BYU Law Review

Volume 2016 | Issue 1 Article 11

February 2016

The Peril of Paroline: How the Supreme Court Made It More Difficult for Victims of Child Pornography

Janet Lawrence

The Peril of *Paroline*: How the Supreme Court Made It More Difficult for Victims of Child Pornography

> "[E]xtremism in the defense of liberty is no vice. And . . . moderation in the pursuit of justice is no virtue."
>
> —Barry Goldwater[1]

I. INTRODUCTION

In 1996, Congress passed the Mandatory Restitution Provision as a way to help those who have suffered enormous losses as child pornography victims.[2] "Andy"[3] is one of those victims. FBI Special Agent Jeff Ross had received a file on a young boy who was being repeatedly sexually abused by an adult male. The National Center for Missing and Exploited Children (NCMEC) sent him the file after determining that the abuse occurred in Utah from hearing a radio ad for a Utah car dealer and "see[ing] a Salt Lake City telephone directory in the background" of a video.[4] Agent Ross had a break in the case and was able to learn the name of the victim, the city where he lived, and the name of the abuser—Antonio Cardenas.[5]

For three of the five years Cardenas volunteered as a "big brother" to Andy, he had sexually abused Andy and documented the abuse with video and photos. The first video of him showed acts of sexual abuse on a blanket decorated with the Nickelodeon cartoon, SpongeBob Squarepants. The series of videos became known as the "SpongeBob" series in the underground child-porn community and is among the most widely distributed child pornography on the

1. Senator Barry Goldwater, Speech Accepting the Republican Presidential Nomination (Jul. 16, 1964), http://www.americanrhetoric.com/speeches/barrygoldwater1964rnc.htm.

2. 18 U.S.C. § 2259 (2012).

3. "Andy" is a pseudonym used to protect the victim's identity.

4. Brooke Adams, *For FBI Agent, Luck and Dedication Cracked Child Porn Case*, SALT LAKE TRIB. (June 24, 2012), http://archive.sltrib.com/story.php?ref=/sltrib/news/54341564-78/ross-cardenas-child-utah.html.csp.

5. *Id.*

Internet.[6] Cardenas repeatedly raped the child, acts that he deemed as "consensual sex" performed in the name of love. Cardenas believes that there is nothing criminal or inherently wrong with having sex with children. He thinks that laws should be changed to decriminalize this behavior.[7]

At one point, Cardenas lost his job and decided to move back with his parents in Mexico. He wanted to profit as the "creator of SpongeBob" from his videos and contacted private child-porn traders "to get everything from anybody with nothing but my name."[8] He knew he "had a very unique, special, tradable, beautiful kid series with which to climb up the pornography ladder," and would be able to "get access to things [he] always wanted to see but could never get hold of."[9] In a short time span, he "felt like [he] was god, [he] was at the top of the game."[10]

Antonio Cardenas was arrested January 10, 2010, and the story of Andy's abuse came to light.[11] At Cardenas's sentencing, Andy's mother brought in two large boxes containing hundreds of brown envelopes, each a victim-notification statement regarding a case where a defendant was charged with possessing "SpongeBob" images. His mother poignantly observed, "Every one of those envelopes represents perverts looking at pictures of my son."[12] At the time of sentencing, there were at least 500 defendants.[13] Today, that number is rapidly approaching 1,000.[14]

6. Brief for "Vicky" & "Andy" as Amici Curiae Supporting Amy Unknown at 3, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12.8561).

7. Stephen Dark, *Warped Desire: Inside the Mind of a Child Pornographer*, SALT LAKE CITY WKLY. (Aug. 01, 2012), http://www.cityweekly.net/utah/warped-desire/Content?oid=2284115&showFullText=true.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. This number is based on a count of the number of cases recorded with the Utah Crime Victims Legal Clinic as of December 2014. The Utah Crime Victims Legal Clinic receives notices on a regular basis and the number is expected to continue to increase.

Andy's losses encompass psychological counseling and future lost income. Andy also seeks restitution for expenses for a forensic psychological exam and follow-up report and an econometric calculation of his actual losses as a necessary precursor to his restitution requests, as well as legal fees.[15] Andy's case is precisely the situation Congress had in mind when it passed 18 U.S.C. § 2259, the Mandatory Restitution Provision, which applies to child pornography victims.

In a report to Congress, the U.S. Department of Justice defined child pornography as "the possession, trade, advertising, and production of images that depict the sexual abuse of children."[16] It is worth noting that the term child pornography has fallen out of favor among experts in the field because the "use of that term contributes to a fundamental misunderstanding of the crime—one that focuses on the possession or trading of a picture and leaves the impression that what is depicted in the photograph is pornography. Child pornography is unrelated to adult pornography; it clearly involves the criminal depiction and memorializing of the sexual assault of children and the criminal sharing, collecting, and marketing of the images."[17]

There is a rising preference for calling these photographs indecent images of children, child exploitation materials, and child abuse images, which "is thought to more adequately capture the content of these images and the ways that they are used, and move

15. Sample Restitution Request, Utah Crime Victims Legal Clinic (on file with author).

16. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 8 (2010).

17. *Id.*; *see* RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATION, AND PREVENTION 7–9 (Graeme R. Newman ed., 2012) ("There is much debate in the literature and among advocacy groups and law enforcement agencies about the proper term for sexual material involving children. Some have objected to the term *child pornography* on the grounds that it trivializes the severity of the offense by linking the problem too closely with the legal production and consumption of adult pornography . . . ."); Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61, 68 (2013) ("[A]lthough the term 'child pornography' is widely used, it carries misleading cultural connotations. The term 'pornography' equates child pornography with erotic material appealing to the viewer's normative sexual interest, and is neither the best nor the most accurate term to describe, for example, images and videos which graphically record children being raped.") (footnotes omitted).

us away from uncritical comparisons with adult pornography."[18] However, in this Comment, the term "child pornography" will be used "because it is the legal and accepted term for images of child sexual abuse,"[19] it is what is used in legislation and by law enforcement, and it is easily identifiable by the general public.

This Comment looks at the way the Mandatory Restitution Provision developed, how it has been interpreted, and how Congress has responded to the Court's decision. Part II examines some of the motivations and public issues that informed congressional action on behalf of the victims of child pornography. Part III introduces the victims the government represented in the recent Supreme Court decision regarding the Mandatory Restitution Provision, *Paroline v. United States.*[20] Part IV discusses the *Paroline* decision, including the framework for courts as embedded in the canons of construction used when interpreting statutes, the particular interpretive problems *Paroline* presents, how the Court interpreted the statute, and the effects and continuing problems that exist in the wake of *Paroline*. Part V concludes.

II. LEGISLATIVE RESPONSE TO THE GROWING CHILD PORNOGRAPHY TREND

In response to "a rising tide of violence . . . target[ing] American women both in the streets and in their own homes" with "increasing incidence of rape, sexual assault and domestic violence,"[21] Congress enacted the Violence Against Women Act (VAWA) in 1994, which serves all victims of sexual abuse and domestic violence regardless of age or gender.[22] Acknowledging that sexual assault "carries with it long-term psychological wounds" along with "often serious physical

18. Ethel Quayle & Roberta Sinclair, *An Introduction to the Problem*, *in* UNDERSTANDING AND PREVENTING ONLINE SEXUAL EXPLOITATION OF CHILDREN 4 (Ethel Quayle & Kurt M. Ribisl eds., 2012) (citations omitted).

19. U.S. DEP'T OF JUSTICE, *supra* note 16, at 8 (emphasis omitted).

20. Paroline v. United States, 134 S. Ct. 1710 (2014).

21. H.R. REP. NO. 103-395, at 25 (1993).

22. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001–703, 108 Stat. 1796, 1902–55 (1994) (enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994).

injuries" that would both need treatment,[23] this act required courts to order defendants to pay "the full amount of the victim's losses" as restitution[24] to victims of child sexual abuse falling under 18 U.S.C. § 2251 et seq., including not only the creation and distribution of child pornography, but also possession of child pornography.[25] Child victims of sexual assault experience actual harm and long-term effects that require ongoing treatment.

A. Mandatory Restitution

Congress intended that child pornography victims receive full compensation from their offenders.[26] Child pornography victims are entitled to restitution in the full amount of their eligible losses from defendants convicted of possessing or distributing their images.[27] Full restitution

> includes any costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense.[28]

Ordering restitution is mandatory, seemingly imposing joint and several liability on each defendant.[29] "A court may not decline to [order restitution] because of the economic circumstances of the defendant; or the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance

23. H.R. REP. NO. 130-395, at 26 (1993). Victims are "8.7 times as likely as non-victims to have attempted suicide and twice as likely to experience major depression." *Id.* (quoting *Victims of Rape: Hearing Before the H. Select Comm. on Children, Youth, and Families*, 101st Cong. 37 (1990) (statement of Dean G. Kilpatrick, Ph.D.).

24. 18 U.S.C. § 2259(b)(1) (2012).

25. 18 U.S.C. § 2259(a), (b)(4) (2012).

26. *See id.* § 2259(b)(1).

27. *Id.*

28. *Id.* § 2259(b)(1), (3).

29. *Id.* § 2259(b)(4)(A).

or any other source."[30] This provision supports "Congress's well-founded recognition that the possession and distribution of child pornography causes significant harm to the victims depicted in those images. The endless circulation of a victim's child sex images subjects victims to continuous invasions of privacy that cause lasting psychological injury"[31] that can be measured in economic losses.[32] This provision also supports the declaration in the Crime Victim's Rights Act,[33] which states that "[a] crime victim has . . . [t]he right to full and timely restitution as provided in law."[34]

Congress enacted the Mandatory Victim Restitution Act of 1996 to amend its predecessor, the Victim and Witness Protection Act of 1982.[35] In a committee report to the House of Representatives on the proposed Victim Restitution Act regarding restitution to victims of crime, the threefold purpose was delineated: 1) "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due," 2) "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society," and 3) "to replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure."[36] This Act reinforces the mandatory nature of restitution orders for the crimes covered in 18 U.S.C. § 2259, and was not intended to change the "scope of restitution authorized by the mandatory restitution provisions of the Violence Against Women Act . . . ."[37]

30. *Id.* § 2259(b)(4)(B).

31. Cassell et al., *supra* note 17, at 66.

32. *Id.*

33. 18 U.S.C. § 3771(a)(6) (2012). This Act was signed into law on October 30, 2004, greatly enhancing the victim's role in criminal proceedings. *See Victims' Rights*, U.S. DEP'T OF JUSTICE (July 8, 2015), http://www.justice.gov/usao/priority-areas/victims-rights-services/victims-rights.

34. 18 U.S.C. § 3771(a)(6) (2012).

35. 18 U.S.C. § 3663A (2012).

36. S. REP. NO. 104-179, at 12 (1995); *see* Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 201–11, 110 Stat. 1214, 1227–41 (1996) (enacted as Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996).

37. S. REP. NO. 104-179, at 19 (1995).

B. Victims of Child Pornography

An understanding of the impact of being a victim of internet child pornography can aid in an understanding of the indivisible nature of the harm done by those who possess these images—the focus should be on the harm to the victim, not on what is in the images or even the offender's perception of his own role in the victimization.[38] To understand the motivation behind Congress's actions in passing the Mandatory Restitution Act, it is helpful to look at the actual harm done to the child victims of sexual assault. Congress has relied on reports and evidence from various agencies depicting the trauma and continuing effects of sexual assault in the ongoing process of strengthening protection for children.[39] Child pornography, which has become increasingly prevalent with growing ease of access to the internet, is a major concern.[40] The Honorable John Adams decried the current state of affairs, proclaiming that "[g]iven the current statistics surrounding child pornography, we are living in a country that is losing its soul."[41] In an influential 1982 decision, *New York v. Ferber*, the Supreme Court found that child pornography and the intrinsically related sexual abuse of children harm the victims because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[42]

As horrible as the original abuse is for the victim, "its memorialization, distribution, and viewing are psychologically

38. Marcella Mary Leonard, *"I Did What I Was Directed to Do but He Didn't Touch Me": The Impact of Being a Victim of Internet Offending*, 16 J. SEXUAL AGGRESSION 249, 249–50 (2010).

39. *See* New York v. Ferber, 458 U.S. 747, 760 n.11 (1982) (quoting *Sexual Exploitation of Children: Hearing Before the Subcomm. on Crime of the H. Judiciary Comm.*, 95th Cong., 1st Sess., 11 (1977) (statement of Frank Osanka, Professor of Social Justice and Sociology) ("[We] have to be very careful . . . that we don't take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography.").

40. U.S. DEP'T. OF JUSTICE, *supra* note 16.

41. *Id.* at 1 (quoting United States v. Cunningham, 680 F. Supp. 2d 844, 846 (N.D. Ohio 2010)).

42. *Ferber*, 458 U.S. at 759.

intertwined with and compound the impact of the abuse."[43] The American Professional Society on the Abuse of Children (APSAC) notes that "[i]t is not only that a child is sexually assaulted or abused as part of its production that makes child pornography so damaging, but also the fact that detailed and graphic images of the child's sexual assault or abuse are made available to millions across the globe."[44] And "each person who views the images inflicts fresh damage to the victim. . . . The harm is multiplied by the very size of the global marketplace."[45] These harms include their images being used to increase the demand for child pornography and the victims knowing that their images are being used for the sexual gratification of others.

Victims are first harmed by the sexual assault memorialized in heinous images, and then re-victimized every time these images are shared over the Internet with a worldwide audience.[46] The anonymous nature of the Internet makes it difficult to identify and locate the offenders, who often meet up in online communities where trading images is "one component of a larger relationship that is premised on a shared sexual interest in children."[47] Having a "support group" in their network of online "friends" makes these perpetrators bolder, erodes the shame usually present with this kind of behavior, and desensitizes the viewers to the damage, both physical and psychological, experienced by the children, creating a self-reinforcing cycle that fuels an increasing demand for more images.[48] "In the world of child pornography, this demand drives supply. The individual collector who methodically gathers one image after another has the effect of validating the production of the image, which leads only to more production."[49]

43. Amicus Brief of the American Professional Society on the Abuse of Children Supporting Respondent at 6, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561) [hereinafter APSAC Brief].

44. *Id.* at 5.

45. *Id.*

46. U.S. DEP'T OF JUSTICE, *supra* note 16, at 3.

47. *Id.*

48. *Id.*

49. *Id.*

The children who are sexually exploited on the Internet suffer a special kind of harm through their knowledge that the images of their abuse are being used for the sexual gratification of countless pedophiles at their expense. Academic researchers, medical professionals, and child pornography victims themselves report that knowing that it is impossible to remove or retrieve all copies of child pornography images "compounds the victimization."[50] The victims' shame is deepened by the knowledge that their abuse was recorded in images readily available to others, and the children are re-victimized each time those images are used for sexual gratification.[51] "[T]hese children struggle to find closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images."[52] The victims of child pornography are denied their right to privacy and fundamental human dignity when the images of their abuse are posted to the Internet, never again to be fully retracted once they have started circulating and being viewed by others.[53] "The possessor thus has real victims and inflicts actual harm upon them by his conduct."[54]

50. *Id.* at 9.

51. *Id.*

52. *Id.*

53. Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 853–54 (2008) (footnotes omitted).

54. *Id.* at 854. The mother of one victim describes the harm her daughter experienced:

> The pictures of my daughter were "made for trade"— her abuser adapted to serve his market—whatever his audience was looking to acquire, that's what happened to her . . . Producer, distributor, and consumer—everyone who participates in this evil exchange helps create a market, casting a vote for the next abuse. Regardless of whether they directly abused children themselves, reveled in the images of suffering, or persuaded others to abuse children on their behalf (to provide images of the abuse) each participant has a responsibility for the effects . . . . I can find no words to express the fury I feel at those who participate in this evil, or my scorn for any attempt to minimize responsibility by feeble claims that the crime was "victimless." My daughter is a real person. She was horribly victimized to provide this source of "entertainment." She is exploited anew each and every time an image of her

Pornography is not only an end-product, but also a common element of grooming.[55] In the process of grooming, the offender attempts to normalize sexual behavior in the "offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child's barriers."[56] As part of their methodology, child pornography is introduced to demonstrate desired behaviors with suggestive images and nudity.[57] The offender is usually in a position of authority and trust over the immature and submissive child—a combination that makes it possible to subdue the child's resistance through a gradual process.[58] Then, actual sexual abuse ensues. The victims have little or no control over their situation and circumstances and have difficulty comprehending what is happening and why.[59] Having likely been subjected to the grooming process themselves, victims suffer even more knowing that the images of their horrific experiences are being used by predators to condition more victims.[60]

Child sex victims typically experience long-term psychological harm and need lifelong care.[61] There is usually pressure from the offender to elicit cooperation and secrecy from his victim.[62] The impact of sexual abuse encompasses post-traumatic stress syndrome (PTSD), trauma symptoms, presentations of depression, anxiety, self-abusive behaviors, substance abuse, and low self-esteem, as well as sexual and relationship difficulties.[63] After being abused, child victims "may feel grief, guilt and fear," resulting in behavior that reflects an

suffering is copied, traded, or sold. While the crime is clearly conscienceless, it is hardly "victimless."

U.S. DEP'T OF JUSTICE, *supra* note 16, at 10.

55. APSAC Brief, *supra* note 43, at 9.

56. U.S. DEP'T OF JUSTICE, *supra* note 16, at 21.

57. *Id.* at 31.

58. *Id.* at 21.

59. *Id.*

60. APSAC Brief, *supra* note 43, at 3.

61. *Id.* at 10.

62. WORTLEY & SMALLBONE, *supra* note 17, at 15.

63. Leonard, *supra* note 38, at 249–50.

"inability to trust, cognitive confusion, lack of mastery and control, repressed anger and hostility, blurred boundaries and role confusion, pseudo-maturity, and failure to complete development tasks, depression, and poor social skills."[64]

Victims also feel shame because of their self-perceived complicity, a perception that is often encouraged by their offender, and a conflicting sense of loyalty to the offender.[65] Later in life, those initial feelings of "shame and anxiety" do not fade, rather they intensify to "deep despair, worthlessness, and hopelessness."[66] Their experiences often yield a "distorted model of sexuality," and victims frequently have difficulty "establishing and maintaining healthy emotional and sexual relationships."[67]

Studies have recognized that child sex victims are at higher risk for health problems such as depression, alcoholism, illicit drug use, unintended pregnancies, and sexually transmitted diseases.[68] One study found a "direct neural mechanism, via alteration of the brain's fear circuitry . . . [where] maltreatment [led] to anxiety and depressive symptoms by late adolescence."[69] Female victims in particular are at "an increased risk of further sexual victimization later in life—often in apparently unrelated circumstances . . . . [W]omen who had experienced sexual abuse as a child were twice as likely as previously non-victimized women to be raped."[70]

Child pornography victims experience even greater harm. After the initial abuse, every time the pornographic images are viewed by others, the children depicted are victimized again. One expert noted that "[t]he victim's knowledge of publication of the visual material

64. APSAC Brief, *supra* note 43, at 12 (citation omitted).

65. WORTLEY & SMALLBONE, *supra* note 17, at 15.

66. *Id.*

67. *Id.*

68. APSAC Brief, *supra* note 43, at 10.

69. *Id.* at 11 (quoting Ryan J. Herringa et al., *Childhood Maltreatment Is Associated with Altered Fear Circuitry and Increased Internalizing Symptoms by Late Adolescence*, PNAS EARLY ED. (Nov. 3, 2013), http://www.pnas.org/content/early/2013/10/30/1310766110.full.pdf+html).

70. WORTLEY & SMALLBONE, *supra* note 17, at 73.

increases the emotional and psychic harm suffered by the child."[71] The exponential growth of the circulation of the pictures on the Internet causes these feelings to be continual, because at any given time, the images are in circulation and every stranger a victim meets can be an offender. This type of exposure causes a never-ending barrage of feelings of shame, humiliation, and powerlessness requiring lifelong care.[72] Child pornography victims experience exacerbated negative effects.[73]

"Each time the image is viewed is experienced as a fresh assault by the victim . . . . [V]ictims feel 'impotent because they will have had no control over the disclosure process—they have not been able to choose when to disclose, what to disclose, how to disclose, and to whom they want to disclose.'"[74] Because victims do not know who these viewers may be and how many there are, they develop a "general feeling of unsafeness, feeling sexualized, feeling victimized because they cannot identify their perpetrators" because they do not know who the perpetrators are. They "could be people whom they meet every day in shops, offices, leisure centres, church, school and parks, as well as people whom they know."[75] Victims are profoundly affected by

> the knowledge of what the unknown perpetrators are doing sexually to their picture every time one of the perpetrators views that picture . . . [and] the realization of the quantity of people who are looking, not past-tense looked but still present-tense looking, at their pictures . . . gaining and performing sexual gratification to their pictures at any time of the day.[76]

71. Rogers, *supra* note 53, at 854 (quoting T. Christopher Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979)).

72. *Id.* at 853–54 (footnotes omitted).

73. APSAC Brief, *supra* note 4343, at 12.

74. *Id.* at 13.

75. Leonard, *supra* note 38, at 252.

76. *Id.* at 253. In Amy's Victim Impact Statement, she describes how she is affected by this knowledge:

> Every day of my li[f]e I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts to know someone is looking at them—at me—when I was just a little girl being abused for the camera.

The perpetrators of these ongoing fresh assaults based on possession of the images are not separable to the victims from the creators or the distributors.

III. VICTIMS AMY[77] AND VICKY[78] AND THEIR QUEST FOR RESTITUTION

The primary purpose of the Mandatory Restitution Act seems clear: to provide mandatory restitution in full to the victim for his or her losses.[79] However, this has not been the case as illustrated by the situations of Amy and Vicky, both victims of Internet child pornography.

Amy and her uncle shared a "special secret."[80] That "secret" involved her uncle telling her that he loved her while raping her, forcing her to endure masturbation, cunnilingus, fellatio, and digital and anal penetration.[81] But Amy's uncle did not keep their "special secret." Amy is the victim depicted in what has been dubbed the "Misty" series.[82] Amy's uncle forced her to pose for photographs in response to specific requests from Internet users,[83] and forced her to communicate with "followers."[84] Some of the assaults on her were perpetrated in order to provide child

> I did not choose to be there, but now I am there forever in pictures that people are using to do sick things.

Jonathan R. Hornok, Note, *A Right to Contribution and Federal Restitution Orders*, 2013 UTAH L. REV. 661, 663 n.17 (2013) (quoting Government's Memorandum of Law Regarding the Victims' Losses at 8, United States v. Monzel, 746 F. Supp. 2d 76 (D.D.C. 2010) (No. 09-243), 2010 WL 6845823).

77. "Amy" is a pseudonym used to protect the victim's identity.

78. "Vicky" is a pseudonym used to protect the victim's identity.

79. 18 U.S.C. § 2259(b)(1) (1996).

80. Hornok, *supra* note 76, at 663.

81. *Id.*

82. Brief of the National Center for Missing and Exploited Children on Issues of Restitution for Victims of Child Pornography Under 18 U.S.C. § 2259 at 6, United States v. Paroline, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 6:08-CR-61) [hereinafter NCMEC Brief].

83. Hornok, *supra* note 76, at 663.

84. *Id.*

pornography for a child molester in the Seattle area, making her also a victim of child sexual exploitation.[85]

At the age of nine, Amy underwent psychological counseling to come to terms with the devastating trauma she had endured at the hands of her uncle.[86] Eventually, Amy got to a point where her therapist reported that she was "back to normal."[87] Then, at the age of seventeen, Amy learned that images of her abuse were in the hands of countless individuals and were a popular trade item among pedophiles.[88] "Amy's use of a pseudonym reflects a painful irony: she seeks anonymity, but hers is among the most widely trafficked 'series' of child pornography in the world."[89]

Vicky was also sexually abused at a young age.[90] Her abuser took requests from pedophiles and then forced Vicky to perform those requests, including rape, anal penetration, and bondage.[91] Vicky also learned of the widespread distribution of the images of her abuse many years later.[92] This knowledge has had a profound, negative impact on her psychological well-being.[93]

Amy has received notice of more than 1,500 defendants who were found in possession of her images.[94] Prior to the recent

85. Cassell et al., *supra* note 17, at 70; *see also* NCMEC Brief, *supra* note 82.

86. Cassell et al., *supra* note 17, at 70.

87. *Id.*

88. *Id.*

89. *Id.* (citations omitted).

90. Hornok, *supra* note 76, at 664.

91. *Id.*

92. *Id.*

93. *Id.*

> When I learn . . . about [a] defendant having downloaded the pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about. I live in fear that any of them, may try to find me and contact me and do something to me. I have been contacted by some of them and some have said terrible things to me. The fact that each one is out there and has seen me and watched me being raped makes me sicker, makes me feel less safe, makes me feel more ashamed and humiliated.

Id. (quoting Government's Memorandum of Law Regarding the Victims' Losses at 8, United States v. Monzel, 746 F. Supp. 2d 76 (D.D.C. 2010) (No. 09-243), 2010 WL 6845823).

94. Hornok, *supra* note 76, at 666.

Supreme Court decision in *Paroline*, her attorney routinely requested restitution for the full amount of her losses from each defendant.[95] The full amount of her losses is $3,367,854 and includes future treatment and lost future income.[96] She has acquired more than $20,000 in expenses for expert witness fees and attorney's fees.[97] Vicky's losses are calculated at $497,819.86 and her attorney also regularly requested restitution in the full amount from each defendant.[98]

Because of the nature of the Internet and the ease of access to the images of Amy and Vicky, defendants were brought to trial, convicted, and sentenced in district courts across the country. Prior to the *Paroline* decision, some courts awarded nothing, some courts ordered full restitution, and some courts entered a restitution amount somewhere in between.[99] The primary issue in determining the restitution award is whether proximate cause is a necessary condition to the losses listed in subsections (A)-(E) of the Mandatory Restitution Act or only to "any other losses" where the proximate-result requirement is attached.[100] Federal appellate courts were split in the results. The Fifth U.S. Circuit Court of Appeals determined in *In re Unknown*, that the proximate-result requirement only applies to the last catchall provision.[101] Nearly all other circuit courts ruled that the proximate-result requirement applied to all losses, some even awarding no restitution after determining that there was not a sufficient causal connection between the victim's losses and the defendant's actions.[102] A separate issue discussed in these cases was how to split the required full restitution amount

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* (citation omitted).

98. *Id.*

99. Lorelei Laird, *Pricing Amy: Should Those Who Download Child Pornography Pay the Victims?*, 98 A.B.A. J. 48, 51 (2012).

100. 18 U.S.C. § 2259(b)(3) (1996).

101. Laird, *supra* note 99, at 51–52; *see In re* Amy Unknown, 701 F.3d at 774 (5th Cir. 2012) (en banc), *rev'd sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014).

102. Laird, *supra* note 99, at 52.

among defendants, both known and unknown, current and future, in unpredictable numbers.[103]

On February 3, 2009, one defendant, Doyle Randall Paroline, pled guilty to possessing two images of Amy.[104] Amy sought restitution under 18 U.S.C. § 2259, and the Fifth District Court declined to award restitution.[105] The victim then sought a writ of mandamus, which was eventually granted en banc in consolidated appeals from the United States District Courts for the Eastern District of Texas and the Eastern District of Louisiana, incorporating Michael Wright as a defendant.[106] The Fifth District Court held that each defendant who possessed the victim's images should be liable for the entire amount of the losses of that victim.[107] Ultimately, the case made its way to the Supreme Court, where it was argued on January 22, 2014 and decided on April 23, 2014.[108]

Several parties with an interest in the outcome filed amicus curiae briefs. One of the most relevant of these briefs was submitted by a bipartisan group of United States senators in support of Amy Unknown. Each of the amici served in the 103rd Congress that passed the provision at issue in the *Paroline* case and "are deeply interested in ensuring that child-pornography victims like Amy receive the restitution to which they are entitled . . . [and] have a fundamental and institutional interest in seeing Congress's enactments enforced as they are written."[109] The bipartisan brief

103. *Id*. For example, the National Center for Missing and Exploited Children has obtained more than 35,000 "extremely graphic" images of Amy's abuse in over 3200 cases. *In re* Amy Unknown, 701 F.3d at 752.

104. Paroline v. United States, 134 S. Ct. 1710, 1716 (2014); United States v. Paroline, 2009 U.S. Dist. LEXIS 7422 (E.D. Tex. Dec. 7, 2009).

105. United States v. Paroline, 672 F. Supp. 2d 781, 782 (E.D. Tex. 2009), *aff'd*, 134 S. Ct. 1710 (2014).

106. *In re* Amy Unknown, 701 F.3d.

107. *Id*. at 752.

108. *Paroline*, 134 S. Ct.

109. Brief for United States Senators Orrin G. Hatch, Dianne Feinstein, Charles E. Grassley, Edward J. Markey, John McCain, Patty Murray, and Charles E. Schumer as Amici Curiae Supporting Respondent, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561) [hereinafter Brief for United States Senators].

functions as a synopsis of the intentions of Congress in passing the provisions and an aid to the courts in interpreting the statutes.

The American Professional Society on the Abuse of Children (APSAC) also submitted an amicus curiae to the Supreme Court in support of Amy Unknown. The APSAC is the leading national organization that supports the professionals who treat children and their families who have been affected by child sex abuse and child pornography.[110] It submitted the brief "to assist the Court in understanding the most recent science documenting the nature and harm done to victims by the market in child pornography."[111] Amicus briefs in support of Amy Unknown were also filed by multiple parties with interest in the case.[112]

Despite the overwhelming support demonstrated on behalf of the respondents in the amicus briefs, the Supreme Court vacated the decision and remanded the case back to the Fifth Circuit, concluding that the proximate-cause requirement applied to the losses in all subsections of 18 U.S.C. § 2259, and that restitution could only be ordered to the extent that the defendant's offense proximately caused the victim's losses.[113] District courts should, therefore, assess in the best way it could from the evidence, the weight of the defendant's conduct in comparison with the broader process that produced the losses.[114] Amy's case was remanded to the district court for a new calculation of restitution.

110. APSAC Brief, *supra* note 43, at 1.

111. *Id*. at 2.

112. The briefs were filed by the National Crime Victim Bar Association, et al., the Women's and Children's Advocacy Project, and Justice for Children, Mothers Against Drunk Driving, the National District Attorneys Association, the National Center for Missing and Exploited Children, victims in other related proceedings, "Vicky" and "Andy," ECPAT International, the Domestic Violence Legal Empowerment and Appeals Project et al., the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence Against Children, the National Association to Protect Children, the State of Washington, et al., and the National Crime Victim Law Institute et al. *Paroline v. United States*, *Proceedings and Orders*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/paroline-v-united-states/ (last visited Nov. 24, 2015).

113. *Paroline*, 134 S. Ct. at 1720–22.

114. *Id*. at 1727–29.

IV. THE *PAROLINE* DECISION: PROBLEMS PRESENTED AND THE SUPREME COURT INTERPRETATION

The majority opinion in *Paroline* primarily rested on the interpretation of two statutes, 18 U.S.C. § 2259 and 18 U.S.C. § 3771. The tools that courts should use in interpreting statutes are commonly debated and the subject of many books and articles. The debate over judicial statutory interpretation is often described in opposing models: the faithful-agent model (encompassing textualism and intentionalism)[115] and a best-answer approach.[116] The majority decision in *Paroline*, however, is not justified by either the faithful-agent model or a best-answer approach under the canons of construction, nor according to purposes of Congress as evidenced in legislative history.

115. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 201 (2010). As the name suggests, "the assumption that judges must act as Congress's faithful agent" is the basic premise of this philosophy. *Id.* A proponent of the faithful-agent model might claim that courts should be guarded in decisions and that "judges are no more competent than others to engage large issues of political theory . . . . [J]udges of divergent political persuasions can discern the original meaning of texts without making political judgments of their own . . . . [A] judge . . . need not undertake political and moral analysis in individual cases." KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 10–11 (1999); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001). To do this, courts should look to the plain meaning of the original text and the canons of statutory construction (textualism), WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 231–37 (2d ed. 2006), and rely on legislative intent by looking to the specific intent of Congress, imaginative reconstruction, and the general intent or purpose Congress had when enacting the statute (intentionalism). *Id.* at 221–30.

116. MANNING & STEPHENSON, *supra* note 115, at 201–02. In the best-answer approach, judges act more like Congress's junior partners than as agents of Congress. *Id.* Judges have more participation in shaping legislation through interpretation and though the interpretation proceeds from a statute, their decisions need not be strictly bound by congressional instruction. *Id.* Guido Calabresi proposed "a new relationship between courts and statutes, a relationship that would enable us to retain the legislative initiative in lawmaking . . . while restoring to courts their common law function of seeing to it that the law is kept up to date." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1982). Ronald Dworkin posited that a judge should "see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began." RONALD DWORKIN, LAW'S EMPIRE 313 (1986).

A. Proximate-Cause Requirement

In *Paroline*, the Supreme Court held that a victim must prove that costs for which the victim seeks restitution stem from the offense in question. The cause must be proximate, not simply a factual link (i.e., there must be a sufficient connection between the offense and the restitution costs requested).[117] In coming to this holding, the Supreme Court did not adhere to the customary standards expected for statutory interpretation. Because Congress would anticipate that the courts would use these conventional methods when interpreting the statute, the Supreme Court acted in a way that rejected Congress's intent and purpose in passing the Mandatory Restitution Act. Furthermore, the Court did so with full knowledge of what Congress had intended because of the bi-partisan amicus brief filed by those who spearheaded the statute, which explained the interpretive methods Congress was relying on when it wrote and enacted the statute.[118] The interpretive methods Congress anticipated courts using include: a) the plain meaning of the text; b) the rule of the last antecedent; c) the presumption against surplusage; and d) use of legislative history. "Where the statute's plain text, its legislative history, and multiple canons of statutory interpretation all speak with one voice, the Court's job is not a difficult one."[119]

1. Canons of construction

The judiciary uses canons of construction as interpretive guidelines for determining the meaning of statutes that have ambiguity. The cardinal canon of construction that should be used before all others in interpreting a statute is *the plain meaning of the text*. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."[120] With regard to the Mandatory Restitution Act, the senators argued in their brief,

117. *Paroline*, 134 S. Ct. at 1720–22.
118. *See supra* text accompanying note 109.
119. Brief for United States Senators, *supra* note 109, at 3.
120. Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted).

"[t]he statute's meaning is plain, and it should be enforced as it was written."[121] The statute's text clearly requires that the "proximate result" limitation only applies to subsection (F).[122]

Under the Mandatory Restitution Act, "qualifying as a 'victim' . . . is the only causal nexus required to recover for the five categories of specific costs listed in subsections (A)–(E)." The catchall category in the sixth subsection includes "an undefined and potentially unpredictable set of costs. For costs falling into that less predictable category only, Congress included an additional 'proximate result' constraint."[123] Subsections (A)–(E) do not require proximate cause, only that the individual meet the requirements of a "victim" according to the definition in the statute. "That is the statue Congress wrote, and this Court need look no further than its plain language . . . ."[124]

The distinction between the "proximate result" constraint in subsection (F) and the lack thereof in subsections (A)–(E) "reflects Congress's sound policy judgment to allow victims to recover certain identifiable and predictable losses with a threshold showing of basic causation (i.e., 'victim' status), and to likewise prevent victims from recovering 'any other' potentially more attenuated losses unless they can satisfy a proximate cause requirement."[125]

The Supreme Court, however, took a different reading of "the threshold question" of "whether § 2259 limits restitution to those losses proximately caused by the defendant's offense conduct."[126] The Court ignored the plain language of the congressional statutory mandate to award the victim full restitution for the costs in subsections (A)–(E), instead turning to a common-law understanding of proximate cause. Citing the *Restatement (Third) of Torts*, the majority declared that "[t]he concept of proximate causation is applicable in both criminal and tort law, and . . . is often

121. Brief for United States Senators, *supra* note 109, at 3.
122. *Id*. at 4.
123. *Id*. at 2–3.
124. *Id*. at 5.
125. Cassell et al., *supra* note 17, at 81–82.
126. Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."[127] Further, the majority stated, "A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[128]

Congress, basing its decision on carefully weighed research and evidence, determined that proximate cause was already sufficiently established by possessors of child pornography—there is no difference to the victim between those who possess and those who cause the images to be produced and distributed.[129] "[F]rom the perspective of the victim, . . . there is no meaningful difference between the creator, the viewers, or the distributors of pornographic images. They are all participants in a marketplace of child pornography [who] . . . inflict pain and suffering on the victims."[130] As such, all the participants both known and unknown, current offenders and future offenders, are players in a perpetual, indivisible harm. Therefore, the losses delineated in subsections (A)–(E) did not require that proximate cause be proven for each individual defendant. The Court dismissed the congressional findings based on academic experts and research, and instead determined that the defendant had only to pay for the losses caused by "the conduct of the particular defendant from whom restitution is sought," ignoring the complex causality inherent in the defendant's actions that Congress had considered.[131] The majority concluded that "Paroline's possession of two images of the victim was surely not sufficient to cause her entire losses from the ongoing trade in her images"[132] despite Congress's considerations. Thus, the Court second-guessed Congress's ability to determine the allocation of the harms to the victims among plaintiffs and rejected the Act's plain meaning in favor

127. *Id*. (citation omitted).
128. *Id*. (citation omitted).
129. *See supra* text accompanying notes 71–76.
130. APSAC Brief, *supra* note 43, at 2.
131. *Paroline*, 134 S. Ct. at 1720.
132. *Id*. at 1723.

of an interpretation that reflected its own understanding of the harms that victims suffer. The Court reasoned that, "[g]iven proximate cause's traditional role in causation analysis," the Court could "[find] a proximate-cause requirement built into a statute that did not expressly impose one"[133] even where Congress deliberately omitted it. In so doing, the majority effectively overrode the statute as it was written in the legislative process and rewrote it through the judicial process.

The Court came to this decision despite having the explicit intent of Congress to not impose a proximate-cause requirement verified by multiple congressional actors who had played an active role in getting § 2259 passed.[134] The majority sought to justify this decision by using the "proximate result" language that appears in the statue's text.[135] However, several canons of statutory interpretation support the opposite interpretation that the proximate-result requirement only applies to subsection (F).[136]

Another canon of construction is *the rule of the last antecedent*. This canon states that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."[137] This canon, Justices Scalia and Garner noted, is "the legal expression of a commonsense principle of grammar."[138] While this rule can be overcome by other "textual indication[s] of contrary meaning,"[139] there must be something "to justify tossing aside the rules of grammar and statutory interpretation."[140]

133. *Id*. at 1720 (citations omitted).

134. *See supra* text accompanying note 109.

135. *Paroline*, 134 S. Ct. at 1719–20.

136. Brief for United States Senators, *supra* note 109, at 11.

137. Barnhart v. Thomas, 540 U.S. 20, 26 (2003).

138. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012). "It is clearly desirable that an anaphoric (backward-looking) or cataphoric (forward-looking) pronoun should be placed as near as the construction allows to the noun or noun phrase to which it refers, and in such a manner that there is no risk of ambiguity." *Id*. (quoting FOWLER'S MODERN ENGLISH USAGE (R.H Burchfield ed., 3d ed. 1996)).

139. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1344 (2013) (confirming that the rule of the last antecedent should be applied unless textually indicated otherwise); *cf*. Porto

This canon has been relied on by the Supreme Court[141] and circuit courts when interpreting statutes[142] and by Congress when authoring statutes. Professor Cassell et al. shows how the Supreme Court's use of the rule of the last antecedent has been applied in two cases, *Barnhart v. Thomas*[143] and *Porto Rico Railway, Light & Power Co. v. Mor*.[144]

The Supreme Court's reasoning in *Barnhart* contributes a precedent for how the rule of the last antecedent should apply to the Mandatory Restitution Act.[145] In *Barnhart*, the Court acknowledged that, "although the rule of the last antecedent 'is not absolute,' the relative clause . . . modified only the noun phrase that it immediately follows, . . . but not the preceding noun-phrase . . . . [I]t is wrong to read qualifying language . . . as applying broadly throughout [the statute] generally. Doing so 'stretches the modifier too far.'"[146] In general, the last antecedent modifies only the phrase that immediately precedes it.

In *Porto Rico Railway*, the Court discussed the use of the series-qualifier canon as applied to series elements in "a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction."[147] The Court in *Porto Rico*

Rico Railway, Light & Power Co. v. Mor, 253 U.S. 345, 346–49 (1920) (finding that there were "special reasons" to apply the limiting language to both preceding phrases where the provision in question was a lengthy sentence, not divided into subsections and separated only by commas, and the interpretation was necessary "to effectuate the general purpose of Congress" and avoid "assuredly unintended discrimination").

140. Brief for United States Senators, *supra* note 109, at 12.

141. Cassell et al., *supra* note 17, at 82–86.

142. *See, e.g.*, Nw. Forest Res. Council v. Glickman, 82 P.3d 825, 832 (9th Cir. 1996) (remarking that the circuit courts have "long followed this interpretive principle").

143. 540 U.S. 20 (2003).

144. 253 U.S. 345 (1920).

145. Cassell et al., *supra* note 17, at 83–84.

146. *Id.* (quoting *Barnhart*, 540 U.S. at 26, and Jama v. Immigration & Customs Enf't, 543 U.S. 335, 342 (2005)).

147. *In re* Amy Unknown, 701 F.3d 749, 763 (5th Cir. 2012) (en banc), *rev'd sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014); *see also* Porto Rico Railway, 253 U.S. at 346 (quoting Jones Act of March 2, 1917, ch. 145, 39 Stat. 951, 965). The statutory provision analyzed in *Porto Rico Railway* states: "Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not

Railway reasons that the clause "not domiciled in Porto Rico" should be read so as to apply to all the series elements in the phrase "citizens or subjects of a foreign State or States, or citizens of a State, Territory, or Districts of the United States" as a "natural construction of the language."[148] This was especially appropriate given the intent of Congress in passing the statute. If there was some doubt as to the application of the clause to every series element, the Court "should so construe the provision as to effectuate the general purpose of Congress."[149]

The structure of § 2259 clearly shows that each subsection is designed to function as a fully independent element because the elements are lettered and separated by semicolons, and the limiting language in one subsection does not apply to the others.[150] The "proximate result" requirement should, therefore, only apply to the subsection in which it appears (the loosely defined "other losses"), and not the five preceding antecedents (such as the medical expenses, lost income, and attorney's fees). This interpretation is also justified by the textual indications of meaning because it supports the statutory mandate that victims obtain full restitution.[151]

The Fifth Circuit persuasively distinguishes the provision in the Mandatory Restitution Act from the provision in *Porto Rico Railway*.[152] In contrast to *Porto Rico Railway*, in § 2259, the introductory phrase "'full amount of the victim's losses' includes any costs incurred by the victim for—" is formed with a noun and verb that feeds into a list of six eligible losses.[153] All of these enumerated items function as independent objects, each of which completes the phrase. Only the last of these enumerated items has the limiting "proximate result" requirement. Furthermore, an em-dash sets the

domiciled in Porto Rico . . . ." *Id.*; *In re* Amy Unknown, 701 F.3d 749, 762–63 (5th Cir. 2012) (en banc), *rev'd sub nom;* Paroline v. United States, 134 S. Ct. 1710 (2014) (discussing the canon of the rule of the last antecedent).

148. *Porto Rico Railway*, 253 U.S. at 348.

149. *Id.*

150. Brief for the United States Senators, *supra* note 109, at 12.

151. 18 U.S.C. § 2259(b)(1) (2012).

152. *In re* Amy Unknown, 701 F.3d at 762–63.

153. 18 U.S.C. § 2259(b)(1) (2012).

list apart from the introductory phrase and semi-colons separate each of the elements, providing

> a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separations . . . . The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[154]

Scalia and Garner validate the Fifth Circuit's interpretation, clarifying that "semicolons insulate words from grammatical implications that would otherwise be created by the words that precede or follow them."[155] In other words, what happens in a subpart ending in a semicolon, stays in that subpart ending.[156] To apply the "proximate cause" constraint to the medical services costs in § 2259, the reader must go backwards through four separate semicolons.[157]

Furthermore, should the reader find any ambiguity in the statute, the contextual considerations in the statute reveal the congressional purpose that should be used when interpreting the statute. The Fifth Circuit noted that imposing the "proximate cause" constraint on the last "catchall" miscellaneous other loss provision only and not to the earlier provisions listing expenses that are more clearly demarcated and straightforwardly determined "makes sense" in light of Congress's purpose.[158] "[B]y construction, Congress knew the kinds of expense necessary for restitution under subsections A through E." And, by definition, Congress "could not anticipate what victims would propose under the open-ended subsection F" ("any other losses suffered by the victim").[159]

154. *In re* Amy Unknown, 701 F.3d at 763.

155. SCALIA & GARNER, *supra* note 138, at 162.

156. *Id.* at 157–58.

157. Cassell et al., *supra* note 17, at 86.

158. In re Amy Unknown, 636 F.3d at 198, *rev'd sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014).

159. *Id.*

The majority in *Paroline* rejects the rule of the last antecedent, incorrectly analogizing to *Porto Rico Railway* instead of distinguishing it based on syntax and structure,[160] declaring instead that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated."[161] Despite Congress's clearly stated intent to the contrary,[162] the majority found that the "other losses suffered . . . as a proximate result of the offense"[163] would be "most naturally understood as a summary of the type of losses covered."[164] This finding is justified by "common sense," and was declared to be in accordance with the Court's previously erroneous understanding of proximate cause as it pertains to this type of crime and these victims. The Court ignores Congress's judgment and instead substitutes its own view of "the causal link between conduct and result," finding that it is too "attenuated" and "more akin to mere fortuity."[165]

The Court then turns to an absurd illustration first posited in *United States v. Monzell*[166] to show the need for a more strict application of the proximate-cause requirement. The majority proposes that if a victim on the way to therapy needed as a result of an offense were to get in a car accident, requiring the defendant to pay for the expenses associated with the car accident "would be strange indeed."[167] The court in *Monzel* argues that without a proximate-cause standard, a cause-in-fact standard is all that would apply, and the superseding event would not limit the liability of the defendant for medical expenses occurring as a result of the car accident.[168] However, this is an incorrect interpretation of the types of expenses listed in subsections (A)–(E). Under a strict reading, the medical expenses relating to the car accident would not fall under

160. *See supra* text accompanying notes 152–157.
161. *Paroline*, 134 S. Ct. at 1721 (citation omitted).
162. *See supra* text accompanying notes 117–118.
163. 18 U.S.C. § 2259(b)(3)(F) (2012).
164. *Paroline*, 134 S. Ct. at 1721.
165. *Id.* at 1719, 1721.
166. United States v. Monzel, 641 F.3d 528, 537 n.8 (D.C. Cir. 2011).
167. *Paroline*, 134 S. Ct. at 1721.
168. *Monzel*, 641 F.3d at 537 n.8.

(A) as "medical services relating to physical, psychiatric, or psychological care." This expense would not "relate to" the medical care for the abuse. So, even though the accident may be directly caused by pursuing the care in subsection (A), thus meeting a "but-for" causation standard, the care for the car accident injuries would not be one of the enumerated expenses and must, therefore, only be covered under subsection (F). This type of expense would already be subject to the "proximate result" limitation that adheres to subsection (F). There is no need to extend that limitation to the other subsections in an attempt to limit expenses to those that can be attributed to the defendant. Contrary to the Court's interpretation, this example illustrates Congress's reasoning for the catchall category in subsection (F)—a limitation that prevents these types of expenses from growing out of control.

The *presumption against surplusage* canon provides that the court has a duty "to give effect, if possible to every clause and word of a statute."[169] To hold that the limiting language in subsection (F) of § 2259 applies to other subsections would create surplusage. As a rule, "Congress's words should not be reduced to redundancy where a reading that gives them logical effect is readily available."[170] In interpreting the statute, if the proximate-result requirement extends to subsections (A)–(E), the specification of what losses qualify under mandatory restitution would be redundant—they would all be included under subsection (F),[171] which states that "the victim's losses includes any costs incurred by the victim for . . . any . . . losses suffered by the victim as a proximate result of the offense."[172]

The Court finds the argument that the first five subsections "would be superfluous if all were governed by a proximate-cause requirement . . . unpersuasive."[173] The Court, again in direct contrast to the intent of Congress as stated in the amicus curiae brief,[174] finds

169. Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted).

170. Brief for United States Senators, *supra* note 109, at 13.

171. *Id.*

172. 18 U.S.C. § 2259(b)(3)(F) (2012).

173. *Paroline*, 134 S. Ct. at 1721.

174. *See supra* text accompanying notes 118–119.

an alternate explanation that subsections (A)–(E) were meant to "provide guidance . . . as to the specific types of losses Congress thought would often be the proximate result."[175] This interpretation might be sustainable if the amicus curiae brief in the hands of the Court had not directly contradicted it, and if Congress had made any indication in the statute that this was the case. Congress could have put subsection (F) first, and listed (A)–(E) as examples of expenses as a "proximate result" of the offense or used the phrase "such as" in listing subsections (A)–(E). But this is not what Congress wrote, and it is a stretched interpretation that ignores both the plain meaning of the statute and the congressional intent.

2. Legislative history

Another widely held tenet of statutory interpretation is that if there is any ambiguity in a statute's text, courts should consider a statute's text "in light of the objectives Congress sought to achieve."[176] In the Mandatory Restitution Act, "the drafting history . . . makes clear that Congress really did mean what it said."[177] The Act was meant "to [p]rovide [g]enerous [r]estitution to [v]ictims."[178] Mandatory restitution for sex-crime victims was intended to be "a key mechanism for achieving the Act's goals"[179] of being "the cornerstone of the movement to make the United States a safer place for women"[180] by "provid[ing] 'powerful protection and assistance' to the '[w]omen and children who are the innocent victims of domestic violence.'"[181]

Another indication of congressional intent is found by the changes Congress made to the bill before it was ratified. "Where Congress includes limiting language in an earlier version of a bill but

175. *Paroline*, 134 S. Ct. at 1721.

176. Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 469 (1968).

177. Brief for United States Senators, *supra* note 109, at 3.

178. *Id.* at 5.

179. *Id.* at 6.

180. *Violence Against Women: Victims of the System: Hearing on S.15 Before the S. Comm. on the Judiciary*, 102d Cong. 185 (1991).

181. Brief for United States Senators, *supra* note 109, at 6 (quoting 139 CONG. REC. S1281 (daily ed. Jan. 26, 1993) (statement of Sen. Rockefeller)).

deletes it prior to enactment, it may be presumed that the limitation was not intended."[182] The original draft of the VAWA restitution provisions "contain[ed] two express 'proximate result' limitations."[183] In the enacted version, one of the "limitation[s] was deleted from the Act[] . . . prior to its passage . . . confirm[ing] that Congress acted intentionally when it included proximate-cause requirements for some kinds of costs and omitted them for others."[184] "It beggars belief that Congress's decision to *delete* the 'proximate result' language in the lost-income subsection was a *sub silentio* decision to *incorporate* proximate-cause principles into all of the subsections."[185]

An additional indication of Congress's intent can be found in the deletion of the word "direct" from the definition of "victim." In the original draft, a "victim" was defined as "any person who has suffered direct physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter."[186] "[W]hen the statute was enacted, all [provisions requiring mandatory restitution] defined 'victim' . . . as 'the individual harmed as a result of a commission of a crime under this chapter,'"[187] thus eliminating the requirement for "direct" harm.

Compare this mandatory-restitution provision in the Violence Against Women Act, written as a part of the larger Violent Crime Control and Law Enforcement Act, with the mandatory-restitution provision in another part of that larger Act, the Senior Citizens Against Marketing Scams Act of 1994.[188] The Senior Citizens Against Marketing Scams Act defines the term "victim" as "a person *directly and proximately* harmed as a result of the commission of an offense for which restitution may be ordered."[189] Furthermore, the

182. Russello v. United States, 464 U.S. 16, 23–24 (1983).

183. Brief for United States Senators, *supra* note 109, at 3.

184. *Id.*

185. *Id.* at 9.

186. *Id.* (quoting S. REP. No. 101-545, at 5, 17 (1990)) (emphasis removed).

187. *Id.* (quoting 18 U.S.C. §§ 2248(c), 2259(c), 2264(c) (2012)).

188. *Id.* at 10 (citing Senior Citizens Against Marketing Scams Act of 1994, Pub. L. No. 103-332, 108 Stat. 2082 (1994)).

189. *Id.* (quoting 18 U.S.C. § 2327(c) (2012)).

Act also "defines the 'full amount of the victim's losses' as 'all losses suffered by the victim as a *proximate cause* of the offense.'"[190] The purposeful inclusion of a proximate-cause requirement in this Act "demonstrates that Congress knew how to impose a general proximate-cause requirement when it wished to,"[191] and chose not to make the victims defined in § 2259 restricted by the same proximate-cause requirement in all recoverable costs. Instead, the Act "carefully explain[s] that some costs are recoverable in all circumstances while others are recoverable only with a showing of proximate cause."[192] The Court's interpretation does not reflect the carefully constructed statute in light of its drafting history.

B. Restitution

The Court in *Paroline* determined that restitution can be ordered according to "the defendant's relative role in the [larger] process" of the harms to the victim and that defendants cannot be held jointly and severally liable for the victim's losses.[193] However, this does not comport with the legislative intent of Congress, who intended that victims be fully compensated for their losses.[194]

When Congress enacted the first victim restitution provision as part of the Victim and Witness Protection Act in 1982, the Committee on the Judiciary reported to the Senate the justification for requiring restitution from defendants:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is

190. *Id.* (quoting 18 U.S.C. § 2327(b)(3) (2012)).

191. *Id.*; *see* Jama v. Immigration & Customs Enf't. 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

192. Brief for United States Senators, *supra* note 109, at 10.

193. Paroline v. United States, 134 S. Ct. 1710, 1727–29 (2014).

194. 18 U.S.C. § 2259(b)(1) (2012).

> required to the degree possible to restore the victim to his or her prior state of well-being.[195]

This comports with common principles of restitution found in tort law. Although the Mandatory Restitution Act is part of a criminal statute, its function is similar to a tort claim in its effect—making the victim whole from the losses caused by the defendant.[196] As such, the court "on appellate review in *Monzel* . . . concluded that 'tort doctrine [would] inform[its] thinking'" in matters of restitution.[197] The Supreme Court recognizes that restitution serves purposes that, although different in some respects from the purposes of tort law, also overlap in some respects.[198]

Harper et al. note that "[t]he primary notion [for awarding restitution] is that of repairing [the] injury or of making [the victim] whole as nearly as that may be done by an award of money."[199] Harper et al. also describe compensation as "a natural enough corollary of the fault principle . . . . [I]t seems eminently fair that these damages should (at least) put the plaintiff as nearly as may be in the same position he would have been in if defendant's wrong had caused no injury."[200] The primary goal of the courts should be to make the victims whole to the extent possible, which requires full restitution in a timely manner so that the victims can get the care and services they need.

---

195. S. REP. No. 104-179, at 12–13 (1995) (quoting Judiciary Comm., S. REP. No. 97-532, at 30 (1982)).

196. Cassell et al., *supra* note 17, at 92–93.

197. *Id.* (quoting United States v. Monzel, 641 F.3d 528, 535 n.5 (D.C. Cir. 2011)).

> Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party. "Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished."

Monzel, 641 F.3d at 535 n.5 (quoting United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999)) (citation omitted).

198. *Paroline*, 134 S. Ct. at 1724 ("Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from (though they overlap with) the purposes of tort law.").

199. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 25.1 (2d ed. 1986).

200. *Id.*

In apparent disregard of the extensive professional research available to Congress, the Court determined that "Paroline's contribution to the causal process underlying the victim's losses [as a single possessor] was very minor."[201] This notion ignores the way the demand for child pornography creates the supply,[202] and, more importantly, the real harm to the victim caused by even one defendant's possession—a harm that cannot be extricated from the aggregate harm of potentially tens of thousands of possessors.[203] Although the Court acknowledged that "the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured," and that "[t]he unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse—including Paroline—plays a part in sustaining and aggravating this tragedy," the Court refused to hold the defendant liable for the full amount of damages fearing that it might inconvenience the guilty defendant when he faces difficulty trying to seek the right to contribution from other defendants,[204] which the Court seemed to find to be a more serious infraction than inconveniencing the innocent victim.[205]

This does not comport with the principles of tort law that overlap with the restitution orders of criminal sentencing. "[W]hoever does an injury to another is liable in damages to the extent of that injury."[206] It was Congress's aim, clearly stated, to

201. *Paroline*, 134 S. Ct. at 1725.

202. *See supra* text accompanying notes 46–49.

203. *See supra* text accompanying notes 71–73.

204. *Paroline*, 134 S. Ct. at 1725–26.

205. *Id.* at 1729 ("Congress has not promised victims full and swift resolution."). But Congress did state in the declaration in the Crime Victim's Rights that a crime victim has "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6) (2012). The Court apparently finds it acceptable to "consign [victims] to 'piecemeal' restitution and leave [them] to face 'decades of litigation that might never lead to full recovery.'" *Paroline*, 134 S. Ct. at 1729 (quoting Brief for Respondent Amy at 57, *Paroline*, 134 S. Ct. 1710 (No. 12-8561), 2013 WL 6056611). "Of course the victim should someday collect restitution for all her child-pornography losses, but it makes sense to spread payment among a larger number of offenders . . . ." *Id.*

206. 4 HARPER ET AL., *supra* note 199 (citations omitted).

award the victim the full amount of her losses.[207] Victims will not be receiving a windfall—they are only able to recover for actual expenses related to and caused by the offense under § 2259 in a criminal sentencing hearing. Moreover, when a person "intentionally or recklessly causes harm," that actor "is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."[208] Those who possess child pornography are intentional tortfeasors, a realm where proximate cause is rarely a factor.[209]

Furthermore, the majority ignores the fact that the defendant is acting in concert with the producers, distributors, and other possessors, despite the fact that he may have had "no contact with the overwhelming majority" and that they are "geographically and temporally distant."[210] Although "[o]ur present system . . . has traditionally focused attention on the defendant's individual fault, and the limitations on defendant's liability bear the mark of the fault formula,"[211] there are well-established tort principles that an intentional wrongdoer is jointly and severally liable with other wrongdoers for an innocent victim's losses.[212] Where there is an innocent victim who suffers an indivisible harm (a harm that can't be determined who is responsible for what part of the harm among the

207. 18 U.S.C. § 2259(b)(1) (2012).

208. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (AM. LAW INST. 2005).

209. Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1206 (2013).

> In intentional tort cases "the defendant's wrongful conduct is closely linked—temporally and conceptually—to the plaintiff's harm." Few intentional tort cases involve multiple causal factors. Further, the intent requirement makes it clearer that the defendant should be held accountable for its actions, and courts express less concern about extending liability in this context. Thus, the necessity and strength of proximate cause doctrine severely diminishes in the intentional tort context. When proximate cause is relevant in intentional tort cases, proximate cause analysis may cut off liability for the defendant in fewer circumstances than it would when applied to negligence.

Id. at 1206–07 (quoting Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009)) (citations omitted).

210. *Paroline*, 134 S. Ct. at 1725.

211. HARPER ET AL., *supra* note 199, at 130–31.

212. Cassell et al., *supra* note 17, at 89.

defendants),[213] and all defendants are guilty (particularly when they are intentional tortfeasors),[214] the defendants should bear the responsibility for the entire burden and that part of the burden that the co-offenders cannot or will not cover.[215]

Justice Sotomayor acknowledges in her dissent that individual offenders act in concert as part of a larger network with knowledge of their roles and the larger harm their actions cause to the victim.[216] Therefore, a causal link is established in an indivisible harm and they should be held liable in full.[217] Justice Roberts also notes that there is no way to prove what exact part of the harm was caused by the defendant's actions; therefore, any amount of damages must be arbitrarily decided and the injury to the victim is not divisible.[218] These opinions, though not sustained by the majority, are more in line with common law principles and help to fulfill Congress's purpose to award the victim the full amount of her losses. As Sotomayor opines in her dissent, the statute requires *full* restitution to the victim.[219]

In a lower court decision, *Monzel*, the court declined to hold Monzel jointly and severally liable for all of Amy's losses in its restitution order, citing "substantial logistical difficulties in tracking awards made and money actually recovered."[220] Although this

213. *See id.* at 96–101.

214. "[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." *Id.* at 102 (quoting RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 12 (2000)). "[T]here is, so far as we are aware, no authority whatsoever for exempting intentional tortfeasors from joint and several liability." *Id.*

215. *See id.* at 96–109.

216. *Paroline*, 134 S. Ct. 1710, 1741 (2014) (Sotomayor, J., dissenting) ("Indeed, one expert describes Internet child pornography networks as 'an example of a complex criminal conspiracy,'—the quintessential concerted action to which joint and several liability attaches.") (citation omitted).

217. *Id.* (Sotomayor, J., dissenting).

218. *Id.* at 1732–33 (Roberts, J., dissenting).

219. *Id.* at 1739–40 (Sotomayor, J., dissenting).

220. United States v. Monzel, 641 F.3d 528, 531 (D.C. Cir. 2011) (quoting United States v. Church, 701 F. Supp. 2d 814, 832 (W.D. Va. 2010)).

> Using what it described as 'traditional principles' of tort law, the court rejected Amy's argument that Monzel should be held jointly and severally liable for all of her

difficulty will occur and need to be dealt with appropriately, the difficulty should not be a burden the victim has to bear. It should more justly fall on the defendants and the government. "[T]raditional tort law principles strongly support the conclusion that § 2259 should be read to impose liability on each child pornography defendant and that each defendant should be liable for the full amount of their victim's losses," because "child pornography victims suffer indivisible losses that intentional tortfeasors (i.e., criminals) must jointly and severally pay in their entirety."[221]

C. The Paroline *Decision: An Example of Judicial Overreach and Judicial Activism*

Ultimately, what branch of government should make particular decisions relies on several important factors that should be balanced in determining the comparative institutional competence to reach particular decisions.[222]

> [The] indicia of comparative competencies include the relevant grants of constitutional power over the issues; the ability of the judiciary to develop consistent, workable standards to govern the determination; the role of political accountability in determining the appropriate respect due to competing sovereigns; the ability to tailor solutions and respond flexibly to changing circumstances; the

> losses because Monzel was essentially a joint tortfeasor with other criminals who had caused her indivisible injuries. Because Monzel's possession of a "single image" was not independently sufficient to cause the entirety of Amy's injury, the court reasoned that it could not therefore be viewed as creating an 'indivisible' injury. Likewise, because Amy suffered separate injuries each time someone viewed her images, the defendant was obligated to pay restitution only for the separate injury for which he was individually responsible.

Cassell et al., *supra* note 17, at 92–93. "Monzel's possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses. She would have suffered tremendously from her sexual abuse regardless of what Monzel did." *Monzel*, 641 F.3d at 538.

221. Cassell et al., *supra* note 17, at 90.

222. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. R. 759, 781 (2014). "This question of institutional competence is very much related to traditional 'separation of powers' philosophy. As a feature of our government, various institutions have been structured in different ways (with overlapping powers) to achieve different goals." Jason Mehta, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 57, 72 (2007).

> control over resource allocation questions that may factor into policy determinations; and the subject matter expertise of the branch involved.[223]

Where problems are "polycentric," or have "complex repercussions" such that "adjudication cannot encompass and take [them] into account," these should not be within the policy-making decisions of the judicial branch.[224]

The principle of institutional competency is illustrated in a landmark Supreme Court decision in 1982. In *New York v. Ferber*, the Court held that child pornography was out of the reach of First Amendment protections on free speech and that New York had appropriately acted to protect the interests of children in prohibiting the knowing promotion or distribution of sexual performances by children under 16.[225] In reaching this decision, the Court appropriately relied on reports from committee hearings in both the House and the Senate, found that child pornography had "become a serious national problem,"[226] and deferred to the legislative branches' policy-making authority in this area.

This deference to Congress's findings appropriately allocated the fact-finding and policymaking aspects of legislation to the legislative branch, allowing both the state legislatures and the United States Congress to utilize their role as the legislative authority with the accompanying political accountability to make laws that reflected the political will of the people through their representatives. In contrast, however, twenty-two years later in its *Paroline* decision, the Court ignored the explicitly stated purposes and intentions of Congress, including the plain language of the statute, and took on a policy-making role that should belong strictly in the hands of the political branch. The Court went beyond its role of interpreter to judicial activism, ignoring the careful deliberations of Congress when it

223. Steele, *supra* note 222 at 781.

224. *Id.* at 783 n.116 (quoting Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–95 (1978)).

225. New York v. Ferber, 458 U.S. 747 (1982).

226. *Id.* at 749. "[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." *Id.* at 749 n.1 (quoting S. REP. NO. 95-348, p. 5 (1977)).

enacted the Mandatory Restitution provision. The majority thought it had a better way to "impress upon defendants that their acts are not irrelevant or victimless."[227] The majority, therefore, rejected the statute as written, took a stretched interpretation that would fit their purposes and policies, and effectively rewrote § 2259 to comport with their ill-informed notions.

Having been left with the *Paroline* decision, which flatly contradicts the stated intent of § 2259, Congress's primary recourse is to pass new legislation in order to correct the Court and clarify its intentions, a time consuming and difficult process. In a 2014 proposed legislation that had bipartisan support in both chambers, Congress essentially tells the Court that they got it wrong in *Paroline*. The proposed Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, has 90 co-sponsors (59 Democrats and 31 Republicans) in the House,[228] and 23 supporters (11 Democrats and 12 Republicans) in the Senate at the time of writing.[229]

The amendment acknowledges that "[t]he unlawful collective conduct of every individual who reproduces, distributes, or possesses the images of a victim's childhood sexual abuse plays a part in sustaining and aggravating the harms to that individual victim," constituting "intentional crimes that combine to produce an indivisible injury to a victim."[230] As such, the amendment seeks to adopt an aggregate causation standard, holding each defendant jointly and severally liable with the ability to recover contributions. The proposed amendment also addresses the "proximate result" issue, clarifying that "in addition to the costs listed in subparagraph (A)," such as medical expenses, lost income, therapy, transportation, attorney's fees, etc., "the term 'full amount of the victim's losses'

227. *Paroline*, 134 S. Ct. 1710, 1715 (2014).

228. Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, H.R. 4981, 113th Cong. (2014), reintroduced as Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, H.R. 595, 114th Cong. (2015) [hereinafter Amy and Vicky Act]. The Amy and Vicky Act was referred to the Subcommittee on Crime, terrorism, Homeland Security, and Investigations on Mar. 17, 2015. 2015 FED CRS SUM H.R. 595 (Westlaw), 114th Cong. (2015).

229. *Id.*

230. *Id.* at § 2(4).

also includes any other losses suffered by the victim . . . if those losses are a proximate result of the offense."[231] Thus, the proposed legislation states in a manner beyond dispute that the proximate-result limitation only applies to the catchall "other losses" provision (as it had previously informed the Court in its amicus curiae brief).[232]

D. Effects of the Paroline *Decision*

The *Paroline* decision has done little to help courts clarify the amount of restitution that victims should be awarded. In cases being decided post-*Paroline*, some courts have used "the *Hernandez* approach," which divides the total amount of the victim's losses by the number of standing restitution orders.[233] Other courts have used the *Gamble* formulation for calculating restitution awards by dividing the losses by the number of defendants convicted of the offense.[234] The District Court for the District of Rhode Island estimated a pool of defendants at 1000 (approximately double the current number), and accordingly awarded the victim 1/1000th (0.1%) of the outstanding losses.[235] Another court, noting that *Paroline* is of limited use in its suggested "starting point" for losses caused by "continuing trafficking," determined that the court would, instead, consider the other factors discussed in *Paroline*.[236]

Although the district courts appear to be using the guidelines given in *Paroline* to implement appropriate restitution under § 2259, the resulting awards vary considerably in the amount and the method of calculation. Furthermore, some victims are not given any

231. *Id.* at § 3(1)(B).

232. *See supra* text accompanying notes 118–119.

233. *See, e.g.*, United States v. Hernandez, No. 2:11-CR00026GEB, 2014 U.S. Dist. LEXIS 89688 (E.D. Cal. June 30, 2014) (awarding victim $2,282.86 in restitution); United States v. Watkins, No. 2:13-CR00268LKKAC, 2014 U.S. Dist. LEXIS 112420 (E.D. Cal. Aug. 12, 2014) (awarding victim $2,191.74 in restitution).

234. *See* United States v. Gamble, 709 F.3d 541, 554 (6th Cir. 2012); *see, e.g.*, United States v. Galan, No. 6:11-CR60148AA, 2014 U.S. Dist. LEXIS 94377 (D. Or. July 11, 2014) (awarding victim $3,433.00).

235. United States v. Crisostomi, No. 12-166M, 2014 U.S. Dist. LEXIS 97513 (D. R.I. July 16, 2014) (awarding one victim $713.68 and another victim $683.41).

236. United States v. Reynolds, No. 12-20843, 2014 U.S. Dist. LEXIS 116854, at *15 (D. Mich. Aug. 22, 2014) (awarding one victim $11,000 and another $15,500).

restitution if the court determines that the defendant did not "knowingly receive[] an image" of the specified victim.[237] Victims are required to submit restitution requests in each of the cases in which they are identified as a victim. They bear the burden of justifying the amount of their losses and recovering the amount they are awarded from each defendant. This can be particularly onerous and harmful as each new case is a reminder that their images are still in circulation. One judge noted that "[t]hough the court has awarded restitution, the negligible amount and piecemeal process under § 2259 can hardly be considered a victory for Cindy and other victims like her."[238] He further stated that the restitution award "does not fully compensate losses suffered by child pornography victims and may, in fact, dissuade victims from seeking restitution; the end result is hardly worth yet another reminder of their continued exploitation."[239] The burden on the victim as the situation currently stands is more than the victim should have to bear.

In the *Paroline* decision, the Court wants to avoid a situation where "each possessor of the victim's images would bear the consequences of the acts of the many thousands who possessed those images."[240] Instead, the Court shifts this burden from the guilty defendant to the innocent victim. However, this burden should rightfully rest on those who wronged the victim by knowingly appropriating his or her image—the defendants should be the one to try to recover contributions from other defendants.

In Salt Lake City, the Utah Crime Victims Legal Clinic works with district courts nationwide to try to secure some restitution for Andy[241] on a *pro bono* basis.[242] The Court's decision in *Paroline* creates an enormous workload for the clinic, which receives several notices for each of the hundreds of defendants being prosecuted

237. *Hernandez*, No. 2:11-CR00026GEB at *16.

238. United States v. Galan, No. 6:11-CR60148AA, 2014 U.S. Dist. LEXIS 94377, at *21–22 (D. Or. July 11, 2014).

239. *Id.* at 22.

240. Paroline v. United States, 134 S. Ct. 1710, 1724 (2014).

241. *See supra* Part I.

242. This information is based on the author's experience working as an intern on these cases in the summer of 2014.

across the nation. The clinic must track each case and send in a restitution request for each sentencing. Sometimes, the logistical implications of the timing of the sentencing hearings makes it difficult to get requests in before the judicially set deadlines. Attorneys and interns have devoted thousands of hours to this task, and are seeing limited success. Should Andy have to pay an attorney for this legal service, the costs would be enormous and prohibitive.

V. CONCLUSION

Congress's intent in the Mandatory Restitution Act was and is plain. Victims of child pornography should be awarded the full amount of their losses in restitution. Defendants should be held jointly and severally liable, with the ability to seek compensation from new defendants as the cases arise. Congress made its intentions known in its amicus brief presented in the *Paroline* case, which the Court largely disregarded. The Court also abandoned several important canons of construction, leaving Congress less capable of drafting legislation in a manner that they can predict will be upheld by the courts. As a result of the *Paroline* decision, Congress is working on new legislation that would, in effect, overturn *Paroline*. The courts should interpret the "*Paroline*-fix" in a way that effects the intentions of Congress and provides much needed restitution to victims.

Janet Lawrence[*]

[*] J.D. candidate, April 2016, J. Reuben Clark Law School, Brigham Young University. I would like to thank Professor Maybell Romero for her assistance and support in writing this Comment. I would also like to thank Brandon Stone and the *BYU Law Review* staff for their editing expertise and advice.