

STATEMENT

OF

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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*.<sup>1</sup> Interpreting a restitution statute enacted by Congress, the Court concluded that in a child pornography prosecution, a restitution award from a particular defendant is only appropriate to the extent that it reflects “the defendant’s relative role in the causal process that underlies the victim’s general losses.”<sup>2</sup> Exactly what 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

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<sup>1</sup> 134 S.Ct. 1710 (2014).

<sup>2</sup> *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.<sup>3</sup>

## **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

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<sup>3</sup> 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.”<sup>4</sup> When she was eight and nine years old, Amy was repeatedly raped by her uncle in order to produce child pornography.<sup>5</sup> The images of her abuse depict Amy being forced to endure vaginal and anal rape, cunnilingus, fellatio, and digital penetration. Amy was sexually abused specifically for the purpose of producing child sex abuse images; her uncle required her “to perform sex acts” requested by others who wanted her images for their own sexual gratification. Amy’s abuser pleaded guilty to production of child pornography<sup>6</sup> and in 1999 was sentenced to 121 months in prison. He was also ordered to pay the psychological counseling costs Amy had incurred up to that time, a total of \$6,325.

By the end of her treatment in 1999, Amy was (as reflected in her therapist’s notes) “back to normal” and engaged in age-appropriate activities such as dance. 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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<sup>4</sup> 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.”).

<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup>

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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<sup>7</sup> 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.<sup>8</sup> The court began by making a factual finding that Amy was a “victim” of Paroline’s crime because of his gross invasion of her privacy. Although the district court recognized that a “significant” part of Amy’s losses is “attribut[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as [Paroline],”<sup>9</sup> 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.”<sup>10</sup>

Amy promptly sought review of the district court’s denial of her restitution request, employing the appellate review provision found in the Crime Victims’ Rights Act (CVRA).<sup>11</sup> Acting quickly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting.<sup>12</sup>

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.<sup>13</sup> 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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<sup>8</sup> See *United States v. Paroline*, 672 F.Supp.2d 781, 784-85 (E.D. Tex. 2009) (*discussing* 2259(b)(1) & (b)(4)).

<sup>9</sup> 672 F.Supp.2d at 792.

<sup>10</sup> *Id.* at 793 n.12.

<sup>11</sup> 18 U.S.C. 3771(d)(3).

<sup>12</sup> *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

<sup>13</sup> *In re Amy*, 636 F.3d 190 (5th Cir. 2011).

individual defendant’s crime in order to secure restitution.<sup>14</sup> 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’ . . . .”<sup>15</sup>

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,<sup>16</sup> Amy asked for enforcement of a “mandatory” restitution statute – 18 U.S.C. § 2259 – promising her that she would receive restitution for the “full amount” of her losses.<sup>17</sup> 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.<sup>18</sup> This cause-in-fact link or nexus between an individual’s harm and a defendant’s crime establishes a statutorily-recognized “victim” entitled to restitution for the “full amount” of her losses.<sup>19</sup> Amy pointed out that the district court had made a factual finding that Paroline’s possession of her images harmed Amy.<sup>20</sup>

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<sup>14</sup> *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012).

<sup>15</sup> *Id.* at 774.

<sup>16</sup> See Respondent Amy’s Br. on the Merits, *Paroline v. U.S.*, No. 12-8561 (Nov. 13, 2013).

<sup>17</sup> 18 U.S.C. § 2259(b)(1).

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

<sup>19</sup> 18 U.S.C. § 2259(c) & (b)(1).

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.”<sup>23</sup> Amy quoted from an earlier Supreme Court decision that “[a] child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of

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<sup>21</sup> *Id.* at 38-51.

<sup>22</sup> *Id.* at 35-37.

<sup>23</sup> 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.”<sup>24</sup>

Amy also pointed to “the vast machinery” that generates child pornography harms.<sup>25</sup> 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.<sup>26</sup> It was therefore reasonable for Congress to conclude that “the production of child pornography [will decrease] if it penalizes those who possess and view the product, thereby decreasing demand.”<sup>27</sup> 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.<sup>28</sup>

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. . . .”<sup>29</sup> 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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<sup>24</sup> *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

<sup>25</sup> Amy’s Merit Br. at 12.

<sup>26</sup> *Ferber*, 458 U.S. at 759-60.

<sup>27</sup> *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990).

<sup>28</sup> *Ferber*, 458 U.S. at 760. Congress did just that by criminalizing child pornography possession. *See, e.g.*, 18 U.S.C. 2252(a)(4).

<sup>29</sup> 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.”<sup>30</sup>

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.”<sup>31</sup> Two recent law enforcement initiatives “identified over 20 million unique IP [Internet Protocol] addresses offering child pornography over P2P networks from 2006 to August 2010.”<sup>32</sup> The ease with which child pornography can now be downloaded creates “an expanding market for child pornography [that] fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.”<sup>33</sup>

In the case before the Supreme Court, Paroline downloaded several hundred images of toddlers and other children being sexually abused—including two depicting Amy.<sup>34</sup> 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.”<sup>35</sup> Amy asked the Court to decide her case against “the sobering reality” that Congress needed to respond to a vast, de facto joint criminal enterprise of child pornography producers, distributors, and possessors.<sup>36</sup>

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<sup>30</sup> Amy Merit’s Br. at 11 (*citing* DOJ Report to Congress, *supra* note 5, at 17).

<sup>31</sup> U.S. Sentencing Commission, Report to the Congress: Federal Child Pornography Offenses 51 (2012) (hereinafter “Sentencing Comm’n Report to Congress”).

<sup>32</sup> *Id.* at 51-52.

<sup>33</sup> *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

<sup>34</sup> *Paroline v. United States*, No. 12-8561, J.A. at 146.

<sup>35</sup> *Id.* at 352.

<sup>36</sup> 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.<sup>37</sup> 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*.<sup>38</sup> 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.<sup>39</sup>

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

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<sup>37</sup> See Br. for the U.S. at 42-49, *Paroline v. United States*, No. 12-8561.

<sup>38</sup> *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014).

<sup>39</sup> 18 U.S.C. § 2259(b)(3).

(F) where the language appears, but elsewhere as well.<sup>40</sup> Subsection (F), Justice Kennedy concluded, “is most naturally understood as a summary of the type of losses covered—i.e., losses suffered as a proximate result of the offense.”<sup>41</sup> He reasoned “[r]estitution is therefore proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses.”<sup>42</sup>

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.”<sup>43</sup> 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.”<sup>44</sup>

Justice Kennedy then examined whether a “but for” test could be used to identify the losses suffered by a victim as the result of a particular defendant’s crime. The difficulty with this approach, however, 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.”<sup>45</sup>

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.<sup>46</sup> The Justice thought that such

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<sup>40</sup> 134 S. Ct. at 1720.

<sup>41</sup> *Id.* at 1721.

<sup>42</sup> *Id.* at 1722.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1723.

<sup>46</sup> *Id.* at 1724.

tests “though salutary when applied in a judicious manner, also can be taken too far.”<sup>47</sup> 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.”<sup>48</sup>

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.<sup>49</sup> 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.”<sup>50</sup> Justice Kennedy conceded that “[t]his approach is not without its difficulties,” but thought that district court judges would be able to exercise their discretion to impose appropriate restitution amounts.<sup>51</sup>

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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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1725.

<sup>49</sup> *Id.* at 1724.

<sup>50</sup> *Id.* at 1727.

<sup>51</sup> *Id.* at 1729.

no mechanism for answering that question.”<sup>52</sup> 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.”<sup>53</sup> 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.”<sup>54</sup> The Chief Justice concluded with a call for congressional action: “The Court’s decision today means that Amy will not go home with nothing. But it would be a mistake for that salutary outcome to lead readers to conclude that Amy has prevailed or that Congress has done justice for victims of child pornography. The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it.”<sup>55</sup>

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.”<sup>56</sup> Justice Sotomayor found the majority’s interpretation fundamentally flawed, because the statute “directs courts to enter restitution not for a ‘proportional’ or ‘relative’ amount, but for the ‘full amount of the victim’s losses.’”<sup>57</sup>

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

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<sup>52</sup> *Id.* at 1732 (Roberts, C.J., dissenting).

<sup>53</sup> *Id.* at 1734 (Roberts, C.J., dissenting).

<sup>54</sup> *Id.* (Roberts, C.J., dissenting).

<sup>55</sup> *Id.* at 1734-35 (Roberts, C.J., dissenting).

<sup>56</sup> *Id.* at 1737 (Sotomayor, J., dissenting).

<sup>57</sup> *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.<sup>58</sup>

#### **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."<sup>59</sup> Section 2259, lower courts had consistently held, was "phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."<sup>60</sup> Section 2259 thus interlocks with

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<sup>58</sup> *Id.* at 1744 (Sotomayor, J., dissenting).

<sup>59</sup> See, *e.g.*, *United States v. Hayes*, 555 U.S. 415, 427 (2009).

<sup>60</sup> *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.”<sup>61</sup>

Justice Kennedy’s opinion acknowledged the remedial purpose underlying the statute, but believed that “Congress has not promised victims full and swift restitution at all costs.”<sup>62</sup> Holding individual defendants responsible for all of Amy’s loss, he thought, would be “twist[ing] [the] statute into a license to hold a defendant liable for an amount drastically out of proportion to his own individual causal relation to the victim’s losses.”<sup>63</sup>

But conventional tort law (which is often regarded as a model for criminal restitution) has never tried to limit liability to an individual’s “causal relation” to a victim’s losses. Instead, tort law 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.”<sup>64</sup> 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.<sup>65</sup> In determining tort compensation, the proper question is whether

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<sup>61</sup> *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).

<sup>62</sup> *Paroline*, 134S.Ct. at 1729.

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

<sup>64</sup> ALI, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27 cmt. f, at 381 (hereinafter cited as *Restatement*).

<sup>65</sup> 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."<sup>66</sup> Of course, the "untold numbers" he was alluding to included him. Convicted defendants like Paroline should not be able to escape responsibility to pay significant restitution by hiding in a crowd.

The *Restatement* notes that well-established tort precedent (pre-dating Congress' 1994 enactment of 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."<sup>67</sup> While numerous toxic tort cases illustrate the contributing cause approach, the *Restatement* identifies much deeper roots: "Nuisance cases were the pre-toxic-substances equivalent of asbestos and other such cases, and courts resolved them similarly."<sup>68</sup> In one Fifth Circuit case from 1951, for example, the Circuit explained that "According to the great weight of authority where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of

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<sup>66</sup> *Paroline v. U.S.*, Petitioner's Br. at 50.

<sup>67</sup> *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)).

<sup>68</sup> *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. . . .”<sup>69</sup> 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.”<sup>70</sup>

Justice Kennedy seemingly acknowledged that these tort law principles supported Amy’s position, but thought that the principles “can be taken too far.”<sup>71</sup> 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.”<sup>72</sup>

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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<sup>69</sup> *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.”).

<sup>70</sup> Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1792 (1985) (discussing various cases).

<sup>71</sup> *Paroline*, 134 S.Ct. at 1725.

<sup>72</sup> *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. . . .”<sup>73</sup> Victims of intentional torts generally do not have to establish a standard proximate cause nexus because “[a]n inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.”<sup>74</sup> Legal scholars Prosser and Keeton agree that “[f]or an intended injury the law is astute to discover even very remote causation.”<sup>75</sup> Reiterating these general principles, the *Restatement (Third) of Torts* explains that “[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently.”<sup>76</sup>

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.<sup>77</sup> These statutes impose restitution for violent crimes that involve physical invasions of their victims’ bodily integrity—obvious intentional torts. Section 2259 likewise provides restitution for intentional torts. It provides restitution for Chapter 110 offenses such as the sexual exploitation of children,<sup>78</sup> selling children,<sup>79</sup> and distribution, receipt, and possession of child pornography.<sup>80</sup> These crimes are all

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

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

<sup>75</sup> *Prosser & Keeton*, *supra* note 73, at 37 n.27 (internal quotation omitted).

<sup>76</sup> *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 33 (2010) (hereinafter “*Restatement (Third): Harms*”).

<sup>77</sup> See 18 U.S.C. §§ 2248 & 2264.

<sup>78</sup> 18 U.S.C. § 2251.

<sup>79</sup> 18 U.S.C. § 2251A.

<sup>80</sup> 18 U.S.C. § 2252 & 2252A.

felonies containing stringent *mens rea* requirements that a defendant must have acted (at least) “knowingly.”<sup>81</sup> These child pornography *crimes* are thus like intentional torts, including well-established invasion of privacy torts.<sup>82</sup> 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.”<sup>83</sup> It is generally accepted that “[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). . . .”<sup>84</sup> This view continues today, as “[n]ot a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified.”<sup>85</sup>

Conventional tort principles for intentional tortfeasors are well illustrated by Professors Harper and James, who give the example of “several ruffians [who] set upon a man and beat him, each inflicting separate wounds.”<sup>86</sup> 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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<sup>81</sup> See, e.g., 18 U.S.C. § 2252(a)(4)(B) (forbidding “knowingly” possessing child pornography).

<sup>82</sup> 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).

<sup>83</sup> *Restatement (Third) of Torts: Apportionment of Liability* § 12 at 113.

<sup>84</sup> *Id.* at § 12, Reporters’ Note cmt. b, at 111.

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

<sup>86</sup> 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.<sup>87</sup> 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

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<sup>87</sup> 18 U.S.C § 2248.

each.”<sup>88</sup> Paroline did not need to formally conspire with other persons. Instead, “if one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm, a joint tort has been consummated even when there is no prearranged plan.”<sup>89</sup> 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.<sup>90</sup> But tort law is never proportionate to culpability. A few seconds of inattentive driving can lead to a multi-million dollar wrongful death judgment. A small tap on an eggshell plaintiff can cause a skull to collapse with huge liability. The overarching tort rule is that a wrongdoer takes his victim as he finds her.<sup>91</sup> 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.”<sup>92</sup> This point is particularly important here because many child pornography criminals are indigent while innumerable others are beyond the reach of law enforcement. The only way for victims to actually obtain restitution for the “full amount” of their losses is by collecting from a handful of solvent defendants. Amy, for instance, has received victim notices in more than 1800 cases since January 2006. She has received

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<sup>88</sup> Prosser & Keeton, *supra* note 73, at 346.

<sup>89</sup> 1 Harper & James, *supra* note 86, at 699.

<sup>90</sup> 134 S.Ct. at 1726.

<sup>91</sup> *Restatement (Third): Harms*, *supra* note 76, at § 31.

<sup>92</sup> *Restatement (Third): Apportionment*, *supra* note 83, § A18 cmt. a.

restitution awards in approximately 180 cases<sup>93</sup> 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.<sup>94</sup> 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.”<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup> A right to pursue a contribution action has been recognized in other restitution settings.<sup>98</sup> 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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<sup>93</sup> 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.

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

<sup>95</sup> 134 S.Ct. at 1725.

<sup>96</sup> *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”).

<sup>97</sup> Of course, such a lawsuit would proceed through legal counsel. As registered sex offenders, child pornography defendants should not have personal contact with each other.

<sup>98</sup> See, e.g., *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (a defendant held jointly and severally liable for a restitution award “may seek contribution from his co-conspirators to pay off the restitution award”).

could be recognized. . . .”<sup>99</sup> In enacting section 2259, Congress required that all defendants must pay the “full amount” of a victim’s losses,<sup>100</sup> which itself is a recognition that some defendants might have to pay more than others. Against this backdrop, it would have been fair to infer Congress’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.<sup>101</sup> It will, however, enable [Paroline] to distribute ‘the full amount of the victim’s losses’ across other possessors of Amy’s images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.”<sup>102</sup> Justice Kennedy should have concluded that Congress properly created a regime in which innocent crime victims receive “full” restitution, leaving it to guilty defendants to sort out among themselves who will bear the financial burden.

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.<sup>103</sup> Presumably this is because a “fine” is a “pecuniary criminal punishment or civil penalty payable to the public treasury.”<sup>104</sup> Conversely, a

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<sup>99</sup> *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”).

<sup>100</sup> 18 U.S.C. § 2259(b)(1)

<sup>101</sup> See, e.g., 42 U.S.C. § 9607(a) (CERCLA).

<sup>102</sup> *In re Amy*, 636 F.3d 190, 206 (5th Cir. 2011).

<sup>103</sup> *Paroline v. United States*, Petitioner’s Br. at 58.

<sup>104</sup> *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.<sup>105</sup>

**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.”<sup>106</sup> 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.”<sup>107</sup> Justice Kennedy cautioned that “[t]hese factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders.”<sup>108</sup>

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<sup>105</sup> 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).

<sup>106</sup> *Id.* at 1727.

<sup>107</sup> *Id.* at 1728 (*citing* Brief for the United States, which had listed these factors).

<sup>108</sup> 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.<sup>109</sup> 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.”<sup>110</sup> 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.<sup>111</sup>

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).<sup>112</sup>

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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<sup>109</sup> Paroline v. United States, Amy’s Merits Br. at 65.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (citing DOJ Report to Congress at 14 (table regarding domestic vs. international P2P file sharing of child pornography)).

<sup>112</sup>  $3,367,854 \times 1/3,200 \times 1/10 \times 45/100 \approx \$47$ .

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.”<sup>113</sup>

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.<sup>114</sup> 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*,<sup>115</sup> decided less than two months ago in the Middle District of Florida. In that case, the Government had sought restitution for two young female victims: “Vicky” and “Sarah.” Both of these victims had suffered substantial losses, which they quantified in a similar fashion to Amy. Nonetheless, the district court declined to award even a single dollar in restitution to either victim. With regard to Vicky, for example, the district court held that “[i]t is reasonably predictable that the Vicky Series will continue to be a staple of the internet among

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<sup>113</sup> 134 S.Ct. at 1734 (Roberts, C.J., dissenting).

<sup>114</sup> *United States v. Crisostomi*, CR 12-166-M, 2014 WL 3510215 (D.R.I. July 16, 2014).

<sup>115</sup> 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 losses is virtually impossible, other to say that if past history is any indication the number will be fairly substantial.”<sup>116</sup> The district court also relied on the fact that the “government has presented no evidence from which the Court can reliably estimate the broader number of offenders involved in possession or distribution of the Vicky Series images.”<sup>117</sup> 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.”<sup>118</sup>

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<sup>116</sup> *Id.* at \*4.

<sup>117</sup> *Id.*

<sup>118</sup> *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”).<sup>119</sup> When the bill failed to be considered in the 113<sup>th</sup> Congress, Senators Hatch and Schumer introduced the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015 on January 28, 2015.<sup>120</sup> An identical bill was introduced in the House on the same day. On February 11, 2015, in one of the first acts of the 114<sup>th</sup> 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.<sup>121</sup>

The Amy and Vicky Act will establish a more workable restitution regime by establishing fixed amounts of restitution that convicted child pornography defendants must pay. The AVA is a

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<sup>119</sup> S. 2301 (2014). An identical bill was introduced in the House on June 26, 2014 as H.R. 4981.

<sup>120</sup> S. 295 / H.B. 595.

<sup>121</sup> 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.”<sup>122</sup> 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”<sup>123</sup> 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.”<sup>124</sup>

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.”<sup>125</sup> Congress specifically recognizes that “[t]he unlawful *collective conduct* of every individual who reproduces, distributes, or possesses the

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<sup>122</sup> S. 295, § 2(1).

<sup>123</sup> 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.

<sup>124</sup> S. 295, § 2(3).

<sup>125</sup> 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.*”<sup>126</sup> 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.”<sup>127</sup> The AVA addresses the shortcomings in *Paroline*, providing an updated approach firmly rooted in the well-established theories of tort liability discussed earlier in this testimony.<sup>128</sup>

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.”<sup>129</sup> 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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<sup>126</sup> S. 295, § 2(4) (emphasis added).

<sup>127</sup> See *Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014). In the AVA, Congress specifically rejects *Paroline*’s narrow approach by adopting “an aggregate causation standard to address the unique crime of child pornography and the unique harms caused by child pornography.” S. 295, § 2(6).

<sup>128</sup> See Part IV.B, *supra*.

<sup>129</sup> 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.”<sup>130</sup> The main reason for including this provision is to capture fully the harm suffered by victims of child pornography crimes.

Once a victim’s full losses 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.”<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

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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<sup>130</sup> *Id.*

<sup>131</sup> S.B. 295, § 3(3).

<sup>132</sup> *Id.*

<sup>133</sup> *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, including 18 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.<sup>134</sup> In setting a payment schedule, a judge must consider all relevant factors, including “(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; (B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant; including obligations to dependents.”<sup>135</sup> Such payments may consist of “a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.” Section 3664 also specifies that defendants can move the court to modify restitution payment orders when there is any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution.<sup>136</sup>

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.<sup>137</sup> This, along with a right of contribution, allows defendants to spread the losses among and between similarly situated defendants.<sup>138</sup> 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

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<sup>134</sup> 18 U.S.C. § 3664(f)(1)(B)(2).

<sup>135</sup> 18 U.S.C. § 3664(f)(1)(B).

<sup>136</sup> 18 U.S.C. § 3664(k)

<sup>137</sup> S. 295, § 3(1).

<sup>138</sup> 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.<sup>139</sup>

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,<sup>140</sup> 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

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<sup>139</sup> Floor Statement of Senator Hatch on S. 295 (Feb. 4, 2015).

<sup>140</sup> 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.<sup>141</sup> I agree that mandatory minimums can sometimes be draconian and blunt,<sup>142</sup> and so do some of the AVA's key sponsors.<sup>143</sup> 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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<sup>141</sup> 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](http://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).

<sup>142</sup> See, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1 (2010).

<sup>143</sup> See, e.g., Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 192-95 (1993).

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.<sup>144</sup> 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.<sup>145</sup> This provision, along with 18 U.S.C. § 3664, obviates any Eighth Amendment "excessive" fine concerns, since indigent defendants will typically only pay a fraction of the restitution they have been ordered to pay while wealthy defendants will have a contribution action to spread their restitution obligation across multiple defendants. To be sure, it may be burdensome for a rich defendant to track down other

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<sup>144</sup> See 18 U.S.C. § 3571(b)(3) (authorizing a fine of \$250,000 for each felony conviction).

<sup>145</sup> 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.”<sup>146</sup> It is far better that this burden be 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.<sup>147</sup> A more direct answer to constitutional concerns is that, properly understood, the Eighth Amendment has no bearing at all on criminal restitution issues. Whether or not the Eighth Amendment applies to restitution remains an unsettled issue. Most federal courts have 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.<sup>148</sup> The *Paroline* decision flagged the possibility that large restitution awards could raise constitutional concerns, but did not rule on the issue one way or the other.<sup>149</sup>

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

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<sup>146</sup> 636 F.3d at 201.

<sup>147</sup> 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.

<sup>148</sup> 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)).

<sup>149</sup> See 134 S.Ct. at 1725-26.

<sup>150</sup> 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.”<sup>151</sup> 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.”<sup>152</sup>

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.”<sup>153</sup> Child pornography felonies are serious crimes, punishable by lengthy prison terms.<sup>154</sup> Nor can such crimes be called “victimless” crimes. As the Second Circuit recently explained:

The ease with which a person can access and distribute child pornography from his home—often with no more effort than a few clicks on a computer—may make it easier for perpetrators to delude themselves that their conduct is not deviant or harmful. But technological advances that facilitate child pornography crimes no more mitigate the real harm caused by these crimes than do technological advances making it easier to perpetrate fraud, traffic drugs, or even engage in acts of terrorism—all at a distance from victims—mitigate those crimes. If anything, the noted digital revolution may actually aggravate child pornography crimes insofar as an expanding market for child pornography fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.<sup>155</sup>

In sum, the AVA complies with all constitutional requirements and protects individual defendants from being solely responsible for restitution. It creates an easy-to-administer restitution regime that ensures full compensation for victims, while reducing the litigation

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

<sup>151</sup> *Black’s Law Dictionary* 664 (8th ed. 2004); *see United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998).

<sup>152</sup> S.B. 295, § 2(1).

<sup>153</sup> *Bajakajian*, 524 U.S. at 334.

<sup>154</sup> *See, e.g.*, 18 U.S.C. § 2252(b); 18 U.S.C. § 2252A(b).

<sup>155</sup> *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.<sup>156</sup> With broad, bipartisan support, Congress not only established a series of victims' rights (including a right to restitution<sup>157</sup>) 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

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<sup>156</sup> See 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statements of Sen. Feinstein and Sen. Kyl).

<sup>157</sup> 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.<sup>158</sup>

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

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<sup>158</sup> *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.<sup>159</sup> 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.”<sup>160</sup>

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

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<sup>159</sup> 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.

<sup>160</sup> *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.<sup>161</sup> Under

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<sup>161</sup> 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.”<sup>162</sup> 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.<sup>163</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> 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.”<sup>164</sup> 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.”<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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).

<sup>164</sup> 18 U.S.C. § 3572(b).

<sup>165</sup> 18 U.S.C. § 3612(c).

<sup>166</sup> See <http://www.crimevictim.utah.gov/>.

<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup> 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.<sup>171</sup> 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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<sup>168</sup> Statement of Jill Steinberg, U.S. Dept. of Justice, Before the Crime Subcomm. of the House Judiciary Committee at 5 (Mar. 19, 2015).

<sup>169</sup> 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).

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

<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> But a number of others Courts of Appeals have given crime victims

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<sup>172</sup> 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).

<sup>173</sup> 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.<sup>174</sup> Ordinary appellate review is what Congress intended, as the legislative history to the CVRA makes clear.<sup>175</sup>

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.’”<sup>176</sup>

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.”<sup>177</sup> The Fifth Circuit’s later en banc ruling reached a similar conclusion.<sup>178</sup>

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<sup>174</sup> 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.”).

<sup>175</sup> 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).

<sup>176</sup> *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.

<sup>177</sup> *In re Amy Unknown*, 636 F.3d 190, 197 (5th Cir. 2011).

<sup>178</sup> *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.”<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup>

#### **D. A Constitutional Amendment Protecting Crime Victims’ Rights.**

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<sup>179</sup> S. 178, § 13(c).

<sup>180</sup> 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)).

<sup>181</sup> 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.<sup>182</sup> In 2012 and 2013, for example, I submitted testimony to this Committee supporting the VRA.<sup>183</sup>

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 sentencing. 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

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<sup>182</sup> 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 Victims' 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); Rachele 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).

<sup>183</sup> 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).<sup>184</sup>

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.<sup>185</sup>

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.”<sup>186</sup> 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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<sup>184</sup> S. Rep. 108-191 at 6-7 (2003).

<sup>185</sup> *Id.* at 7-8.

<sup>186</sup> 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.<sup>187</sup> Amy first described the pain she feels for the crimes committed against her:

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

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

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<sup>187</sup> <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.”<sup>188</sup>

Amy, however, was caught in the litigation maelstrom that led up to the Supreme Court case. She explained that “we started having problems with the restitution law. Judges sometimes gave me just \$100 and sometimes nothing at all.”<sup>189</sup> But, “[a]fter a long time and a lot of court hearings all over the country, my case was finally at the Supreme Court. I couldn’t believe how long and how far my case and my story had gone until I was sitting there in the Supreme Court surrounded by so many of the people who have supported me and helped me during these years.”<sup>190</sup>

Amy obviously hoped for a favorable Supreme Court decision, not just for her but for “all the victims like me—who were so young when all these horrible things happened to us— [I hoped we could all] get the restitution we need to try and live a life like everyone else.” But then came the Supreme Court’s ruling which, for Amy, “was even worse than getting no restitution at all. It was sort of like getting negative restitution. It was a horrible day.”<sup>191</sup>

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.”<sup>192</sup>

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

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *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.