The Heritage Foundation

LEGAL MEMORANDUM

No. 379 | AUGUST 4, 2025

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

Taking Child Pornography Seriously by Improving Restitution for Victims

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KEY TAKEAWAYS

Combatting child pornography requires that laws and their enforcement be based on the unique ways that these crimes impact victims.

The aggregate causation standard is best suited to impose restitution for the losses suffered by victims of non-contact child pornography crimes such as possession.

Congress's 2018 law holds more defendants accountable and increases victim restitution, but Congress and the Department of Justice can do more to help victims.

Law & Order: Special Victims Unit, now in its 26th season on NBC, is known for tackling sensitive contemporary criminal justice issues. The episode titled "Downloaded Child," which aired on April 2, 2014, not only fit that description, but was based on a real-life case in which detectives investigating a mother for alleged child endangerment discovered that she had been sexually abused as a child and that pictures and videos of her abuse were circulating widely among pedophiles.

James R. Marsh, who co-authored this *Legal Memorandum*, inspired that *Law & Order* episode and has represented victims for decades. One of them is "Amy" (a pseudonym), on whose experience the *Law & Order* episode was based and who brought her struggle to obtain restitution all the way to the Supreme Court of the United States. In fact, the Supreme Court announced its decision in that case, *Paroline v. United*

States,[1] just days after the episode aired. The other co-author of this *Legal Memorandum*, Thomas Jipping, served as Chief Counsel to Senator Orrin Hatch (R–UT) when, reacting to *Paroline*, Hatch introduced legislation, named after Amy and two other victims, to make the provision of restitution to victims of child pornography more reliable and easier to obtain.[2] President Donald Trump signed that legislation into law on December 7, 2018.

With President Trump again in office and the U.S. Department of Justice (DOJ) under new leadership, this is a good time to evaluate the vital task of providing restitution for victims of this insidious and complex crime. This *Legal Memorandum* explains the unique nature of child pornography and how it impacts victims and highlights ways in which it has not been taken as seriously as it should be. It then examines how *Paroline*'s misguided interpretation of the existing restitution statute actually made obtaining restitution more complicated and arbitrary. Finally, it explains how the legislative response to *Paroline* has improved the provision of restitution for victims and suggests additional steps that should be taken to address this scourge more seriously and effectively.

The Unique Nature of Child Pornography

Federal law defines child pornography—a horrific crime—as "any visual depiction" of "a minor engaging in sexually explicit conduct"[3] and provides robust prison sentences for those convicted of producing,[4] distributing,[5] or possessing[6] it. Federal law gives victims of crime the right to "full and timely restitution as provided by law" and requires those convicted of child pornography crimes to pay restitution for "the full amount of the victim's losses."[7] Taking child pornography seriously requires enacting and vigorously enforcing strong laws and providing meaningful restitution, all based on an accurate understanding of the unique nature of these crimes and how they impact victims.

Senator Hatch sometimes quoted the axiom "ending in the right place requires starting in the right place,"[8] and it certainly applies here. Sound policy, effective enforcement, and meaningful victim assistance all depend on how we understand child pornography and its impact on victims. That understanding begins with vocabulary.

This *Legal Memorandum* uses the term "child pornography" because it remains enshrined in federal statutes and court decisions. However, we believe that it "carries misleading connotations"[9] that contribute to a "fundamental misunderstanding of the crime."[10] The word "child," for example, can appear to be simply an adjective, distinguishing this material from other

sexually explicit images only in the characteristics of the depicted individuals. Even worse, the word "pornography" suggests that these crimes involve nothing more than depictions.

Terms like these inadequately capture and may even obscure the reality that all child pornography crimes are "a form of child sexual exploitation."[11] Many advocates prefer more descriptively accurate phrases such as "child sexual abuse material."[12] The Justice Department explains that this phrase "better reflects the abuse that is depicted in the images and videos and the resulting trauma to the child."[13]

Child pornography crimes are both "intrinsically related to the sexual abuse of children"[14] in general and "inextricably linked"[15] together in a "vast criminal machinery."[16] Production creates a "permanent record of the children's participation, and the harm to the child is exacerbated by [the] circulation"[17] of that record. Together, they fuel the "market for the exploitative use of children."[18]

Although child pornography crimes have this in common, they impact victims differently. It is natural to think of crimes as concrete acts by identifiable defendants that harm particular victims in objective ways. The *production* of child pornography in which perpetrators record their rape or sexual assault of children[19] might be seen that way. While production and "non-contact"[20] child pornography crimes such as *distribution* and *possession* are part of the same overall exploitative enterprise, however, they inflict their own unique kind of harm on victims. Failure to grasp the difference contributes to "the misguided sentiment that possessors of child pornography cause little harm."[21]

The "initial production of the videos and other images of their sexual abuse is only the beginning of a lifetime of trauma"[22] for victims. The U.S. Sentencing Commission explains that "[n]on-production child pornography offenses normalize and validate the sexual exploitation of children, which contributes to the sexual abuse of new victims."[23] In addition, "recurrent victimization through existence of images"[24] causes child victims "continuing harm by haunting those children in future years."[25] One sentencing judge has put it this way: "[E]very time one of these web sites is opened and every time one of these images is viewed, additional harm is visited upon the victim"[26] that is "separate from the harm of production."[27]

More than four decades ago, in *New York v. Ferber*,[28] the Supreme Court recognized that trafficking in child pornography images fuels the sexual exploitation market. Four years later, the Attorney General's Commission on Obscenity and Pornography addressed the "special horror"[29] of child

pornography, recognizing that "[w]hat is commonly referred to as 'child pornography' is not so much a form of pornography as it is a form of sexual exploitation of children."[30] The commission distinguished between the production of child pornography, which involves the "sexual abuse of a real child," and the "trade in child pornography"[31] images. This insight into the nature of child pornography was emerging well before the Internet became commercially available,[32] at a time when child pornography consisted of physical objects such as "photographs and movies."[33]

Finally, the Internet has magnified the unique harm from non-contact child pornography crimes and has made calculating a victim's losses from those crimes and imposing restitution for those losses more challenging. Convicting a defendant of child pornography production means that, at least for that victim, the initial sexual abuse and creation of a permanent record of that abuse have come to an end. The defendant is directly responsible for the losses that result from that crime.

Convicting a defendant of child pornography possession brings no such finality or closure. Instead, there is the virtual certainty that a potentially infinite number of people, most of whom will never be identified or prosecuted, will continue that victim's exploitation by obtaining and continuing to circulate images of her abuse. Victims able to overcome the initial abuse may yet be haunted for their entire lives by the reality that they can never leave behind the ongoing use of that abuse and its record.

Amy's case is a good example of how child pornography possession, separate from production, harms its victims.[34] According to her therapist, Amy had gotten "back to normal" by the time her uncle was convicted of abusing her. Eight years later, however, she learned that "images of her abuse were being trafficked on the Internet."[35] The initial sexual abuse and production of the images may have ended, and the perpetrator jailed, but the receipt, collection, and distribution of those images by unknown consumers everywhere had only just begun.

The Supreme Court observed in *Paroline* that "[t]housands of images of Amy's abuse [had] emerged in numerous child pornography cases"[36] in only the previous several years. In fact, by 2014, the National Center for Missing and Exploited Children had received more than 70,000 images of Amy's sexual abuse.[37] The estimate for her future psychological counseling and lost income was nearly $3.4 million.[38] "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," Amy explained in a victim impact statement. "[T]he crime has never really stopped and will never really stop.... It's like I am being abused over and over and over again."[39]

The restitution process itself ensures that this harm is not simply theoretical. The Justice Department notifies victims every time images of their abuse are identified in a distribution or possession prosecution to allow them to seek restitution.[40] The *Law & Order* episode included a dramatic scene in which bins of such notices were stacked on a table, tangible evidence that the victim was in fact being abused over and over again. Each notification is a reminder that a potentially unlimited universe of perpetrators continues to drive this exploitative enterprise, deriving deviant sexual pleasure by witnessing the victim's sexual abuse and using images of that abuse to fuel exploitation of other children.[41]

In a 1996 report, the U.S. Sentencing Commission outlined ways that computers could be used to promote the distribution of child pornography.[42] Today, the Internet is ubiquitous with more than two-thirds of the global population connected to the Internet and sexually explicit websites numbering in the millions. The ease and anonymity of obtaining and distributing all forms of pornography have vastly expanded the trafficking in images of child sexual abuse, fueling the demand for production of those images and magnifying the unique harm caused by these non-contact crimes.[43] Already, a decade ago, researchers found that "[t]he child pornography market is one of the fastest growing businesses on the Internet."[44] According to the Justice Department:

> The expansion of the Internet and advanced digital technology lies parallel to the explosion of the child pornography market. Child pornography images are readily available through virtually every Internet technology, including social networking websites, file-sharing sites, photo-sharing sites, gaming devices, and even mobile apps. Child pornography offenders can also connect on Internet forums and networks to share their interests, desires, and experiences abusing children, in addition to selling, sharing, and trading images.[45]

In short, possession of child pornography is, at the same time, inextricably linked to production and distribution in the child sexual exploitation marketplace and imposes its own distinct form of ongoing harm on victims. How child pornography is trafficked today magnifies that harm, making more urgent the need to acquire a proper understanding of this harm and more serious the consequences of failing to do so.

Taking Child Pornography Less Than Seriously

Taking child pornography crimes, especially non-contact crimes such as possession, seriously requires that efforts to combat child pornography

be informed by an accurate understanding of its unique nature and how it impacts victims. These efforts include legislative and regulatory policy, enforcement priorities, and the restitution process. Glaring failures to take child pornography seriously suggest that a proper and consistent understanding of the true nature of this insidious enterprise may still be elusive.

***United States v. Knox*.** Stephen Knox was indicted in 1991 on two counts of receiving and possessing child pornography in the form of three videotapes of young girls in sexual poses with the camera spending "more than a substantial amount of time...focusing on [the area surrounding their genitals]."[46] The statute prohibited knowingly receiving or distributing "any visual depiction...involv[ing] the use of a minor engaging in sexually explicit conduct,"[47] defined as including the "lascivious exhibition of the...pubic area of any person."[48]

Knox moved to dismiss the indictment, arguing that the tapes did not depict sexually explicit conduct because the young girls were wearing "underwear or other abbreviated attire while they were being filmed."[49] The U.S. District Court denied the motion and convicted Knox. and the U.S. Court of Appeals for the Third Circuit affirmed. Based on the "language of the statute, its legislative history, the underlying rationale for the federal child pornography laws and relevant case law," the appeals court held that "nude exposure...is not necessary for an exhibition to take place."[50]

President Bill Clinton, elected 19 days after the appeals court's decision, appointed Drew S. Days III as Solicitor General on June 7, 1993, the same day the Supreme Court granted Knox's motion to review the Third Circuit's decision.[51] Three months later, Days filed a brief informing the Supreme Court that the United States was changing its position in the case, siding with Knox rather than defending his conviction.[52] Days argued for an even narrower construction of the statute than Knox had sought, requiring not only a "visible depiction...of the area of the body," but also "a child lasciviously engaging in sexual conduct."[53]

Days' construction required rewriting the statutory text in two ways. The statute prohibited depictions of "a minor engaging in sexually explicit conduct," not "lasciviously engaging in sexual conduct." It also defined the prohibited conduct as including a "lascivious exhibition," not a "visible depiction." Each of these textual departures narrowed the statute's application. Nonetheless, the Supreme Court vacated the judgment against Knox and remanded the case to the Third Circuit "for further consideration in light of the position asserted by the Solicitor General."[54] On remand, the appeals court rejected the Clinton Administration's interpretation, holding that "the federal child pornography statute, on its face, contains no nudity

or discernibility requirement" and that "non-nude visual depictions...can qualify as lascivious exhibitions."[55] The court reaffirmed Knox's conviction.

Declining to defend a conviction on appeal is unusual in any case, but doing so after an appeals court has already affirmed that conviction is even more bizarre; predictably, the Clinton Administration's move sparked a political firestorm. On October 20, 1993, shortly after Days filed his change-of-position brief with the Supreme Court, Representative Chris Smith (R–NJ) introduced House Resolution 281 declaring the "sense of the House of Representatives that the Department of Justice repudiate its reinterpretation of Federal child pornography laws, defend the conviction won in lower courts in the Knox case, and vigorously prosecute sexual exploitation of children."[56]

Although it took just a month for a majority of House Members to co-sponsor the Smith resolution, a House Judiciary subcommittee refused to take action, and Smith took two steps to push his resolution forward. First, he filed a discharge petition[57] which, if signed by a majority of House Members, would bring the resolution directly before the full House.[58] Second, Smith offered the resolution language as an amendment to a comprehensive crime bill, and Senator Charles Grassley (R–IA) did the same on the Senate side.[59] The House voted 425–3 for the Smith amendment,[60] and the Senate voted 100–0 for Grassley's parallel language,[61] which remains in the law today.[62]

United States v. Hillie. Judicial misapprehension of child pornography, however, has not disappeared. In *United States v. Hillie*,[63] for example, the U.S. Court of Appeals for the D.C. Circuit narrowed, as the district court in *Knox* attempted to do, the interpretation of what constitutes "sexually explicit conduct" under federal child pornography statutes.

Charles Hillie had been convicted of multiple crimes including sexual exploitation of a minor,[64] possession of child pornography,[65] and child sexual abuse offenses under District of Columbia law. The charges stemmed from videos Hillie secretly recorded using hidden cameras placed in the bedrooms and bathrooms used by his girlfriend's daughters. The footage showed the minors in various states of undress, engaging in routine activities such as bathing and using the toilet. Hillie appealed his 354-month prison sentence, arguing that the videos did not depict "sexually explicit conduct."

As it was in *Knox*, the central issue in *Hillie* was whether the videos constituted a "lascivious exhibition of the genitals or pubic area." The government relied on factors first articulated in *United States v. Dost*[66] that help to implement Congress's intent, stated in its 1984 amendments to the child pornography statute, to "broaden the scope" of existing laws.[67] The

appeals court's approach indicated an appreciation that child pornography is inherently different from other sexually explicit material and should be treated as such.

The court, for example, emphasized that what "constitutes a 'lascivious exhibition' of a child's genitals will be different" from such an exhibition depicting an adult.[68] Factors related to how the subject is depicted, for example, are more relevant in the former, and those related to the characteristics or behavior of the subject are more relevant in the latter. To determine whether a visual depiction of a minor constitutes a "lascivious exhibition," courts should therefore consider such factors as the "focal point" and setting of the depiction, whether the child's pose or attire is age-appropriate, and whether the depiction appears to be "intended or designed to elicit a sexual response in the viewer."[69]

Writing for the majority in *Hillie*, however, Judge Robert L. Wilkins appeared to hold that the criteria for determining whether depictions are sexually explicit must be the same for children as they are for adults. While the district court in *Dost* sought to apply the statutory language on a "case-by-case basis,"[70] the D.C. Circuit in *Hillie* appeared to hold that the same factors apply in the same way to every case regardless of context. As a result, the court concluded that "no rational trier of fact could find the girl's conduct depicted in the videos to be a 'lascivious exhibition'" under the statute.[71] This decision aligns with others seeking to limit the application of child pornography statutes.[72]

Judge Karen LeCraft Henderson's dissent, on the other hand, reflected a better understanding of the nature of child pornography and the way that federal law is directed at protecting minors from sexual exploitation. She defended the six-part *Dost* test, maintaining that it provides a flexible, context-sensitive guide on which courts should still rely. Rather than a rigid formula or a single standard that ignores context, these factors allow jurors and judges to navigate the inherently subjective nature of these cases. To that end, Henderson underscored the importance of visual context and creator intent. She pointed to the clandestine nature of Hillie's recordings and the private settings in which they were made as strong indicators of exploitative intent. For Henderson, rather than being ancillary, these contextual clues were central to understanding the harm Congress sought to prevent.

Henderson's dissent serves as a powerful reminder of the judiciary's role in balancing deference to juries with fidelity to statutory text. It reflects a judicial philosophy that prioritizes the protection of vulnerable populations while cautioning against judicial overreach. Her dissent in *Hillie* is a thoughtful, principled contribution to the ongoing debate over how best to interpret and apply child exploitation laws in the digital age.

Weak Child Pornography Sentences. Congress first made the production and distribution of child pornography a federal crime in the Protection of Children Against Sexual Exploitation Act of 1977[73] and created the U.S. Sentencing Commission in 1984.[74] The commission's guidelines provide sentence range recommendations that incorporate an offense's seriousness and the offender's criminal history. The first set of guidelines, promulgated in 1987, provided sentence ranges for those convicted of production, transport, distribution, and receipt of child pornography.[75]

A 1990 Sentencing Commission staff report found that sentences departing from the guideline recommendation for trafficking in child pornography images were "almost evenly split between sentences above and below the guideline range."[76] By 1996, however, downward departures exceeded upward departures by a three-to-one ratio.[77] In 2005, the Supreme Court held in *United States v. Booker*[78] that because application of the sentencing guidelines may result in sentences based on facts not proven beyond a reasonable doubt, the Sixth Amendment requires that the guidelines be discretionary rather than mandatory. In a 2009 report, the Sentencing Commission documented "a high and increasing rate of downward departures and below-guidance variances"[79] in sentencing for all child pornography crimes.

Three years later, the commission reported that "defendants sentenced under the non-production child pornography guidelines have received sentences outside of the applicable guideline ranges more frequently than defendants in *all other major types of federal criminal cases*."[80] Between 2004 and 2011, the percentage of offenders receiving sentences within the recommended range declined from 83 percent to 33 percent. The shift was almost entirely downward; the percentage receiving below-guidelines sentences increased from 9 percent to 48 percent during the same period.[81] The commission's 2012 report speculated that *Booker* contributed to this trend by making the guidelines "effectively advisory."[82]

The same trend continued over the next decade. Another Sentencing Commission report found that by 2019, the percentage of defendants sentenced within the recommended range for non-production child pornography crimes had fallen to 30 percent and that nearly all departures from that range were in a downward direction.[83]

This problem became an issue during the March 2022 confirmation hearing for Supreme Court Justice Ketanji Brown Jackson. Data introduced during the hearing showed that, while serving as a U.S. District Judge between March 2013 and June 2021, Jackson had sentenced child pornography defendants below the recommended range in every case that

she handled across all three categories: production, distribution, and possession.[84] Her sentences were 34 percent lower for all child pornography crimes, 47 percent lower for distribution, and 57 percent lower for possession compared to U.S. District Court judges across the country.[85]

The Sentencing Commission's 2021 report speculated that the downward sentencing trend "indicated that courts increasingly believed the sentencing scheme for [non-production] offenders was overly severe."[86] This is another way of saying that judges increasingly believe that trafficking in child pornography and, certainly, its possession are less serious than the recommended sentence ranges indicated.

Department of Justice Failures. Senator Hatch introduced S. 151, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act,[87] in January 2003, and President George W. Bush signed it into law a few months later. Citing *Ferber*, the act's findings noted that child pornography is not protected by the First Amendment[88] and that the government "has a compelling interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers"[89] and, therefore, a "compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective."[90]

Five years later, Congress enacted the PROTECT Our Children Act,[91] directing the Attorney General to "create and implement a National Strategy for Child Exploitation Prevention and Interdiction"[92] and specifying subjects that the report must address. These subjects include comprehensive long-range goals for reducing child sexual exploitation as well as annual measurable objectives and targets.[93] The act required the Attorney General to submit the initial strategy to Congress no later than October 13, 2009, and an updated strategy every two years thereafter.[94] Attorneys General of both parties have failed to do what Congress required.

Attorney General Eric Holder submitted the first strategy in August 2010,[95] 10 months late, and failed to do so altogether in 2011. After a report that year from the Government Accountability Office (GAO)[96] found that the department had not implemented several provisions of the PROTECT Act, the department agreed to do so but failed to establish a time frame for completing those remaining required actions.[97] Holder again failed to submit the strategy to Congress in 2013; Attorney General Loretta Lynch submitted the strategy in April 2016,[98] six months late; Attorney General Jeff Sessions failed to do so in 2017; Attorney General William Barr failed to do so in 2019; and Attorney General Merrick Garland failed to do so in 2021.[99]

In a 2022 report, the GAO documented the department's poor record more fully, observing that its failure to meet the PROTECT Act's requirements was "due in part to it *not making the strategy a priority*."[100] For example:

- "[A]lthough required by law, the department did not designate a senior management official to lead the strategy's development. Instead, DOJ rotated detailees through the position of national coordinator, and nine national coordinator detailees have held the position in the last 13 years."[101]

- The strategy submitted in 2016 "did not fully include 12 of the 19 required elements established in law."[102]

- "[T]he strategy is not up-to-date on key technology advances that are making it more difficult to catch perpetrators."[103]

The updated strategy Garland sent to Congress in June 2023[104] was only the third since the 2008 PROTECT Act's enactment and the only one submitted by the mandated deadline. The next strategy is due to be submitted to Congress by October 2025.

Restitution for Victims of Child Pornography

Taking child pornography, especially its possession, seriously requires that the language we use for it, as well as statutes, enforcement, and sentencing, be informed by an accurate and substantive understanding of the nature of this crime. That understanding is even more important as a guide to the process of providing restitution for victims.

Restitution is "compensation for loss paid by a criminal to a victim."[105] Congress has long emphasized the priority of restitution for victims of crime in general and victims of child pornography in particular. In its December 1982 report, the President's Task Force on Victims of Crime recommended legislation mandating victim restitution.[106] Two years later, Congress established the Crime Victims Fund by enacting the Victims of Crime Act,[107] and in 1988, it established the Office for Victims of Crime within the Justice Department[108] to take over the fund's administration. The Victims' Rights and Restitution Act, enacted as part of the Crime Control Act of 1990, stated the sense of Congress that a victim of crime "should never be forced to endure again the emotional and physical consequences of the original crime."[109]

Against this backdrop, in 1994, Congress enacted the Violent Crime Control and Law Enforcement Act.[110] It required that "the defendant pay to the victim...*the full amount of the victim's losses*,"[111] identifying five specific loss categories,[112] and "any other losses suffered by the victim as a proximate result of the offense."[113] The restitution process has three primary steps: identifying defendants, calculating a victim's total losses, and issuing restitution orders to those defendants.

Full restitution for victims of child pornography is not simply an abstract aspiration. Congress established this process so that victims would *actually* receive full restitution. To that end, the restitution process is relatively straightforward for child pornography production crimes. The real challenge is "calculating criminal restitution awards to victims of child pornography from a 'non-contact' defendant, someone convicted of possessing and perhaps distributing the victim's pornographic images but who had no role in their creation."[114] Achieving Congress's purpose of full restitution for victims of child pornography possession is possible only if the nature of that crime informs the restitution process.

Two principles, each drawn from tort law, represent contrasting approaches to quantifying a victim's losses and imposing restitution orders to cover those losses. One approach, *proximate cause*, holds defendants responsible only for the losses that a victim can prove result specifically from that defendant's conduct. As described above, this is consistent with the nature of child pornography production, in which particular identified perpetrators cause all of the harm from the initial abuse and its capture in images.

Proximate cause, however, is fundamentally at odds with the nature of non-contact child pornography crimes and the kind of harm they impose on victims. The harm, resulting losses, and the universe of perpetrators who cause them, most of whom will never be identified or prosecuted, are all inherently indivisible. This makes proving the specific portion of a victim's losses caused only by an individual defendant's discreet conduct all but impossible. By requiring proof of the unprovable, the proximate cause standard therefore severely limits restitution for victims like Amy and in many cases results in no restitution at all.

The second approach, *aggregate causation*, accommodates the different way that child pornography production and possession harm victims. This approach holds "each of the defendants jointly and severally liable for the indivisible injury"[115] to the victim. To state the obvious, crimes are intentional acts; therefore, the most relevant tort principle to utilize in apportioning losses derives from intentional, rather than negligent, torts.

That principle is aggregate causation.[116] The *Restatement (Third) of Torts* explains that "[e]ach person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."[117]

Amy spent years pursuing restitution from individual defendants who were convicted of possessing images of her sexual abuse. Time after time, a court would convict the defendant but deny restitution because Amy could not prove the specific amount of her losses caused only by that defendant's conduct. In *United States v. Kennedy*,[118] for example, a jury convicted the defendant of possessing and transporting images of Amy's abuse.[119] Based on aggregate causation, the government asked that Amy receive either full restitution from the defendant or, in the alternative, a specific amount per image. The district court acknowledged "some degree of causal connection between the victims' losses and the defendant's conduct"[120] and awarded restitution on a per-image basis.

The Ninth Circuit reversed and vacated the district court's restitution order. The court observed that the "statutory restitution schemes"[121] in two statutes, the Victim and Witness Protection Act (VWPA)[122] and Mandatory Victim Restitution Act (MVRA),[123] require proof of proximate cause.[124] The court looked no further than these statutes' "similar restitutionary purpose" and incorporated the proximate cause standard wholesale into 18 U.S. Code Section 2259, but while these statutes and Section 2259 share such a general purpose, they do not have the same text.

The VWPA and MVRA define "victim" as "a person directly *and proximately* harmed as a result of the commission of an offense for which restitution may be ordered."[125] Section 2259, however, defines a "victim" as "the individual harmed as a result of a commission of a crime under this chapter."[126] These statutes, as the Ninth Circuit held, may "inform [the] analysis of the appropriate standard for awards of restitution under §2259."[127] That analysis, however, should have led the court to conclude that Section 2259 does not require proof of proximate cause for all losses.

The Supreme Court has held that when Congress uses particular language in one section of a statute but omits that language from another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[128] The Court has applied the same principle to language in two closely related statutes.[129] Therefore, including the "directly and proximately" language in the VWPA and MVRA but omitting it from Section 2259 is further evidence that the latter requires proving proximate cause not for all losses, but only for the catch-all category to which the "proximate result" language is attached. By focusing only on the

statutes' general purpose and ignoring their text, the Ninth Circuit effectively treated different crimes and different statutes as if they were the same.

Courts not only have used the proximate cause standard inappropriately to determine restitution in child pornography possession cases,[130] but also have done so in different ways.[131] In *United States v. Rogers*,[132] for example, the Second Circuit affirmed a "small" restitution award to Vicky based on "amounts Vicky had received in *other* cases."[133] In *United States v. Aumais*,[134] the same court affirmed a conviction for transporting and possessing images of Amy's sexual abuse but denied restitution because the defendant's possession "was not a *substantial factor"* (a term not found anywhere in the statutory text) in causing her loss.[135]

Paroline v. United States. Amy's attempt to seek restitution from Doyle Paroline, who pled guilty to possessing images of her sexual abuse, gave the Supreme Court an opportunity to address this confusion and ensure that the restitution process worked as Congress intended. Paroline pleaded guilty in January 2009 to possessing hundreds of child pornography images, including two depicting Amy's abuse, and was sentenced to 24 months in prison.[136] Amy sought an order of restitution against Paroline for the "full amount of [her] losses."

The district court construed the reference to "proximate result" in the final catch-all loss category to apply also to the specific categories. As a result, the court limited any restitution from an individual defendant to "the amount of the victim's losses proximately caused by [that] defendant's conduct."[137] This standard required proving the amount of Amy's losses "directly produced by Paroline that would not have occurred without his possession of her images."[138] Since Amy sought instead to recover all of her losses from Paroline, the district court denied any restitution.

The U.S. Court of Appeals for the Fifth Circuit reversed, concluding that "the district court clearly and indisputably erred in grafting a proximate causation requirement onto the [restitution statute]."[139] That requirement, the court concluded, applies only to "the 'catchall' provision,"[140] rather than to every loss category listed in Section 2259(b)(3).

The district and appeals court decisions in *Paroline* therefore represent the two approaches to calculating losses and imposing restitution. The Supreme Court sided with the district court over the Fifth Circuit, reading the restitution statute as requiring proof of proximate cause for any losses, thereby rendering the statute useless for victims of child pornography possession. *Paroline*'s conceptual and analytical flaws have been explored elsewhere,[141] and we will point out a few that reflect a failure to fully appreciate the nature of the crime for which this defendant owed restitution.

First, aggregate causation comports better with the statute's text. Congress could have applied a proximate cause requirement to both the specific and the catch-all loss categories; it did not do so.[142] Senator Hatch led a bipartisan group of Senators who supported Section 2259 when it was enacted in filing an amicus brief defending the Fifth Circuit's construction. They argued that "well-established canons of statutory interpretation" support the plain meaning of its text.[143] For example, the "rule of the last antecedent" provides that "a limiting clause or phrase…should ordinarily be read as modifying only the noun or phrase that it immediately follows."[144]

In addition, the statute's drafting history indicates that this result was intentional. The proximate cause language was attached to multiple loss categories in the original draft of this legislation. When it enacted the final statute, however, Congress abandoned that text and instead limited the requirement of showing proximate cause only to the final catch-all provision.

Second, the Supreme Court has consistently declined to construe statutes in a way that would "'frustrate Congress's manifest purpose.'"[145] As the Court acknowledged in *Paroline,* Section 2259 "states a broad restitutionary purpose."[146] Imposing a proximate cause requirement on all of a child pornography possession victim's losses would not only frustrate or inhibit that purpose in some way, but prevent achievement of that purpose altogether by ignoring the essential nature of the crime itself. The Supreme Court has also held that even the plain meaning of a statute may be rejected "if it would produce an 'absurd result.'"[147] The ultimate absurd result would be to conclude that Congress required "full and timely restitution,"[148] mandated that a defendant must pay the "full amount of the victim's losses," and at the same time established a process that makes achievement of those objectives impossible.

Third, the Supreme Court has repeatedly applied the presumption that Congress is "thoroughly familiar" with relevant judicial decisions and "expect[s] its enactment [of legislation] to be interpreted in conformity with them."[149] In *Miles v. Apex Marine Corp.*,[150] for example, the Court held unanimously that "[w]e assume that Congress is aware of existing law when it passes legislation."[151] Congress added child pornography possession to production and distribution as serious federal crimes before enacting the restitution statute that covers them all.

Congress was aware of the Supreme Court's decision in *Ferber* that explained how all child pornography crimes amount to child sexual exploitation and that the production and trafficking of child pornography are inextricably linked as part of the overall market for such exploitation. Congress was aware of the well-documented work, such as that of the

Attorney General's Commission, on the nature and impact of non-contact child pornography crimes. As one federal appeals court observed, "Congress repeatedly has stressed the terrible harm child pornography inflicts on its victims, dating back to its first enactment of child pornography laws in 1977."[152] Moreover, just a few years before Congress enacted the restitution statute, the Supreme Court held in *Osborne v. Ohio*[153] that child pornography is not protected by the First Amendment and upheld a state law banning its possession. In other words, Congress enacted the restitution statute and made it applicable to the possession of child pornography with full knowledge of the nature of that crime.

In one of *Paroline*'s most baffling passages, the Supreme Court stated that:

> [T]ort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy. Those are the principles that underlie the various aggregate causation tests the victim and the Government cite, and they are sound principles.[154]

In child pornography possession cases, a victim's losses clearly result from the "wrongful acts of many" rather than a single person. The Court acknowledged as much. On its face, this makes it, in the Court's words, "anomalous" and "nonsensical" to utilize a standard "whereby individuals hurt by the combined wrongful acts of many…would have no redress."[155] The Court even acknowledged that "courts have departed from the but-for standard where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome."[156] Individually, and especially together, the Supreme Court's own considerations point inexorably in one direction: Courts should utilize aggregate causation rather than proximate cause to interpret and apply the restitution statute in child pornography possession cases.

Eight justices agreed that applying the proximate cause requirement to all of a victim's losses would make restitution for victims of child pornography possession virtually impossible. Writing for the majority, Justice Anthony Kennedy conceded that:

> 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.... Nor is there a practical way to isolate some subset of the victim's general losses that Paroline's conduct alone would have been sufficient to cause.[157]

The Court nonetheless required what it conceded was not possible, reading "*other* losses...suffered as a proximate result of the offense" to mean "*all* losses."

Justice Sonia Sotomayor got it right when she observed in a dissenting opinion that "[t]he Court's approach...cannot be reconciled with the law Congress enacted." Specifically, "Congress mandated restitution for the full amount of the victim's losses, and did so within the framework of settled tort law principles that treat defendants like Paroline jointly and severally liable for the indivisible consequences of their intentional, concerted conduct."[158] There is, she wrote, "every reason to think Congress intended § 2259 to incorporate aggregate causation. Whereas a [proximate cause] requirement would set § 2259's 'mandatory' restitution command on a collision course with itself, the aggregate causation standard follows directly from the statute."[159]

After getting its interpretation of the existing statute wrong, the majority then offered a series of observations or suggestions about how district courts might proceed. These not only constituted gratuitous dicta, but were both confusing and circular. For example:

- The Court "rejected" aggregate causation as the basis for implementing the restitution statute yet maintained that it was still relevant "to determining the proper outcome in cases like this."[160]

- The Court said that it would be "anomalous" to say that "no restitution is appropriate in these circumstances"—the outcome in that very case—yet embraced a standard under which, as the Court itself conceded, "it is not possible to identify a discreet, readily definable incremental loss [that the defendant] caused."[161]

- The Court considered it "indisputable" that Paroline "was part of the overall phenomenon that caused [Amy's] general losses"[162] but rejected the standard that would treat him that way.

- The Court found "no doubt that Congress wanted victims to receive restitution for harms [from possession of child pornography]"[163] yet

insisted that Congress enacted the restitution statute with a standard that makes this result impossible.

- The Court said that while "Congress limited restitution to losses that are the 'proximate result' of the defendant's offense…such causal language by no means requires but-for causation by its terms."[164]

- District courts "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" even where "it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry."[165]

- Restitution orders in child pornography possession cases should require neither a "severe" nor a "token or nominal amount."[166]

- District courts should use "discretion and sound judgment."[167]

These so-called *Paroline* factors, instead of proving to be helpful to lower courts, only added to the confusion. In *United States v. Crisostomi*,[168] for example, Judge John McConnell described the factors as "virtually unknown and unknowable." They are "at best difficult, and at worst impossible" to apply.[169] Without any evidence, he assumed that the number of offenders already convicted for possessing Vicky's images (500) might double and, on that basis alone, awarded her one one-thousandth (0.1%) of her total losses.[170] The number of known offenders possessing Vicky's images had risen to 830 by 2016 when the judge in *United States v. Miltier*[171] also calculated restitution by first doubling that number. Instead of including the defendant in the total number of past and future cases as McConnell had done in *Crisostomi*, however, the judge in *Miltier* included the defendant only in the latter,[172] an arbitrary change certain to grant the same victim, in a case with similar facts, a significantly different amount of restitution.

A House Judiciary subcommittee held a hearing in March 2015 on post-*Paroline* child exploitation restitution. Inexplicably, the Justice Department claimed that *Paroline* "significantly" improved "the department's ability to obtain restitution orders" for victims of child pornography but made no distinction between cases involving production and those involving trafficking.[173] Professor Jonathan Turley, by contrast, testified that "the guidelines given to lower courts are not very helpful. They are pretty opaque, in fact, as to what lower courts are supposed to do to find a figure of restitution."[174]

Turley was being charitable. One U.S. District Court judge described the post-*Paroline* situation this way: "[Section 2259] makes a court's imposition of restitution mandatory, but it then demands the government to prove what in essence is unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim."[175] The result was "legal disagreements and wildly inconsistent restitution awards."[176] Another judge compared the task of calculating losses and imposing restitution after *Paroline* to "piloting a small craft to safe harbor in a Nor'easter."[177]

The U.S. Sentencing Commission's *Sourcebook of Federal Sentencing Statistics*, published for each fiscal year, began to include child pornography as a primary offense category in fiscal year (FY) 2010.[178] These reports include data on the percentage of offenders in each category ordered to pay a fine and/or restitution in any amount. In the five years prior to the *Paroline* decision, an average of 87.4 percent of child pornography offenders received no restitution order at all. That dismal average rose to 91.4 percent in the three years after *Paroline*, rendering inexplicable the Justice Department's claim that *Paroline* "significantly improved" its ability to obtain restitution for victims.

Congress's Response to *Paroline*. In *Paroline*, then, the Supreme Court held that a defendant may be held liable only for losses that can be directly attributed to his specific conduct, even in cases where those losses resulted from the inherently cumulative and diffuse harm caused by many. This left the legal landscape surrounding restitution for victims of child pornography even more confused than it was before *Paroline*. While attempting to balance fairness to defendants with justice for victims, the Court's ruling made it even more difficult for survivors to obtain restitution.

This mismatch places a virtually insurmountable evidentiary burden on victims of child pornography possession crimes. To receive any restitution at all, victims must attempt the impossible: parsing out and attempting to quantify specific harms caused by an offender who is part of a network of perpetrators that, in addition to being vast and often anonymous, continues to change. The inevitable result was a patchwork of inconsistent awards after protracted and often useless litigation, often adding a sense of revictimization to the crime for which that process should provide restitution.

Paroline's mistaken interpretation also creates a truly perverse irony: Wider circulation of a victim's abuse images increases the indivisible harm and accompanying losses that she suffers but decreases the likelihood that any individual defendant will be held responsible for any divisible harm. Every perpetrator can thus contribute to the harm and get "lost in the crowd" to avoid being held accountable.[179]

Senator Hatch introduced S. 295, the Amy and Vicky Child Pornography Victim Restitution Improvement Act, on January 28, 2015. It quickly gained 42 bipartisan co-sponsors, was endorsed by 43 state attorneys general, and was passed unanimously by the Senate only two weeks after its introduction. In its congressional findings and substantive provisions, the bill established methods for calculating a victim's losses and determining restitution that reflected the inherent differences between child pornography production and trafficking crimes. The bill effectively overruled *Paroline* by defining "full amount of the victim's losses" as including "any costs incurred by the victim" for the five specific loss categories and proximately caused costs only for the catch-all category.

Finally, S. 295 provided for defendants to seek contribution from others involved in "causing aggregated losses."[180] A defendant convicted of distributing child pornography, for example, could sue those from whom he obtained it or to whom he provided it. In *Paroline*, the Fifth Circuit explained that "[a]mong its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient."[181]

As noted above, the Justice Department defended the *Paroline* decision and opposed utilizing the aggregate causation standard for restitution in any child pornography case. In fact, as Professor Paul Cassell told a House Judiciary subcommittee in May 2015, "the Department has been litigating *against* Amy and Vicky (and other victims) in the Supreme Court and elsewhere."[182] The Department opposed the Amy and Vicky Act in that hearing, insisting that "remov[ing]…the proximate causation element invites litigation without providing any attendant benefits."[183]

Despite evidence that the percentage of child pornography defendants escaping restitution altogether was increasing after *Paroline*,[184] the Justice Department claimed that *Paroline* "significantly improved" its ability to obtain restitution.[185] The department urged Congress not to change the operative causation standard and instead to "create an alternative system that allows victims of distribution and collection of child pornography to obtain some measure of restitution without enduring litigation."[186]

When Senator Hatch introduced the bill in November 2017, he added "Andy" to its title, recognizing a Utah resident whose images of sexual abuse had been identified in more than 800 child pornography cases.[187] It marked a pivotal shift in statutory law by codifying a more victim-centered restitution model. Both the Senate and House passed it unanimously.[188]

Many bills contain congressional findings, which are included when a law appears in the *Statutes at Large* compilation published by the Office

of the Federal Register[189] but not when a statute is codified in the United States Code. While congressional findings generally lack "independent legal effect,"[190] both houses of Congress adopt them; therefore, they can be more useful than bits of pre-enactment legislative history.[191] The new bill's congressional findings focus squarely on the unique nature of child pornography crimes and how they impact victims, emphasizing that this understanding must inform the restitution process.[192] Those findings, for example, state that:

- "The harms caused by child pornography begin, but do not end, with child sex assault because child pornography is a permanent record of that abuse and trafficking in those images compounds the harm to the child."

- Child pornography production, distribution, and possession are "intertwined and each compound the harm suffered by the child-victim."

- "The unlawful collective conduct of every individual who reproduces, distributes, or possesses the images of a victim's childhood sexual abuse plays a part in sustaining and aggravating the harms to that individual victim."

- "It is the intent of Congress that victims of child pornography be compensated for the harms resulting from every perpetrator who contributes to their anguish. Such an aggregate causation standard reflects the nature of child pornography and the unique ways that it actually harms victims."

The AVAA maintains the existing restitution process for victims of child pornography production, requiring a defendant to "pay the victim...the full amount of the victim's losses."[193] The real change benefits victims of child pornography trafficking crimes by guaranteeing minimum restitution and providing an option for obtaining additional restitution without litigation.

Under the AVAA, every victim receives a minimum of $3,000 in restitution from each defendant[194] up to, but not exceeding, the full amount of her losses. This means that victims with substantial demonstrable losses such as Amy, Vicky, and Andy have the option of collecting a series of these awards without running the risk—as Amy experienced many times—of a court's denying restitution altogether. In addition, the AVAA provides two options

for a child pornography possession victim to seek additional restitution. She may, as before, pursue further litigation against a defendant, which would require proving the amount "that reflects the defendant's relative role in the causal process that underlies the victim's losses."[195]

A victim can avoid litigation altogether by receiving a one-time payment from the Defined Monetary Assistance Victims Reserve, a novel mechanism created by the AVAA and funded by special assessments on convicted offenders.[196] The Justice Department's Office for Victims of Crime is responsible for the Reserve's administration. The AVAA required the Attorney General to submit a report to Congress by December 2020 "on the progress of the Department of Justice in implementing [the AVAA]...include[ing] an assessment of the funding levels for the Child Pornography Victims Reserve." The report has never been submitted.

Some have argued that a mandatory minimum restitution award violates the Sixth Amendment. The Supreme Court held in *Apprendi v. New Jersey*[197] that "any facts that increased the prescribed range of penalties to which a criminal defendant is exposed"[198] are elements of the crime and therefore "must be submitted to a jury, and proved beyond a reasonable doubt."[199] In *United States v. Thomas*,[200] the defendant argued that imposition of the mandatory $3,000 minimum restitution award violated *Apprendi*. The Eleventh Circuit had previously held that *Apprendi* does not apply to restitution[201] and concluded here that, even if it did, "the facts that would trigger [the mandatory minimum restitution amount's] applicability are the same facts necessary for a defendant to be found guilty beyond a reasonable doubt."[202]

In *United States v. Caudillo*,[203] the Fifth Circuit similarly concluded that *Apprendi* does not apply to non-mandatory minimum restitution orders, restitution awarded under the Mandatory Victims Restitution Act of 1996, or cases in which "no statutory maximum applies to restitution" because "the restitution amount is equal to the victims' loss."[204]

Data from the U.S. Sentencing Commission confirm that the AVAA is making a real difference for victims of child pornography crimes. As noted above,[205] despite Congress's promise that crime victims have "[t]he right to full and timely restitution,"[206] an average of 87.4 percent of offenders were not required to pay any restitution during the five years prior to *Paroline*, a shocking figure that rose to 91.4 percent in the three years after the decision. That average, however, has plunged to 35 percent in the six years following the AVAA's enactment. The amount of restitution ordered shows the same positive pattern. Adjusted for inflation,[207] the average median restitution awarded to child pornography victims has jumped 165 percent since the AVAA's enactment.

Before the AVAA, the only way child pornography victims could obtain the restitution that Congress promised was to confront one defendant at a time, relive the initial abuse, and repeatedly recount the ongoing harm. After all that, victims still ran the real risk of ending up with nothing. Under the AVAA, victims now have two ways to receive guaranteed restitution and therefore are not forced to roll the dice in litigation. For the first time, a federal law explicitly identifies the real nature of child pornography crimes and creates an approach to restitution that is responsive to how these crimes impact victims. This story is a testament to how our understanding of trauma can develop, the limitations of traditional causation doctrines in the digital age, and the power of law to adapt in the service of justice.

Taking Child Pornography More Seriously

The AVAA should not have been necessary because the Supreme Court in *Paroline* should have interpreted and applied the existing restitution statute consistent with its text and Congress's restitutionary purpose. Nonetheless, the AVAA was an important step in refocusing the restitution process on that purpose. Congress and the Justice Department can now take additional steps to take child pornography more seriously.

Building on the AVAA. As described above, in light of the Justice Department's opposition to the aggregate causation standard, the AVAA retained proximate cause as the standard for litigation to obtain restitution. Nonetheless, aggregate causation remains the approach that best reflects the nature of non-contact child pornography crimes and their impact on victims and would help those victims to come closer to the "full and timely restitution"[208] that Congress promised. By unanimously passing the AVAA, Congress affirmed that, as stated in the bill's findings, the aggregate causation standard "reflects the nature of child pornography and the unique ways that it actually harms victims." Congress should therefore consider making aggregate causation the operative approach in seeking restitution from all child pornography defendants.

One of the Justice Department's arguments against aggregate causation in 2015 was the potential for very large restitution awards to violate the Eighth Amendment's prohibition on "excessive fines."[209] The Supreme Court mentioned this possibility in *Paroline* but conceded that the "primary goal of restitution is remedial or compensatory."[210] While fines are punitive, restitution is compensatory and therefore is not covered by the Excessive Fines Clause.[211] This is especially true in the AVAA, which ties restitution expressly to demonstrated losses.

Additional improvements in the AVAA include indexing the $3,000 statutory minimum for inflation as it does for the lump sums available from the Victims Reserve. If that indexing had been included in the AVAA, the mandatory minimum award today would be almost $3,900.[212]

Congress can also extend the AVAA to victims of child pornography production. Federal courts have confirmed what is apparent in federal statutes: that a conviction for child pornography production does not constitute a conviction for trafficking and therefore does not allow a court to award statutory minimum restitution.[213]

Congress could also provide that, subject to court oversight, victims be allowed to utilize the same tools that the Department of Justice uses to collect restitution.[214] Currently, a Financial Litigation Unit (FLU) is embedded within each U.S. Attorney's Office and treats a restitution order as "a lien in favor of the United States on all property and rights to property of the person fined as if the liability were a tax assessed under the Internal Revenue Code."[215] The FLU therefore can automatically impose a lien upon entry of judgment, attach the lien to all of the defendant's property and rights to property, and maintain the lien enforceable for 20 years or until the debt is satisfied or otherwise resolved.[216] In addition, the FLU can levy wages, bank accounts, and other assets, including retirement accounts; garnish income streams; and seize and sell property subject to the lien.[217] Although victims can reduce a restitution order to a civil judgment, the ability to collect on such a judgment under a myriad of state and federal laws is complicated and often ineffective.[218]

The STOP CSAM Act. Congress should strongly consider passing the STOP CSAM Act, introduced in the 118th Congress as S. 1199 by Senator Dick Durbin (D–IL)[219] and in the 119th Congress as S. 1829 by Senator Josh Hawley (R–MO).[220] This bill would further improve the restitution process by defining "trafficking in child pornography" more comprehensively and allowing courts to appoint a trustee or other fiduciary to hold funds received in restitution in an account for the benefit of the victim. The bill would make it unlawful for companies that provide interactive computer services to intentionally host or store child pornography or knowingly facilitate a violation of the child pornography laws. It would also provide for victims to seek compensation in a more traditional way by suing companies that host child pornography online for damages.

Sentencing Guidelines. As described above, the Sentencing Guidelines are designed to reflect the seriousness of a crime and should be revised so they better reflect how child pornography crimes have evolved. Some factors that the Guidelines say enhance the severity of these crimes, such

as the use of a computer, have become ubiquitous and occur in the vast majority of cases.

At the same time, the Sentencing Commission has identified factors that aggravate non-contact child pornography offenses that have yet to be incorporated into the Guidelines. For example, in FY 2019, more than 43 percent of non-production child pornography offenders participated in an online child pornography community, and nearly half engaged in aggravating sexual conduct before, or concurrently with, their non-contact offense.[221]

Most concerning, when tracking 1,093 non-production child pornography offenders released from incarceration or placed on probation in 2015, 27.6 percent were rearrested within three years.[222] The Sentencing Guidelines need to account for this high recidivism risk along with factors that reflect a propensity to engage in significant aggravating sexual conduct against children.

The Attorney General. *First,* the Attorney General must fulfill the statutory obligation of submitting an updated national strategy to combat child sexual exploitation, which is due in October 2025. This update must include, at a minimum, the 19 elements required by the PROTECT Our Children Act and provide robust and up-to-date analysis of technological issues.[223]

Second, the Attorney General must submit the report—which was due nearly three years ago—required by the AVAA on the Justice Department's implementation of the law and the Child Pornography Victim's Reserve funding levels.

Third, the Attorney General must address the factors that led the GAO to conclude in 2022 that combatting child sexual exploitation was simply not a Justice Department priority.[224]

Improving the Collection of Restitution. Another crucial problem is the Justice Department's inability to effectively collect court-ordered restitution. In February 2018, the GAO issued a report reviewing the department's efforts to collect court-ordered restitution from federal criminal offenders between FY 2014 and FY 2016.[225] Among the GAO's key findings was that, although judges ordered $33.9 billion in restitution during the review period, there was a backlog of $110 billion outstanding, $100 billion of which was deemed uncollectible because of the offenders' inability to pay. In addition, although DOJ had tools to monitor collections, it lacked performance measures or goals to assess how effective U.S. Attorney's Offices were in collecting restitution.[226]

Most concerning is that, in stark contrast to offenders convicted of crimes such as embezzlement (86 percent) and robbery (80 percent), only 27 percent of child pornography offenders were ordered to pay restitution.[227] The percentage of child pornography offenders ordered to pay restitution was similar to restitution ordered for traffic violations and environmental, game, fish, and wildlife offenses.[228]

Conclusion

Congress has promised "timely and full restitution" to crime victims and requires that child pornography defendants pay restitution for the "full amount of a victim's losses." Courts have used one of two approaches in this task. The first, proximate cause, ignores the inherent difference between child pornography production and trafficking; it is workable for the former but unworkable for the latter. The second, aggregate causation, is workable for all child pornography cases and should be the basis for the restitution process.

In its findings, the AVAA states what the Supreme Court in *Paroline* should have concluded: that the aggregate causation standard "reflects the nature of child pornography and the unique ways that it actually harms victims."[229] Grafting a proximate cause requirement onto the entire restitution process not only was unnecessary as a matter of statutory interpretation, but also made achieving Congress's restitutionary purpose virtually impossible for victims of child pornography trafficking.

The AVAA was a "a major improvement for victims"[230] even though it did not fully establish aggregate causation as the prevailing principle for imposing restitution. It significantly reduced the percentage of defendants who escaped without any restitution obligation and increased the amount of restitution that victims, especially in trafficking cases, actually receive. For victims with relatively modest calculated losses, the AVAA makes full restitution significantly more likely and gives all victims a way to receive restitution without the repeated trauma of defendant-by-defendant litigation. For victims that choose litigation, the AVAA gives them more tools in that pursuit than were previously available to them.

Looking ahead, both Congress and the Justice Department can and should take child pornography more seriously and further help victims. These include finally reconfiguring the restitution process to utilize the aggregate causation standard in all child pornography cases and enacting legislation that empowers victims to combat child pornography more comprehensively. In addition to enforcing the child pornography laws more consistently and vigorously, the Justice Department can show its commitment and support for victims by developing and implementing strategies for combatting child sexual exploitation and improving the mechanisms Congress has already created to help victims reclaim their lives.

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Endnotes

1. 572 U.S. 434 (2014).
2. When first introduced as S. 2301 in the 114th Congress, the bill was named for Amy and "Vicky," another prominent victim, and titled the Amy and Vicky Child Pornography Victim Restitution Improvement Act. Hatch reintroduced the bill as S. 295 in the 115th Congress, adding "Andy," a Utah resident. This *Legal Memorandum* therefore refers to the bill as the AVAA (Amy, Vicky, and Andy Act).
3. 18 U.S.C. § 2256(8). *See* U.S. Dep't of Justice, Citizen's Guide to U.S. Federal Law on Child Pornography (updated August 11, 2023), https://www.justice.gov/criminal/criminal-ceos/citizens-guide-us-federal-law-child-pornography.
4. *See* 18 U.S.C. § 2251. First, second, and third convictions bring mandatory minimum prison sentences of 15, 25, and 35 years, respectively. *Id.* at § 2251(e).
5. *See* 18 U.S.C. § 2251(a). A first conviction brings a mandatory minimum prison sentence of five years. A previous conviction for certain sexual exploitation crimes raises the minimum to 10 years. *Id.* at § 2252(b)(1).
6. *See* 18 U.S.C. § 2252(a)(2). A first conviction brings a maximum of 10 years in prison, or 20 years if the depicted minor is under the age of 12 or the defendant has a prior conviction for certain sexual exploitation crimes. *Id.* at § 2252(b)(2).
7. 18 U.S.C. § 2259(b)(1).
8. *See*, *e.g.*, Congressional Record, July 20, 2005, at S8584.
9. Paul G. Cassell, James R. Marsh, and Jeremy M. Christiansen, Not Just "Kiddie Porn": The Significant Harms from Child Pornography Possession, in Refining Child Pornography Law: Crime, Language, and Social Consequences 188 (2016). *See also* Paul G. Cassell, James R. Marsh, and Jeremy Christiansen, The Case for Full Restitution for Child Pornography Victims, 82 Geo. Wash. L. Rev. 61, 68–69 (2013).
10. U.S. Dep't of Justice, The National Strategy for Child exploitation Prevention and Interdiction: A Report to Congress 8 (2010), https://www.justice.gov/psc/docs/natstrategyreport.pdf.
11. U.S. Dep't of Justice, Child Pornography, https://www.justice.gov/criminal/criminal-ceos/child-pornography.
12. *See*, *e.g.*, National Center for Missing and Exploited Children, Child Sexual Abuse Material, https://www.missingkids.org/theissues/csam; National Children's Alliance, Child Sexual Abuse Material (Child Pornography) Resource Toolkit, https://learn.nationalchildrensalliance.org/csec-resource-toolkit-sexual-images-resources; Rape, Abuse & Incest National Network, https://rainn.org/news/what-child-sexual-abuse-material-csam.
13. U.S. Dep't of Justice, National Strategy for Child Exploitation Prevention & Interdiction: A Report to Congress 2 n.5 (2023), https://www.justice.gov/d9/2023-06/2023_national_strategy_for_child_exploitation_prevention_interdiction_-_a_report_to_congress.pdf. Federal government agencies involved in the fight against child sexual exploitation are shifting their vocabulary from "child pornography" to "child sexual abuse material." These agencies include the Federal Bureau of Investigation, https://www.fbi.gov/how-we-can-help-you/victim-services/cenp, and the Department of Homeland Security, https://www.dhs.gov/know2protect/key-definitions.
14. New York v. Ferber, 458 U.S. 747, 759 (1982).
15. Not Just "Kiddie Porn," *supra* note 9, at 189.
16. *Id*. *See also* Suzanne Ost, A New Paradigm of Reparation for Victims of Child Pornography, 36 Legal Studies 613, 613 (2016) ("although the [child pornography] victim's sexual abuse and its recording often occur in isolation from the distribution and downloading of the images(s) and may be perpetrated by different actors, the boundaries between creators and distributors can blur.").
17. *Ferber*, 458 U.S. at 759.
18. Osborne v. Ohio, 495 U.S. 103, 111 (1990). *See also* Attorney General's Commission on Obscenity and Pornography Final Report Pt. 1 405 (1986), https://www.ojp.gov/pdffiles1/Digitization/102046Part1.pdf ("What is commonly referred to as 'child pornography' is not so much a form of pornography as it is a form of sexual exploitation of children.... To understand the very idea of child pornography requires understanding the way in which...[it creates] a special harm largely independent of the kinds of concerns often expressed with respect to sexually explicit materials involving only adults.").
19. This *Legal Memorandum* focuses on restitution for victims of child pornography and therefore does not address so-called virtual child pornography, which does not involve "the abuse of real children." Child Obscenity and Pornography Prevention Act of 2002, Report 107-526, 107th Congress, 2d Session, June 24, 2002, at 2. Congress has struggled to legislate regarding computer-generated images of what appear to be children.
20. U.S. Sentencing Commission, Federal Child Pornography Offenses 100 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf. *See also* Isra Bhatty, Navigating Paroline's Wake, 63 UCLA L. Rev. 2, 4 (2016) ("someone convicted of possessing and perhaps distributing the victim's pornographic images but who had no role in their creation.").
21. Not Just "Kiddie Porn," *supra* note 9, at 187. *See also* Ost, *supra* note 16, at 17 (treating "dissemination and downloading" of child pornography as a "secondary harm [that] has the potential to trivialize and downgrade the effects on the victim").
22. Not Just "Kiddie Porn," *supra* note 9, at 190.

23. U.S. Sentencing Commission, *supra* note 20, at 107.
24. *Id*. at 112.
25. Child Pornography Prevention Act § 121, Public Law 104-208, 110 Stat. 2009 (1996). See also Osborne v. Ohio, 495 U.S. 103, 111 (1990); U.S. Sentencing Commission, *supra* note 20, at 311 ("the perpetual nature of the distribution of images on the Internet causes a significant, separate, and continuing harm to victims."); Warren Binford et al., Beyond *Paroline*: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad, 35 Children's Legal Rights Journal, 117, 127 (2015) (describing the impact of "continual victimization").
26. United States v. Blankenship, 606 F.3d 1110, 1117 (9th Cir. 2010).
27. U.S. Sentencing Commission, *supra* note 20, at 112. *See also* Child Exploitation Restitution Following the Paroline v. United States Decision, Hearing before the H. Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, 114th Congress, 1st Session 6 (Mar. 19, 2015), https://www.govinfo.gov/content/pkg/CHRG-114hhrg93798/pdf/CHRG-114hhrg93798.pdf (testimony of Jill Steinberg) ("these victims are unique among crime victims. Because of the mechanics of the crime committed against them, they continually suffer harm caused by countless individuals all over the country and the world.").
28. 458 U.S. 747 (1982).
29. Attorney General's Commission, *supra* note 18, at 405.
30. *Id*.
31. *Id*. at 406.
32. *See* Julian Ring, 30 Years Ago, One Decision Altered the Course of Our Connected World, NPR, Apr. 30, 2023 ("On April 30, 1993, something called the World Wide Web launched into the public domain."), https://www.npr.org/2023/04/30/1172276538/world-wide-web-internet-anniversary.
33. New York v. Ferber, 458 U.S. 747, 760 (1982).
34. *See* Not Just "Kiddie Porn," *supra* note 9, at 191–93.
35. Paroline v. United States, 572 U.S. 434, 440 (2014).
36. *Id*.
37. Binford et al., *supra* note 25, at 117 (2015). *See also* In re Amy Unknown, 636 F.3d 190, 193 (5th Cir. 2011). Law enforcement sends child pornography images uncovered through investigations to the National Center for possible victim identification.
38. *See* In re Amy Unknown, 636 F.3d at 193; In re Amy Unknown, 701 F.3d 749, 753 (5th Cir. 2012) (en banc).
39. *Paroline*, 572 U.S. at 440–41.
40. *See* the Victims' Rights and Restitution Act, codified at 34 U.S.C. § 2014(c).
41. *See* House hearing, *supra* note 27, at 23 (statement of Linda Krieg) ("As these images continuously proliferate and are traded online, child pornography victims suffer a perpetual invasion of their privacy and re-victimization.... Offenders who possess child pornography images perpetuate the ongoing harm to child victims.").
42. U.S. Sentencing Commission, Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties 25–30 (June 1996).
43. U.S. Sentencing Commission, *supra* note 20, at 312–13 ("These technological changes have resulted in exponential increases in the volume and ready accessibility of child pornography."). In a 2015 hearing on restitution for child pornography victims, the National Center for Missing and Exploited Children explained that "the demand for and trade of child sexual abuse material has been increasingly facilitated by technological advances." House hearing, *supra* note 27, at 23 (Statement of Linda Krieg).
44. Binford, *supra* note 25, at 124.
45. U.S. Dep't of Justice, Child Pornography (updated Aug. 11, 2023), https://www.justice.gov/criminal/criminal-ceos/child-pornography. *See also* MacKenzie Durkin, Restitution for Child Pornography: Reframing a System for Victims Harmed by Too Many, 52 Loy. U. Chi. L. J. 557, 570–75 (2021); Urban Institute, Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities, Mar. 2014, at 251–59; Binford et al, *supra* note 25, at 122 ("technological innovations and the rise of the Internet have transformed child pornography into a problem that is transnational, borderless, and never-ending in its growth.").
46. United States v. Knox, 776 F.Supp. 174, 179 (M.D. Penn. 1991).
47. 18 U.S.C. § 2252(a)(2)(A).
48. 18 U.S.C. § 2256(2)(A)(v).
49. United States v. Knox, 977 F.2d 815,817 (3rd Cir. 1992). The company that produced the videos claimed in its marketing material that they were legal because they contained neither sex nor nudity. *Knox*, 776 F.Supp. at 179.
50. *Id*. at 823.
51. Knox. v. United States, 508 U.S. 959 (1993).
52. Knox v. United States, Brief for the United States, 1993 WL 723366 (Sept. 17, 1993).

53. *Id*. at 9.
54. Knox v. United States, 510 U.S. 939 (1993).
55. United States v. Knox, 32 F.3d 733, 737 (3rd Cir. 1994).
56. House Resolution 281, 103rd Congress, 2nd Session, Oct. 20, 1993.
57. House Rule XV provides that a Member may present a motion to discharge "a committee from consideration of a public bill or resolution that has been referred to it for 30 legislative days." Rules of the House of Representatives, 119th Congress, Rule XV(2)(a)(1)(A), https://rules.house.gov/sites/evo-subsites/rules.house.gov/files/documents/houserules119thupdated.pdf. The House clerk arranges for Members to be able to sign the petition and "shall make the signatories a matter of public record, causing the names of the Members who have signed a discharge motion during a week to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspection in an appropriate office of the House." Rule XV(2)(b).
58. *See* Congressional Record, Feb. 11, 1994, at 2246.
59. House Judiciary Committee Chairman Jack Brooks (D–TX) introduced H.R. 3355, and Senate Judiciary Committee Chairman Joe Biden (D–DE) introduced S. 1607, each chamber's version of the Violent Crime Control and Law Enforcement Act.
60. *See* Congressional Record, Apr. 20, 1994, at 7942. Among the three dissenters was Representative Don Edwards (D–CA), the House Judiciary Subcommittee chairman who had refused to take up the Smith resolution.
61. Congressional Record, Nov. 4, 1994, at 27494.
62. *See* Public Law 103-322, 108 Stat. 2038 (Sept. 13, 1994).
63. 14 F.4th 677 (D.C. Cir. 2021).
64. 18 U.S.C. § 2251(a).
65. 18 U.S.C. § 2252(a)(4)(B).
66. 636 F.Supp. 828 (S.D. Cal. 1986).
67. *Id*. at 831.
68. *Id*. at 832. *See also* Free Speech Coalition, Inc. v. Paxton (June 27, 2025), slip op. at 8–9 (distinguishing between "speech that is obscene to the public at large" and "that which is obscene from a child's perspective").
69. *Dost*, 636 F.Supp. at 832.
70. *Id*.
71. United States v. Hillie, 14 F.4th 677 (D.C. Cir. 2021).
72. *See*, *e.g.*, United States v. Steen, 634 F.3d 822 (5th Cir. 2011); United States v. Amirault, 173 F.3d 28 (1st Cir. 1999).
73. Public Law 95-225, 92 Stat. 7 § 2 (1978), codified at 18 U.S.C. §§ 2251–53.
74. Sentencing Reform Act, Public Law 98-473, 98 Stat. 1837 (1984).
75. *See* U.S. Sentencing Commission, The History of the Child Pornography Guidelines 19 (Oct. 2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
76. U.S. Sentencing Commission, Revised Report of the Working Group on Child Pornography and Obscenity Offenses and Hate Crimes 17–18 (1990).
77. U.S. Sentencing Commission, *supra* note 75, at 29.
78. 543 U.S. 220 (2005).
79. U.S. Sentencing Commission, *supra* note 75, at 8.
80. U.S. Sentencing Commission, *supra* note 20, at 7 (emphasis added).
81. *Id*.
82. *Id*. at 9.
83. U.S. Sentencing Commission, Federal Sentencing of Child Pornography Non-Production Offenses 5 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf.
84. Senator Ted Cruz (R–TX) prepared an analysis of sentencing data comparing Jackson to other U.S. District judges in the District of Columbia and across the country. *See* https://www.cruz.senate.gov/imo/media/doc/ketanji_brown_jackson__sentencing.pdf.
85. *Id*.
86. U.S. Sentencing Commission, *supra* note 83, at 1. See also U.S. Sentencing Commission, *supra* note 75, at 54 ("Sentencing courts have also expressed comment on the perceived severity of the child pornography guidelines through increased below-guidelines variance and down departure rates.").
87. Public Law 108-21, 117 Stat. 650 (Apr. 30, 2003).

88. Section 501(1).
89. Section 501(2).
90. Section 501(3).
91. Public Law 110-401, 122 Stat. 4229 (Oct. 13, 2008).
92. Originally codified at 42 U.S.C. § 17611(a), reclassified as 34 U.S.C. § 21111(a).
93. 34 U.S.C. § 21111(c).
94. *Id*. at § 21111(b).
95. U.S. Dep't of Justice, *supra* note 10.
96. U.S. Gov't Accountability Office, Combatting Child Pornography (Mar. 2011), https://www.gao.gov/assets/gao-11-334.pdf.
97. *Id*.
98. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction (April 2016), https://www.justice.gov/d9/pages/attachments/2016/04/19/2016_natl_strategy_rpt_-_online_version_updated_final_08_16_2016.pdf.
99. *See* U.S. Gov't Accountability Office, *supra* note 96, at 2–3.
100. U.S. Gov't Accountability Office, Online Exploitation of Children (Dec. 2022), https://www.gao.gov/assets/gao-23-105260.pdf at 2 (emphasis added).
101. *Id*.
102. *Id*. *See also* Kristin Finklea, Congressional Research Service In Focus, Project Safe Childhood and the National Strategy for Child Exploitation Prevention and Interdiction, June 14, 2024, https://sgp.fas.org/crs/misc/IF12688.pdf.
103. U.S. Gov't Accountability Office, *supra* note 100, at 2.
104. U.S. Dep't of Justice, *supra* note 13.
105. Legal Information Institute, Restitution, https://www.law.cornell.edu/wex/restitution.
106. President's Task Force on Victims of Crime Final Report 33–34 (Dec. 1982), https://www.ojp.gov/pdffiles1/ovc/87299.pdf.
107. As of January 2025, the Crime Victims Fund had a balance of $4.3 billion from various sources, including assessments paid by criminal defendants, forfeited bail bonds, and private contributions. *See* Office for Victims of Crime, Crime Victims Fund, https://ovc.ojp.gov/about/crime-victims-fund.
108. U.S. Dep't of Justice Office for Victims of Crime, https://www.justice.gov/vtatf/ovc#:~:text=The%20Office%20for%20Victims%20of,victim%20assistance%20and%20compensation%20programs.
109. Public Law 101-647, 104 Stat. 4823 (Nov. 29, 1990).
110. Public Law 103-322, 108 Stat. 1796 (Sept. 13, 1994).
111. 18 U.S.C. § 2259(b)(1) (emphasis added).
112. *Id*. at § 2259(b)(3(A)–(E). These are medical services; physical and occupational therapy or rehabilitation; transportation, temporary housing, and child care; lost income; and attorneys' fees.
113. *Id*. at § 2259(b)(3)(F).
114. Bhatty, *supra* note 20, at 4.
115. Cassell, Marsh, and Christiansen, The Case for Full Restitution, *supra* note 9, at 97.
116. *Id*. at 101–106. *See also* Paul G. Cassell & James R. Marsh, Full Restitution for Child Pornography Victims: The Supreme Court's *Paroline* Decision and the Need for a Congressional Response, 13 Ohio St. J. Crim. L. 1, 18–22 (2015); Not Just "Kiddie Porn," *supra* note 9, at 199–202.
117. Restatement (Third) of Torts: Apportionment of Liab. § 12 (21000).
118. 643 F.3d 1251 (9th Cir. 2011).
119. At sentencing, the district court vacated the possession conviction, determining that possession is a lesser-included offense of transportation. *Id*. at 1254.
120. *Id.* at 1255–56.
121. *Id*. at 1261.
122. 18 U.S.C. § 3663.
123. 18 U.S.C. § 3663A.
124. *Kennedy*, 643 F.3d at 1261.
125. 18 U.S.C. § 3663(a)(2) (emphasis added); 18 U.S.C. § 3663A(a)(2) (emphasis added).
126. 18 U.S.C. § 2259(c). *See* Cassell, Marsh & Christiansen, The Case for Full Restitution, *supra* note 9, at 88 (noting "§ 2259's materially different—and broader—definition of 'victim' from those found in other federal restitution statutes.").

127. *Kennedy*, 643 F.3d at 1262.
128. Russello v. United States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). *See also* Riegel v. Medtronic, Inc., 522 U.S. 312, 327 (2008).
129. *See*, *e.g.*, Sullivan v. Stroop, 496 U.S. 478 (1990).
130. *See*, *e.g.*, United States v. Benoit, 713 F.3d 1 (10th Cir. 2013); United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012); United States v. Gamble, 709 F.3d 541 (6th Cir. 2013); Amy & Vicky v. United States, 698 F.3d 1151 (9th Cir. 2012); United States v. Mozel, 641 F.3d 528 (D.C. Cir. 2011).
131. House hearing, *supra* note 27, at 10 (statement of Jill Steinberg) ("courts adopted many different methods to calculate the restitution amount.").
132. 714 F.3d 82 (2nd Cir. 2013).
133. *Id*. at 89 (emphasis added).
134. 656 F.3d 147 (2nd Cir. 2011).
135. *Id*. at 148 (emphasis added).
136. *Paroline*, 672 F.Supp.2d at 783.
137. *Id.* at 793.
138. *Id*. at 791.
139. In re Amy Unknown, 636 F.3d at 193.
140. *Id*. at 198.
141. *See*, *e.g.*, House hearing, *supra* note 27, at 41–55 (statement of Hon. Paul G. Cassell); Cassell & March *supra* note 116; Janet Lawrence, The Peril of Paroline: How the Supreme Court Made It More Difficult for Victims of Child Pornography, 2016 BYU L. Rev. 325; Bhatty, *supra* note 20.
142. See Cassell, Marsh, and Christiansen, The Case for Full Restitution, *supra* note 9, at 81 ("The plain text alone strongly suggests that there is no generalized proximate cause requirement in § 2259.").
143. Brief for United States Senators in Paroline v. United States, No. 12-8561 (Nov. 2013), at 3.
144. *Id*. at 11, quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003). *See also* Cassell, Marsh, and Christensen, The Case for Full Restitution, *supra* note 9, at 82–86.
145. Cassell & Marsh, *supra* note 116, at 15, quoting United States v. Hayes, 555 U.S. 415, 427 (2009).
146. *Paroline*, 572 U.S. at 443.
147. Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).
148. 18 U.S.C. § 3771(a)(6).
149. *Id*.
150. 498 U.S. 19 (1990).
151. *Id*. at 32.
152. United States v. Pugh, 515 F.3d 1179, 1197 (9th Cir. 2009)
153. 495 U.S. 103 (1990).
154. *Paroline*, 572 U.S. at 452.
155. *Id*.
156. *Id*. at 451.
157. *Id*. at 450–51.
158. *Id*. at 474.
159. *Id*. at 476.
160. *Id*. at 456.
161. *Id*. at 456–57.
162. *Id*. at 457.
163. *Id*.
164. *Id*. at 458.
165. *Id*.
166. *Id*.

167. *Id*. at 460.
168. 31 F.Supp.3d 361 (D.R.I. 2014).
169. *Id*. at 367.
170. *Id*. at 365.
171. Criminal No. 2:15cr151 (E.D. Virginia 2016), https://case-law.vlex.com/vid/united-states-v-miltier-884531283.
172. *Id*.
173. House hearing, *supra* note 27, at 12 (statement of Jill Steinberg).
174. *Id*. at 8 (testimony of Jonathan Turley).
175. United States v. Tallent, 872 F.Supp.2d 679, 693 (E.D. Tenn. 2012). *See also* Dean A. Mazzone, *Paroline v. United States*: The Question of Restitution, 16 Engage 28, 28 (Feb. 2015) (calling this "an impossible dilemma: in a case such as this one, how do you determine what particular portion of harm was caused by the defendant, where the total quantum of harm suffered by the victim was undoubtedly cause by a vast and effectively unknowable number of most anonymous people.").
176. Bhatty, *supra* note 20, at 4. *See also* Lawrence, *supra* note 141, at 362 ("Since the *Paroline* decision, federal courts have struggled to calculate appropriate awards. The *Paroline* decision has done little to help courts clarify the amount of restitution that victims should be awarded."); Paul G. Cassell and James R. Marsh, The New Amy, Vicky, and Andy Act: A Positive Step Towards Full Restitution for Child Pornography Victims, 31 Fed. Sent. Rptr. 186, 190–91 (2019); Durkin, *supra* note 45, at 589–98 (reviewing different approaches used by courts of appeals).
177. United States v. DiLeo, 58 F.Supp.3d 239, 244 (E.D. N.Y. 2014).
178. U.S. Sentencing Commission, 2024 Sourcebook of Federal Sentencing Statistics, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf. Each Sourcebook includes links to those for previous fiscal years. Data on those ordered to pay a fine and/or restitution in each offense category are available in the appropriate table within the "Sentencing Information" section of the compilation of tables and figures.
179. *See* Cassell & Marsh, *supra* note 116, at 16.
180. *See id*. at 21–22. The courts have recognized a right to pursue a contribution action in other restitution settings. *See*, *e.g.*, United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008) (defendant held jointly and severably liable may "seek contribution from his co-conspirators to pay off the restitution award.").
181. In re Amy Unknown, 636 F.3d at 201.
182. House hearing, *supra* note 27, at 69 (statement of Hon. Paul G. Cassell) (emphasis in original).
183. *Id*. at 14. Professor Paul Cassell, who argued *Paroline* for Amy, disagreed and explained numerous ways that the Amy and Vicky Act improved the restitution process. *Id*. at 60–65.
184. *Id*. at 13 (statement of Jill Steinberg).
185. *See supra* note 178 and accompanying text.
186. House hearing, *supra* note 27, at 13 (statement of Jill Steinberg); *id*. at 14 (recommending "an approach that would provide victims of child pornography offenses of this kind with a choice: use a simple method to obtain a fixed amount of compensation, or pursue restitution in individual cases under the standards set forth in the *Paroline* decision.").
187. *See id*. at 66–67 (statement of Hon. Paul G. Cassell).
188. Public Law 115-299, 142 Stat. 4283 (Dec. 7, 2018).
189. Under the provisions of 1 U.S.C. § 112, the printed edition of the *Statutes at Large* constitutes legal evidence of the laws, concurrent resolutions, presidential proclamations, and both proposed and ratified constitutional amendments.
190. Victoria L. Killian, Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations, CRS R46484 (May 19, 2022), at 31.
191. Senator Hatch introduced S.1237, the Child Pornography Prevention Act, on September 13, 1995. When reported to the Senate from the Judiciary Committee, the bill had robust findings regarding the nature of child pornography, its harms, and how computers and imaging technology can be used to promote them. See Child Pornography Prevention Act of 1995, Report 104-358, 104th Congress, 2nd Session, at 2–3.
192. *See* House hearing, *supra* note 27, at 56–57 (statement of Hon. Paul G. Cassell).
193. 18 U.S.C. § 2259(b)(1).
194. 18 U.S.C. § 2259(b)(2)(B).
195. *Id*.
196. As enacted, the AVAA originally required assessments of up to $17,000 for defendants convicted of possession, up to $35,000 for those convicted of distribution, and up to $50,000 for those convicted of production. 18 U.S.C. § 2259A(a). These amounts "shall be adjusted annually in conformity with the Consumer Price Index." *Id*. at § 2259A(b). *See also* U.S. Dep't of Justice, Defined Monetary Assistance Victims Reserve, https://www.justice.gov/dmavr. In addition to defendant assessments, the Reserve receives an annual sum from the existing Crime Victims Fund.

197. 530 U.S. 466 (2000).
198. *Id*. at 490.
199. *Id*. *Apprendi* involved increasing a sentence beyond the statutory maximum. The Court applied the same principle to increasing a mandatory minimum sentence in Alleyne v. United States, 570 U.S. 99 (2013). This is the same principle that led the Supreme Court in United States v. Booker to hold that the Sentencing Guidelines are advisory rather than mandatory. *See supra* note 78 and accompanying text.
200. No. 23-10368, 2024 WL 706205 *3 (11th Cir. 2024), cert. denied sub nom. Thomas v. United States, 145 S.Ct. 1066 (2025).
201. Dohrmann v. United States, 442 F.3d 1279, 1281 (11th Cir. 2006).
202. *Id.*
203. 110 F.4th 808, 811 (5th Cir. 2024).
204. *Id*. at 811.
205. *See supra* note 173 and accompanying text.
206. 18 U.S.C. § 3771(a)(6).
207. This calculation incorporates the Consumer Price Index using the U.S. Inflation Calculator available at https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/.
208. 18 U.S.C. § 3771(a)(6).
209. House hearing, *supra* note 27, at 7. *See also id.* at 113 (testimony of Jonathan Turley). *Cf* Not Just "Kiddie Porn," *supra* note 9, at n.64; Cassell & Marsh, *supra* note 116, at 21–22, 32.
210. *Paroline*, 572 U.S. at 456.
211. *See*, *e.g.*, In re Amy Unknown, 701 F.3d at 771–72 (en banc); United States v. Visinaiz, 344 F.Supp. 2d 1310, 1318–23 (D. Utah 2004). *See also* Durkin, *supra* note 45, at 621–23.
212. Consumer Price Index for All Urban Consumers (CPI-U) to May 2025.
213. *See*, *e.g.,* United States v. Nesdahl, No. 24-2404, 2025 WL 1637318 (8th Cir. June 10, 2025); United States v. West, 137 F.4th 395, 402 (5th Cir. 2025) ("Section 2259(b)(2) is inapplicable because that subsection applies only to restitution orders for trafficking in child pornography [and] West's conviction under § 2251(a) does not qualify as trafficking in child pornography").
214. The Department of Justice recognizes the utility of this approach. The current edition of the DOJ Justice Manual notes that "in many cases, corporate or nonfederal government victims may be in a better position to pursue enforcement than the United States Attorney's office and they should be encouraged to do so, thus freeing up resources in the United States Attorney's office to concentrate on other victims." 9-143.600–Efforts for Victims of Crime, https://www.justice.gov/jm/jm/9-143000-collection-criminal-monetary-impositions#9-143.600 (visited June 20, 2025). See also J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1155 (2012) (Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws. It provides protections against harm based on the initiative of a few, which counters the problem of limited agency resources.).
215. 18 U.S.C. 3613(f) makes "all provisions of this section…available to the United States for the enforcement of an order of restitution."
216. See DOJ Justice Manual, 9-143.000–Collection Of Criminal Monetary Impositions, https://www.justice.gov/jm/jm/9-143000-collection-criminal-monetary-impositions (visited June 20, 2025).
217. Even with the FLU's vast enforcement powers, certain assets are exempt from levy, including minimal household goods, unemployment benefits, and certain pensions (26 U.S.C. § 6334).
218. See Roger Haydock, Fundamentals of Litigation Practice, Thomson West (2024); Randa Trapp et al., You Have a Judgment, Now What? Mastering the Art of Judgment Collection, Business Law Today, American Bar Association (Sept. 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/you-have-a-judgment/ ("judgment collection and enforcement can be every bit as complex and challenging as the proceedings that gave rise to the judgment in the first instance, if not more").
219. The Senate Judiciary Committee unanimously approved the Durbin bill in May 2023.
220. As of June 12, 2025, when the Senate Judiciary Committee unanimously approved it, S. 1829 had eight bipartisan co-sponsors. In its current form, the STOP-CSAM bill would, for the first time, fund a guardian ad litem for child victims who, in most federal criminal prosecutions, are victims of child pornography production. *See also* Binford et al., *supra* note 25, at 155.
221. U.S. Sentencing Commission, *supra* note 83, at 6.
222. *Id*. at 7.
223. *See supra* notes 91–94 and accompanying text.
224. *See supra* notes 100–03 and accompanying text.
225. U.S. Gov't Accountability Office, Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved (2018), https://www.gao.gov/assets/gao-18-203.pdf.

226. In a follow-up performance review, the GAO concluded that while DOJ had made progress in developing performance measures and goals, challenges remained. *See* U.S. Gov't Accountability Office, Federal Criminal Restitution: Department of Justice Has Ongoing Efforts to Improve Its Oversight of the Collection of Restitution and Tracking the Use of Forfeited Assets (2020), https://www.gao.gov/assets/gao-20-676r.pdf.
227. U.S. Gov't Accountability Office, *supra* note 225, at 18.
228. *Id*. at 43.
229. For a legislative proposal based squarely on aggregate causation, *see* Durkin, *supra* note 45, at 615–21.
230. *Id*. at 600.