

HOW TO IMPROVE RESTITUTION FOR CHILD PORNOGRAPHY VICTIMS

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TOPLINE: Congress should enhance the 2018 *Amy, Vicky, and Andy Child Pornography Victim Assistance Act* (AVAA) by:

- Making **aggregate causation** the standard for child pornography restitution;
- **Indexing** the AVAA's statutory minimum restitution award for inflation;
- **Extending** the AVAA to victims of child pornography production.

BACKGROUND:

Federal law gives crime victims the right to “full and timely restitution as provided by law” and requires those convicted of child pornography crimes to pay restitution for “the full amount of the victim's losses.”¹ To that end, the federal restitution statute identifies five specific loss categories² and one catch-all category of “any other losses suffered by the victim as a proximate result of the offense.”³

Federal law defines child pornography as “any visual depiction” of “a minor engaging in sexually explicit conduct”⁴ and separately criminalizes producing,⁵ distributing,⁶ and possessing⁷ it. Calculating a victim's losses and imposing restitution is relatively straightforward for child pornography production in which, like most crimes, an individual perpetrator causes identifiable harm to a particular victim.

Child pornography distribution and possession, however, are very different crimes and harm victims in unique ways. These “non-contact” crimes, often referred to collectively as child pornography trafficking, cause “recurrent victimization through

¹ 18 U.S.C. § 2259(b)(1).

² *Id.* at § 2259(b)(3)(A)–(E). These are medical services; physical and occupational therapy or rehabilitation; transportation, temporary housing, and childcare; lost income; and attorneys’ fees.

³ *Id.* at § 2259(b)(3)(F).

⁴ 18 U.S.C. § 2256(8).

⁵ 18 U.S.C. § 2251.

⁶ 18 U.S.C. § 2251(a).

⁷ 18 U.S.C. § 2252(a)(2).

existence of images”⁸ and impose “continuing harm by haunting those child [victims] in future years.”⁹ This harm, and the resulting losses, never end and most of those who contribute to it will never be identified, let alone caught and convicted. The Internet magnifies this ongoing harm and makes calculating a victim’s losses and imposing restitution much more challenging.

The most difficult question is how much restitution to require from individual defendants who contribute to this indivisible harm but whose specific contribution cannot be isolated or its specific share of a victim’s losses calculated.

- One approach, *proximate cause*, holds a defendant responsible only for the losses that a victim can prove result directly from that defendant’s conduct. This is unworkable in cases of child pornography trafficking and, in practice, results in very little, if any, restitution for these victims.
- The other approach, *aggregate causation*, accommodates the nature of non-contact child pornography crimes and the kind of harm they impose on victims. It holds “each of the defendants joint and severally liable for the indivisible injury”¹⁰ to the victim.

In *Paroline v. United States*,¹¹ a man was convicted of possessing hundreds of child pornography images, including two of “Amy,” the pseudonym for the victim in the most widely distributed series of child pornography images in the world. While his “share” of the 70,000 images of her abuse that had been identified at the time was very small, the network of pedophiles possessing and distributing those images, and driving the demand for more, was very large and steadily expanding.

The U.S. Court of Appeals for the Fifth Circuit held that *aggregate causation* was consistent with the statute’s language and should be used in child pornography possession cases. The Supreme Court reversed, holding that *proximate cause* was the theory Congress had in mind when it enacted the restitution statute; as a result, Amy received no restitution at all. Congress responded in 2018 by unanimously

⁸ U.S. Sentencing Commission, Federal Child Pornography Offenses 112 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

⁹ Child Pornography Prevention Act § 121, Public Law 104-208, 110 Stat. 2009 (1996). See also *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); U.S. SENTENCING COMMISSION, FEDERAL CHILD PORNOGRAPHY OFFENSES 311 (2012) (“the perpetual nature of the distribution of images on the Internet causes a significant, separate, and continuing harm to victims.”); Warren Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, 35 CHILDREN’S LEGAL RIGHTS JOURNAL 117, 127 (2015) (describing the impact of “continual victimization”).

¹⁰ Paul G. Cassell, James R. Marsh, and Jeremy M. Christiansen, *Not Just “Kiddie Porn”: The Significant Harms from Child Pornography Possession*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 197 (2016).

¹¹ 572 U.S. 434 (2014).

enacting the *Amy, Vicky, and Andy Child Pornography Victim Assistance Act* (AVAA),¹² which was endorsed by the attorneys general of all 50 states, four territories, and the District of Columbia.

When Senator Orrin Hatch (R-UT) first introduced this legislation, named for Amy and two other prominent victims, it would have required using aggregate causation in all child pornography restitution cases, but the Obama Justice Department opposed changing the standard. Instead, the AVAA created new options for victims of child pornography trafficking to obtain restitution without facing litigation under the impossible proximate cause standard.

The AVAA sets a minimum restitution amount for trafficking cases and created the Defined Monetary Assistance Victims Reserve,¹³ funded by a special assessment on all child pornography defendants. Victims can opt for a one-time payment from the reserve in lieu of pursuing restitution litigation against individual defendants.

These steps have increased the median amount of restitution that victims receive and decreased the percentage of defendants who avoid paying restitution altogether. Congress can take several steps to enhance the AVAA:

- **Make aggregate causation the standard for child pornography restitution.** The most important way to enhance the AVAA is to accomplish its original objective of establishing aggregate causation as the operative approach to seeking restitution from all child pornography defendants. It is as workable as proximate cause in child pornography production cases and the only approach that works in distribution and possession cases.
- **Index the AVAA's statutory minimum restitution award for inflation.** The AVAA's \$3,000 restitution minimum would, if indexed, be approximately \$3,900 today.
- **Extend the AVAA to victims of child pornography production.** The AVAA's options for obtaining restitution without litigation allow victims to avoid revisiting their abuse every time they seek restitution from an individual defendant. Victims of child pornography production should have this option just as victims of child pornography trafficking do.

¹² Public Law 115-299 (Dec. 7, 2018), 132 Stat. 4383.

¹³ 18 U.S.C. § 2259(d).