enforcement is completely overwhelmed. In every single State, law enforcement is unable to even pursue any more than 2 percent of known leads, of known leads.

Mr. CHABOT. Thank you very much.

Let me ask you another question. I also practiced law for 18 years and did criminal cases, represented victims, et cetera. In going through the victims' compensation funds, as you all know, to fund them, they will slap on court costs on criminal cases. Unfortunately, oftentimes, the people in our criminal courts all over the country are basically indigent, and they are supposed to pay but oftentimes don't. How can we make sure that the actual perpetrators here—and I think a lot of these perpetrators are people who have some financial ability to pay. I am sure there are exceptions, but how do we make sure that actually the people who are committing these horrific crimes are the ones who foot the bill and not taxpayers, or in some way the public is paying for it.

We want the victims to get something, but it really ought to be the bad guys and not all of us, the taxpayers, paying.

Professor Turley, would you want to take that?

Mr. TURLEY. Well, under my written testimony, I refer to the fund as actually collecting money from these cases, a central fund where these district courts can refer to an office that has the expertise and can also distribute this with a centralized idea of who is receiving what money and has the ability to do this in an efficient way.

It would also allow courts to send fines into the fund, which could help support it even further.

One of the things that I think has great promise is that these people, if they are out of prison, should have garnishment. They should have money removed from every paycheck to remind them of what they helped facilitate, if they are possessors, or what they did, as core original violators. That can be done.

Mr. CHABOT. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chair.

And thank you to all the witnesses here today. I appreciate your testimony and would echo the comments from my colleagues regarding all that you do and the importance of what you do. Thank you very much.

I practiced law for 22 years, too, and I had a chance to be on both sides of the law. I have seen victims firsthand, and I know that this is an ongoing process that all of us are working on and trying to do the best that we can do.

Many of you can answer these questions. I have several of them. I am sure, as time goes on, I will have a chance to ask them in the future.

I think, Judge Cassell, you helped write this. Is there a reason it didn't include a compensation fund to address the droves of victims that haven't sought traditional restitution?

Mr. CASSELL. Thank you, Congressman.

The reason we wrote the bill—when I say "we," a large number of people, the victims community, members of the staffs on both sides of the Hill have looked at this. The idea was to keep it narrow, so that it wouldn't attract the controversy that seems to attend broader bills.

The Supreme Court in the *Paroline* decision says someone is going to need stop in, at least the four dissenting Justices all indicated that. So we responded to that call and simply addressed the narrow problems that needed to be fixed in the wake of the Supreme Court decision.

Obviously, Congress could do a number of broader things. Congressman Chabot has talked about a constitutional amendment, and I believe I will be here in April when the House will be holding hearings on that. There are some much broader steps that can be taken to protect victims' rights. But we tried to do a narrow approach to a narrow problem.

Mr. BISHOP. Thank you very much for that.

One of the dissenting opinions, Justice Roberts, in that particular case, provided that the victims should get nothing under the restitution statute as written, and that Congress should fix the statute. But after that, he gives very little guidance as to what he meant by that.

Perhaps you all can give me some idea as to what you think he meant by that.

Mr. CASSELL. I think he meant that victims like Amy should receive ample compensation, and the bill that has been passed by the Senate, the Amy and Vicky act, does exactly that.

One of the things it does, Congressman Chabot talked about the taxpayers here. Frankly, the only people who love the current regime are wealthy child pornography criminals, because now they can manage to get off the hook and pay just $1,000 or $2,000, which is the collection rate of victims in the system. If the Amy and Vicky act passes, then a substantial amount of money can be taken from those defendants and given to victims. And if those defendants are unhappy about having to shoulder the burden for paying a large amount, they can then go track down other criminals around the country.

What happens under the current regime is that crime victims like Amy have to go to literally dozens and dozens and dozens of different cases, different courts, different judges, to try to collect restitution. I think that is the kind of thing that Chief Justice Roberts was thinking needed to be changed.

Mr. TURLEY. I will disagree to some extent to what my friend Judge Cassell has said, in terms of the dissent by Chief Judge Roberts, although we all, obviously, could read this differently.

One thing that comes out of eight of nine Justices is a view that the system designed by the Congress was unworkable. That was not a close question.

I mean, one of the things I tried to convey in my written testimony is you have 10 out of 11 circuits saying that what Congress did was impossible to carry out. You have eight out of nine Justices, who agree on less and less each year, who agreed on that position.

My problem with the Senate bill is it does try to make marginal changes, and what you see in these opinions is that there are substantial changes that have to be made, but not in what we want to achieve. We can achieve it. But this is an example of what I talk about in my written testimony of what economists call path dependence. This idea of fitting these fines as a form of restitution and part of joint and several liability was a flawed concept. And this is a good time to simply take another path.

One of the nice things about the compensation fund is that it will get you out of that morass. These Justices said clearly, look, this just doesn't fit. It is very hard to make this into proximate causation in terms of restitution. They weren't saying that the victims couldn't get the relief, but this was not the vehicle. That is why a compensation fund would move you out of that problem.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The Chair will ask unanimous consent that all Members of the Subcommittee have the opportunity to submit written questions of the witnesses within 5 days.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 11:25 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

The crime of child exploitation, including the trading and viewing of images of sexual abuse against children, is one of the most horrific crimes one can imagine. It is also, sadly, one of the fastest growing. The National Center for Missing and Exploited Children, which works in partnership with law enforcement, reviewed over 3 million child sexual abuse images and videos last month alone. And, there was an 18 percent increase in the files they reviewed between 2013 and 2014.

The harm that the victims of child exploitation trafficking suffer is extensive. Not only must these young victims overcome the trauma of being raped—most often by a so-called loved one or an adult in a position of trust—but they are also faced with the knowledge that everyday many thousands of pedophiles could be viewing the evidence of their rape for their own pleasure. Horrifically, many pedophiles also use these exploitative images to groom other victims for abuse.

There are some who think that the possession, or "mere possession" as they call it, of child pornography is a victimless crime. I want to state unequivocally that *it is not*. Amy, the extraordinarily brave victim whose restitution claim formed the basis of the Supreme Court case we will examine today, has said this in a victim impact statement:

> "Every 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."

* * *

> "The truth is, I am being exploited and used every day and every night somewhere in the world by someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people?"

* * *

While the equities of online child exploitation cases, including those involving defendants who traffic in images, seem pretty clear to me, the federal courts have long struggled with these cases. It is very disappointing to me that federal judges sentence child exploitation defendants below the applicable guideline range with increasing frequency. In 2011, only 32 percent of these defendants were sentenced within the guideline range. It is a travesty that our federal judges are not treating this crime with appropriate seriousness. Congress, and this Committee, must address this issue.

Determining the appropriate amount of restitution for the victims of child exploitation has also proven difficult for the courts. Under current law, federal courts are required to award any child depicted in sexually explicit material restitution in "the full amount of the victim's losses" as determined by the court. These losses can include medical services, therapy, and attorneys' fees, among other things. Unlike child pornography production cases, where there is a limited universe of defendants who are generally joined in the same prosecution, the harm to the victims in end-user child pornography trafficking cases is often caused by hundreds or thousands

of unrelated individuals who are prosecuted across time and in different jurisdictions, which makes apportionment difficult.

In recent years, there has been disagreement among the federal circuit courts over how to calculate the restitution owed by a defendant who received, distributed, or possessed child pornography. In response to the circuit split, the Supreme Court ruled in *United States v. Paroline* [Pear-a-line] that an individual child pornography trafficking defendant may be made liable only for the harm caused by their own conduct, and not for the conduct of others.

I am glad that the *Paroline* decision gave the lower courts better guidance on how to determine the appropriate restitution under the existing statute, but there is still work to be done. To date, only fifteen of the more than 8,600 known victims of child exploitation have ever sought restitution. Congress must craft a scheme that helps to address this travesty.

It is also incumbent on Congress to ensure that any changes to the existing restitution statute, 18 U.S.C. 2259, are done deliberately and with a close eye to the Supreme Court's constitutional admonishments in *Paroline.* It serves no one if Congress were to make changes that create unneeded litigation and circuit splits over legislation that is intended to make victims whole.

We have a very distinguished panel of legal and subject-matter experts here today to help us examine the *Paroline* decision and the state of restitution in child exploitation trafficking cases. I thank all of you for being here today.

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

The harms that result from the sexual abuse of children are horrible, and too lengthy to list. These harms last long after the abuse ends. Importantly for our hearing today, they can also be incredibly expensive. The cost of finding a new home, on-going therapy, and other care quickly adds up for the victims of child exploitation. Over the victim's lifetime, this sum can range into the millions of dollars. Our laws rightly allow victims to seek financial restitution from their abusers, but this is not the end of the story.

Having endured horrific abuse, these children are often confronted with the fact that photos and videos of that abuse are being traded and collected by hundreds of thousands of pedophiles on the Internet. Even children victimized before digital cameras became widespread are now faced with the knowledge that in the Internet Age, a detailed visual record of the darkest moments of their lives exists, is in wide distribution online, and is hungrily sought by pedophiles around the world.

To better compensate victims of child exploitation, Congress expanded restitution liability to those who produce and traffic in the pornographic images stemming from that exploitation. Unfortunately, to date, these efforts have done little to get sex offenders' money into the hands of their victims.

In the nearly twenty years since the child exploitation restitution statute, 18 U.S.C. Section 2259, was enacted, only fifteen victims of child exploitation trafficking, out of more than 8,600 known victims, have actually sought restitution from those defendants trading their images.

The Supreme Court case we are here to consider today, *Paroline* [Pear-a-line] *v. United States,* arose only because of the few brave victims who have sought the restitution they are due. In that case, a young woman, who goes by the name "Amy," was raped by her uncle when she was a very young child. Like so many other victims, she was horrified to discover, years later, that pictures of her most painful memories were favorites of sick online communities.

It is estimated that because of her initial abuse and constant revictimization through the trafficking in her images, the cost of Amy's lost wages and other damages will be more than three million dollars over the course of her lifetime. Using 18 U.S.C. Section 2259, Amy has sought restitution from hundreds of sex offenders caught with her images on their computers.

In *Paroline,* the Supreme Court decided that one defendant with only two of Amy's images could not be held liable for the full restitution from the actions of thousands of offenders. They also rejected the notion that, at least under the existing statute, the first sued offender could simply sue subsequent offenders for contribution.

We are here today to discuss what comes next. Clearly, even before the *Paroline* ruling, the system of child pornography restitution needed to be reworked. As I mentioned earlier, only 15 victims, out of the thousands we know of whose images

are on the Internet, have sought restitution. That is proof that something is broken. Congress has a responsibility to ensure that those who harm children in this vile way are held accountable for the suffering of their victims.

A well-functioning system must encourage and enable more victims of child exploitation to come forward. It must ensure that they can secure adequate restitution from those who continue their victimization by trading in their images. And, finally, any solution must be appropriately crafted within our Constitutional boundaries.

I look forward to hearing from our panel and hope we can use what we learn today to address the *Paroline* decision in a thoughtful, responsible manner. As a father and soon-to-be grandfather, I am committed to doing all we can to protect our children and ensuring child victims receive the care they deserve.

I thank our distinguished witnesses, and yield back the balance of my time.

Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Mr. Chairman: We have no greater cause than to promote the health and well-being of our children. Today, we hear testimony to assist in crafting legislation to help the most vulnerable and injured of our children due to exploitation and sexual abuse.

It is my hope that we can more effectively provide restitution to child victims in light of the Supreme Court's recent child pornography restitution decision. In *Paroline v. United States,* the Court addressed ambiguities in the current restitution provision of 18 U.S.C. Section 2259.

The Supreme Court acknowledged in *Paroline* that, "the demand for child pornography harms children in part because it drives production, which involves child abuse." Unlike most crimes, the existence of child pornography creates a continuing, permanent record of the abuse which exacerbates the harm each time it is shared on the internet. It is for this reason that we strive to find a unique legislative solution, for a unique and continuing harm to children, to provide necessary restitution for their injuries.

The extent of this harm cannot be underestimated. The National Center for Missing and Exploited Children (NCMEC) reported in 2014 alone, they received 1,080,371 reports relating to child pornography images on the internet. NCMEC also reports that the number of images being collected and traded worldwide continues to expand exponentially. Of the millions of images, the Department of Justice notes that to date over 8500 children have been identified in these images.

Sadly, of the total number of identified children with documented sexual abuse due to child pornography, only 15 have sought restitution through the federal courts to date. As I have said before, perpetrators of crime know that they are more likely to evade detection and punishment when their victims refuse to assist or cooperate with law enforcement. We need to find better ways to encourage child victims to come forward to address their injuries and pursue restitution.

Despite evidence of a clear link between child pornography and ongoing harms to child victims, the Court in *Paroline* denied restitution to one such child victim known as "Amy". We are here today for Amy, and all child victims, both identified and yet to be identified.

Understanding why the Court denied restitution is essential if we are to provide future relief to child victims. The ruling in *Paroline* establishes an unequivocal causation standard requiring a sentencing court to find 'proximate cause' between a defendant's acts and a victim's harms before imposing restitution. The Court refrained from adopting a 'joint and severable liability' standard to require a single defendant to pay 'Amy' restitution for her total aggregated harms. The Court's stated reason for not adopting this standard is the lack of guidance in the restitution statute from Congress. Moreover, the Court relied on a bedrock standard of proximate cause between the defendant's acts and the victim's harm before it would order a restitution assessment. In this case, the Court found insufficient facts to establishment proximate cause liability to assess restitution.

The ruling goes on to direct that, "a court should order restitution in an amount that comports with the defendant's relative role in the causal process underlying the victim's general losses." To do otherwise could raise questions of workability under the Excessive Fines Clause of the Eighth Amendment. How best to provide a workable guide for sentencing courts to determine a defendant's relative role is one of the tasks before us.

We should direct our attention to heeding the admonition in *Paroline,* that the punishment fits the crime, and in this context, that restitution reflects the relative harm committed by each defendant. The Court notes factors, such as whether a criminal defendant took part in production of the child pornography or possessed the images, how many images may have been possessed, and reliable estimates of the number of individuals who possessed the images, as possible guideposts in sentencing. I look forward to considering the testimony of today's witnesses in determining what statutory guidance Congress should provide.

The necessary urgency to provide statutory relief for these child victims is without question. The United States Sentencing Commission, in its latest report to Congress, cites numerous studies documenting the long-term impact of child sexual abuse. Those impacts include low self-esteem, psycho-pathology, PTSD symptoms, distorted sexual development, as well as a higher risk of have multiple sex partners, becoming pregnant as teenagers, and experiencing sexual assault as adults. The Journal of the American Academy of Child and Adolescent Psychiatry documents studies linking child sexual abuse with higher rates of major depression, anxiety disorder, conduct disorder, substance use disorder, and suicidal behavior. The American Academy of Experts in Traumatic Stress documents long-term effects of child sexual abuse to include problems in relationships and intimacy, self-esteem, mental health disorders, and alcohol abuse. The need for restitution is clear.

Clinical sources note that child sexual abuse victims, who are involved in lengthy unresolved criminal cases, appear to stay symptomatic for longer periods. Providing resolution and restitution brings relief to these child victims. That is why we need to act to provide clarity in the restitution statute and to provide more certain relief to those harmed by child pornography.

Congress could provide additional statutory guidance by providing a right of contribution for restitution payments among multiple convicted defendants, or by directing sentencing courts to assess liability for a lifetime of the full amount of a victim's losses for each defendant. However, the Court in *Paroline* cautioned the possible Constitutional concerns in these approaches. I look forward to considering the opinions of today's witnesses to determine the best, workable statutory solution to providing restitution.

The witnesses today in their written statements have each addressed the possibility of creating a separate fund to more readily assist victims. We should consider these and other remedies to more effectively provide resources to child victims.

Child pornography offenses, which involve the internet, a number of wrong-doers, and individual victims pose unique restitution issues. There will be continuing difficulties getting restitution for victims with the requirements enunciated in *Paroline,* unless there is further statutory guidance from Congress. I look forward to working with my Judiciary Committee colleagues to develop legislation to provide this guidance.

It is my hope that the hearing today will help refine the issues, provide a voice to child crime victims, and ultimately deliver restitution to those who most need it.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Member, Committee on the Judiciary

Today's hearing concerns finding the best means to provide restitution to victims of child pornography in cases where the measure of liability is in question.

In doing so, we need to remember that it is for children who have been harmed by exploitation that we are here today. These children represent a potential lifetime of repeated injury from the continued recirculation of these images. One of those documented child victims, known as 'Amy' was the subject of the Supreme Court case, *Paroline v. United States.* Due to the ambiguity of the current restitution statute, 18 U.S.C. 2259, the Court was unable to award Amy full restitution. We need to address the importance of the ruling by the Supreme Court in *Paroline.*

However, as we seek to redress the harm we have identified, we should avoid a legislative reaction of overcriminalization. I'm concerned that placing mandatory minimum punishments into any legislation may produce unforeseen and unwanted results. The Court in its decision articulated familiar themes: measured judicial discretion, restitution based on unique facts, articulated statutorily imposed sentencing factors. We would be well advised to heed these signposts.

By engaging with a broad range of stakeholders through various means, such as the bipartisan Task Force on Overcriminalization and Overfederalization, we have been considering a range of issues, one of which is mandatory minimum sentencing

reform. As a general matter, I am concerned about expanding mandatory minimums and reducing judicial discretion, even in the context of financial penalties, as opposed to prison terms.

Finally, as we address the best way to legislatively facilitate payment of restitution, we should be both true to fairness and the rights of victims to be made whole. To that end, we need to look very closely at the advisability of holding defendants liable for harms caused by other individual's conduct, as the Court cautioned, in this, a criminal case context. If and when legislation moves in this Committee, I plan to work on a bipartisan basis to make sure the necessary modifications are made to any legislation.

I look forward to the discussion before us, and to considering remedies for these child victims.

Prepared Statement of Victims of Child Pornography

We are "Alice" and "Aurora," sisters and victims of child pornography whose "series" are widely traded on the internet by people all over the world. We came to the hearing on March 19, 2015 on what to do about the growing problem of child pornography and the Amy and Vicky Act. We appreciated the opportunity to see that the Committee cares about us, to meet with Committee Chair Sensenbrenner, and to later meet with certain Congressmen and staff, including the staff of our Congressman, Rep. Nunes.

We are really thankful that you listened to us. It means a lot to us that Congress is seriously considering passing the Amy and Vicky Act – which would help victims like my sister and me. By passing this bill, the Congress will be telling my sister, me and other victims that we are important, that we matter. My sister and I urge you to pass the Amy and Vicky Act.

The Amy and Vicky Act does some very important things for victims like us. It allows us to look directly into the eyes of the criminals who hold the images of us being raped as children and tell those criminals that we are people, that their possession, distribution and creation of our images hurt us personally, and that they are personally responsible to us in restitution.

This Act would continue to allow us to work directly with our attorney, Carol Helpburn, who has helped us so much by finding a therapist, getting the help and support that we so desperately need, helping us take action and get back some kind of control which was taken from us as children, and so much more.

We understand that the Committee is considering creating a fund to help victims like us. While a fund could help give victims some money, without the Amy and Vicky Act, we would lose the ability to be heard personally and to hold criminals individually responsible for what they did and continue to do to us every day by looking at our images. A fund would not help us like our attorney helps us.

Please pass the Amy and Vicky Act and please don't use a fund to rob us of the ability to get restitution and stand up for ourselves, which is such a critical part of the process of getting our lives back.

"Alice" and "Aurora"

Ladies and Gentlemen of the House Judiciary Committee,

As a victim of one of the most prolific series of child pornography in the world, I ask for your support of the Amy and Vicky Act, which will help victims receive the restitution they so desperately need. The restitution that I have received has helped me pay for the counseling that I have needed and will continue to need. The psychological effects of being a victim of child pornography are complex and I have had to seek out help from different counselors and psychologists from different theoretical orientations and skill sets to be able to address all of the symptoms I have experienced. Healing from this kind of ongoing trauma is not an easy fix. I have been in and out of counseling for the last 9 years of my life trying to heal from this. The trauma of having my images downloaded and used for sexual gratification by tens of thousands of pedophiles has led to symptoms of PTSD, uncontrollable anxiety, serious dissociative symptoms, insomnia, nightmares, inability to work at times, difficulty trusting others, and the wear and tear of this stress upon my body. I have been stalked and harassed by some of these pedophiles, adding to the extreme stress and fear generated by the situation. The restitution I have received has helped me stay afloat during periods when I was too paralyzed by fear to work outside my home. Despite academic strengths, I have had to take a slower pace through school including some breaks for when this situation was too emotionally overwhelming for me. This crime has affected every area of my life including work, school, family, friends, romantic relationships, and my self-image. Without the counseling that restitution has helped me pay for, I would be very low functioning right now. Due to the counseling I have received, I have experienced a lot of healing. I am currently months away from finishing a Masters degree in Professional Counseling and am married with two children. Years ago, I doubted if I would ever be able to trust someone enough to get married and intimate relationships terrified me. This has been one wonderful result of the counseling that I have been able to receive that restitution has allowed me to pay for. I am still a work in progress, but I am amazed at the progress that I have been able to make when so many other victims remain stuck in overwhelming sadness, anxiety, and fear.

Another important aspect of receiving restitution is that it validates my status as a victim and causes the perpetrator to recognize it too. Many pedophiles that download these images do not think that they are hurting anyone, when, in truth, victims such as myself are suffering from the intense humiliation and feelings of uncontrollable sexual exploitation. Images of us being raped as children are being used for sexual gratification by these perpetrators and our humanity is forgotten while it feels like our souls are dying. When a court orders someone who has downloaded these images of me to pay restitution, I feel like the court is recognizing my status as a victim and forcing the perpetrator to acknowledge that they have hurt a real person. This is healing in and of itself. To be treated as a sex object is so damaging, but to be validated as a victim and have my hurt recognized by the government is empowering.

With these things in mind, I ask for your strong support of the Amy and Vicky Act. I want other victims to be able to experience the healing that I have, and receiving restitution is integral to being able to get the help that they need. I also hope that our government will continue to see victims of child pornography as individuals with individual needs for healing, and never as a clump of people with a one-size fits all treatment. Lastly, I hope that our government will make the process of receiving restitution easier rather than harder for victims. Being one of the first

victims of child pornography to go through the process of seeking restitution, it has been a difficult road, especially at first. Some of the things I have been asked to do have ended up re-traumatizing me. Most of that has been because we have had to fight so hard to justify the restitution and I have had to describe my trauma over and over again. While the experience has definitely been worth it because I have been able to receive help to heal, my hope for the victims who come after me is that the government will not cause them to do things that will re-traumatize them to get the help that they need. This process should be simplified, not made more complicated. Please support the Amy and Vicky Act to help victims receive the help they need for healing.

Sincerely,

"Vicky"