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# Navigating *Paroline*'s Wake

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## ABSTRACT

Over the last six years, courts have struggled with the challenge of calculating criminal restitution in child pornography cases. At the heart of this struggle has been the statute mandating restitution, 18 U.S.C. § 2259, which requires courts to simultaneously grant restitution for the "full amount" of a victim's losses and limit this award to those losses "proximately caused" by the defendant. Faced with navigating this ambiguity in the context of child pornography, when a single defendant may be one of thousands of fellow distributors and possessors harming the victim, courts have awarded restitution in a wide range of amounts, from tens to millions of dollars, using inconsistent methodology or none at all. The Supreme Court's decision in *Paroline v. United States* tried to provide the courts relief by clarifying the meaning of § 2259 and offering practical guidance on how to calculate restitution. But the Court's attempt at making § 2259 workable has failed. In the first empirical analysis of the child pornography restitution issue, this Article uses sentencing data from thousands of cases to show that, even in *Paroline*'s wake, the restitution system fails to achieve its compensatory, punitive, and victim-affirming purposes. Most of today's victims continue to receive no restitution at all. Moreover, most courts deciding to award restitution continue to order defendants to pay low-level amounts that are neither calibrated to offense-specific characteristics nor informed by any consistent methodology. As a result, the system causes a number of secondary harms to victims who choose to request restitution, while offering no support to the majority of victims who decline to do so. The system is therefore ripe for legislative overhaul, but Congress's current proposal to amend § 2259 does little to make it any more practical for courts, fair to defendants, or therapeutic for victims. Drawing on its empirical findings, this Article suggests replacing the current system with a victim reimbursement fund that would better achieve the purposes of restitution. The fund would reimburse victims regardless of their participation in the justice system and would derive its contributions from defendants using reasonable, evidence-based baseline amounts and enhancement criteria that meaningfully distinguish between modern child pornography offenses.

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## INTRODUCTION

For the past six years, courts have wrestled with a formidable task: calculating criminal restitution awards to victims of child pornography from a "non-contact" defendant, someone convicted of possessing and perhaps distributing the victim's pornographic images but who had no role in their creation.[1] In taking on the challenge, courts have largely been guided by a single lodestar: 18 U.S.C. § 2259, which mandates restitution awards in "the full amount of the victim's losses," including costs incurred for medical and therapeutic services, lost income, attorneys' fees, and "any other losses suffered by the victim as a proximate result of the offense."[2] It was this catch-all provision's reference to "proximate" causation that left courts struggling to calculate the seemingly incalculable. As one court put it:

> [Section 2259] makes a court's imposition of restitution mandatory, but it then demands the government to prove what is in essence unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim.[3]

With the courts' struggle yielding legal disagreements and wildly inconsistent restitution awards,[4] the Supreme Court's April 2014 decision in *Paroline v. United States* attempted to offer a workable solution.[5] Recognizing the dually punitive and compensatory goals of restitution,[6] the Court clarified that judges must calculate the portion of the victim's general losses that were proximately caused by the offense—that is, the defendant's "relative causal role."[7] This inquiry, the Court suggested, should involve adjusting the victim's losses to reflect certain factors, or "guideposts," such as the total number of offenders, the number of images in the defendant's possession, and whether the defendant actually

1. *See* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 100 (2012) [hereinafter USSC, CHILD PORNOGRAPHY REPORT].
2. 18 U.S.C. § 2259(b) (2012).
3. United States v. Tallent, 872 F. Supp. 2d 679, 693 (E.D. Tenn. 2012).
4. All but one of the circuit courts agreed that Section 2259 imposes a proximate cause requirement. *See infra* note 59 and accompanying text. Between 2008 and April 2014, award amounts ranged from $60 to $5,406,463. *See infra* Parts I.B.1. and II.B.
5. Paroline v. United States, 134 S. Ct. 1710 (2014).
6. *Id.* at 1726.
7. *Id.*

produced the images.[8] With such guidance, the Court hoped, § 2259 could become a workable restitution system.

But *Paroline*'s intervention has been almost entirely inconsequential. Using data drawn from thousands of child pornography cases decided before and after *Paroline*, this Article shows that the current restitution system remains broken even in *Paroline*'s wake. In most cases, even those involving child pornography production, victims come away with no restitution at all. The relatively few courts that have awarded restitution have done so in a wide variety of amounts even post-*Paroline*, with median awards in the low thousands.[9] These amounts, moreover, are typically related to neither offense characteristics nor victim losses. In addition, few courts have chosen to follow *Paroline*'s guideposts in calculating restitution—guideposts that have largely proven to be impractical, detached from reality, and internally incoherent.[10] Instead, courts seem to have taken *Paroline* as a license to use their discretion to calculate any reasonable amount of restitution using any non-arbitrary method of calculation.[11] These empirical conclusions, coupled with the reality that the current restitution system may cause a number of secondary harms to victims[12] (most of whom it leaves without any compensation at all), demonstrate that the system far from achieves its goals of punishing offenders while compensating and empowering victims.

This Article argues that § 2259 must be overhauled and replaced with a system that actually achieves the compensatory, punitive, and victim-affirming goals of criminal restitution. A victim reimbursement fund would do just that, offering financial assistance to all victims regardless of their participation in the criminal justice system and requiring all defendants to pay in. Each defendant's fine-like contribution would be calculated using baseline figures drawn from empirical evidence and enhancement criteria that meaningfully distinguish between modern child pornography offenses.[13]

To date, scholarship dealing with the issue of restitution in child pornography cases has dealt exclusively with the pre-*Paroline* timeframe, and most of this scholarship has focused on how courts have interpreted the causal language

8. *Id.* at 1728.
9. *See infra* Part II.B.2.
10. As one court has put it, they are "at best difficult, and at worst impossible to calculate." United States v. Crisostomi, 31 F. Supp. 2d 361, 364 (D.R.I. 2014).
11. For a discussion of the courts' reasoning, see *infra* Parts I.B.1. and II.B.
12. *See infra* Part III.
13. *See infra* Part IV.

of § 2259.[14] No article thus far has critiqued *Paroline* or analyzed the post-*Paroline* restitution landscape. Further, while several articles make broad conclusions about how courts decided restitution awards before *Paroline*,[15] none have engaged in any empirical review of judicial opinions or court documents in order to substantiate their claims. The restitution story is therefore only half told, and ready for retelling, especially at a time when Congress is poised to remodel the system.[16]

This Article proceeds as follows. After examining the roots of modern criminal restitution and its goals, Part I uses sentencing data from hundreds of cases to examine the pre-*Paroline* restitution landscape. Part I reveals that in most cases before *Paroline*, victims received no restitution at all. Courts ordering restitution, meanwhile, tended to employ a variety of calculation methods to arrive at a wide

14. *See, e.g.*, Ashleigh B. Boe, Note, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims*, 86 N.D. L. REV. 205 (2010); Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 CARDOZO L. REV. 297 (2011); Katherine M. Giblin, Comment, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109 (2011); Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167 (2011); Steven Joffee, Note, *Avenging "Amy": Compensating Victims of Child Pornography Through 18 U.S.C. § 2259*, 10 WHITTIER J. CHILD & FAM. ADVOC. 201 (2011); Michael A. Kaplan, Note, *Mandatory Restitution: Ensuring That Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531 (2011); Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327 (2011); Tyler Morris, Note, *Perverted Justice: Why Courts Are Ruling Against Restitution in Child Pornography Possession Cases, and How a Victim Compensation Fund Can Fix the Broken Restitution Framework*, 57 VILL. L. REV. 391 (2012); Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333 (2011); Dianne Weiskittle, Comment, *Proximate Cause, Joint and Several Liability, and Child Pornography Possession: Determining and Calculating Restitution Awards Under 18 U.S.C. § 2259*, 38 U. DAYTON L. REV. 275 (2013). Some have argued that § 2259 is an inappropriate means of granting victims compensation for their losses. *See, e.g.*, Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343 (2013); Jennifer A.L. Sheldon-Sherman, *Rethinking Restitution in Cases of Child Pornography Possession*, 17 LEWIS & CLARK. L. REV 215 (2013). *But see* James R. Marsh, *Masha's Law: A Federal Civil Remedy for Child Pornography Victims*, 61 SYRACUSE L. REV. 459 (2011) (arguing that § 2259 permits compensation for the full amount of victims' losses without a proximate cause requirement).

15. *See, e.g.*, Lollar, *supra* note 14, at 364 (concluding that "[m]ost judges" awarding restitution do so in amounts ranging "from $1,000 to $3,000, usually based on less-than-precise judicial calculations"); Morris, *supra* note 14, at 394 (arguing that "courts denying restitution have generally based their holdings on a finding that the convicted child pornography possessor did not proximately cause harm to a particular victim"); Weiskittle, *supra* note 14, at 292–95 (arguing that courts awarding a "set amount of restitution" do so "primarily" because there exists no means to apportion losses between defendants, and that "[m]any" courts deny restitution because they find showing of proximate cause insufficient).

16. *See* Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. (2015). For further discussion of this bill, see *infra* Part IV.A.

range of amounts, from tens of dollars to millions. Yet most courts awarded low-level amounts of about $3000, often without justification and regardless of whether the offense involved actual sexual contact with the victim.

Part II examines the Supreme Court's *Paroline* decision and its impact on restitution awards. Analyzing hundreds of cases that have dealt with child pornography-related offenses following *Paroline*, this Article shows that *Paroline's* attempt at making § 2259 workable has failed almost entirely. In most cases, victims are still left emptyhanded, and those courts that do award restitution appear to lack any methodological consistency in deciding when to award restitution and in what amount. Further, courts still tend to award low-level amounts for all types of offenses without explanation and without calibration to offense or victim characteristics. Some of this confusion may be due to *Paroline's* nebulous and impractical guideposts, which ask courts to calculate restitution by simultaneously working backward from the amount of a victim's general losses and forward from the nature and severity of the offense. As sentencing data shows, despite *Paroline's* directive that awards reflect the "relative causal significance of the defendant's conduct,"[17] defendants who have been convicted of more egregious crimes (for example, production or distribution) in more deliberate and harmful ways are frequently sentenced to pay less restitution than their counterparts. Moreover, when calculating restitution awards, courts do not appear to be taking into account any "aggravating factors"[18] related to the nature of the offense. Even after *Paroline*, calculating a fair restitution award appears to be an exercise in ascertaining the impossible.

Part III takes a step back from the case law and data to examine an additional, and more important, problem with the current child pornography restitution system: its potential for causing secondary victimization among the very population it is designed to protect and serve. Restitution awards are meant to pay back victims for the harm of the offense, including compensating victims for the psychological and emotional costs they incur as they piece their lives back together.[19] But perversely, the process by which victims request and receive restitution may revictimize and retraumatize them all over again.[20] Instead of assisting victim recovery, the current restitution system is anti-therapeutic. As the system notifies victims of their ongoing victimization, it offers no support for those victims

17. Paroline v. United States, 134 S. Ct. 1710, 1728 (2014).
18. *See infra* Part II.B.
19. *See infra* notes 25, 32, and accompanying text.
20. *See infra* Part III.C.

choosing not to receive such reminders. Meanwhile, victims seeking restitution bear the heavy burden of showing how much "loss" they have suffered from a particular defendant with whom they likely have never had contact. These victims often attempt this near-impossible showing of loss for each of hundreds of defendants nationwide for years on end, only to receive a few hundred dollars in restitution (and sometimes none at all).

Even in *Paroline*'*s* wake, then, the child pornography restitution system continues to suffer from serious deficiencies. Restitution amounts vary widely and bear no correlation to factors relating to the nature of the offense. The uncertainty of receiving restitution (and in what amount) and the burden of making difficult evidentiary showings of loss in turn increase the system's potential for retraumatizing victims. Unfortunately, as Part IV discusses, Congress's proposed legislative response to *Paroline* provides neither much-needed guidance to courts nor the guaranteed compensation that victims deserve. Instead, the bill introduces additional, significant problems. In lieu of the current and proposed systems, this Article recommends enacting a flexible yet mandatory victim reimbursement fund that calculates contribution amounts beginning with reasonable, data-based minimums and incorporating a handful of enhancement criteria to meaningfully distinguish between the harms of modern child pornography offenses. Such a system would better achieve the purposes of restitution, offer clear guidance to courts, and reduce the potential for secondary victimization.

## I. RESTITUTION IN CHILD PORNOGRAPHY CASES

The phenomenon of awarding restitution in child pornography cases is relatively recent and reflects the increased involvement of victims in the criminal justice process during the last thirty years. Beginning with the passage of the federal Victim and Witness Protection Act (VWPA) in 1982,[21] criminal restitution

21. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009); Lynne Henderson, Commentary, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581 (1998). Federal judges could award restitution only as a condition of probation, *see* Woody R. Clermont, *It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution*, 35 NOVA L. REV. 363, 373 (2011), and most state statutes made no mention of criminal restitution, *see* Note, *Restitution and the Criminal Law,* 39 COLUM. L. REV. 1185, 1195 (1939). *See also* Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 152, 155 (1970) (describing state procedures for ordering restitution); Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 229 (1965) (same).

awards became more prevalent[22] and the range of losses covered by the restitution umbrella expanded. For the first time, the VWPA endorsed court-ordered compensation for losses well beyond those directly caused by a defendant, including costs for medical, psychiatric, and psychological treatment for victims who suffered bodily injuries.[23]

With the passage of the Violence Against Women Act (VAWA) in 1994[24] and the Mandatory Victims Restitution Act of 1996 (MVRA),[25] restitution further cemented its place in the sentencing system. In cases of sex-related and domestic violence crimes, VAWA required defendants to pay restitution to cover victims' resulting physical and psychological injuries.[26] The MVRA extended obligatory restitution to all "identifiable" victims who have "suffered a physical injury or pecuniary loss" as a result of the defendant's offense, which could include sex-related crimes but also crimes of violence, fraud crimes, and crimes in which a victim "has suffered a physical injury or pecuniary loss."[27]

Because of this expansion in the role and breadth of criminal restitution, the purpose of criminal restitution has become muddled, particularly in child pornography cases. The following Subpart describes the three distinct but sometimes contradictory purposes of restitution in this context.

### A. Purposes of Restitution in the Child Pornography Context

The first and most historically recognized purpose of criminal restitution is victim compensation. Restitution awards have traditionally been used in both

22. Dickman, *supra* note 21. President Reagan's Task Force on Victims of Crime, whose recommendations informed the content of the Victim and Witness Protection Act (VWPA), encouraged judges to order restitution in "all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 72–73 (1982).

23. 18 U.S.C. § 3579(b)(2) (1982) (current version at 18 U.S.C. § 3663 (2012)). Lost wages are also compensable. For an argument that criminal restitution has become increasingly "vengeful" as it has morphed from focusing on disgorging a defendant's unlawfully obtained economic gains to focusing on compensating the victim for a broad range of "economic, emotional, and psychological losses," see Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97 (2014).

24. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, pt. 40113(a)(1), § 2248, 108 Stat. 1902, 1904 (codified at 18 U.S.C. § 2248 (2012)).

25. Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, pt. 204, § 3663A(c)(1)(B), 110 Stat. 1214, 1229 (codified at 18 U.S.C. § 3663A(c)(1)(B) (2012)). *See generally* Parts 202, 204, & 205, 110 Stat. at 1227–32 (codified as amended at 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3556, 3663, 3663A (2012)); 23 Pub. L. No. 104-132, Parts 204–05, §§ 3663, 3663A, 110 Stat. at 1227–32 (2012).

26. 18 U.S.C. § 2248(b)(3).

27. Pub. L. No. 104-132, pts. 204–05, §§ 3663, 3663A, 110 Stat. at 1227–32 (2012).

civil and criminal cases to "financially restore a person economically damaged by another's actions, thereby preventing the unintended beneficiary from being unjustly enriched at the aggrieved party's expense."[28] Although the scope of victims' losses covered by the criminal restitution umbrella has gone beyond the disgorgement of the defendants' unlawful gains[29]—expanded to include a range of "indirect" losses such as the cost of future psychological treatment and associated attorneys' fees[30]—the compensatory flavor of restitution has remained.[31] In fact, with the recent legislative and judicial focus on calculating restitution from the victim's losses, rather than on equating restitution to the defendant's unlawful gain, victim compensation is perhaps an even more central goal today than ever before.[32]

A second purpose of criminal restitution is punishment. In *Paroline*, the Supreme Court explicitly confirmed the punitive nature of modern-day criminal restitution.[33] Reflecting the intentions of the victims' rights movements of the 1980s and 1990s, the punitive aspect of restitution seeks to hold defendants accountable for the full extent of the harm they have caused, both to society and to their victims. Thus, just as a defendant's term of imprisonment is payback to society for his wrong, his required restitution is payback to victims for the harm he caused specifically to them. The distinction between the punitive and compensatory purposes of restitution is therefore conceptual: both purposes seek to recompense victims, but the punitive aspect views this compensation as part of

28. Lollar, *supra* note 23, at 99.
29. *See* RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. e(2) (2011).
30. *See, e.g.*, 18 U.S.C. § 2259(b)(3) (2012).
31. *But see* Lollar, *supra* note 23, at 100–01 (arguing that criminal restitution should more accurately be called "victim compensation" because it is now measured by a victim's "tangible and abstract" losses rather than by a defendant's unlawful gain). Lollar's argument is that the original focus of restitution was not victim compensation but rather disgorgement (that is, restitution aimed to disgorge the defendant's unlawful gains, not necessarily to compensate a victim's losses). As Lollar correctly observes, criminal restitution does not aim to disgorge, but rather seeks to compensate victims in a manner detached from calculating the defendant's unlawful gains.
32. *See* discussion *infra* Parts II.A.1., IV.A.
33. Paroline v. United States, 134 S. Ct. 1710, 1726 (2014) ("The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes.") (internal citation omitted); *see also* Pasquantino v. United States, 544 U.S. 349, 365 (2005) (noting that "[t]he purpose of awarding restitution" under 18 U.S.C. § 3663A "is . . . to mete out appropriate criminal punishment"); United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) (stating that "restitution under the [Mandatory Victims Restitution Act] MVRA is punishment" and subject to Eighth Amendment limitations "because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes.").

the offender's due punishment.[34] This conceptual distinction, however, is a blurry one.[35]

A third and related purpose of restitution is victim recognition and empowerment. Criminal restitution allows victims to receive "some public recognition that harm has been done . . . without requiring them to endure the rigors of an adversarial legal process."[36] In this context, restitution is one right among an array of victims' rights awarded by two statutes, the Victims Rights and Restitution Act (VRRA)[37] and the Crime Victims Rights Act (CVRA).[38] These two statutes in aggregate afford victims the right to be kept informed during the investigation of the offense, to be kept informed about victims' services, to be notified of public court proceedings,[39] to be reasonably heard at certain such proceedings, to receive full and timely restitution, to confer with government counsel, and to be treated with dignity and respect.[40] Each of these rights is meant to acknowledge the harms inflicted on all victims and to empower otherwise silenced victims to make their voices heard to the defendant, jury, judge, or general public.[41] Beyond

34. Indeed, in the civil context, compensation and disgorgement are not viewed as punitive.

35. *See, e.g.*, Lollar, *supra* note 23, at 100–01 (noting "significant doctrinal confusion and incoherence, as restitution in the civil setting is a legal term of art that still strictly refers to disgorgement of unlawful gains, whereas in the criminal context, 'restitution' refers to what is more aptly termed 'victim compensation.'").

36. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention,* 16 J. TRAUMATIC STRESS 159, 161 (2003).

37. 42 U.S.C. § 10607 (2012).

38. 18 U.S.C. § 3771 (2012).

39. A victim (or, in the case of a minor victim, a non-offending parent or guardian) may elect to opt-in to be notified if his or her image appears in future cases. *See* FED. BUREAU OF INVESTIGATION, CHILD PORNOGRAPHY VICTIM ASSISTANCE (CPVA): A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS (2014), http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf. Upon opting-in, a victim is entered into the Department of Justice's Victim Notification System (VNS), which provides automatic notice and court-related outcome information to victims, as required by the CVRA. At any point, a victim may be able to opt-out of the program. *See Victim Notification Program*, DEP'T OF JUSTICE, http://www.justice.gov/criminal/vns [http://perma.cc/XW8Q-AL27] (last visited Mar. 15, 2015); *CPVA Notification Preference Form*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/stats-services/victim_assistance/notification-preference [http://perma.cc/D9UK-AMUM] (last visited Mar. 15, 2015) .

40. *See* 18 U.S.C. § 3771(a) (2012); 42 U.S.C. § 10607 (2012).

41. One way victims make their voices heard is through victim impact statements, which allow victims an opportunity to share narratives of their experiences and the harms they have suffered as a result of the offense. Whether or not a victim has opted to be notified through the VNS, he may submit a victim impact statement and, in the case of child pornography possession cases, permit the DOJ to attach his statement in each case involving his image. The victim may also request a sentencing judge to read his statement aloud at sentencing. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 117. The Supreme Court has upheld the victim's right to "be heard" and to share his narrative. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991). *See generally* Paul Gewirtz, *Victims and*

compensating the victim's losses and punishing the defendant, then, restitution also seeks to achieve a less traditional objective: affirming the victim's rights to be involved in the legal process and empowering the victim to share his narrative and perspective on the defendant's culpability.

### B. Restitution Awards in Child Pornography Cases

Before 2009, courts rarely awarded restitution in most child pornography cases, and almost never in possession cases, but the efforts of one attorney, James Marsh, charted a new course. Marsh began pursuing restitution from hundreds of defendants in nonproduction child pornography cases beginning in 2008,[42] often seeking the full amount of the victim's losses from defendants convicted solely of "hands-off" offenses.[43] Figure 1 below visually captures the sharp increase in child pornography restitution cases since 2009.[44]

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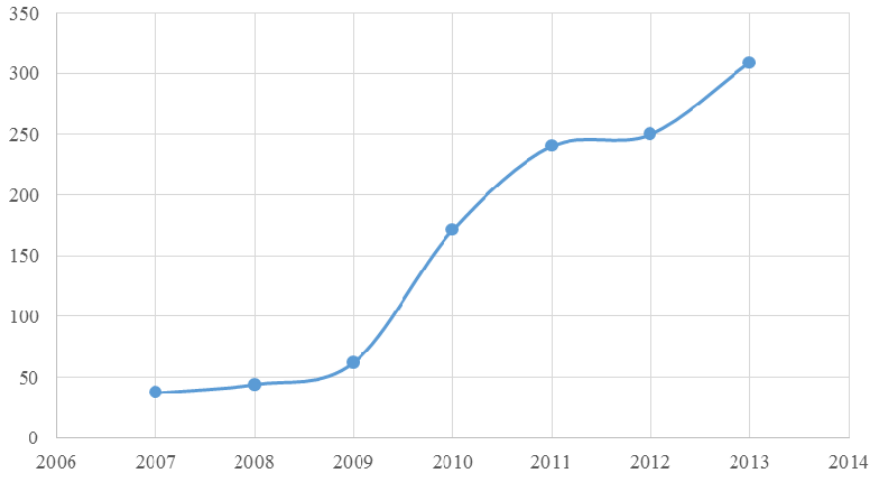
*Voyeurs: Two Narrative Problems at the Criminal Trial*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 135 (Peter Brooks & Paul Gewirtz eds., 1996) (defending the use of victim impact statements in criminal sentencing). *But see* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) (arguing that "victim impact statements . . . should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing").

42. Marsh's efforts began with the case of 19-year-old victim known by the pseudonym "Amy," whose uncle had abused her and distributed the images of her abuse to others, creating a series of child pornography images that would become one of the most actively traded worldwide. *See* Emily Bazelon, *Money Is No Cure*, N.Y. TIMES MAG., Jan. 27, 2013, at 22, 27; John Schwartz, *Court Rejects Restitution for Victim in Porn Case*, N.Y. TIMES, Sept. 9, 2011, at A20 [hereinafter Schwartz, *Court Rejects*]; John Schwartz, *Pornography, and an Issue of Restitution at a Price Set by the Victim*, N.Y. TIMES, Feb. 3, 2010, at A19 [hereinafter Schwartz, *Pornography*].

43. For example, in *United States v. Hesketh*, Marsh requested restitution for the full amount of the victim's losses ($3.4 million) from a single possessor. *See* Transcript of Restitution Hearing at 45–46, United States v. Hesketh, No. 3:08-CR-00165 (D. Conn. May 5, 2009).

44. Data taken from United States Sentencing Commissions' annual reports. *See* U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2007), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2007/Table15.pdf; U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2008), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/Table15.pdf; U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2009), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table15.pdf; U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table15.pdf; U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2011), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table15.pdf; U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table15.pdf;

**FIGURE 1: ANNUAL NUMBER OF CHILD PORNOGRAPHY RESTITUTION ORDERS**




The primary vehicle for these restitution requests was 18 U.S.C. § 2259, enacted as part of VAWA, which ordered mandatory restitution for a victim of a sex or domestic violence offense in the full amount of the victim's losses.[45] These losses include costs incurred for physical and mental healthcare services, therapy, transportation, housing, childcare expenses, lost income, attorneys' fees, and "any other losses suffered by the victim as a proximate result of the offense."[46] This language offered two points of certainty for courts awarding restitution to victims of child pornography: (1) such awards were required, and (2) such awards could compensate for a range of direct and indirect expenses. But the interplay between two of § 2259's terms—"full amount" and "proximate result"—left courts perplexed. How could courts award victims the full amount of their

U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table15.pdf. The increase in child pornography restitution orders is actually even sharper than this figure depicts. Before 2010, child pornography restitution orders were grouped with prostitution offenses. Thus, the actual number of restitution orders awarded in child pornography cases before 2010 is likely lower than reflected.

45. Pub. L. No. 103-322, pt. 40113, §§ 2248, 2259, 108 Stat. 1902, 1904, 1907 (1994) (codified at 18 U.S.C. §§ 2248, 2259 (2012)).

46. 18 U.S.C. §§ 2248(b)(3), 2259(b)(3) (2012).

losses, yet simultaneously limit that award to those losses proximately caused by the particular defendant's offense?

Victims' attorneys like Marsh reconciled the statute's apparent contradiction by reading the statute literally:[47] not all losses need be the proximate result of the defendant's offense, simply those that fell into the catch-all provision.[48] In other words, a court must order the defendant to pay restitution for the full amount of the losses described in the enumerated categories[49] along with an amount covering any residual losses proximately caused by the defendant's offense. By sharp contrast, many defense attorneys applied the catch-all provision's "proximate result" language to the court's calculation of losses generally, no matter the type of loss.[50] That is, they argued that the court could only award restitution in the amount of loss that the defendant himself proximately caused. As the following Subpart describes, until the Supreme Court decided *Paroline*, § 2259's ambiguity resulted in significant disagreement among parties and courts on two issues: whether the proximate cause requirement of § 2259(b)(3)(F) applied to all of the victim's losses (not simply those without a categorical home), and, if so, how to quantify the losses proximately caused by the defendant, particularly when the defendant committed a non-contact child pornography offense (that is, distribution or possession).

### 1. Restitution Awards Pre-*Paroline*

In the years leading up to *Paroline*, most federal courts slowly came to the consensus that § 2259's proximate cause requirement applied to all losses encompassed by the statute—in other words, the statute required showing that the defendant proximately caused the losses for which the victim seeks compensation.[51]

47. *See* Transcript of Restitution Hearing, *supra* note 43, at 45–46; Victim-Intervenor Vicky's Brief in Defense of the Judgment Below at 10, United States v. Crawford, No. 11-5544, 2011 WL 6018374 (6th Cir. Nov. 29, 2011); United States v. Mather, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at *2, *4 (E.D. Cal. Dec. 10, 2010); Schwartz, *Pornography*, *supra* note 42, at A19.

48. These "catch-all provisions" are found in 18 U.S.C. §§ 2248(b)(3)(F) and 2259(b)(3)(F) (2012).

49. 18 U.S.C. §§ 2248(b)(3)(A)–(F), 2259(b)(3)(A)–(F) (2012).

50. *See, e.g.*, Respondent Amy's Brief on the Merits at 18–20, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561).

51. *See* United States v. Benoit, No. 12-5013, 2013 WL 1298154, at *13–15 (10th Cir. Apr. 2, 2013); United States v. Laraneta, 700 F.3d 983, 989–91 (7th Cir. 2012); United States v. Burgess, 684 F.3d 445, 459 (4th Cir. 2012); United States v. Kearney, 672 F.3d 81, 96–100 (1st Cir. 2012); United States v. Evers, 669 F.3d 645 (6th Cir. 2012); United States v. Aumais, 656 F.3d 147 (2d Cir. 2011); United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011); United States v. Monzel, 641 F.3d 528, 535–36 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011); United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). *But see* Paroline v.

Yet courts struggled mightily with determining how to apply this proximate cause requirement, particularly in cases in which a defendant was convicted of solely possessing or distributing child pornography.[52] As a result, the landscape of restitution decisions before *Paroline* was disjointed. While some courts readily found a causal link between a defendant's possession of child pornography and the victim's aggregate losses, others found none.[53] And while some courts employed a formula to calculate the degree of harm attributable to the particular defendant and awarded restitution proportionally, others simply granted restitution in some "reasonable" amount without any formal calculation.[54]

Several scholars have commented on the hodgepodge of factors that courts used before *Paroline* to calculate restitution awards.[55] None, however, have engaged in a more systematic or empirical review of the magnitude of these awards or the factors courts have considered in their calculations. After analyzing data obtained from the United States Sentencing Commission and court opinions, this Subpart presents findings on both issues.[56] The data reveals the following important realities about the state of restitution awards in the five years preceding *Paroline*:

(1) In most cases, courts awarded no restitution, even when the offense was hands-on;
(2) The size of the restitution awards varied dramatically across cases, regardless of offense type;
(3) The average size of the restitution awards was no larger in hands-on offenses than in hands-off offenses;
(4) The vast majority of offenders could not afford to pay any type of fine; and

Unknown, 697 F.3d 306 (5th Cir. 2012) (en banc) (holding that the proximate cause requirement applies only to losses discussed in § 2259(b)(3)(F)).

52. *See infra* Table 3.
53. *See id.*
54. *See id.*
55. *See, e.g.*, Lollar, *supra* note 14, at 364–66; McLeod, *supra* note 14, at 1332–36; Sheldon-Sherman, *supra* note 14, at 241–67.
56. The dataset for this paper, on file with the author, includes final data on all cases beginning October 1, 2009, and continuing through September 22, 2014, in which the Commission received complete guideline application information and in which the primary sentencing guideline was U.S. Sentencing Guideline § 2G2.1 or § 2G2.2. The data is derived from confidential court documents including presentence reports (PSRs), Statement of Reasons forms, Judgment and Commitment forms, indictments, and plea agreements. I would like to thank the Commission for allowing me access to this data as part of my fellowship.

(5) Courts employed a wide variety of methods to calculate restitution.

Each of these conclusions is described in more detail *infra*.

### a. Most Courts Awarded No Restitution

In most child pornography cases from 2009 to April 23, 2014, the date *Paroline* was decided, courts awarded no restitution at all. In fact, restitution was awarded in only 13.3 percent of child pornography cases—in actual numbers, this was only 1077 out of 7003 cases. This pattern, moreover, held across offense types. That is, courts awarded restitution in a minority of cases even when the offense was hands-on. As Table 1 shows, the percentage of pre-*Paroline* cases in which restitution was granted was well under 20 percent in all offense categories.[57]

**TABLE 1. PERCENTAGE OF PRE-*PAROLINE* CHILD PORNOGRAPHY CASES IN WHICH RESTITUTION WAS ORDERED BY OFFENSE TYPE**

| | Number of cases in which restitution was granted | Total number of child pornography cases | Percentage of cases in which restitution was ordered |
|---|---|---|---|
| Production | 214 | 1162 | 18.4% |
| Distribution | 467 | 3619 | 12.9% |
| Possession | 397 | 3307 | 12.0% |

### b. Magnitude of Restitution Awards Varied Dramatically

In the pre-*Paroline* era, courts awarded restitution in immensely varied amounts, again regardless of the offense type. Overall, restitution orders ranged from $60 on the low end to $5,406,463 on the high end (a range of $5,406,403). It is important to recognize that these amounts reflect the total amount awarded to all victims of a single defendant, not the amount ordered to an individual victim. Thus, the amount awarded to any given victim was sometimes less than these figures.

57. In Part II.B. *infra*, I explore further the reasons why courts decline to award restitution.

**TABLE 2. MINIMUM, MAXIMUM, AVERAGE, AND MEDIAN RESTITUTION AWARDS IN PRE-*PAROLINE* CHILD PORNOGRAPHY CASES, BY OFFENSE TYPE**

| | Minimum award | Maximum award | Average award | Median award |
|---|---|---|---|---|
| Production (n=173) | $60 | $5,406,463 | $117,970 | $3434 |
| Distribution (n=389) | $165 | $3,517,854 | $37,312 | $3000 |
| Possession (n=336) | $100 | $1,100,000 | $31,017 | $3000 |

As Table 2 shows, the median restitution award in any offense category—that is, for both hands-on and hands-off offenses[58]—remained at or close to $3000, despite the much higher average awards in each offense category, particularly production. As cumulative frequency figures confirm, the majority of courts awarded restitution in low amounts—55 percent between $60 and $3000 and 71 percent between $60 and $5000. By contrast, only 6 percent of courts awarded restitution in amounts over $100,000, and only 1 percent in amounts over $1,000,000. Thus, the average restitution award for each offense type is misleading, driven upwards by the small percentage of courts deciding to award restitution in large amounts.

### c. Vast Majority of Offenders Could Not Afford to Pay Any Type of Fine

In the vast majority of child pornography cases preceding *Paroline* (92 percent), courts waived recommended fines—supplemental penalties to mandatory restitution—because of the defendants' financial circumstances.[59] Furthermore, in over 89 percent of cases in which courts awarded restitution, courts declined to

58. In the data analysis sections of this article, the terms "hands-on," "hands-off," "contact," and "non-contact" refer to the actual offense of conviction. Many offenders convicted of hands-off or non-contact offenses will have previously committed a hands-on or contact offense (and vice versa). *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 204.

59. The sentencing guidelines recommend a fine amount that a court may waive in light of the defendant's inability to pay. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C3.3 (2014).

impose a fine.[60] The court's decision to waive a fine, moreover, was unrelated to the type of offense or the amount of restitution awarded. This reality indicates that, as required by 18 U.S.C. § 2259(b)(4)(B)(i), courts are disregarding a defendant's financial circumstances when calculating restitution.

### d. Courts Employed a Wide Variety of Methods to Calculate Restitution

To further explore some of the aforementioned conclusions, particularly the question of why most courts awarded restitution in low amounts, I supplemented the aggregate-level data analysis reported above with an in-depth examination of a sample of pre-*Paroline* opinions in which courts awarded, declined to award, or vacated awards of restitution.[61] In sixty-four cases, courts awarded restitution using a variety of methods, as described in Table 3.

**TABLE 3. METHODS USED TO CALCULATE RESTITUTION AWARDS AMONG A SAMPLE OF SIXTY-FOUR PRE-*PAROLINE* CASES**

| | |
|---|---|
| Court awarded some "reasonable" amount without any formal calculation | 24 |
| Court divided restitution request by number of defendants convicted thus far | 16 |
| Court awarded full request | 8 |
| Court used civil damages amount as starting point[62] | 8 |
| Court awarded nominal figure | 6 |
| Court averaged awards in other cases | 2 |

In thirty-six cases, district courts awarded no restitution or courts of appeals vacated a restitution calculation. In almost two-thirds of this sub-sample

60. *See also* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 162 fig.6-23 (showing that 72.2 percent of all federal child pornography defendants had $10,000 or less in net assets at the time of conviction, 47.5 percent of which had negative assets).

61. These sixty-four opinions consist of cases in which courts have issued unpublished or published opinions describing their reasons for awarding or declining to award restitution. All sixty-four were issued before *Paroline*.

62. The starting point in these calculations is 18 U.S.C. § 2255, which prescribes a minimum level of $150,000 in civil damages for "[a]ny person who, while a minor, was a victim of a violation of section . . . 2252 [or] 2252A." Courts have divided this amount by an estimate of the number of offenders who will be subject to restitution orders to arrive at a restitution award amount. *See, e.g.*, United States v. Mather, 1:09-CR-412, 2010 WL 5173029, at *5 (E.D. Cal. Dec. 10, 2010) (dividing $150,000 by fifty defendants to arrive at a restitution award of $3000).

(23 cases), courts specifically found no evidence that the victims' harms were proximately caused by the defendant.[63] In seven of these cases, moreover, courts explicitly stated that the victims' specific knowledge of the defendant's offense (that is, possession or distribution) could have helped satisfy, or was required to satisfy, the proximate cause requirement.[64]

### 2. Setting the Stage for *Paroline*

In sum, over the five years before *Paroline*, courts created a restitution landscape that was both inconsistent and incoherent. A circuit split emerged on the threshold question of whether § 2259 requires a showing of proximate cause.[65] Further, even in the ten circuits that answered the question in the affirmative, courts employed a range of methods to calculate restitution. Some of these methods—awarding a "reasonable" or "nominal" amount, granting a fraction of the civil damages remedy, or averaging the awards in other cases—were completely detached from the characteristics of the offense at hand. Other courts sought to roughly capture the defendant's relative role in causing the victim's losses by dividing the total losses by the number of known or projected convictions. Very few, however, sought to incorporate any factors related to the nature of the defendant's crime, whether by capturing the number of images he produced, distributed, or possessed, the nature of his relationship with the victim, or whether he distributed or traded images with the intent of engaging or having others engage in sexual contact with children. Given the courts' inconsistencies, the same victim could receive vastly disparate restitution awards (from a few hundred dollars to millions) and the same defendant could be forced to pay such varying

63. *See, e.g.*, United States v. Aumais, 656 F.3d 147, 154 (2d Cir. 2011); United States v. Faxon, 689 F. Supp. 2d 1344, 1345 (S.D. Fla. 2010); United States v. Solsbury, 727 F. Supp. 2d 789 (D.N.D. 2010).

64. *See, e.g.*, United States v. Kennedy, 643 F.3d 1251, 1261–64 (9th Cir. 2011); United States v. Chow, 760 F. Supp. 2d 335, 343 (S.D.N.Y. 2010); United States v. Berk, 666 F. Supp. 2d 182, 191 (D. Me. 2009).

65. *Compare* Randall v. Unknown, 701 F.3d 749, 752 (5th Cir. 2012) (en banc) (holding there is no proximate cause requirement under § 2259), *with* United States v. Rogers, 714 F.3d 82, 89 (1st Cir. 2013) (holding there is a proximate cause requirement under § 2259); United States v. Benoit, 713 F.3d 1, 20 (10th Cir. 2013) (same); United States v. Fast, 709 F.3d 712, 721–22 (8th Cir. 2013) (same); United States v. Laraneta, 700 F.3d 983, 989–90 (7th Cir. 2012) (same); United States v. Burgess, 684 F.3d 445, 456–57 (4th Cir. 2012) (same); United States v. Evers, 669 F.3d 645, 659 (6th Cir. 2012) (same); *Aumais*, 656 F.3d at 153 (same); *Kennedy*, 643 F.3d at 1261 (same); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011) (same); United States v. McDaniel, 631 F.3d 1204, 1208–09 (11th Cir. 2011) (same).

amounts simply based on forum or judge. This muddled backdrop set the stage for the Supreme Court's decision in *Paroline*.

## II. RESTITUTION AWARDS POST-*PAROLINE*

After the Fifth Circuit's en banc decision in *In re Amy Unknown* held that § 2259 imposed no proximate cause requirement for awarding restitution, [66] the Supreme Court granted certiorari to resolve the circuit split on this key question. But the Court's decision in *Paroline* did more than just this. First, it affirmed the harms of child pornography possession, the dually punitive and compensatory nature of restitution, and the need for safeguarding the rights of defendants. Second, in response to the actual question presented by the case, the Court made clear that § 2259 incorporated a proximate cause requirement and articulated a new standard for determining causation-in-fact: District courts must award restitution that reflects the defendant's relative role in causing the victim's losses. Third, perhaps recognizing that a simple answer to the proximate cause question would offer struggling lower courts little practical guidance, the Court delineated guideposts to assist in calculating the defendant's relative role in causing the victim's losses. The following Subparts summarize and critique *Paroline* in some detail before analyzing the extent to which *Paroline* has in fact impacted restitution awards.

### A. *Paroline v. United States*

*Paroline* involved the following facts. Petitioner Doyle Randall Paroline admitted to possessing between 150 and 300 images of child pornography[67]—a relatively small number compared to other offenders.[68] Two of these images depicted the victim "Amy." Amy sought $3.4 million in restitution to cover lost income, future treatment and counseling costs, and attorney's fees and costs.[69] The district court denied Amy's request, concluding that the government had failed to prove the amount of losses proximately caused by Paroline's offense.[70] The Fifth Circuit then denied the victim's writ of mandamus asking Paroline to pay restitution in

66. *Randall*, 701 F.3d at 773.
67. Paroline v. United States, 134 S. Ct. 1710, 1716 (2014).
68. As the discussion in Part II.B. *infra*, reveals, most offenders today possess well above this amount.
69. *Paroline*, 134 S. Ct. at 1718 (2014).
70. United States v. Paroline, 672 F. Supp. 2d 781, 791–93 (E.D. Tex. 2009).

the requested amount.[71] Upon rehearing en banc, the Fifth Circuit held that § 2259 did not restrict restitution to those losses proximately caused by the defendant and that Paroline was liable for the entirety of the victim's losses, despite the causal role played by other offenders.[72] In the Supreme Court opinion penned by Justice Kennedy, a five-member majority created a new causal standard for restitution awards in child pornography cases, vacated the award in *Paroline*, and remanded the case.[73]

### 1. Majority Opinion

The Court first addressed "whether § 2259 limits restitution to those losses proximately caused by the defendant's offense conduct."[74] The Court noted the obvious causal language in the statute. Specifically, it noted that "[t]he statute defines a victim as 'the individual harmed as a result of a commission of a crime under this chapter,'"[75] and that § 2259(b)(3)'s reference to "costs incurred by the victim" is "most naturally understood as costs stemming from the source that qualifies an individual as a 'victim' in the first place—namely, ones arising 'as a result of' the offense."[76]

The Court then proceeded to analyze whether the statute imposes a proximate (rather than simply factual) cause requirement. The Court concluded that § 2259(b)(3)(F)'s catch-all category for "any other losses suffered by the victim as a proximate result of the offense" is "most naturally understood as a summary of the type of losses covered—*i.e.*, losses suffered as a proximate result of the offense."[77] Further, "[r]eading the statute to impose a general proximate-cause limitation accords with common sense."[78] Undoubtedly, then, § 2259 imposed a proximate cause limitation on restitution.

71. *In re* Amy, 591 F.3d 792, 795 (5th Cir. 2009).
72. *Randall*, 701 F.3d at 772–74.
73. 134 S. Ct. at 1730.
74. *Id.* at 1719.
75. *Id.* at 1720 (quoting 18 U.S.C. § 2259(c)).
76. *Id.* (quoting 18 U.S.C. § 2259(c)).
77. *Id.* at 1721; *see also* Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 734 (1973) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.").
78. *Paroline*, 134 S. Ct. at 1721. "[I]t would be strange indeed," the Court posited, to order a hypothetical defendant to pay the medical costs associated with a car-accident injury the victim incurred on the way to her therapist, even though the costs were a factual result of the defendant's offense. *Id.*

The trickier question, however, was how to apply this proximate cause requirement in this case—a question made particularly difficult by the daunting task of determining the amount of losses "that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim."[79] To address this question, the Court weighed various standards of determining "causation in fact," including the "but-for" and the "aggregate causation" standards.[80] Ultimately, the Court rejected both. In cases like Paroline's, the Court said that "where the defendant is an anonymous possessor of images in wide circulation on the Internet," a but-for standard would be impossible to implement.[81] The victim would be hard-pressed to prove that her losses would be less had a defendant like Paroline never viewed her images, given that the images were circulated among thousands of people and especially because the victim knew nothing of the defendant's offense.[82]

The Court similarly eschewed the less rigorous "aggregate causation" standard "where a wrongdoer's conduct, though alone 'insufficient . . . to cause the plaintiff's harm,' is, 'when combined with conduct by other persons,' 'more than sufficient to cause the harm.'"[83] Despite the "salutary"[84] nature of this standard, the Court rejected its applicability in Paroline's case for two reasons. First, Paroline did not commit his offense in concert with other wrongdoers; on the contrary, he had no contact with the overwhelming majority of the other individuals who caused the victim harm.[85] Second, treating each possessor as a cause-in-fact of all of the victim's harm would "make an individual possessor liable for the combined consequences of the acts of not just 2, 5, or even 100 independently acting offenders; but instead, a number that may reach into the tens of thousands."[86] The

79. *Id.* at 1722.
80. *Id.* at 1722–24. The but-for causation standard requires showing that the harm in question would not have occurred "but for" the conduct of the individual actor. *See id.* at 1722. Under the aggregate causation standard, by contrast, the combined conduct of multiple actors is considered the but-for cause of the harm, and because the "application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Id.* at 1737 (Sotomayor, J., dissenting) (internal quotation marks omitted).
81. *Id.* at 1723 (majority opinion).
82. *Id.*
83. *Id.* (quoting 1 RESTATEMENT (THIRD) OF TORTS § 27, cmt. f, 380–81 (2009)).
84. *Id.* at 1724 (rejecting as "nonsensical" the notion of "adopt[ing] a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy").
85. *Id.* at 1725.
86. *Id.*

Court feared that the latter concern, coupled with the reality that each possessor and distributor would have "no legal or practical avenue for seeking contribution" from one another, would be so severe as to "raise questions under the Excessive Fines Clause of the Eighth Amendment."[87]

Despite its rejection of both the but-for and aggregate causation standards, the Court declared that "[i]t would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach."[88] Calling the child pornography possession cases a "special context,"[89] the Court articulated a new causal standard: "a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[90] The amount in a case like *Paroline*, in which the possessor was one of thousands of offenders, would be neither severe nor nominal; rather, the Court stated, the "required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role."[91]

Perhaps realizing its "relative causal role" standard may be difficult to apply in practice, the Court spent significant time addressing the question of how district courts should calculate the amount of restitution to award in a given case. This calculation "cannot be a precise mathematical inquiry," the Court noted; rather, it must "involve[] the use of discretion and sound judgment."[92] Concurring with the government's suggestion that a discretion-based allocation approach "best comports with the statutory scheme and with the relevant equities,"[93] the Court listed several factors that district courts might consider as

87. *Id.* at 1726.
88. *Id.* at 1727.
89. That is, "where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry." *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1728.
93. Brief for the United States at 41, *Paroline*, 134 S. Ct. 1710 (No. 12-8561), 2013 WL 5425148, at *41; *see id.* at 40–41, 47–49. In endorsing an allocation approach, the Court adopted the approach of every court of appeals except the Fifth Circuit. *See, e.g.*, United States v. Benoit, 713 F.3d 1, 22 n.8 (10th Cir. 2013); United States v. Hargrove, 714 F.3d 371, 375–76 (6th Cir. 2013); United States v. Lundquist, 731 F.3d 124, 138–41 (2d Cir. 2013); United States v. Kearney, 672 F.3d 81, 100–01 (1st Cir. 2012).

part of their restitution calculation.[94] These factors include, as a starting point, "the amount of the victim's losses caused by the continuing traffic in the victim's images," as well as "factors that bear on the relative causal significance of the defendant's conduct in producing those losses," such as:

> the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.[95]

The allocation approach, the Court noted, has a number of advantages. It allows the award amount to be proportional to the offense, without "turning away victims emptyhanded."[96] Further, the approach advances "the need to impress upon defendants that their acts are not irrelevant or victimless" by "spread[ing] payment among a larger number of offenders in amounts more closely in proportion to their respective causal roles and their own circumstances," instead of simply forcing a smaller handful of wealthier defendants to cover the full amount of the victims' losses.[97]

The Court concluded by noting the allocation approach is not without its difficulties.[98] Having delineated rough guideposts for district courts and having cautioned that a sentencing court's inquiry should not be reduced to a rigid formula that would yield "trivial restitution orders,"[99] the Court noted that district courts can only do their best to apply § 2259 in a "workable manner, faithful to the competing principles at stake."[100] Trusting that district courts that "routinely exercise wide discretion" in fashioning restitution awards would be able to take on this task, the Court declined to provide any further guidance.[101]

94. *Paroline*, 134 S. Ct. at 1728.
95. *Id.*
96. *Id.* at 1729.
97. *Id.*
98. *Id.*
99. *Id.* at 1728.
100. *Id.* at 1729.
101. *Id.*

### 2. Dissenting Opinions

*Paroline* featured two diametrically opposed dissenting opinions. The first, written by the Chief Justice and joined by Justices Scalia and Thomas, would have awarded Amy no restitution at all under § 2259 because the statute provides "no mechanism" for calculating the amount of loss Paroline caused Amy.[102] According to the Chief Justice, the dysfunction of § 2259 stems from its inability to accommodate the peculiar crime of child pornography possession.[103] Put simply, a victim, like Amy, suffers harm from "the collective actions of a huge number of people . . . acting independently from one another."[104] Yet, as is the case with Amy, a victim often has no knowledge of the defendant's existence, and no evidence comes close to demonstrating that the victim would have suffered less had the defendant never possessed her images, "let alone how much less."[105] In other words, § 2259 requires knowing the unknowable; that is, the defendant's "particular share of [the victim's] losses."[106] Thus, according to the Chief Justice's dissent, it is simply "impossible" for the government to prove in most cases of child pornography possession what the statute demands: "the amount of the loss sustained by a victim as a result of *the* offense."[107]

The Chief Justice's dissent also took issue with the majority's allocation approach, which is clearly "not the system that Congress created."[108] While "[t]he statute requires restitution to be based exclusively on *the losses that resulted from the defendant's crime*," the dissent noted, the majority created a restitution scheme based on the defendant's relative culpability.[109] The majority's approach, according to the Chief Justice, had two major pitfalls. First, it would lead to only piecemeal restitution for victims like Amy, along with the perverse result that when the total number of possessors is "tragically large," the recovery would be

102. *Id.* at 1732 (Roberts, C.J., dissenting). The Chief Justice agreed with the majority that the statute imposes both proximate and actual cause requirements, the latter being the more pressing problem in the case of child pornography possession. *Id.* at 1731. Despite referencing 18 U.S.C. § 3664(e)'s requirement that, for the purpose of calculating restitution, the losses incurred by a victim must result from the offense, § 2259 offers no guidance on how to calculate the amount of loss that a particular possessor of child pornography has caused his victim. *Id.*
103. *Id.* at 1732–33.
104. *Id.* at 1732.
105. *Id.* at 1733.
106. *Id.*
107. *Id.* (internal quotation marks omitted).
108. *Id.*
109. *Id.* at 1733–34.

"pitiful."[110] Thus, as the dissent put it, despite the majority's demand that restitution orders not be trivial, "it is hard to see how a court fairly assessing this defendant's relative contribution could do anything else."[111] Second, the majority's discretion-based approach would lead to arbitrary application: A system that "asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault" runs afoul of the bedrock principal that "every criminal defendant receive due process of law."[112] To address its impossibly dysfunctional terms, the Chief Justice would return § 2259 to Congress to fix.[113]

In sharp contrast to both the majority and her dissenting colleagues, Justice Sotomayor would have affirmed the Fifth's Circuit's holding ordering the district court to award Amy the full amount of her losses.[114] According to Justice Sotomayor, this result follows directly from the plain text of the statute, which mandates restitution for the "full amount of the victim's losses."[115] And given this simple textual command, Justice Sotomayor noted there was reason to believe Congress intended to adopt an "aggregate causation standard," as settled principles of tort law "treat defendants like Paroline jointly and severally liable for the indivisible consequences of their intentional, concerted conduct."[116] The majority's holding that § 2259 requires a district court to calculate a restitution amount reflecting the defendant's "relative" contribution to the victim's losses therefore contravenes the statute's plain-text command that a court award victims the full amount of their losses.[117]

Justice Sotomayor noted that requiring defendants to pay for all of a victim's losses may be unfair (for example, defendants caught earlier may have to pay more than their "fair share"), but Congress deliberately struck such a balance, "placing the risk of loss . . . on the morally culpable possessors of child pornography and not their innocent child victims."[118] Further, the statute is fully capable of ensuring fairness in the schedule of payments based on the defendant's

110. *Id.* at 1734.
111. *Id.*
112. *Id.*
113. *Id.* at 1735.
114. *Id.* (Sotomayor, J., dissenting).
115. *Id.*
116. *Id.* at 1735, 1737. Like her colleagues on the Court, Justice Sotomayor agreed that § 2259 imposes a proximate cause requirement and focused her attention on the proper standard of determining causation in fact. *Id.* at 1736.
117. *Id.* at 1739.
118. *Id.* at 1742.

financial circumstances.[119] In light of the Court's holding, Justice Sotomayor directed her final comments to Congress, specifically suggesting two changes that Congress may adopt to clarify § 2259's causal standard: first, including the term "aggregate causation," and second, enacting fixed minimum restitution amounts to avoid disparities in courts' restitution calculations.[120] As I discuss further *infra*,[121] Congress adopted both suggestions in its proposed legislative response to *Paroline*.

### 3. Critiquing *Paroline*

The Supreme Court granted certiorari in *Paroline* to determine "what causal relationship must be established between the defendant's conduct and a victim's losses for purposes of determining the right to, and the amount of, restitution under § 2259."[122] This question left the Court divided into three camps, torn by competing readings of the murky statutory language and policy considerations.[123] Each camp offered a different answer to the following question: "How much of Amy's $3.4 million in losses should a court order Paroline to pay?"

The first—Justice Sotomayor—answered, "all," for the simple reason that § 2259(b)(1) orders a defendant to pay "the full amount of the victim's losses" (as long as the defendant caused the losses under an aggregate causation standard).[124] The second camp—the Chief Justice, Justice Scalia, and Justice Thomas—answered, "none," because the text of the statute "allows no recovery."[125] And the third camp—the majority—answered, "depends." Reluctant to affirm a system in which victims would receive either full restitution from any defendant or no restitution at all, the majority disregarded the text of § 2259,[126] looking instead to the statute's intent,[127] and created an entirely new restitution scheme by which

119. *Id.* at 1742–43.
120. *Id.* at 1744.
121. *See infra* Part IV.A.
122. *Paroline*, 134 S. Ct. at 1716.
123. *Id.* at 1734 (Roberts, C.J., dissenting).
124. Because nothing in the statute indicates that a restitution award should be proportional or relative, Justice Sotomayor argued, district judges should adhere to the statute's "full amount" language and order a defendant like Paroline to bear the entirety of his victim's losses. *See id.* at 1739 (Sotomayor, J., dissenting).
125. *Id.* at 1735 (Roberts, C.J., dissenting).
126. The majority, for example, gave almost no weight to either the "full amount" language that Justice Sotomayor relied on or § 3664(e)'s "as a result of the offense" language, which the Chief Justice emphasized. *See id.* at 1726–29 (majority opinion).
127. *See id.* at 1726–27 (noting "Congress' clear intent that victims of child pornography be compensated by the perpetrators who contributed to their anguish" and that "[i]t would undermine this

district courts "assess . . . the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses."[128]

Besides lacking statutory grounding, the majority's restitution scheme suffers from several practical shortcomings. First, the majority's proposed roadmap for implementation, which sets out the victim's losses as a starting point, as well as rough guideposts to assess "the relative causal significance of the defendant's conduct in producing those losses,"[129] is both confusing and unworkable. The Court's guideposts ask a court to simultaneously calculate backward from a victim's total losses (divided by the number of total offenders, presumably) and forward from various aggravating factors relating to the nature of the offense, including the defendant's role in reproducing or distributing images, any connection to the images' initial production, and the number of images involved. It seems the Court envisioned a two-part calculation involving (1) an initial baseline calculation of the losses for which a defendant would be responsible, assuming all offenders involved were equally liable (that is, losses divided by the number of offenders),[130] and (2) a subsequent enhancement based on the aggravating factors applicable to the defendant. But the Court's hesitance to provide further detailed guidance and its desire to leave the intricacies of calculation to lower court discretion[131] has left lower courts wondering how to actually implement the Court's roadmap.

Perhaps most befuddling is the Court's reference to various proxies for the "number of offenders involved," including the number of defendants convicted of producing, distributing, or possessing the victim's images, a rough estimate of those likely to be convicted in the future, and an even rougher estimate of the total

intent to apply the statute in a way that would render it a dead letter in child-pornography prosecutions of this type").

128. *Id.* at 1727–28.

129. *Id.* at 1728.

130. Several district courts have seemed to adopt this approach, calculating restitution (or at least a baseline) by dividing some measure of victim losses by some estimate of the number of other offenders involved. *See infra* note 149. Yet other courts have recognized that gauging the losses from continuing traffic of a victim's image is difficult, particularly when there is no "demarcation between the losses from the initial abuse and the losses from continued trafficking," as there was in *Paroline*. United States v. Reynolds, No. 12-20843, 2014 WL 4187936, at *5 (E.D. Mich. Aug. 22, 2014); *see also* United States v. Campbell-Zorn, No. CR–14–41–BLG–SPW, 2014 WL 7215214, at *4 (D. Mont. Dec. 17, 2014). Victims' advocates have also rejected the feasibility and fairness of this "per capita" approach. *See* Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61, 106–10 (2013) (highlighting several problems with this approach, including that "there is no way to determine the denominator").

131. *Paroline*, 134 S. Ct. at 1729.

number of offenders involved in harming the victim.[132] As the Court itself seemed to recognize,[133] these numbers are almost impossible to ascertain.[134] Meanwhile, the Court's guidance invites courts to increase restitution based on aggravating factors such as distribution and the number of images in possession, both of which have become increasingly irrelevant bases for distinguishing offender conduct in pornography cases.[135]

A second, related shortcoming of the Court's restitution scheme is that its reliance on the discretion of district courts in awarding restitution, coupled with a confusing set of guideposts, invites arbitrary implementation. As the Chief Justice put it, the Court's scheme asks district judges to award restitution based solely on "their own intuitions regarding comparative fault," thereby undermining the defendant's right to due process.[136] Although district courts readily exercise wide discretion in sentencing, their discretion with respect to child pornography restitution is virtually limitless, as Congress, the Supreme Court, and the Sentencing Guidelines all fail to provide workable guidance on calculating restitution. Both victims and defendants are left at the mercy of this ad hoc approach.[137]

Third, the Court's restitution scheme risks perpetuating nominal restitution amounts and piecemeal recovery.[138] In an apparent contradiction that mirrors the confusing "full-versus-proximate" language of § 2259 itself, the Court cautioned district courts against awarding token or nominal amounts, but simultaneously invited courts to consider the "broader number of offenders involved."[139] Consideration of the latter figure, which often reaches into the hundreds or thousands,

132. *Id.* at 1728.

133. The Court observed that most of the "broader number of offenders involved" will "of course[] never be caught or convicted." *Id.*

134. District courts have noted as much. *See* United States v. DiLeo, 58 F. Supp. 3d 239, 245 (E.D.N.Y. 2014) ("[I]t is hard to fathom how, at any given point in time, such estimates and predictions could be more than a wild guess."); *Reynolds*, 2014 WL 4187936, at *6 (stating that estimates of broader numbers of offenders and future offenders "strike this Court as incredibly speculative—this Court questions how you could ever have reasonable or reliable estimates of the above"); United States v. Crisostomi, 31 F. Supp. 3d 361, 364 (D.R.I. 2014); *see also* Cassell et al., *supra* note 130, at 106–10 (noting that "there is no way to determine" the number of defendants convicted of possessing the victim's images).

135. The vast majority of defendants in non-contact cases have distributed pornography, own large pornography collections, and possess images that are sadistic in nature. *See* discussion accompanying notes 146–49, *infra*.

136. *Paroline*, 134 S. Ct. at 1734 (Roberts, C.J., dissenting).

137. For discussion of how this ad hoc approach to restitution has affected victims following *Paroline*, see Part III.C. below.

138. *See Paroline*, 134 S. Ct. at 1734 (Roberts, C.J., dissenting) (noting that district courts have typically awarded under $5000 in restitution per case).

139. *Id.* at 1727 (majority opinion).

"could lead to exactly the type of trivial restitution awards the Court disclaims."[140] In any case, honing in on a middle-ground, "Goldilocks" amount that is more-than-token and less-than-all has left courts weary and most victims inadequately compensated.

### B. Post-*Paroline* Cases

Despite the Supreme Court's attempt to provide guidance to sentencing courts on both the causal standard for awarding restitution and how to calculate such awards, courts have continued to struggle to determine appropriate restitution amounts in *Paroline*'*s* wake. This Subpart presents the findings of an empirical study of child pornography cases following *Paroline*. As with the pre-*Paroline* data presented in Part II, this Subpart presents findings from aggregate-level analyses of over 700 child pornography cases in which restitution was statutorily mandated,[141] as well as an intimate analysis of pre-sentence reports and other court documents from a sample of 140 cases in which restitution was awarded and 100 cases in which no restitution was awarded. These analyses assess the extent to which *Paroline* has influenced whether district courts decide to award restitution, how courts calculate restitution, and whether courts follow *Paroline*'*s* guidance. The data reveals the following:

(1) In most cases, courts awarded no restitution, even when the offense was hands-on;
(2) The size of the restitution awards continues to vary significantly regardless of offense type, but much less dramatically than before *Paroline*;
(3) The average and median restitution awards were larger in hands-on offenses than in hands-off offenses, and median awards in the latter category were similar to their pre-*Paroline* counterparts;

140. *Id.* at 1744 (Sotomayor, J., dissenting). As Justice Sotomayor points out, "in light of the large number of persons who possess her images, a truly proportional approach to restitution would lead to an award of just $47 against any individual defendant [in Amy's case]." *Id.*; *see also id.* at 1734 (Roberts, C.J., dissenting) ("[T]o the extent it is possible to project the total number of persons who have viewed Amy's images, that number is tragically large, which means that restitution awards tied to it will lead to a pitiful recovery in every case.").

141. The data was obtained from the United States Sentencing Commission and reflects cases decided through September 22, 2014, and coded through November 2014. The dataset includes only those cases for which the Commission received complete guideline application information and in which the primary sentencing guideline was U.S. Sentencing Guidelines § 2G2.1 or § 2G2.2. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL (2014).

(4) Very few courts and probation officers referenced *Paroline* generally, or any of *Paroline's* guideposts specifically, when calculating restitution;
(5) Restitution awards bore no correlation with aggravating factors such as the number of images, nature of the images, or the nature of distribution; and
(6) The large majority of offenders could not afford to pay any type of fine and had negative cash flows or negative net worth at sentencing.

Each of these conclusions is described in more detail *infra*.

### 1. Most Courts Awarded No Restitution

Following *Paroline*, most courts awarded no restitution in child pornography cases. In fact, restitution was awarded in only 22.2 percent of child pornography cases—that is, in only 189 out of 853 cases. Nevertheless, as Table 4 shows, the percentage of cases in which restitution was ordered was significantly higher among post-*Paroline* cases than among pre-*Paroline* cases. For example, while courts awarded restitution in 18.4 percent of production cases before *Paroline*, they awarded restitution in 29.5 percent of production cases following *Paroline*.

**TABLE 4: PERCENTAGE OF POST-*PAROLINE* CHILD PORNOGRAPHY CASES IN WHICH RESTITUTION WAS ORDERED, BY OFFENSE TYPE**

| | Total number of child pornography cases | Number of cases in which restitution was ordered | Percentage of (post-*Paroline*) cases in which restitution was ordered | Percentage of pre-*Paroline* cases in which restitution was ordered |
|---|---|---|---|---|
| Production | 166 | 49 | 29.5% | 18.4% |
| Distribution | 442 | 98 | 22.2% | 12.9% |
| Possession | 245 | 42 | 17.1% | 12.0% |

The increased rates of awarding restitution post-*Paroline* comes as no surprise, given that *Paroline* made clear that in awarding mandatory restitution courts need not determine the exact amount of loss that the defendant caused, but should instead use their discretion and judgment to estimate an award proportional to the harm of the offense. This guidance eliminated one reason courts before *Paroline* had declined to award restitution.

Nonetheless, in the majority of cases following *Paroline*, victims were awarded no restitution at all. To further investigate why, I analyzed court documents from a random sample of 100 cases in which no restitution was given. Although courts gave five reasons for denying restitution (see Table 5), the majority (62 percent) did so because no victim in the case chose to request restitution.[142] Thus, in at least 78 percent of post-*Paroline* cases, courts were under no obligation to award restitution under current law.[143]

**TABLE 5: REASONS WHY COURTS HAVE DENIED RESTITUTION FOLLOWING *PAROLINE***

| Reason Given by Court | Percentage of sample (n=100) |
|---|---|
| No victims had been identified | 10% |
| Victims had been identified but no victims had requested restitution | 62% |
| Victims requesting restitution had already been paid in full | 6% |
| The court tabled the restitution issue for a later date for an unknown reason | 20% |
| No causal connection between the offense and the victim's losses | 2% |

### 2. Magnitude of Restitution Awards Continue to Vary Dramatically, But Less So Than in Pre-*Paroline* Cases, and Most Courts Award Restitution in Amounts Below $6000.

Following *Paroline*, courts continued to award restitution in varied amounts regardless of the offense type. Overall, awards ranged from $56 to

142. The fact that many victims in this subset chose not to seek restitution is concerning and reflects the broader reality that most victims decline to request restitution. *See infra* note 241 and accompanying text; Part III.C (discussing why child pornography victims are especially reluctant to seek restitution).

143. That is, in 78% of subsample cases in which restitution was denied, victims had not been identified, had not requested restitution, or had already been fully compensated. Because the law requires restitution only for those victims who, after being identified, have requested restitution for outstanding losses, courts have obviously declined to award restitution in these cases.

$976,418 (a range of $976,362).[144]

**TABLE 6: MINIMUM, MAXIMUM, AVERAGE, AND MEDIAN RESTITUTION AWARDS IN POST-*PAROLINE* CHILD PORNOGRAPHY CASES, BY OFFENSE TYPE**

| | Minimum award | Maximum award | Average award | Median award |
|---|---|---|---|---|
| Production (n=37) | $56 | $250,000 | $23,447 | $6,000 |
| Distribution (n=73) | $500 | $976,418 | $18,262 | $3,000 |
| Possession (n=35) | $500 | $33,000 | $6,636 | $4,000 |

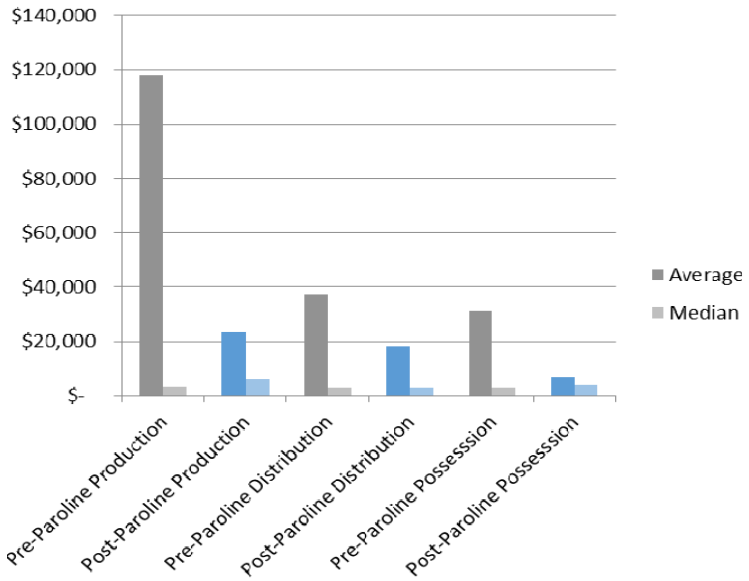
As Table 6 shows, however, despite their sizeable range, post-*Paroline* restitution awards, like their pre-*Paroline* counterparts, have tended to be low. For example, the median restitution award for production offenses was only $6000. In fact, according to cumulative frequency figures, the majority of courts awarded restitution in low amounts—50 percent between $56 and $3000 and 65.5 percent between $56 and $5000. By contrast, only 2.8 percent of courts awarded restitution in amounts over $100,000, and only one award exceeded $250,000.

But post-*Paroline* restitution awards have differed from pre-*Paroline* awards in several important respects. As Figure 2 depicts, following *Paroline*, average awards are much lower though median awards in production and possession cases are slightly higher.[145] Minimum awards in distribution and possession cases have gone up as maximum awards have plummeted. In general, then, most awards have remained low (with median awards between $3000 and $6000), while extreme awards have pulled closer toward the median.

144. Again, it is important to note that these award amounts reflect the total amount ordered from a single defendant to all of his victims. Thus, the amount given to any victim is almost always a fraction of the awards figures cited here.

145. Post-*Paroline* figures are represented in shades of blue.

FIGURE 2: COMPARISON OF AVERAGE AND MEDIAN AWARDS PRE- AND POST-*PAROLINE*




### 3. Very Few Courts and Probation Officers Referenced *Paroline* Generally, or Any of *Paroline*'s Guideposts Specifically, When Calculating Restitution.

Of the 140 cases awarding restitution and the 100 randomly selected cases denying restitution following *Paroline*, only nine explicitly referenced *Paroline* in court documents. Five of these references came from probation officers citing *Paroline* in pre-sentence reports and none incorporated any of *Paroline*'*s* guideposts into the court's restitution calculation. A supplementary search of opinions available on Westlaw revealed only eighteen district court cases that explicitly cited *Paroline* when awarding restitution.[146] In these eighteen cases, courts adopted a range of approaches to calculate restitution.[147]

146. The search retrieved cases through May 31, 2015.

147. *See* United States v. Baslan, No. 13 CR 220(RJD), 2015 WL 1258158, at *1–6 (E.D.N.Y. Mar. 17, 2015) (awarding $25,000 and $16,000 to two victims per the victims' request after considering these amounts to be close to those prescribed by the Amy and Vicky Child Pornography Victim Restitution Improvement Act); United States v. Monge, No. 5:14-CR-065-JLQ, 2015 WL 787099, at *6–7

The most common approach was to divide some measure of the victim's losses by some measure of the number of total offenders.[148] Other courts calculated the

(C.D. Cal. Feb. 25, 2015) (awarding $3000 to each of seven victims with no methodology); United States v. Hanlon, No. 2:14-CR-18–FtM–29DNF, 2015 WL 310542, at *3–5 (M.D. Fla. Jan. 23, 2015) (denying restitution because the government failed to provide evidence of proximate harm caused by defendant); United States v. Bellah, No. 13-10169-EFM, 2014 WL 7073287, at *4 (D. Kan. Dec. 12, 2014) (averaging other awards to determine restitution and ratcheting it up based on the number of images possessed to reach awards of between $1500 and $7500 to four victim series); United States v. Massa, No. 14CR471 WQH, 2014 WL 6980503, at *6–7 (S.D. Cal. Dec. 9, 2014) (awarding $1000 or $8000 to four victims as generic "reasonable" amounts); United States v. Cooley, No. 4:14CR3041, 2014 WL 5872720, at *3 (D. Neb. Nov. 12, 2014) (ordering $2207 to be split among five victims in amounts from $18 to $1910, after halving the overall losses to estimate losses based on trafficking and then dividing by an estimate of 10,000 offenders); United States v. DiLeo, 58 F. Supp. 3d 239, 248–49 (E.D.N.Y. 2014) (dividing victim losses by the number of convicted defendants with restitution orders and decreasing the award slightly based on the presence of additional offenders soon to be prosecuted, for a total of $2000); United States v. Wencewicz, No. CR 13-30-M-DWM, 2014 WL 5437057, at *2 (D. Mont. Oct. 24, 2014) (awarding $29,859 to one victim after dividing the general losses by the number of previous restitution orders and adding attorney's fees, but denying another victim's request as "entirely arbitrary," unrelated to the defendant's causal role, and outdated); United States v. McIntosh, No. 4:14cr28, 2014 WL 5422215, at *7 (E.D. Va. Oct. 22, 2014) (awarding $14,500 after considering each *Paroline* factor but engaging in no formal calculation); United States v. Daniel, No. 3:07–CR–142–O, 2014 WL 5314834, at *2 (N.D. Tex. Oct. 17, 2014) (awarding $368.28 after dividing the victim's outstanding losses by the number of defendants found to have contributed to that loss); United States v. Sanders, 52 F. Supp. 3d 1329, 1341–42 (N.D. Ga. 2014) (finding it impossible to make factual findings of the victim's losses when psychological reports detailed harm resulting only from initial abuse and not from possession of pornography); United States v. Miner, No. 1:14-cr-33 (MAD), 2014 WL 4816230, at *11–12 (N.D.N.Y. Sept. 25, 2014) (awarding the median of awards granted by other courts); United States v. Reynolds, No. 12-20843, 2014 WL 4187936, at *7 (E.D. Mich. Aug. 22, 2014) (awarding between $8000 and $14,500 in restitution after increasing the baseline award of $1000 based on the number of previous restitution orders and the nature and number of images); United States v. Jacobs, No. 10-801, 2014 WL 4182338, at *6 (D.N.J. Aug. 21, 2014) (awarding the full amount of historic and future healthcare costs, $75,000); United States v. Watkins, No. 2:13-cr-00268 LKK AC, 2014 WL 3966381, at *7–*8 (E.D. Cal. Aug. 13, 2014) (awarding $2192 in restitution after dividing the losses by the number of prior restitution orders); United States v. Hernandez, No. 2:11-CR-00026–GEB, 2014 WL 2987665, *10 (E.D. Cal. July 1, 2014) (awarding $2283 in restitution after dividing the victim's losses by the number of prior restitution awards); United States v. Crisostomi, 31 F. Supp. 3d 361, 365 (D.R.I. 2014) (calculating victim awards by dividing outstanding losses by an estimate of additional offenders); United States v. Galan, No. 6:11-cr-60148–AA, 2014 WL 3474901, at *8 (D. Or. July 11, 2014) (awarding $3433 after dividing post-offense losses by the number of standing restitution orders); *see also* United States v. Rogers, 758 F.3d 37, 39–40 (1st Cir. 2014) (affirming the district court's award of $3150 and its method of calculating the cost of eighteen therapy visits). A victim series refers to the group of victims depicted in a particular series of child pornography images and/or videos.

148. Most of the cases cited *supra* in note 147 employed this methodology. *But see Bellah*, 2014 WL 7073287, at *4 ("The Court is not persuaded that this formula adequately results in fair restitution awards in general, and specifically not in this case in which one victim has four previous restitution awards and another has 502.").

median award given in other cases or simply chose some "reasonable" amount.[149]

Several courts have bluntly declared their frustration with *Paroline*, particularly its confusing and impractical guidance for lower courts.[150] Seeking to avoid "the bramble bush that is the *Paroline* 'framework,'" some courts have expressly chosen to follow the tried-and-tested methods of other district courts, even if the origin of these methods precedes *Paroline*.[151]

### 4. Restitution Awards Bore No Correlation With Aggravating Factors Such as the Number of Images, Nature of the Images, Nature of Distribution, and Means of Possession.

To gauge whether courts have followed *Paroline's* guideposts without explicitly referencing the case, I also analyzed the relationship between restitution awards and the factors that *Paroline* suggest ought to guide the restitution calculation, including aggravating factors related to the nature of the crime (such as the number of images in the defendant's possession).[152] None

149. *See id.* (averaging other awards to determine restitution and ratcheting up based on the number of images to reach awards of between $1500 and $7500 to four victim series); *Massa*, No. 2014 WL 6980503, at *6–7 (awarding $1000 or $8000 to four victims as generic "reasonable" amounts).

150. *See, e.g.*, United States v. Campbell-Zorn, No. CR 14-41-BLG-SPW, 2014 WL 7215214, at *3 (D. Mont. Dec. 17, 2014) (noting that "the bramble bush that is the *Paroline* 'framework'" is "seemingly useful in a theoretical sense" but "very difficult, and very limited, [in] practical application"); *DiLeo*, 58 F. Supp. 3d at 244 ("With the bulk of compensable loss long suffered, with potential responsible parties at varying levels of criminal culpability[,] . . . it is a struggle to conceive of a system that will not exceed loss and perhaps trigger creation of a judicial clearinghouse, where the courts become unseemly paymasters smoothing out restitution contributions among pornographers."); *Miner*, 2014 WL 4816230, at *9 (noting that district courts "have expressed their concern with the lack of precise guidance from Congress and the Supreme Court in deciding restitution awards in these circumstances"); *Crisostomi*, 31 F. Supp. 3d at 364 (explaining that "while some of the *Paroline* factors are determinable with some precision, a number of other factors are virtually unknown and unknowable, regardless of the detail available in the record").

151. For example, the district court in *Wencewicz* developed a formula to calculate general losses (the sum of post-offense treatment and counseling costs, post-offense educational or vocational losses, and post-offense costs "that are impossible to trace to an individual defendant alone" (for example, the cost of evaluation), minus costs directly related to another defendant or litigation). *United States v. Wencewicz*, 2014 WL 5437057, at *3. The court then divided this amount by the number of previous restitution orders and, finally, added attorney's fees, to arrive at a restitution award of $29,859. *Id.* at *4–6. In justifying this method, the court relied on a pre-*Paroline* case, *United States v. Gamble*, 709 F.3d 541, 554 (6th Cir. 2013). Another district court has since adopted this approach. *See Campbell-Zorn*, 2014 WL 7215214, at *5.

152. This analysis does not examine the relationship between the amount of the victim's losses and the restitution awarded because court documents noted the amount of the victim's losses in only a small fraction of cases. Thus, any conclusions drawn from such a sample would be meaningless. As a

of these factors bore any correlation with the size of the court's restitution award.[153]

The total number of images[154] and the possession of images depicting sado-masochistic or violent conduct[155] were unrelated to the size of the restitution award. The Supreme Court in *Paroline* specifically highlighted the number of images as an aggravating factor that bore on the defendant's relative role in causing the victim's losses.[156] Following *Paroline*, some courts have increased a victim's restitution award based on the number and nature of the images in the defendant's possession.[157] Others, however, have expressly rejected including these factors in the restitution calculation, finding it inappropriate to calibrate punishment to factors that are widely characteristic of all child pornography offenses.[158]

Data from this and previous studies indeed calls into question the usefulness of tailoring punishment and restitution to the number and nature of images in a defendant's possession given that today's offenders often have very large collections of images that display a wide range of gruesome conduct. A 2012 study by the Sentencing Commission, for example, found that the vast majority of non-contact child pornography offenders possess in excess of 600 images, and most of these images depict sado-masochistic conduct that subjects the defendants to

purely anecdotal observation, several courts have chosen to begin their restitution calculation with the victim's losses. *See supra* note 138 and accompanying text. In these cases, the restitution amount would likely bear some correlation with the victim's losses.

153. By "bore no correlation" or "unrelated," I mean that the Pearson's correlation coefficient between restitution award and each factor was close to zero, that is, an absolute value of less than 0.05.

154. Under § 2G2.2 app. note 4(B)(ii) of the Sentencing Guidelines, courts are directed to multiply each video by seventy-five to calculate the total number of images for sentencing purposes. U.S. SENTENCING COMM'N, *supra* note 141. Section 2G2.2(b)(7) directs courts to apply incremental sentencing enhancements of two to five levels for the number of images in possession. *Id.*

155. Under § 2G2.2(b)(4), courts are directed to apply a four-level sentencing enhancement for the possession of "material that portrays sadistic or masochistic conduct or other depictions of violence." U.S. SENTENCING COMM'N, *supra* note 141. This type of conduct may include a variety of forced sexual conduct including oral, vaginal, or anal penetration by adults, other children, and inanimate objects; urination or defecation; bestiality; and gagging or physical restraining of victims. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 90–91 (describing representative images of child pornography).

156. Paroline v. United States, 134 S. Ct. 710, 1728 (2014).

157. *See, e.g.*, United States v. Reynolds, No. 12-20843, 2014 WL 4187936, at *7 (E.D. Mich. Aug. 22, 2014) (increasing baseline award in part based on sadistic nature and number of images).

158. United States v. DiLeo, 58 F. Supp. 3d 239, 246 (E.D.N.Y. 2014); *see also* United States v. Dorvee, 616 F.3d 174, 186 (2d Cir. 2010) (noting that § 2G2.2 enhancements, including for number of images, apply to most defendants and therefore fail to distinguish the particular nature and circumstances of an individual defendant).

enhancements under § 2G2.2 of the Sentencing Guidelines.[159] And among cases following *Paroline*,[160] the average number of total images in a single defendant's possession was about 62,000, while the median was about 5700. Further, in 99 percent of non-contact and contact cases, the images that the defendant produced depicted sado-masochistic or violent conduct.[161] In addition, 98 percent of non-contact cases involved a prepubescent minor.[162]

While defendants have become increasingly indistinguishable with respect to the number and nature of the images they possess, several commentators have noted that defendants do differ with respect to the particular ways in which they distribute and come to possess child pornography, as well as in their degree of technological sophistication.[163] Methods of distribution include both impersonal means such as P2P file-sharing programs,[164] chat rooms,[165] newsgroups and bulletin boards,[166] commercial websites,[167] and more personal

159. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 141, 209 (noting that in fiscal year 2010, 96.3% of all § 2G2.2 cases involved an image of a prepubescent minor, 74.2% involved an image depicting sadistic or masochistic conduct or other forms of violence, and 69% involved 600 or more images).

160. That is, all 140 cases in which restitution was ordered and 100 randomly selected cases in which restitution was denied.

161. For the purposes of this analysis, this type of conduct includes conduct described *supra* in note 155. As the National Center for Missing and Exploited Children (NCMEC) has noted, a majority of victims have at least one image depicting oral, anal, or vaginal penetration. Michelle Collins, Vice Pres., Exploited Children Div. and Assistant to the Pres. of the Nat'l Ctr. for Missing & Exploited Children, Testimony to the U.S. Sentencing Commission: Federal Child Pornography Offenses 5 (2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Collins.pdf.

162. Such conduct subjects a defendant to a two-level increase pursuant to § 2G2.2(b)(2). U.S. SENTENCING COMM'N, *supra* note 141.

163. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 61. Some offenders, for example, claim to be unaware that by installing P2P software they would be sharing certain files with others on the same network. *Id.* Circuits have split on the issue of whether the Sentencing Guidelines' distribution enhancement has a mens rea requirement. *Compare* United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015); United States v. Baker, 742 F.3d 618, 622 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1313 (10th Cir. 2013), *with* United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2014); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013); United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009).

164. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 48–51 (describing intricacies of P2P file sharing).

165. Chat rooms facilitate virtual, real-time discussions based on common interests, via text or video. *See id.* at 53.

166. Bulletin boards allow users to read and post messages and to link to trading groups or to temporarily available online images. *See id.* at 54.

167. *See id.* at 55.

direct-trading means such as email, instant messaging, webcasting, and videostreaming.[168]

In addition, today's offenders vary in the extent to which they demonstrate deliberate, personal involvement in distributing and obtaining child pornography.[169] Some, for example, engage in offender communities in which offenders can "connect with one another, commiserate about their marginalized status in society, and validate and normalize their sexual interest in children."[170] Whereas P2P file sharing usually does not involve direct communication between offenders, child pornography communities often involve offenders reaching out to one another online to seek and share specific material.[171] These communities facilitate direct offender communication and content trading, while validating, normalizing, and encouraging offenders' deviant beliefs and behavior.[172] As a result, research has found that some offenders who participate in such communities progress from simply viewing child pornography to actually committing hands-on sexual abuse.[173] Offenders using other personal means of distribution and possession, such as chat rooms, may also demonstrate a higher degree of intentionality and involvement by seeking out specific images or distributing certain images in exchange for further production.[174]

To examine whether such variety in the means of distribution accounted for the variety among restitution awards (that is, whether courts increased restitution awards for conduct that was more personal or that demonstrated a higher level of intentionality of involvement), I analyzed the correlation between these

168. *See id.* at 56. Other, emerging methods include anonymizing software and the "invisible internet." *Id.* at 60.

169. *See id.* at D-20 (describing the statement of Susan Howley, Chair of Victims' Advisory Group, advocating revising punishment to reflect offenders' degree of deliberate involvement in possessing and distributing pornography).

170. *Id.* at 92.

171. *Id.* at 93.

172. *Id.* at 94. Offender communities are often organized, exclusive, and hierarchical. An offender may heighten his status in the community by building up his child pornography collection, distributing new or hard-to-find images and videos, and sharing technology know-how. *Id.* at 95–96.

173. *See* Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCHIATRY PSYCHOL. & L. 79, 81 (noting that "the longer sexual fantasies are maintained and elaborated on, the greater the chance that the behaviour will be acted out in real life"); *see also* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 102–03 & nn.172–78 (discussing and citing studies affirming correlation between having sexually deviant fantasies and hands-on sexual offending). Because of the connection between participation in child pornography communities, the normalization of child pornography, and potential for further hands-on abuse, the Sentencing Commission has advocated revising the relevant guidelines to reflect the degree of an offender's involvement in such a community. *See id.* at 320.

174. USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at D-20.

characteristics and whether and how much restitution was granted.[175] Predictably, a court's decision to award restitution and the amount of restitution bore no correlation with the defendant's use of personal distribution methods or various aspects relating to the way in which he distributed or came to possess images (that is, whether he coerced images, distributed images to a minor, distributed images in exchange for opportunities to commit abuse, and so on).

So what have courts relied on in calculating restitution awards in the post-*Paroline* period? In 95 percent of cases, courts engaged in no formal calculation whatsoever to award restitution and offered no formal reasoning to justify their awards.[176] Additionally, in most cases (55 percent) restitution awards per victim tended to be whole numbers divisible by $500 (e.g., $6000, $3000, or $1500), suggesting that most courts have followed a "gut-instinct" approach to awarding restitution. In some cases, restitution awards were explicitly agreed upon by both parties.[177] And again, it is worth mentioning that in the majority of cases (66 percent), courts after *Paroline* awarded restitution in amounts under $5000 per defendant, which means that any given victim usually received well less than this amount. Thus, it seems that courts have not only declined to calibrate their restitution calculation to factors related to the nature of the offense (as *Paroline* advised), but have also devised their own, seemingly ad hoc system of ordering restitution in low-level amounts—a system devoid of any formality, calculation, or incorporation of offense-specific characteristics.

### 5. Vast Majority of Offenders Could Not Afford to Pay Any Type of Fine and Had Negative Monthly Cash Flow or Negative Net Worth

In the overwhelming majority of child pornography cases preceding *Paroline* (92 percent), courts waived recommended fines in light of the defendants'

175. Again, this analysis involved examining the defendant's actual conduct as described in the PSRs.

176. "Formal calculation" refers to, for example, awarding restitution equal to the full amount of a victim's losses or in an amount equal to the victim's losses divided by the number of previous restitution orders. Cases with no formal calculation include cases in which sentencing documentation (for example, PSRs or Statement of Reasons) or formal written opinions contained no formal calculation as well as those in which I could not discern the court's calculation from the variables provided (for example, the amount of the victim's losses, number of defendants, and so on).

177. A precise percentage of courts that awarded agreed-upon amounts is impossible to ascertain because of limited data on whether the defendant agreed to the award amount. Nonetheless, some courts expressly stated that this was the case. *But see* United States v. Miner, No. 14–33, 2014 WL 4816230, at *9 (N.D.N.Y. Sept. 25, 2014) (declining to award an agreed-upon amount of $3000 because the amount was inappropriately arbitrary and choosing instead to use the median of awards granted by other courts).

financial circumstances. This trend continued following *Paroline*, holding true for 95 percent of all post-*Paroline* cases. Additionally, in over 96 percent of cases in which courts awarded restitution, courts declined to impose a fine. As with pre-*Paroline* cases, a court's decision to waive a fine was unrelated to the type of offense or the amount of restitution awarded, which indicates that a defendant's ability to pay played no role in the court's restitution calculation.

Further analysis of the defendant's financial circumstances in post-*Paroline* cases reveals that the overwhelming majority (80 percent) of these defendants experienced negative monthly cash flows or had negative net worth at the time of sentencing.[178] This conclusion debunks a commonly held belief that child pornography offenders are generally more well-off than other types of offenders.[179] Whether a defendant's financial status is related to the restitution he must pay is still an open question, however. Further research is needed to determine whether the nearly ubiquitous nature of financial instability among defendants helps explain the courts' tendency to order low levels of restitution.[180]

### 6. Making Sense of the Post-*Paroline* Restitution Landscape

This Article's examination of child pornography cases following *Paroline* has demonstrated that despite the Supreme Court's effort to make § 2259 workable by clarifying the appropriate causal standard and suggesting factors to guide a court's restitution calculation,[181] the restitution system remains incoherent and internally inconsistent. Few courts have chosen to follow *Paroline's* guideposts, though some have attempted to begin their award calculation by dividing victim losses by previous restitution orders or estimates of total offenders. Nevertheless, the relationships between restitution (specifically, whether it was awarded and in

178. For this analysis, I reviewed the PSRs from the post-*Paroline* dataset. Each PSR contains a section on the defendant's ability to pay, which details the defendant's assets, liabilities, and cash flow.

179. Numerous commentators have profiled "typical" child abusers, predators, and pedophiles as upper middle class. *See, e.g.*, LEIGH BAKER, PROTECTING YOUR CHILDREN FROM SEXUAL PREDATORS 194 (2002) (citing an FBI profile of a typical sexual predator); KAREN COOK, UNDERSTANDING RITUAL ABUSE (1991) (describing a typical ritual child abuser as often middle or upper class); ROBERT CROOKS & KARLA BAUR, OUR SEXUALITY 536 (2011) (describing "many" cyberspace pedophiles as upper middle class white males); L. Mattas Curry, *Net Users Find Validation for Socially Unacceptable Behavior*, 31 AM. PSYCH. ASS'N 21 (2000) (describing most computer sex offenders as upper middle class).

180. Any such connection would be despite § 2259's explicit prohibition on declining restitution based on the defendant's economic circumstances. *See* 18 U.S.C. § 2259(b)(4)(B)(i) (2012).

181. United States v. Wencewicz, No. CR13–30–M–DWM, 2014 WL 5437057, at *5 (D. Mont. Oct. 24, 2014) ("*Paroline* effectively restructured restitution awards in the realm of child pornography and, in doing so, rejected the way in which many of those [pre-*Paroline*] awards were determined.").

what amount) and various factors (from the number of images possessed to the manner of distribution) are essentially random. Instead of interpreting *Paroline*'*s* "starting point" or guideposts in any consistent or formal manner, courts seemed to take *Paroline* to mean that they need simply to exercise discretion by using some logical method of calculating restitution. Several courts seem to have given up on finding any meaningful guidance in *Paroline*, calling on Congress to recreate a workable restitution system.

## III. RESTITUTION AND SECONDARY VICTIMIZATION

The previous analysis strongly suggests that despite *Paroline*'*s* self-proclaimed guidance, district courts have been awarding restitution without any internal consistency. Victims of identical child pornography possession offenses can receive restitution awards varying from $500 to $7500, or no restitution at all, simply based on the judges' intuition of how much harm a particular defendant proximately caused. The unpredictability of restitution awards has ramifications not just for judicial coherence and defendant due process, but also for the rights and wellbeing of child pornography victims. Instead of promoting victim welfare by compensating a wide range of losses, as restitution in this context is meant to do,[182] the judiciary's ad hoc approach to restitution has harmed many victims by secondarily victimizing them through the sentencing process. This Part discusses the nature of this victimization and how courts post-*Paroline* have inadvertently enhanced the potential for secondary victimization in the current restitution system.

### A. Child Pornography Victims as "Polyvictims"

In general, victims of child pornography have been the victims of child sex abuse and suffer a range of physical, psychological, and emotional harms as a result.[183] But victims of child pornography also endure harms distinct from those

182. *See supra* Part I.A.

183. These harms include physical pain and bodily damage, psychological and emotional trauma manifested through depression, withdrawal, or aggression, and difficulty building social relationships. *See* JONATHAN WILLOWS, MOVING ON AFTER CHILDHOOD SEXUAL ABUSE: UNDERSTANDING THE EFFECTS AND PREPARING FOR THERAPY 21–24 (2009). These harms have long-term effects as well. *See, e.g.*, *id.* at 24–25; KAREN A. DUNCAN, HEALING FROM THE TRAUMA OF CHILDHOOD SEXUAL ABUSE 22–29, 97–103 (2004); Beth E. Molnar et al., *Child Sexual Abuse and Subsequent Psychopathology: Results From the National Comorbidity Survey*, 91 AM. J. PUB. HEALTH 753, 754–55 (2001); Holly L. Wegman & Cinnamon Stetler, *A Meta-Analytic Review of the Effects of Childhood Abuse on Medical Outcomes in Adulthood*, 71 PSYCHOSOMATIC MED. 805 (2009).

that stem from the initial abuse—harms that result from the ongoing circulation of their images and the knowledge that these images are "available in perpetuity."[184] Both Congress and the Supreme Court have highlighted these unique harms.[185] In impact statements submitted to the court, victims themselves have explained that their suffering is never-ending, for they know that their images are being shared daily, exploited for sexual gratification, and manipulated to groom new victims for sexual abuse.[186] They also fear being recognized and tracked down by those who have viewed their images.[187]

As a result of having to endure recurring victimization from several different sources—from their initial abusers to the knowledge of the widespread sharing and permanent existence of their images—victims of child pornography are often "polyvictims."[188] As such, they are particularly vulnerable to the psychological

184. Tink Palmer, *Behind the Screen: Children Who Are the Subjects of Abusive Images*, *in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET: UNDERSTANDING THE OFFENCE, MANAGING THE OFFENDER, HELPING THE VICTIMS 61, 71 (Ethel Quayle & Max Taylor eds., 2005).

185. Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. § 2(2) (noting that harms of child pornography are "more extensive than the harms caused by child sex abuse alone because child pornography is a permanent record of the abuse of the depicted child, and the harm to the child is exacerbated by its circulation"); Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121(1)(2), 110 Stat. 3009, 3009-26 (1996) (noting that child pornography's continued existence causes ongoing harm "by haunting [victims] in future years"); Paroline v. United States, 134 S. Ct. 1710, 1716–17 (2014) ("[H]arms caused by child pornography . . . are still more extensive [than the harms of child sex abuse alone] because child pornography is 'a permanent record' of the depicted child's abuse, and 'the harm to the child is exacerbated by [its] circulation.'") (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

186. Notice of Filing Victim Restitution Claim and Impact Statements at 4, United States v. Faxon, No. 09-CR-14030-DLG (S.D. Fla. Nov. 3, 2009), ECF No. 34-15 ("Unlike other forms of exploitations, this one is never ending. Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways."); Victim Impact Statement of Amy at 3, *Faxon*, No. 09-CR-14030-DLG, ECF No. 34-9 ("I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids . . . then tell them what to do? Will they see me and think it's okay for them to do the same thing?"); *Paroline*, 134 S. Ct. at 1717 ("'My life and my feelings are worse now because the crime has never really stopped and will never really stop . . . It's like I am being abused over and over and over again.'") (quoting Victim Impact Statement of Amy, *supra*).

187. *Paroline*, 134 S. Ct. at 1717 ("'Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again.'") (quoting Victim Impact Statement of Amy, *supra* note 186); Victim Impact Statement, *Faxon*, No. 09-CR14030-DLG, ECF No. 34-6 at 8 ("I have had people follow me, find me from my pictures I didn't even know were out there. I have been found even by my [social networking website] profile . . . ."); *see also* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 114 (explaining additional elements of recurrent victimization through existence of images).

188. NAT'L CRIME VICTIM LAW INST., POLYVICTIMS: VICTIMS' RIGHTS ENFORCEMENT AS A TOOL TO MITIGATE "SECONDARY VICTIMIZATION" IN THE CRIMINAL JUSTICE SYSTEM 1 (2013).

and physical repercussions of victimization and at increased risk of suffering distress and trauma at the hands of the criminal justice system.[189]

## B. Secondary Victimization From the Criminal Justice System

While the victims' rights movements and associated legislation have highlighted the benefits of victim participation in the criminal justice system,[190] far less attention has been paid to the criminal justice system's propensity to cause "secondary victimization." Secondary victimization is the process by which victims are negatively impacted, not by the initial criminal offense, but by the response of legal institutions and actors to the victim.[191] These negative effects arise from the conflicting goals of the criminal justice system on the one hand and victim needs on the other:

> Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. . . . Victims often need to control or limit their exposure to specific reminders of the[ir] trauma; the court requires them to relive the experience by directly confronting the perpetrator.[192]

189. *Id.*

190. These benefits include facilitating the healing process, empowering victims, restoring their sense of control, providing them public acknowledgement of their suffering, and granting restitution. *See* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention,* 16 J. TRAUMATIC STRESS 159, 160–61 (2003); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health,* 23 J. TRAUMATIC STRESS 182, 182 (2010); *see also* Margaret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71, 72 (2011) (noting that some studies "have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment").

191. *See* NAT'L CRIME VICTIM LAW INST., *supra* note 188, at 1 (defining secondary victimization as "revictimization at the hands of the criminal justice system"); U.N. OFFICE FOR DRUG CONTROL & CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS 9 (1999), http://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf (defining secondary victimization as "victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim"); *see also* Malini Laxminarayan, *Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type,* 25 SOC. JUST. RES. 390, 392 (2012) (describing secondary victimization as negative experiences caused by criminal proceedings or "societal reactions in response to a primary victimization that may be perceived as a further violation of rights or entitlements by the victim").

192. Herman, *supra* note 190, at 159–60.

Partly because of these contradictions, most crime victims decline to get involved in criminal proceedings.[193] This reluctance is especially acute among victims of child pornography, whose feelings of guilt, self-blame, and embarrassment over their initial abuse are exacerbated by the existence of images memorializing their suffering.[194]

The effects of secondary victimization, moreover, may be acute and can range from increased post-traumatic stress symptoms, feelings of frustration and alienation, decreased self-esteem, and reduced trust in the legal system.[195] But secondary victimization is not automatic. Rather, its occurrence depends on the nature of the victim's experience navigating the legal system.[196] Victims who feel they have been treated fairly, included in the process, and afforded their rights tend to experience less secondary victimization and greater satisfaction with the justice system.[197] By contrast, victims who feel that they have been treated unfairly—for example, blamed for the offense, treated with skepticism or disbelief, left uninformed, or prevented from exercising their rights—are more likely to experience trauma and feel mistreated by the justice system.[198] And because they are increasingly likely to be in contact with the criminal justice system, polyvictims are more likely to suffer secondary victimization or experience exacerbated trauma symptoms as a result of their involvement in legal proceedings.[199]

### C. Why the Post-*Paroline* Restitution System Facilitates Secondary Victimization

As polyvictims, child pornography victims are more likely than crime victims generally to be subject to secondary victimization, and this risk is further heightened by the dysfunctional nature of the post-*Paroline* restitution system for

193. *See id.* at 161.
194. USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 111–12.
195. *See* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 314 (2002); Parsons & Bergin, *supra* note 190, at 183 (noting that some research reports exacerbation of mental health problems at the hands of the justice system).
196. Herman, *supra* note 190, at 162.
197. Victims who feel included and empowered through participation in the criminal justice system have better mental health outcomes. *See* Herman, *supra* note 173, at 163; Orth, *supra* note 195, at 321 (finding that victims' perceptions of justice and fair treatment were "[p]owerful predictors of secondary victimization"); Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress,* 3 INT'L R. VICTIMOLOGY 33, 36 (1994) (observing that research indicates that "[v]ictim participation in the criminal justice process reduces feelings of alienation developed when victims believe that they have neither control over, nor 'standing' in, the process").
198. *See, e.g.*, Herman, *supra* note 190, at 160; Orth, *supra* note 195, at 321.
199. NAT'L CRIME VICTIM LAW INST., *supra* note 188, at 2.

a number of reasons. First, restitution awards are quite inconsistent. As the data analysis in this paper has shown, courts have employed a wide range of methods (or none at all) to calculate restitution even in *Paroline's* wake, awarding restitution in amounts ranging from under $100 to over $10,000. In any given case, it seems that victims requesting restitution have little idea of the amount they will receive. If they request an amount close to their outstanding losses, their awards are likely to be much less.[200] If they request a lower amount (say, close to median amounts of $3000), they may be more likely to have the defendant and court agree.[201] In any case, the uncertainty victims experience when making and defending a restitution request, coupled with the court's failure to explain why it settles on an amount, fosters the exact kind of unwelcoming environment that makes the legal system traumatic for victims in the first place.[202]

Second, the process through which victims are notified under the CVRA may impede the healing process, whether by reminding the victim that her images are still being viewed or by triggering unwelcome and traumatic flashbacks.[203] As a number of victims and commentators have noted, the notification process often contributes to the victims' sense of fear, paranoia, and helplessness, despite its supposed aim to protect their rights and promote their wellbeing.[204]

200. For example, in *United States v. Crisostomi*, victim "Vicky" noted that her outstanding losses were $713,675 and sought $10,000 in restitution, while victim "Cindy" submitted that her losses were $1.3 million; the court awarded Vicky $713.68 and Cindy $683.41. 31 F. Supp. 3d 361, 365 (D.R.I. 2014).

201. For example, the government in United States v. Watkins, No. 13-CR-00268 LKK AC, 2014 WL 3966381, at *3 (E.D. Cal. Aug. 13, 2014), sought $2,191.74 in restitution for victim Vicky, which the court granted.

202. *See* Cassell et al., *supra* note 130, at 109 (criticizing courts' losses-divided-by-restitution-orders formula for creating "perverse incentives that result in uncertainty and disparities in the distribution of restitution awards across a given pool of defendants").

203. *See* DUNCAN, *supra* note 183, at 47–48 (describing the causes and intense effects of flashbacks).

204. *See, e.g.*, United States v. Kennedy, 643 F.3d 1251, 1255 (9th Cir. 2011) ("We now have in our house boxes full of victim notifications from cases all around the country involving pornographic images of me. Practically every time I've went to get the mail, there have been two or three of these notifications. They are constant reminders of the horrors of my childhood.") (quoting Victim Impact Statement); United States v. Aumais, 656 F.3d 147, 150 (2d Cir. 2011) (noting that the victim "function[ed] pretty well normally until she learned that her image was being traded on the internet, after which she experienced a fear of being at parties, fear of being in public gatherings, and had difficulty coping with her life because of her sense of pervasive helplessness about the fact that people were viewing her image") (quoting Victim Impact Statement) (internal quotation marks omitted); Victim-Intervenor Vicky's Brief, *supra* note 47, at 6 (observing that Vicky has been "substantially re-traumatized, and further injured by the knowledge of the continuing distribution and viewing of the images of her physical abuse") (quoting Victim Impact Statement) (internal quotation marks omitted); United States v. Woods, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010) ("I learn about each [defendant] because of the Victim Notices. I have a right to know who has the

Third, in order to receive restitution, a victim must detail how a particular defendant caused her specific harm, even if engaging in this nearly impossible task for each of hundreds of defendants heightens the victims' paranoia or sense of helplessness or requires her to repeatedly relive painful memories of her initial and ongoing abuse. Without such evidence, courts may reject the victim's restitution request altogether. Indeed, courts before *Paroline* often denied restitution to victims who failed to offer sufficient case-specific details of their suffering.[205] And with *Paroline*'*s* admonition that restitution awards must reflect the defendant's relative role in causing the victim's losses, some courts have maintained this high evidentiary bar.[206] While some showing of loss is understandable as a prerequisite to receiving restitution, requiring particularized evidence in a context in which such showings are immensely difficult and would need to be repeated for hundreds of defendants begs the question of whether the current restitution structure is the most appropriate.

Fourth, because the restitution process rewards those victims who can show the highest levels of suffering and abuse, the process may perpetuate the objectification and commodification of its victims.[207] The notification process itself serves as a near-constant reminder that the victim continues to be viewed as an object and treated as a tradable commodity.[208] Simultaneously, the restitution calculation process ties monetary compensation to the victim's demonstrated difficulties in moving on and recovering from her abuse, potentially anchoring the victim in her feelings of pervasive helplessness from which she senses no escape.[209]

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pictures of me. The Notice puts [a] name on the fear that I already had and also adds to it. When I learn about one 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 it.") (quoting Victim Impact Statement); USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 116. *But see* Victim Impact Statement, United States v. Faxon, No. 09-CR-14030-DLG (S.D. Fla. Nov. 3, 2009), ECF No. 34-13 ("I can choose to stop receiving the notifications, but I don't. If my words can help keep a pedophile off the streets to protect our young innocent children then that is what I need to do.").

205. *See, e.g.*, United States v. Chow, 760 F. Supp. 2d 335, 343–44 (S.D.N.Y. 2010); *Kennedy*, 643 F.3d at 1263; United States v. Berk, 666 F. Supp. 2d 182, 191–93 (D. Me. 2009).

206. *See, e.g.*, United States v. Sanders, 52 F. Supp. 3d 1329, 1341 (N.D. Ga. 2014) (declining to order a possessor to pay restitution when psychological reports detailed harm resulting only from initial abuse and not from possession of pornography).

207. *See* Lollar, *supra* note 14, at 378–82 (describing the restitution system's potential for commodification of victims).

208. *See supra* note 204.

209. *Aumais*, 656 F.3d at 150 (quoting Victim Impact Statement).

The nature of the post-*Paroline* restitution system therefore creates a strong potential that child pornography victims will be revictimized by their engagement in the sentencing process—a perverse reality in light of modern restitution's explicit goals of vindicating victim's rights, compensating victims, and promoting victim wellbeing. The system is due for a makeover, and the remainder of this Article describes one approach that better aligns the system with its goals.

## IV. RECOMMENDATIONS FOR A SYSTEM MAKEOVER

In *Paroline's* wake, the child pornography restitution system continues to exhibit a number of serious deficiencies. Restitution amounts continue to vary widely, bearing no correlation to factors relating to the nature of the offense. The uncertainty of receiving restitution (and in what amount) in turn increases the system's potential for retraumatizing the polyvictims of child pornography. And each of these problems stems from the lack of formal guidance for courts on how to calculate restitution awards—whether from *Paroline* or any other source.[210] The victims of child pornography deserve a restitution system that is both functional and therapeutic (or at least, not anti-therapeutic). Both the current system and Congress's latest attempt to salvage it (The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015) are neither.

### A. Congress's Proposed Legislative Fix

Two weeks after the Supreme Court decided *Paroline*, and in response to the Court's clarification that § 2259 as written requires courts to calculate restitution based on a defendant's relative causal role, Senator Orrin Hatch introduced a bill purporting to fix the deficiencies of § 2259.[211] After the 113th Congress took no action on the bill, Senator Hatch introduced a substantively identical bill in January 2015 (S. 295), which the Senate quickly passed. The bill made four things clear: (1) Congress's intent to impose an aggregate causation standard under which victims can receive full restitution from a defendant for losses that the

210. As discussed in Part II.B. *supra*, *Paroline*'s guideposts have been largely neglected by courts. The Sentencing Guidelines also offer courts no guidance on how to calculate restitution, either generally or with respect to child pornography cases specifically. *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.1 (2014).

211. *See* The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. § 2 (2014).

defendant did not cause;[212] (2) Congress's intent to hold defendants jointly and severally liable to the victim;[213] (3) the statute's proximate causation requirement applies only to one category of losses, not to all losses;[214] and (4) courts must either order restitution in the full amount of a victim's losses or in an amount that meets or exceeds certain mandatory minimum amounts ranging from $25,000 to $250,000.[215] At the time of this writing, S. 295 had been referred to the House Judiciary Committee.

The bill's proposed restitution scheme constitutes a major overhaul of the current post-*Paroline* scheme. The new system would have the key advantage of assisting courts in apportioning restitution, thereby improving cross-court uniformity in restitution awards and enhancing victim satisfaction with the restitution process and the justice system generally. But the system would also have a number of significant disadvantages. First, by enacting mandatory minimum levels of restitution and offering no guidance on how to ratchet up awards beyond these amounts, the proposed system would have courts award restitution by ignoring important details about the offense and ignoring the actual amount of the victim's losses. A possessor of a single image depicting a naked child could pay as

212. The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. § 2 (2015) (noting Congress's "intent . . . that victims of child pornography be fully compensated for all the harms resulting from each and every perpetrator who contributes to their anguish," and adopting "an aggregate causation standard" under which victims are not "limited to receiving restitution from defendants only for losses caused by each defendant's own offense of conviction"). The bill noted, however, that courts should "recognize[] appropriate constitutional limits and protections for defendants" even as they order defendants to pay restitution for harm caused by others. *Id.*

213. *Id.* § 3 (specifying that defendants "shall be jointly and severally liable to the victim with all other defendants against whom an order of restitution is issued," and that "[e]ach defendant who is ordered to pay restitution . . . and has made full payment . . . may recover contribution from any defendant who is also ordered to pay restitution").

214. *Id.* Amending the text of § 2259, the bill redefined the "full amount of the victim's losses" to include a specific set of losses without any proximate cause requirement. These losses include "(i) lifetime medical services relating to physical, psychiatric, or psychological care; (ii) lifetime physical and occupational therapy or rehabilitation; (iii) necessary transportation, temporary housing, and child care expenses; (iv) lifetime lost income; and (v) attorneys' fees, as well as other costs incurred." *Id.* The bill also included two additional categories of losses that restitution orders must account for: (1) any "other losses" that are a "proximate result of the offense" and (2) "any losses suffered by the victim from any sexual act or sexual contact . . . in preparation for or during the production of child pornography depicting the victim involved in the offense." *Id.* The bill thus made clear that a proximate causation standard applies only to the catch-all provision, not to all losses.

215. These mandatory minimum amounts are $250,000 for production offenses (that is, offenses under §§ 2251(a), 2251(b), 2251(c), 2251A, 2252A(g), or 2260(a)); $150,000 for distribution offenses (that is, offenses under §§ 2251(d), 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2252A(a)(6), 2252A(a)(7), or 2260(b)); and $25,000 for possession offenses (that is, offenses under §§ 2252(a)(4) or 2252A(a)(5)).

much as the possessor of hundreds of videos capturing the repeated anal and vaginal penetration of a child. Or, a defendant who unintentionally distributed images through a P2P network could pay as much as a defendant who actively traded these images through online communities in exchange for the production of new images. Meanwhile, a victim who has suffered $3000 in losses could receive $250,000 from a single defendant, while a victim who has suffered $1 million in losses could receive $25,000. Thus, the bill's proposed system is significantly detached from the traditional concept of restitution as victim compensation. According to one district court, the bill "establishes an arbitrary loss schedule having no essential relevance whatsoever to the loss amounts suffered by the victim or to the individual defendant's role in causing them."[216]

As a result, the proposed system runs into a second significant problem: unconstitutionality. Particularly, if the system's mandatory minimum amounts are considered de facto fines rather than restitution, the system may run afoul of the Eight Amendment's Excessive Fines Clause.[217] Indeed, in *Paroline* itself, the Supreme Court suggested that even severe restitution, though paid not to the government but to a victim, could fall within the purview of the clause.[218] For this reason, the Court rejected the notion that a single defendant could be "liable for millions of dollars in losses collectively caused by thousands of independent actors."[219] Thus, for some defendants, ordering restitution in S. 295's suggested mandatory minimum amounts or the full amount of a victim's losses may be deemed unconstitutionally "excessive and disproportionate,"[220] especially considering that a defendant could well be liable to pay restitution to multiple victims. These fairness concerns may also extend to the proposed system as a whole, which asks courts to impose restitution in amounts that are not calibrated to the victim's losses.[221]

A third and related problem with S. 295's proposed restitution system is that it imposes a standard of joint and several liability despite the impracticality of such a standard. As numerous courts (including the Supreme Court in *Paroline*)

216. United States v. DiLeo, 58 F. Supp. 3d 239, 248 n.5 (E.D.N.Y. 2014).

217. The clause "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" Austin v. United States, 509 U.S. 602, 609–10 (1993) (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

218. Paroline v. United States, 134 S. Ct. 1710, 1726 (2014).

219. *Id.*

220. *Id.*

221. *See DiLeo*, 58 F. Supp. 3d at 248 (raising a question of the constitutionality of S. 2301); Lollar, *supra* note 23, at 148–54 (arguing that because of its now-punitive nature, criminal restitution should be afforded constitutional protections).

have found, a system that imposes joint and several liability on hundreds of defendants in different courts at different times would be "extraordinarily clumsy."[222] Defendants ordered to pay large sums of restitution would have no straightforward way of determining the identities of others convicted of possessing, distributing, or producing each victim's images, let alone seeking restitution from these individuals. Further, those defendants convicted earlier, as well as those with greater ability to pay, would bear more than their fair share of the victim's restitution.[223]

In effect, S. 295's legislation only slightly differs from the approach advocated by the victim in *Paroline*—that is, to "hold[] each possessor liable for her entire losses"—which the Supreme Court vehemently rejected as tantamount "to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution."[224] If the victim's suggested approach in *Paroline* was so severe as to be borderline unconstitutional, Congress's proposed legislation—with its imposition of substantial, de facto fines in amounts detached from the defendant's conduct, a joint-and-several liability standard, and no proposed solution for the "practical problems offenders would face in seeking contribution [from each other]"—raises significant concern.[225]

The proposed legislation also presents a fourth concern: its detachment from the financial reality of the vast majority of child pornography defendants. As an initial point, because most nonproduction child pornography-related offenses today involve some sort of distribution (whether via a P2P network or otherwise),[226] most defendants would likely be required to pay at least $150,000 per victim under the S. 295 system. But, as the data analysis in this Article has shown,

222. United States v. Laraneta, 700 F.3d 983, 993 (7th Cir. 2012); *see also Paroline*, 134 S. Ct. at 1725 (noting "the practical problems offenders would face in seeking contribution" from fellow offenders); United States v. Gamble, 709 F.3d 541, 552 (6th Cir. 2013) ("[T]here is no simple way for the defendants to discover who else has been convicted of possession or receipt [or distribution or transportation] of [the victim's] images."); United States v. Aumais, 656 F.3d 147, 156 (2d Cir. 2011) (noting that joint and several liability standard would "pose significant practical difficulties" because "the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country").

223. *See Paroline* 134 S. Ct. at 1742 (Sotomayor, J., dissenting); *id.* at 1729 (majority opinion) (noting that "it would undermine this important purpose of criminal restitution if the victim simply collected her full losses from a handful of wealthy possessors and left the remainder to pay nothing because she had already fully collected").

224. *Id.* at 1725–26.

225. *Id.* at 1725.

226. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 313 (noting that nearly two-thirds of non-production offenders distributed pornography to others).

the vast majority of offenders have no ability to pay such an amount.[227] On top of this, if courts order payments on a periodic schedule,[228] as many do, victims will be left recovering their due in piecemeal fashion over many years.

Fifth and finally, S. 295 does very little to correct the revictimizing and anti-therapeutic nature of the current restitution scheme. For one thing, the proposed system limits restitution awards to those victims electing to pursue restitution—a small minority of victims in general. For another, the system may enhance the risk of victim commodification by ensuring the victim a stream of income based on the continuing popularity of and trafficking in her images. And although the proposed system provides victims with increased certainty of the restitution they may receive in any given case (which may enhance their faith in the justice system), the reality that most defendants would only be able to pay the mandatory minimum amounts in slow, piecemeal fashion means that some uncertainty remains.

Congress's attempt at fixing the child pornography restitution system therefore leaves much to be desired. Although the proposal may improve the uniformity and certainty of restitution awards, its drawbacks are significant and would undermine any advantages.

### B. A Victim Reimbursement Fund

A child pornography victim reimbursement fund would address many of the problems plaguing today's broken restitution system and the S. 295 proposal, and would best achieve the compensatory and punitive goals of modern criminal restitution. Unlike other compensation fund proposals,[229] this fund would require defendants to contribute fixed, reasonable amounts based on specific offense characteristics that meaningfully reflect the level of harm caused. Floor level amounts would reflect what courts have seemed to agree upon as reasonable restitution amounts, having dealt with thousands of child pornography cases over the last five years and hundreds of cases since *Paroline*: around $3000 for possession, $4000 for distribution, and $6000 for production, based on post-*Paroline*

227. *See supra* text accompanying note 180.

228. Under 18 U.S.C. § 3664(f)(3), courts may order "partial payments" on a periodic schedule or "nominal periodic payments" if the defendant's financial circumstances "do not allow the payment of any amount of a restitution order."

229. Several commentators have offered the idea of a victim compensation fund based on mandatory fines. *See, e.g.*, Lollar, *supra* note 14, at 400–01; Jacques, *supra* note 14, at 1190–93; Morris, *supra* note 14, at 415–19; Sheldon-Sherman, *supra* note 14, at 284–85.

median restitution award amounts.[230] These baseline amounts would then be ratcheted up based on conduct-specific aggravating factors that meaningfully differentiate between offenders' conduct.[231] These factors, and corresponding enhancement levels, could include the following:

(1) Nature of possession
    a. Actions that show intentional and deliberate involvement in amassing a collection of images (for example, possession of at least 5700 images),[232] a span of time over which images were collected, or cataloguing of images (enhancement factor of 1.5)
(2) Distribution method (select highest):
    a. Distribution via P2P network (enhancement factor of 1)
    b. Distribution via impersonal means that deliberately facilitate easy access to images, including bulletin board or website postings (enhancement factor of 1.5);
    c. Distribution via personal means that deliberately facilitate easy access to images, including chats and online communities (enhancement factor of 2); or
    d. Distribution to incite or coerce production, distribution to minors, or leadership roles in an online pornography distribution ring (enhancement factor of 3)
(3) For production offenses only, estimate of known possessors[233]:
    a. Below 7500 (enhancement factor of 2)
    b. Over 7500 (enhancement factor of 3)

A court would then calculate the sum of these enhancement factors, multiply the base level by this sum, and then add any actual monetary gains from the

230. These amounts are based on median restitution amounts since *Paroline* but differ in one respect: the baseline amounts for possession and distribution are $3000 and $4000 respectively, although the post-*Paroline* median amounts for these offenses are $4000 and $3000 respectively. This difference reflects the increased severity of distribution offenses compared to possession offenses.

231. These factors reflect the conduct discussed in the text accompanying notes 152–63 *supra*.

232. This is the median number of images in possession by child pornography offenders in the post-*Paroline* dataset. As under the Sentencing Guidelines, each video is treated as seventy-five images for calculation purposes.

233. DOJ, in cooperation with NCMEC, can provide this estimate, as they did in a number of cases that were reviewed in the data analysis for this article. The cut-off given here (7500) is the average of estimates provided in PSRs of the number of known possessors of a given image. Since very few PSRs provided such an image, this figure is not a reliable estimate of the true average number of known possessors. NCMEC could provide a better estimate of this figure.

defendant's offense.[234] The resulting amount would be transferred to a fund, from which all victims could seek reimbursement for losses they incur.[235] To reimburse victims, a fund administrator could require receipts or other documentation of the loss.[236] The fund would therefore be similar to the Crime Victims Fund established by the Victims of Crime Act of 1984, which collects the revenues from criminal fines, special assessments, and other sources to assist victims through direct compensation and services.[237]

Such a system would have a number of advantages. First, the fund would make the compensation calculation process much simpler, thereby relieving courts of significant headache, creating more uniformity among awards, and reducing uncertainty both in terms of how much a court will award and how much

234. Such gains could include proceeds from fees charged for membership in online communities or for access to websites. FIN. COAL. AGAINST CHILD PORNOGRAPHY, BACKGROUNDER 2 (2013), http://www.icmec.org/en_X1/pdf/FCACPBackgrounder1-13.pdf (noting that "[i]t is not unusual to find sites that cost up to $1,200 per month, and rare to find sites for much less than $100 per month"). For example, a defendant who possessed five images and who had no role in distributing or producing these images would be required to pay $3000. A defendant who possessed 6000 images and operated an online community requiring new members to produce new images, but who was not convicted of actual production, would be required to pay $18,000. If he pocketed $10,000 in membership fees, he would owe $28,000. Finally, a defendant who produced ten images of child pornography and distributed these images impersonally, directly or indirectly resulting in 5000 individuals possessing these images, would be required to pay $21,000.

235. These losses can be identical to the losses categorized in 18 U.S.C. § 2259(b)(3) and may be prioritized by the fund administrator.

236. Reimbursement duties could transfer entirely to the administrator of the fund, which could be an independent organization such as NCMEC, or a federal fund created expressly for this purpose. Some victim compensation funds are run by courts and funded by fines and fees paid to the court. *See, e.g.*, *Crime Victims Compensation Program*, D.C. COURTS, http://www.dccourts.gov/internet/superior/crimevictim/main.jsf (last visited Aug. 15, 2015). The victim must complete and submit an application for reimbursement to the court's claims examiner. *See, e.g.*, *Procedures*, D.C. CTS., http://www.dccourts.gov/internet/superior/crimevictim/procedures.jsf [http://perma.cc/SV5S-7TGY] (last visited June 30, 2015). Other victim compensation funds are administered by federal agencies, such as the September 11th Victim Compensation Fund, which requires eligible victims (or their representatives) to submit compensation forms directly to the fund. *See How to File a Claim*, SEPT. 11 VICTIM COMPENSATION FUND, http://www.vcf.gov/register.html [http://perma.cc/MTY2-SZH8] (last visited Sept. 7, 2015).

237. The Office for Victims of Crime, *OVC Fact Sheet*, http://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html#VictimComp (last visited Nov. 3, 2015) [hereinafter OVC Fact Sheet]. As of September 2013, the Crime Victims Fund balance had reached almost $9 billion. Office for Victims of Crime, *About OVC: Crime Victims Fund*, http://ojp.gov/ovc/about/victimsfund.html (last visited Nov. 3, 2015). Unlike the Crime Victims Fund, this Article's proposed reimbursement fund would provide only compensation (not direct services) to a limited set of victims (child pornography victims) using money collected from a limited set of offenders (child pornography offenders). Like the Crime Victims Fund, the reimbursement fund could impose caps on disbursable funds to ensure that the fund is a "stable source of support for future services." OVC Fact Sheet, *supra*.

a victim should receive based on her losses. Instead of starting with the confusing formula of victim's losses divided by the number of offenders, courts would apply limited enhancement criteria to uniform baseline numbers. Victims would then submit documentation to claim reimbursement, reducing uncertainty and guesswork related to calculating loss. As a result, courts would have a significantly easier time calculating "restitution" owed in child pornography cases. More importantly, victims would be assured that every defendant must pay money to compensate his victims and that any victim who has suffered loss can receive financial reimbursement.

Second, the fund would avoid ordering defendants to pay either token or excessive amounts. The baseline fund contributions reflect the judgment of judges across hundreds of cases as to fair restitution amounts, while the enhancement factors allow courts to individually tailor the award to the offense based on characteristics that actually distinguish between today's offenders. Further, by requiring all offenders to pay into the fund, the amount required of each individual offender more proportionally reflects the harm they have personally caused.[238] The result is, in *Paroline's* words, "a reasonable and circumscribed award"[239] that still impresses the severity of the offense on the defendant (thereby achieving restitution's goal of punishment), meaningfully compensates the victim, and avoids the risk of being unconstitutionally excessive and disproportional.[240]

Third, the fund would spread money to all victims, even those electing not to be notified and those unwilling or unable to afford to bring restitution claims.[241] Indeed, most victims of child pornography opt not to seek restitution.[242] This reality, however, should not give offenders a free pass from victim compensation. If the central purposes of restitution are victim compensation and

238. *See* Jacques, *supra* note 14, at 1195 ("[B]y spreading payments across all offenders, the average payment and burden on individual defendants should become more proportional to the harm of their individual offense.").

239. Paroline v. United States, 134 S. Ct. 1710, 1727 (2014).

240. As *Paroline* put it, reimbursing victims and impressing upon defendants the weight of the harm they have caused are twin goals of restitution, but restitution awards should never be excessive or disproportionate to the harm caused. *Id.* at 1726–27. In contrast to the reimbursement fund idea, S. 295's proposed restitution scheme potentially imposes fines upon defendants that may be unconstitutionally excessive and disproportionate to the harm caused. *See supra* text accompanying notes 203–207.

241. Some of the victims choosing not to seek restitution include those who wish to avoid secondary victimization at the hands of the justice system. *See supra* Part III.C. *See also* Morris, *supra* note 14, at 415 ("[V]ictims should be able to recover restitution without attaching requests to the trials of the innumerable defendants who possess their images.").

242. *See* USSC, CHILD PORNOGRAPHY REPORT, *supra* note 1, at 116–17.

the need to impress upon offenders the harm their possession causes to victims,[243] then each defendant should pay some amount to their victims regardless of whether these victims have chosen to seek restitution (as few do) or whether some of their victims have already recovered all their losses (as some nearly have).[244]

Fourth, by decoupling financial recovery from notification and involvement in the criminal justice system, a reimbursement fund would reduce the likelihood of secondary victimization. A victim's decision to seek restitution is not easy. On the one hand, by declining to seek restitution, most victims forgo receiving financial assistance that may help shoulder the substantial expenses they incur as they seek to rebuild their lives.[245] On the other hand, those victims seeking restitution must endure the risks and realities of secondary victimization through notification, litigation, and sentencing with each and every case. A reimbursement fund would eliminate this difficult decision, allowing victims to receive funds through a one-time showing of need whenever that need may arise, without enduring potential revictimization through repeated court proceedings. And those victims wishing to speak out through victim impact statements and court proceedings would retain their ability to do so.

A fund system would also be more therapeutic than the current system in other ways. It would, for example, align with victims' often-professed desire to help other victims by pooling proceeds from defendants' payments and sharing them among all victims.[246] In addition, the fund would eliminate the need for

243. *Paroline*, 134 S. Ct. at 1729; *see also supra* Part I.A. (discussing purposes of restitution).

244. For example, as of July 2014, victim Vicky had not recovered $713,675 of her $1.3 million in losses, *see* United States v. Crisostomi, 31 F. Supp. 3d 361, 365 (D.R.I. 2014), while other victims have fully recovered their losses, *see supra* Part I.B.

245. As one victim has noted, restitution awards pay for treatment and services that are absolutely necessary for healing. *See* Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG. (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html [https://perma.cc/FGL9-EYFQ] (quoting victim's statement that "I need the help I'm getting, especially the counseling . . . I want other people to get it, too.").

246. Victims Amy and Nicole have expressed their desire to help other victims receive money to pay for needed services and treatment. *See id.* (referring to Amy and Nicole's desire to grant others "the tools to heal"). Other victims, in their impact statements, have noted their desire to speak out to prevent harm to other victims. *See, e.g.*, Victim Impact Statement, United States v. Faxon, No. 09-CR-14030-DLG (S.D. Fla. Nov. 3, 2009), ECF No. 34-13 ("I can choose to stop receiving the notifications, but I don't. If my words can keep a pedophile off the streets to protect our young innocent children then that is what I need to do."); Victim Impact Statement at 3, *Faxon*, No. 09-CR-14030-DLG, ECF No. 34-9 ("I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids . . . then tell them what to do? Will they see me and think it's okay for them to do the same thing?"); DUNCAN, *supra* note 183, at 152 ("With the change that comes from restoring her life, a woman experiences a profound desire to prevent the trauma of sexual abuse from occurring to her children and to other

victims to hire attorneys, thereby allowing victims themselves to retain a larger cut of the money that is meant to reimburse them for their losses.[247]

This Article's proposed reimbursement fund thus presents a number of benefits. In terms of purpose, it achieves the punitive, compensatory, and victim-empowering goals of restitution. In terms of administrative efficiency, the fund streamlines the award-calculation inquiry and preserves scarce judicial resources. In terms of practicality, it offers a type of guaranteed, ex-post insurance for victims of crimes with never-ending harms. And in terms of fairness, the fund preserves an important equity consideration: Each perpetrator contributes, each contribution rises in proportion to the crime's egregiousness, and every victim may derive financial benefit if she so chooses.

## CONCLUSION

In the six years since courts began grappling with the task of awarding restitution in child pornography cases, a few things have become clear. For one, despite the Supreme Court's good intentions in trying to prevent courts from leaving victims emptyhanded, most of today's victims receive no restitution at all. Moreover, those courts deciding to award restitution have done so in a manner that circumvents *Paroline*'s guidance. In fact, most of these courts continue to order defendants to pay restitution in low-level amounts that are not calibrated to any offense-specific characteristics.

The current restitution system is broken and fails to provide victims with any certainty as to whether they will receive restitution and what factors might inform the amount. Congress's only proposal to fix the system thus far, however, fails to make it any more practical for courts or fair to defendants, and does little to empower victims. As proposed in this Article, a victim reimbursement fund into which all defendants would pay and from which all victims could seek compensation would repair many of the deficiencies of the current restitution system and achieve the fundamental goals of restitution.

children as well. Women want to use both their collective and individual voices to expose the core of this trauma . . . .").

247. Attorneys' fees have consumed substantial proportions of restitution awards in cases over the years. In one case, for example, over half of the restitution award went to a victim's attorney. *See* United States v. Benoit, No. 12-5013, 2012 WL 1899100, at *48 (10th Cir. 2012).