Refining Child Pornography Law

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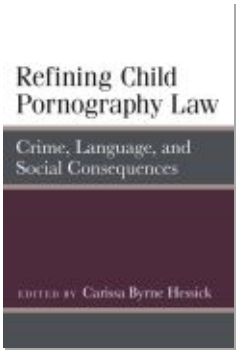

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The Significant Harms from Child Pornography Possession

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The severity of criminal penalties for possessing child pornography has recently come under attack. Both judges and academic commentators have been heard to complain that the prison sentences for child pornography possessors are too long. Implicit in these criticisms is often the claim that possessing child pornography is not a serious crime—that while those who create (or perhaps distribute) child pornography inflict severe harms on their child victims, those who merely possess images are not significantly blameworthy. Indeed, in a case that recently attracted national attention, a man who was convicted of child pornography possession (possessing images of children as young as two years old being sodomized and performing oral sex on adult men) was allowed to keep his pension because his felony crime was not deemed to even rise to the level of "moral turpitude."[1]

In a series of federal cases involving restitution for child pornography victims, the authors of this chapter have encountered the misguided sentiment that possessors of child pornography cause little harm. We have represented such victims in many federal cases across the country, seeking to obtain restitution from those who commit child pornography crimes.[2] Much of that litigation has involved the proper interpretation of the Mandatory Restitution for Sex Crimes provision of the Violence Against Women Act[3] and specifically whether victims should receive full, some, or no restitution from convicted child pornography defendants. The authors' efforts culminated in the recent United States Supreme Court case, *Paroline v. United States*.[4] Unfortunately, a majority of the Court disagreed with the

position of child pornography victims: that Congress passed the Mandatory Restitution for Sex Crimes provision to guarantee full restitution for child pornography victims. However, the *Paroline* decision contains a silver lining: All the opinions in the case agreed the crime of possession of child pornography results in significant suffering on the part of the victims.

Despite the Court's recognition of this suffering, the misguided view that child pornography possession is largely harmless persists. This chapter demonstrates otherwise. In reality, possession of such images causes significant trauma to the victims depicted. The endless collecting and viewing of a victim's child sex images subjects victims to continuous invasions of privacy, producing lasting psychological injury and significant economic losses.

This chapter will detail the significant harms that child pornography possession causes to the children depicted in the images of abuse. The crime of child pornography possession inflicts substantial harm on its victims, through continually reminding the victims of the initial sexual abuse. We illustrate this point with a discussion of two young victims of child pornography possession—two young women we will refer to as "Amy" and "Vicky." We then turn to the issue of quantifying those harms for purposes of restitution. Those who collect and view child pornography cause significant losses for which victims should receive significant compensation. Moreover, each individual defendant should be held jointly and severally liable for all of the harms that child pornography possession causes. This conclusion is consistent with basic principles of tort law, which identify all who contribute to a single harm as being responsible for paying for the entire harm.

I. The Harms Victims of Child Pornography Possession Endure

At the outset, a brief discussion of terminology is in order. The efforts to minimize the harm to child pornography victims begins even with the phrase used to describe the crime. Although the term "child pornography" is widely used,[5] it carries misleading connotations. The term "pornography" suggests that child pornography is akin to adult pornography,that is, erotic material appealing to the viewer's interest in normal sexual activities involving consenting adults. An even more deficient term is "kiddie porn," which some prominent and thoughtful commentators have used.[6]

"Pornography" and, worse yet, "porn" are neither the best nor the most

accurate terms to describe, for example, images and videos which often graphically record prepubescent children (including toddlers) being raped by adults.[7] As one doctor who works closely with victims explained:

> In the context of children . . . there can be no question of consent, and use of the word pornography may effectively allow us to distance ourselves from the material's true nature. A preferred term is *abuse images*, and this term is increasingly gaining acceptance among professionals working in this area. Using the term abuse images accurately describes the process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported.[8]

Other terms that have been suggested as suitable substitutes include "child abuse material," "child sexual abuse material," "documented child sexual abuse," and "depicted child sexual abuse."[9] Given the widespread use of the term "child pornography"—especially in the criminal context—we reluctantly bow to convention in this chapter and will use that term here.

In discussing the harms to the victims of "child pornography" possession crimes, it is also important to understand the vast criminal machinery that generates those harms. In enacting laws criminalizing all aspects of child pornography, Congress (for example) realized that it had to address every stage of this sordid joint enterprise—countless criminals who together create, distribute, and possess child pornography. As the Supreme Court explained, "it is difficult, if not impossible to halt" the sexual exploitation and abuse of children by pursuing only child pornography producers.[10] It was therefore reasonable for Congress to conclude that "the production of child pornography [will decrease] if it penalizes those who possess and view the product, thereby decreasing demand."[11] Indeed, the Court explained that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties" on all persons in the distribution chain.[12] Congress did just that by criminalizing child pornography possession.[13]

Congress properly recognized that child pornography possessors are inextricably linked to child pornography producers. Congressional findings concerning child pornography possession crimes explain that "prohibiting the possession and viewing of child pornography will . . . [help] to eliminate the market for the sexual exploitative use of children. . . ."[14] A recent Justice Department analysis reported that "the growing and thriv-

ing market for child pornographic images is responsible for fresh child sexual abuse—because the high demand for child pornography drives some individuals to sexually abuse children and some to 'commission' the abuse for profit or status."[15]

Once a child is sexually abused to produce digitized child pornography, the images can be disseminated exponentially. Peer-to-peer file sharing (commonly called "P2P") is "widely used to download child pornography."[16] Two recent law enforcement initiatives "identified over 20 million unique IP [Internet Protocol] addresses offering child pornography over P2P networks from 2006 to August 2010."[17] The ease with which child pornography can now be downloaded creates "an expanding market for child pornography [that] fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse."[18] In other words, those who possess child pornography become a cog in the vast machinery that sexually abuses and exploits children through child pornography.[19]

The machinery of child pornography leaves in its wake horrific human suffering. *New York v. Ferber*,[20] the leading Supreme Court case on the subject, well articulates the serious long-term physiological, emotional, and mental harms to victims who are sexually exploited to produce such images. "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."[21] The Court has also recognized that child pornography can pose "an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt [her] in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography."[22] And more recently, the Court has unanimously reaffirmed *Ferber*'s central premise: "[i]t is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals *have viewed and will in the future view* images of the sexual abuse she endured."[23]

Ferber elucidates an unfortunate reality for victims of child pornography crimes: the initial production of the videos and other images of their sexual abuse is only the beginning of a lifetime of trauma. Victims deal

with intense physical and emotional anguish for decades as a direct result of the distribution and possession of their child sex abuse images. The following brief accounts are illustrative of the harms they suffer on a daily basis. Two of the victims who are most active in attempting to secure restitution, "Amy" and "Vicky,"[24] have detailed their experiences in their own words through victim impact statements and psychological reports.

A. The Harms Suffered By "Amy"[25]

Amy was just four years old when her uncle began sexually abusing her.[26] At a time when most girls her age were just learning about letters and numbers, Amy was forced to endure repeated rape, cunnilingus, fellatio, and digital penetration by her uncle, a trusted family member.[27] Her uncle perpetrated some of the sexual assaults in order to produce child pornography for a child molester living in the Seattle area. This illustrates what is often described as the "market creation" effect of child pornography possession—that those who want to possess child pornography often directly cause the sexual abuse of a child to produce those images.[28]

When Amy was nine years old, her uncle was apprehended, ending the direct sexual abuse. Amy then received psychological counseling to cope with the trauma caused by the abuse and the associated child pornography production. When her treatment concluded in 1999, Amy's therapist reported that Amy was "back to normal" and that she engaged in age-appropriate activities like dance.[29] Although Amy always suspected her child sex abuse images were probably somewhere on the Internet, at age seventeen Amy discovered that countless individuals were in fact trading and collecting a vast catalog of her images.[30] Amy's use of a pseudonym reflects a painful irony: she seeks anonymity, but hers is among the most widely trafficked child pornography series in the world.[31] Her own words describe her agony:

> 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. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle.[32]

This knowledge of the ongoing distribution and possession of Amy's child sex abuse images has had "long lasting and life changing impact[s] on her" that "are more resistant to treatment than those that would normally follow a time limited trauma, as her awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation in [her posttraumatic] symptoms."[33] As a result, Amy will require counseling for the rest of her life—counseling that, of course, costs money.[34] Amy also has difficulty maintaining gainful employment in jobs that require even routine interaction with the public.[35] Thus, she experiences not only ongoing psychological trauma but also substantial financial losses.

B. The Harms Suffered By "Vicky"[36]

"Vicky" suffered fate similar to Amy's at the hands of her father when she was ten and eleven years old.[37] As with Amy's abuse, Vicky's abuse was made to order. She was forced to perform scripted videos of rape, sodomy, and bondage based on requests placed with her abuser by child molesters and pedophiles, who later downloaded and traded her videos.[38]

Vicky also first learned that her images were in circulation when she was seventeen years old.[39] As detailed in her victim impact statement, Vicky suffers ongoing serious psychological trauma because of the possession and distribution of her child sex abuse images and videos.[40] Indeed, her condition deteriorated markedly in the years following her discovery of the widespread proliferation of the images of her childhood sexual abuse.[41] When she became aware of how many people around the world are "entertained by [her] shame and pain," Vicky started having nightmares about strangers staring at images of her naked body on their computer screens.[42] She is further burdened by the thought that her images "might be used to groom another child for abuse," which is a seduction technique utilized by pedophiles that her own father used on her as a child.[43]

Here again, Vicky's own words best describe her harm:

> I had no idea the "Vicky" series, the child porn series taken of me, had been circulated at all, until I was 17. My world came crashing down that day, and now, two years later, not much has changed. These past years have only shown me the enormity of the circulation of these images and added to my grief and pain. This knowledge has given me a paranoia. I wonder if the people I know have seen these images. I wonder if the men I pass in the grocery store have seen them. Because the most intimate parts of me are being

> viewed by thousands of strangers and traded around, I feel out of control. They are trading my trauma around like treats at a party, but it is far from innocent. It feels like I am being raped by each and every one of them. What are they doing when they watch those videos anyway? They are gaining sexual gratification from images of me at ages 10 and 11. It sickens me to the core and terrifies me. Just thinking about it now, I feel myself stiffen and I want to cry. So many nights I have cried myself to sleep thinking of a stranger somewhere staring at their computer with images of a naked me on the screen. I have nightmares about it.
>
> My paranoia is not without just cause. Some of these perverts have tried to contact me. One tried to find me through my friends on MySpace. Another created a slide show of me on Youtube. I wish I could one day feel completely safe, but as long as these images are out there, I never will. Every time they are downloaded I am exploited again, my privacy is breeched, and my life feels less and less safe. I will never be able to have control over who sees me raped as a child. It's all out there for the world to see and it can never be removed from the internet.[44]

Vicky also suffers great anxiety that she will encounter individuals who have seen the worst moments of her life—a fear that, sadly, is not unjustified.[45] Multiple child pornography users have contacted Vicky, even sending her e-mails suggesting that she "mak[e] porn" with them.[46] One so-called "end user" of her images and videos actually stalked her through a social media page and harassed her with pointed sexual questions.[47] Unable to cope with the demands of college life while at the same time dealing with her immense emotional suffering, Vicky returned home for counseling.[48] Vicky also limits her employment to jobs that do not involve dealing with the public because of the difficulty she experiences when interacting with unknown male adults.[49] She left her job at an ice cream store, for example, because each encounter with a stranger, each smile from a man at the counter, struck at Vicky's deepest fear: has he seen me in the most humiliating moments of my life?[50]

C. Translating the Harms to Economic Losses

Unsurprisingly, the knowledge that thousands of individuals possess images and video of a child victim being raped can inflict deep, life-lasting trauma that extends well beyond the initial sexual abuse. The Supreme

Court's recent decision in *Paroline* agreed with this conclusion when it recognized that it was "common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured."[51]

This emotional trauma results in economic burdens, particularly for psychological counseling costs and lost income.[52] Although each victim may suffer a baseline amount of harm as a result of such trauma, no two victims are exactly alike. Determining each victim's losses requires a careful analysis of how each victim's life is damaged by child pornography.

For victims like Amy and Vicky, the economic losses are substantial. Both Amy and Vicky have enlisted experts who calculated their losses using standard econometric tools based on their individual circumstances.[53] These calculations serve as the basis for the restitution requests that Amy and Vicky made under federal law from possessors and distributors of their images—restitution that is vitally important to their recovery. The restitution payments have helped them secure not only psychological counseling, but also vocational and educational training to move forward with their lives.[54]

Consider the restitution request Vicky recently filed in a federal criminal case in Washington.[55] In that request, Vicky documented "economic losses" totaling $1,327,166.[56] The losses were comprised of $106,900 in future psychological counseling expenses, $147,830 in educational and vocational counseling needs, $722,511 in lost earnings, $52,110 in expenses paid for such things as forensic evaluations and court costs, and $297,815 in attorneys' fees.[57] Supporting each request was an expert report or declaration.[58]

For example, concerning lost income—the largest item requested—Vicky submitted a forensic economic analysis by Stan V. Smith, an expert economist who isolated the lifetime loss to Vicky's earnings due to the trauma associated with the worldwide circulation of her images and videos.[59] In doing so, Dr. Smith quantified the losses attributable to Vicky's difficulties both in pursuing a college degree and in maintaining employment following her identification as a victim of child pornography. Vicky entered college, but then had to withdraw to focus on therapy.[60] While attempting to hold various jobs, she suffered panic attacks when interacting with men who could have viewed her images.[61] Dr. Smith calculated the economic consequences of a delayed completion of a college degree as well as the reduced employment opportunities that come from restricting her employment to situations where she does not have to interact with unknown men.[62] Accounting for these variables and limitations, Dr. Smith

determined that Vicky's net loss of earnings capacity attributable to her ongoing "psychological injuries" related to the worldwide circulation of her images is $722,511.[63]

The goal of the Mandatory Restitution for Sex Crimes provision of the Violence Against Women Act is to restore to victims the losses they suffer as a result of the child pornography crimes. In other words, its purpose is restorative, not punitive.[64] Yet there often seems to be a misunderstanding about the nature of the losses sought by child pornography victims like Amy and Vicky. For example, one academic commentator, Professor Cortney Lollar, recently argued that restitution in such cases is being imposed "not as disgorgement of unlawful economic gains, but as a punitive mechanism of compensation for emotional, psychological, and hedonic losses in a manner resembling civil damages."[65] Professor Lollar then paradoxically argues that such restitution is actually harmful to child pornography victims.[66]

Describing Amy's and Vicky's restitution requests as involving emotional or hedonic losses is inaccurate. Amy and Vicky are only seeking restitution for the kinds of out-of-pocket pecuniary losses that are typically recoverable from convicted criminals in restitution actions.[67] Indeed, Professor Lollar is ultimately forced to concede that "the restitution being requested and ordered is technically for future therapy and mental health treatment and sometimes future lost wages."[68] This is entirely consistent with federal law, which specifically enumerates *pecuniary* losses related to "psychological care" and "lost income" as those that are compensable in restitution.[69]

II. Allocating the Harms Caused by Child Pornography Crimes

Courts have tended to generally agree with the point that child pornography possession crimes cause harm to their victims. The courts have varied widely, however, on the question of how much harm such crimes cause. Indeed, a number of courts have minimized the harm to the point where restitution awards become vanishingly small. In this section we critique these efforts at minimization. We advance the thesis that the proper way to assess the magnitude of harm is not to attempt to disaggregate the harms child pornography victims suffer, but rather to view them in the aggregate. On this view, each criminal who contributes to a child pornography victim's indivisible harm becomes jointly and several liable for the

full amount of that harm—the standard answer under conventional tort law principles. The Supreme Court's recent decision in *Paroline v. United States*, which requires disaggregation, misapprehends both the factual and legal predicates for full restitution.

A. The Problems from Disaggregation

Courts considering restitution requests from victims of child pornography crimes have almost uniformly agreed that some harm exists. The generally accepted view is that each act of viewing a victim's image is a gross invasion of privacy that causes additional suffering to a victim. The Ninth Circuit has articulated the conventional view of this point in a case involving restitution requests from both Amy and Vicky:

> Amy and Vicky presented ample evidence that the viewing of their images caused them emotional and psychic pain, violated their privacy interests, and injured their reputation and well-being. Amy, for example, stated that her "privacy ha[d] been invaded" and that she felt like she was "being exploited and used every day and every night." Vicky described having night terrors and panic attacks due to the knowledge that her images were being viewed online. Even without evidence that Amy and Vicky knew about [the defendant's] conduct, the district court could reasonably conclude that Amy and Vicky were "harmed as a result of" [the defendant's] participation in the audience of individuals who viewed the images.[70]

Because viewing those images harms the children depicted, the children are properly considered victims of those who possess the images. The U.S. Supreme Court has acknowledged that "[t]he full extent of [these victims'] suffering is hard to grasp."[71] Yet in a series of cases concerning the amount of restitution that child pornography victims may collect from child pornography possessors, federal courts have often struggled to determine how much harm possessors of child pornography cause their victims, sometimes minimizing the harm from each crime.

This minimization is especially visible in cases like Amy's and Vicky's, where the victim's image has been viewed by thousands (or even tens of thousands) of criminals. In those cases, some courts seem to suggest that the harm caused by any one defendant who possesses child pornography is minimal. For example, in one case involving Amy, the D.C. Circuit acknowledged that the "possession of child pornography causes harm to the

minors depicted."[72] But the court concluded that one criminal defendant who possessed and viewed Amy's image only "added to her injuries"; "[s]he would have suffered tremendously from her sexual abuse regardless of what [he] did."[73] Similarly, in a case involving Vicky, the Fourth Circuit stated that one child pornography possessor was not responsible for the losses Vicky has suffered; indeed, the court went so far as to state that Vicky's financial losses are "wholly disproportionate to the harm inflicted by an individual defendant."[74]

Unfortunately the Supreme Court's recent *Paroline* decision went down this path. *Paroline* reversed the Fifth Circuit's award of full restitution to Amy on the grounds that Mr. Paroline's "contribution to the causal process underlying [Amy's] losses was very minor, both compared to the combined acts of all other relevant offenders, and in comparison to the contributions of other individual offenders, particularly distributors (who may have caused hundreds or thousands of further viewings) and the initial producer of the child pornography."[75] *Paroline* ultimately concluded that any one defendant's restitution obligation was to be based on "the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses."[76]

Paroline and similar lower court opinions are troubling because they almost seem to cavalierly invite additional victimization. Under such opinions, the larger the number of criminals who view a victim's images, the less responsible any particular criminal is for the harm caused to the victim. In other words, "the more, the merrier." This problem has been aptly named by one of the nation's leading tort law scholars, Professor Richard Wright, as a "tortfest": each criminal can reduce his restitution liability by encouraging other men to join in and abuse the victim.[77] For example, if a rapist would cause a victim to suffer $10,000 in medical bills (a physical examination, etc.), a gang rapist who gets four of his friends to join in attacking the victim might be responsible for only $2,000, his "fair share" of the bill for the medical examination. Of course, such an approach unfairly and even perversely invites greater victimization. It also might leave the victim with uncompensated losses if the four friends are never apprehended or are insolvent.

Amy raised this point in her arguments to the Supreme Court in *Paroline*. The Court, however, found the point unpersuasive because unlike gang rapists, child pornography possessors do not act in concert.[78] The Court, however, never explained why this should make a difference. The goal of restitution is to compensate victims, regardless of whether they suffered harm from defendants actually individually or in concert. More-

over, as explained in the introduction to section I above, although child pornography defendants may not formally agree to act in concert, as a practical matter they are all part of a de facto joint criminal enterprise.

The obvious and conventional solution to concerns about how to allocate responsibility is to bar a criminal from debating what fraction of the single loss he has caused a victim. A standard illustration is offered by Professors Harper and James, who give the example of "several ruffians [who] set upon a man and beat him, each inflicting separate wounds." Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each "liable for the whole injury."[79] Child pornography victims are the twenty-first-century victims of these hypothetical attackers. A victim like Amy, for instance, is essentially "set upon" by digital "ruffians" who are all harming her. Even if her psychological wounds can somehow be viewed as "separate," conventional tort law demands that liability for her "whole injury" be imposed on each and every one of the ruffians, that is, each and every child pornography distributor and possessor.

B. Child Pornography Possessors Contribute to All of a Victim's Losses

Some courts—including the Supreme Court in *Paroline*—have taken the position that the losses suffered by child pornography victims should be allocated across countless defendants. Using what it described as "traditional principles" of tort law, an influential D.C. Circuit opinion, *United States v. Monzel*, rejected Amy's argument that a child pornography possessor should be held jointly and severally liable for all of her losses.[80] Because Monzel's possession of a "single image" was not independently sufficient to cause the entirety of Amy's injury, the Circuit reasoned that he did not create a single, "indivisible" injury.[81] Thus, because Amy suffered separate injuries each time someone viewed her images, Monzel was obligated to pay restitution only for the separate injury for which he was individually responsible.[82] With less extended analysis, *Paroline* reached essentially the same conclusion, limiting a defendant's responsibility to pay restitution to his "relative role in the causal process that underlies the victim's general losses."[83]

Paroline and similar opinions conveniently duck the fundamental question left by this approach: Just exactly how much restitution should a defendant pay for injuring Amy? In *Monzel*, for example, the D.C. Circuit remanded to the district court for such a calculation. And the district court judge then threw up her hands, awarding Amy no restitution whatsoever

because she was unable to determine what fraction of Amy's substantial losses could be specifically assigned to Monzel. In the wake of the *Paroline* decision, some district courts have had great difficulty in applying the Supreme Court's instructions. A few months after the decision, one frustrated district court judge wrote, "It appears to this Court that some of the factors the Supreme Court suggests be considered are at best difficult, and at worst impossible to calculate in this case as in most similar cases."[84]

But the more fundamental problem with this disaggregation approach is that it fails to recognize that the crime of one child pornography defendant combines with that of other criminals to produce an aggregated harm to Amy. When these crimes are all combined, the collective conduct overdetermines, or is more than sufficient to cause the harm (i.e., the costs of counseling), because Amy will presumably need the same amount of counseling regardless of whether the number of defendants possessing her images was 69,999 (without a particular defendant) or 70,000 (with him).[85] In such situations, the standard answer in tort law is *not* the one reached by the Supreme Court; instead, the standard answer is to hold all defendants jointly and severally liable for the entire injury.

The problem described by *Paroline* is a conundrum about factual causation that modern tort theory resolved long ago.[86] As the *Restatement (Third) of Torts* describes the problem, "[i]n some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm."[87] The standard solution not to award the victims nothing in such circumstances. Instead, the standard answer, as recounted in the *Restatement (Third) of Torts*, is to treat each wrongdoer as being a contributing cause to the entirety of the loss that is created.

The *Restatement* aptly recognizes that it is never possible to identify a single "cause" for an event. For example, an arsonist who uses a match to light a house ablaze is the cause of the house burning down only because of the existence of other conditions as well, such as a lack of rain at the time, the existence of oxygen in the atmosphere, the delay in the fire department responding to the fire, and so forth. It is all of the things—a causal set—that contributes to the ultimate harm.[88]

Reasoning from this insight, it is then possible to consider examples such as five people beating a sixth, who dies from the blows, any three of which would have been sufficient to kill the victim.[89] This is an illustration of an overdetermined causal set causing harm; none of the five attackers is the but-for cause of death, as it is possible to eliminate one of the five at-

tackers and death still results. But this would produce the anomalous and counterintuitive conclusion that the victim died from *none* of the attackers! Instead of this bizarre result, at least for purposes of tort law,[90] the solution is that all five of the attackers are responsible for the death. It is possible to construct a causal set of three of the attackers, which produces the death. And the mere fact that other causal sets could be constructed is no defense to tort liability. Under the *Restatement*, "[w]hen an actor's tortious conduct is not a factual cause of harm under the standard in § 26 [i.e., independently sufficient or but-for causation] only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor's tortious conduct is a factual cause of the harm."[91]

The *Restatement* notes that well-established tort precedent (predating Congress' 1994 enactment of the restitution statute) underlies this contributing cause approach. The *Restatement* reporter explains that, for example, "[s]ince the first asbestos case in which a plaintiff was successful, courts have allowed plaintiffs to recover from all defendants to whose asbestos products the plaintiff was exposed."[92] While numerous toxic tort cases illustrate the contributing cause approach, the *Restatement* identifies much deeper roots: "Nuisance cases were the pre-toxic-substances equivalent of asbestos and other such cases, and courts resolved them similarly."[93] In other words, traditionally in American tort law, an "independent-sufficiency requirement is not followed by the courts. . . . [Instead], courts have allowed the plaintiff to recover from each defendant who contributed to the . . . injury, even though none of the defendants' individual contributions were either necessary or sufficient by itself for the occurrence of the injury."[94]

In their restitution applications, Amy and Vicky are seeking recovery for a single "injury," their psychological counseling costs. Those counseling costs do not increase or decrease with the addition or subtraction of an additional criminal from the estimated tens of thousands of men who have viewed their rapes. In other words, the psychological counseling costs are "indivisible," because the evidence fails to provide "a reasonable basis for the factfinder to determine . . . the amount of [those costs] separately caused" by any particular child pornography possessor or distributor.[95] Against that backdrop, it is not surprising the Congress directed that each convicted child pornography criminal who contributed to a victim's psychological counseling costs must pay for the "full amount" of those costs in the child pornography restitution statute.

The Sixth Circuit's decision in *Michie v. Great Lakes Steel Division, National Steel Corp.*[96] offers a good illustration of this point. In that case,

several air polluters argued that plaintiffs could not proceed with a nuisance action against them when their pollutants "mix[ed] in the air so that their separate effects in creating the individual injuries [were] impossible to analyze."[97] The Sixth Circuit rejected this approach, holding that Michigan tort law allowed the polluters to be held liable as joint tortfeasors for the indivisible injuries caused.[98] The court noted that "it is clear that there is a manifest unfairness in putting on the injured party the impossible burden of proving the specific shares of harm done by each."[99] The rule in such cases is that "[w]hen the triers of the facts decide that they cannot make a division of injuries we have, by their own finding, nothing more or less than an indivisible injury, and the precedents as to indivisible injuries will control."[100]

The application of this principle to child pornography possession cases is obvious. Although it is possible that an individual tortfeasor's action—such as polluting the air or possessing child pornography—is neither "necessary" nor "sufficient" by itself to cause all the injuries, the general approach in American tort law is to hold each tortfeasor fully liable for the entire injury caused.[101] The injury to victims of child pornography due to possession or distribution manifests itself in the same way as other harms caused by multiple tortfeasors. And although some injuries may be theoretically divisible, where it is practically impossible to divide up the injury by causation, "the modern approach has been to hold each defendant . . . jointly and severally liable for all the injuries."[102] Thus, the appellate courts should have paid closer attention to one of the most compelling reasons to apply joint and several liability in analogous tort situations—that is, joint and several liability is applicable where "there is no reasonable basis for division" of the injury suffered.[103]

To this conclusion, it might be objected that each child pornography possessor contributes only a trivial amount to a victims' ultimate harm and thus liability is improper. In support of such a conclusion, one could cite tort theory that there is no liability "where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire."[104] The *Restatement*, for example, recognizes that a trivial cause can be excluded from tort liability.[105] The *Restatement*, however, specifically notes that this triviality limitation "is not applicable if the trivial contributing cause is necessary for the outcome . . . ,"[106] with a cross-reference back to the contributing cause cases that involve constructing a sufficient causal set. Put another way, if all causes would be regarded as trivial causes, then none of them can be regarded as trivial causes. Of course, child pornography possessors are part

of a causal set sufficient to produce Amy's psychological harm. Thus, their crimes are not like tossing a match into an already raging fire. Instead, conceptually the proper hypothetical would be thousands of arsonists all collectively tossing matches into a forest to start the fire or, alternatively, sequentially tossing matches to keep a fire burning. Rather than allowing all of the wrongdoers to escape liability through an exercise in blame shifting and finger pointing, standard tort principles hold all of them liable.

In any event, Congress itself has answered what is considered "trivial" in the context of restitution. Section 2259 mandates imposition of a restitution award for the "full amount" of Amy's losses in every case of a criminal conviction for child pornography possession.[107] By operation of law, the serious felony of possessing child pornography is never trivial.

Amy presented all these arguments to the Supreme Court in *Paroline*. And the majority acknowledged that tort law had, in some areas, applied the principle of "aggregate causation."[108] The majority, however, tersely held that such principles "can be taken too far."[109] Curiously, the majority seemed to agree that the "strict logic" of the recognized tort principles supported Amy.[110] But the majority was simply unwilling to proceed logically because of the "the striking outcome of this reasoning—that each possessor of the victim's images would bear the consequences of the acts of the many thousands who possessed those images."[111]

"Striking" outcome or not, the Court should have simply followed the generally recognized tort principles. Criminal defendants like Paroline have a choice about whether to commit their crimes. The fact that they are part of a vast enterprise with thousands of other similar actors should be an aggravating factor, not a mitigating one. As Justice Sotomayor explained in her dissent, restitution statutes should offer "no safety-in-numbers exception for defendants who possess images of a child's abuse in common with other offenders."[112] Justice Sotomayor went on to explain that "the injuries caused by child pornography possessors are impossible to apportion in any practical sense. It cannot be said, for example, that Paroline's offense alone required Amy to attend five additional minutes of therapy, or that it caused some discrete portion of her lost income."[113] She concluded that the restitution statute should be interpreted to mandate "full restitution," which "dispenses with this guesswork . . . and in doing so it harmonizes with the settled tort law tradition concerning indivisible injuries."[114]

Fortunately the Supreme Court does not have the last word on restitution in this country. The decision about how much restitution to award victims of child pornography crimes belongs to Congress. Congress should amend the statute to ensure that child pornography victims receive

"full" restitution. And Congress has a bill pending before it that would exactly that. Known as the Amy and Vicky Act,[115] the bill should be enacted as soon as possible to ensure that victims will not be left without restitution for losses inflicted by criminals too numerous to count.

Conclusion

In this chapter, we have attempted to provide some insight into the serious harms suffered by the victims of child pornography possession crimes. Possessing child pornography is not just looking at "kiddie porn." Instead, such criminal acts scar real-world victims, who live in constant fear of being exposed and humiliated by those who are obtaining sexual gratification through viewing images of their childhood rape. We have tried to illustrate this point in describing the experience of two young victims of child pornography crimes, Amy and Vicky. Against the backdrop of the suffering of victims such as these, stiff criminal penalties unsurprisingly address, as one court aptly put it, "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms."[116] Without trying to identify the exact quantum of punishment appropriate for child pornography possession, it is clear that the crime produces real and quantifiable harms on its victims that should be reflected in significant prison terms.

But in addition to punishing those who possess child pornography, it is equally important to compensate their victims. When awarding restitution for such aggregated crimes, some courts have minimized each defendant's culpability to the vanishing point. This concern is ironically most acute in cases (like Amy's and Vicky's) where the victim's images have been most widely viewed. Trying to apportion the amount of financial loss among tens of thousands of criminals invariably neglects the very significant psychological harm each crime causes. Those viewings represent continuous invasions of privacy that cause lasting psychological injury.

Traditional tort principles instruct instead that each defendant should be viewed as a contributing cause to the entirety of a victim's injury. This approach properly recognizes that a defendant is part of a group of criminals who cause harm—a harm that is aggravated by the presence of many others working together. Acknowledging the seriousness of harm caused by each possessor is important not only for determining how to compensate victims under federal restitution law, but also for calibrating the criminal penalties imposed for and the enforcement resources devoted to the

possession of child pornography. Child pornography possessors should not be able to hide in a crowd. Instead, they are all jointly responsible for seriously harming victims—and should be held fully accountable through both appropriate criminal penalties and awards of full restitution.

NOTES

1. http://cnsnews.com/news/article/michael-w-chapman/san-francisco-s-gay-icon-larry-brinkin-guilty-felony-child-porn.

2. Paul Cassell and James Marsh have represented child pornography victims at every level of the federal court system in their efforts to obtain restitution, including Amy and Vicky, two child pornography victims whose plight is discussed in this chapter. Jeremy Christiansen has assisted in preparing briefs filed for Amy through the University of Utah Appellate Clinic.

3. 18 U.S.C. § 2259.

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

5. Federal law criminalizes possession of "child pornography," 18 U.S.C. § 2252A, although in other places it is referred to as "material involving the sexual exploitation of minors," 18 U.S.C. § 2252.

6. *See, e.g.*, Douglas A. Berman, *If "Most Egregious and Horrific" Kiddie Porn Offender Gets 15 Years, What Should Mere Downloaders Get?*, SENT'G L. & POL'Y BLOG (May 13, 2011, 10:01 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2011/05/if-most-egregious-and-horrific-kiddie-porn-offender-gets-15-years-what-should-mere-downloaders-get.html; *cf.* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 864 (2011) (contending that sentences for child pornography crimes have become entangled with the sentences for the underlying sex abuse).

7. NCMEC quite accurately refers to these images as "crime scene photos." Brief of the National Center for Missing and Exploited Children, United States v. Paroline, No. 12-8561 at 18. NCMEC also reports that "[a]pproximately 6% of identified children were infants or toddlers; 39% were prepubescent; and 55% were pubescent when the images were created. The files depict several types of sexually exploitative activity, including oral copulation (84%), anal and/or vaginal penetration (76%), use of foreign objects or sexual devices (52%), bondage and/or sado-masochism (44%), urination and/or defecation (20%), and bestiality (4%)." *Id.* at 4–5.

8. Motion for Leave to Participate as Amicus Curiae and Brief of the National Crime Victim Law Institute as Amicus Curiae in Support of Petitioners at 1–2 n.1, Amy & Vicky v. Kennedy, No. 12-651 (2012) (quoting 1 SHARON W. COOPER ET AL., MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 258 (2005)).

9. http://en.wikipedia.org/wiki/Child_pornography (visited on Feb. 28, 2014).

10. *Ferber*, 458 U.S. at 759–60.

11. *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990).

12. *Ferber*, 458 U.S. at 760.

13. *See, e.g.*, 18 U.S.C. 2252(a)(4).

14. Pub. L. No. 104-208, § 121(12), 110 Stat. 3009–27 (1996); *see also* 132 Cong. Rec.

33781 (1986) (statement of Sen. Roth) ("[M]y subcommittee's investigation disclosed the existence of a seamy underground network of child molesters . . . and it showed that the very lifeblood of this loosely organized underground society is child pornography.").

15. Department of Justice, *National Strategy for Child Exploitation Prevention* 17 (2001).

16. U.S. Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses* 51 (2012) (hereinafter "*Sentencing Comm'n Report to Congress*").

17. *Id.* at 51–52.

18. *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

19. *See* Rachel O'Connell, *Paedophiles Networking on the Internet*, in CHILD ABUSE ON THE INTERNET: ENDING THE SILENCE 65, 77 (Carlos A. Arnaldo, ed., 2001) (networks for sharing child pornography are "an example of a complex criminal conspiracy").

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

21. *Id.* at 758 n.9 (internal quotation marks and citations omitted).

22. *Id.* at 759 n.10 (internal quotation marks omitted) (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981)).

23. *Paroline*, 134 S. Ct. at 1226 (emphasis added); *see also id.* at 1732 (Roberts, J., dissenting) (noting that child pornography victims suffer a "qualitatively different injury" from other types of victims, an injury that is "a result of the collective actions of a huge number of people—beginning with [the initial abuser], to the distributors who make those images more widely available, *to the possessors* . . . who view [those] images" (emphasis added)); *id.* at 1741 (Sotomayor, J., dissenting) ("Child pornography possessors are jointly liable . . . for they act in concert as part of a global network of possessors, distributors, and producers who pursue the common purpose of trafficking in images of child sexual abuse. . . . By communally browsing and downloading Internet child pornography, offenders . . . fuel the process that allows the industry to flourish.").

24. These names are pseudonyms used in all court hearings to protect the victims' privacy.

25. The harms Amy suffers from child pornography are detailed in the expert evaluations and her own victim impact statements that accompany her restitution requests in various cases. This part relies specifically on the reports and statements contained as attachments to one of Amy's recent restitution requests, submitted in March 2013. *See* Letter from James R. Marsh, Counsel for "Amy," Marsh Law Firm PLLC, to Camil Skipper, Appellate Chief, E.D. Cal. U.S. Attorney's Office (Mar. 22, 2013) [hereinafter "Amy's Restitution Request"] (on file with authors). Attachment 1 of this request contains Amy's victim impact statement, hereinafter referred to as "Amy's 2013 Impact Statement"; Attachment 2 contains Dr. Joyanna Silberg's November 21, 2008, report of her psychological evaluation of Amy, hereinafter referred to as "Amy's Psychological Evaluation"; and Attachment 6 contains Dr. Stan V. Smith's September 15, 2008, report that calculates Amy's lost income and other economic losses attributable to the distribution of her child sex abuse images, hereinafter referred to as "Amy's Economic Loss Report."

26. Amy's 2013 Impact Statement, *supra* note 25, at 1.

27. *See* Amy's Psychological Evaluation, *supra* note 25, at 2.

28. *See id.*; *see also* Bazelon, *The Price of a Stolen Childhood,* http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?pagewanted=all&_r=0 at 25 (describing how Amy's uncle forced her to per-

form sexual poses for photographs in response to specific requests from anonymous Internet users).

29. Amy's Psychological Evaluation, *supra* note 25, at 2–3 (quoting notes of Amy's original therapist, Dr. Ruby Salazar).

30. *Id.* at 3; Amy's 2013 Impact Statement, *supra* note 25, at 1.

31. Amy is the victim portrayed in what law enforcement officials have identified as the "Misty" series. As of July 2009, analysts at NCMEC had encountered more than 35,570 separate images associated with the "Misty" series, received from law enforcement officials around the world. NCMEC Brief, *supra* note 7, at 5.

32. Amy's 2013 Impact Statement, *supra* note 25, at 2.

33. Amy's Psychological Evaluation, *supra* note 25, at 8. Dr. Silberg explains that the feelings of shame and humiliation that are typically felt by victims of sexual abuse are "multiplied exponentially for victims of internet child pornography." *Id.* at 9. With typical sexual abuse victims, therapists can offer "anonymity" along with the "acknowledgment that they deserve this protection of privacy." *Id.* Dr. Silberg explains, however, that "knowing one's image is out there at all times is an invasion of privacy of the highest degree which makes the victim feel known, revealed and publically shamed, rather than anonymous." *Id.* The course of treatment for these victims must account for the unique harms involved, as certain therapeutic techniques useful to survivors of sexual abuse might actually be "ineffective and potentially harmful" to victims of child pornography. *See id.* The "imagery technique," for example, is used to help victims cope with flashbacks of abuse and requires the victim to imagine herself "going back in time and standing up to the abuser to undo the experience of victimization in their imagination." *Id.* But, as Dr. Silberg explains, "[f]or victims like Amy, such a technique would actually be harmful as she has to face [that] she can never erase the ongoing 'evidence' and 'proof' of what she was forced to do. Such an exercise would add to her feelings [of] helplessness." *Id.*

34. *See* Amy's Economic Loss Report, *supra* note 25, at 3.

35. *See* Amy's 2013 Impact Statement, *supra* note 25, at 3.

36. The facts about the harms Vicky suffers from child pornography come from the reports and statements contained within one of Vicky's recent restitution requests, which is included as an unsealed exhibit (Exhibit B) to a government sentencing memorandum, which itself is still sealed. *See* Government's Resentencing Memorandum Regarding Restitution at Exhibit B, United States v. Kennedy, No. 2:08-CR-00354-RAJ-1 (W.D. Wash. Aug. 21, 2012) [hereinafter "Vicky's Restitution Request"]. The restitution request itself contains several relevant exhibits: Exhibit 1 contains an August 2012 letter from Vicky to a district court judge in Washington State regarding the sentencing of a defendant convicted of possessing her images, hereinafter referred to as "Vicky's Letter to Sentencing Judge;" Exhibit 2 contains two victim impact statements written by Vicky, hereinafter referred to as "Vicky's 2008 Impact Statement" and "Vicky's 2011 Impact Statement," respectively; Exhibit 4 contains two reports of her psychological evaluations conducted by Dr. Randall L. Green, which will be referred to hereinafter as "Vicky's May 2009 Psychological Evaluation" and "Vicky's Dec. 2009 Psychological Evaluation" respectively; and Exhibit 9 contains Dr. Stan V. Smith's November 10, 2010, report calculating Vicky's lost income and other economic losses attributable to the distribution of her child sex abuse images, hereinafter referred to as "Vicky's Economic Loss Report."

37. *See* Vicky's May 2009 Psychological Evaluation, *supra* note 36, at 18–21; *see also* Vicky's 2008 Impact Statement, *supra* note 36, at 1.

38. Vicky's May 2009 Psychological Evaluation, *supra* note 36, at 20.

39. Vicky's 2008 Impact Statement, *supra* note 36, at 1.

40. *See* Vicky's 2011 Impact Statement, *supra* note 36, at 1 ("My world came crashing down the day I learned that pictures of me being sexually abused had been circulated on the internet. Since then, little has changed except my understanding that the distribution of these pictures grows bigger and bigger by the day and there is nothing I can do about it."); *see also* Vicky's May 2009 Psychological Evaluation, *supra* note 36, at 24–29 (detailing Vicky's experiences following her discovery of the worldwide distribution of her images).

41. *See* Vicky's Dec. 2009 Psychological Evaluation, *supra* note 36, at 2–8 (describing Vicky's deteriorating emotional state in the wake of learning about the circulation of her images online). Dr. Green categorized the "knowledge of the dissemination and proliferation of the images of [Vicky] at her times of greatest humiliation and degradation" as a Type II trauma, which represents a "chronic, toxic condition, the knowledge of which continuously works like corrosive acid on the psyche of the individual." Vicky's May 2009 Psychological Evaluation, *supra* note 36, at 6. Other examples of stressors that constitute Type II traumas include the "challenges endured by those who live near Chernobyl, Three Mile Island or the Love Canal or a war zone." *Id.* at 6–7.

42. Vicky's 2011 Impact Statement, *supra* note 36, at 1.

43. Vicky's Letter to Sentencing Judge, *supra* note 36, at 2.

44. Vicky's 2011 Impact Statement, *supra* note 36, at 1.

45. *Id.* at 1–2.

46. *Id.*

47. *Id.*; *see* Press Release, U.S. Dep't of Justice, Man Who Harassed and Stalked Victim of Child Pornography Series Sentenced to 25 Years in Prison (April 28, 2010), *available at* http://www.justice.gov/usao/nv/news/2010/04282010.html.

48. Vicky's 2011 Impact Statement, *supra* note 36, at 3; *see also* Vicky's Dec. 2009 Psychological Evaluation, *supra* note 36, at 4–5 ("[Vicky] says that if there had been a way to afford to stay in college and seek therapy rather than return to her home town, she would have much preferred doing so. [Vicky] says, 'Coming home is difficult because so many know and ask about [her depiction in child pornography].' However, she says that she has learned that she can't escape her issues by changing her geographical location, in view of the impact of the universal reach of the Internet. She explains, 'They follow me.'").

49. Vicky's Letter to Sentencing Judge, *supra* note 36, at 2.

50. Vicky's Dec. 2009 Psychological Evaluation, *supra* note 36, at 2, 4–5, 8. Vicky offered insight into this fear in a statement she wrote for the recent sentencing of defendant Joshua Kennedy:

> I understand that [Kennedy] had a good job, and that many people who are looked up to in the community came to make statements on his behalf at his first sentencing. This tells me that he blended into society and would have previously been seen as someone who was law-abiding and not someone who enjoyed looking at pictures of children being raped. This feeds my paranoia even more,

> and confirms for me that I do need to be afraid of people that I see on an everyday basis, because anyone I see is suspect of being a consumer of child pornography. I could have walked past Joshua Kennedy on the street any time and he might have recognized me from those pictures he had of my sexual abuse. This chills me to the bone.

Vicky's Letter to Sentencing Judge, *supra* note 36, at 2.

51. *Paroline v. United States*, 134 W. Ct. 1710, 1726 (2014).

52. 18 U.S.C. § 2259(b)(3)(A)–(F) (2012).

53. *See* Amy's Economic Loss Report, *supra* note 25; Vicky's Economic Loss Report, *supra* note 36.

54. *See* Bazelon, *supra* note 28, at 45–47.

55. *See* Vicky's Restitution Request, *supra* note 36.

56. *Id.* at 1.

57. *Id.* at 1–2.

58. *See id.* at Exhibit 4 (original and updated psychological evaluation reports); *id.* at Exhibit 7 (vocational evaluation report); *id.* at Exhibit 9 (forensic economic analysis report); *id.* at Exhibit 13 (declaration of attorneys' fees and costs).

59. *See* Vicky's Economic Loss Report, *supra* note 36, at 2–5. To assess her specific situation, Dr. Smith relied on the victim impact statements of Vicky and her mother, the reports of vocational and psychological experts who evaluated Vicky, and his own interview of Vicky. *Id.* at 1.

60. *Id.* Although she returned to school after taking a year off, her psychologist has recommended that due to her "reduced tolerance for stress," she should take a reduced course load each semester, which will further delay her career. *Id.* at 4.

61. *Id.*; *see supra* notes 49–50 and accompanying text.

62. Specifically, Dr. Smith determined that her net loss of earnings capacity is $722,511 to age sixty-seven for full-time employment, assuming a three-year delay of entry into the workforce and a 20 percent reduction in worklife, as she will likely experience more frequent job changes and time off from work than her peers. Vicky's Economic Loss Report, *supra* note 36, at 5.

63. *Id.* at 1.

64. Most federal courts have agreed that restitution is remedial in nature and therefore not subject to Eighth Amendment punishment or "excessive fine" limitations, but a circuit split exists on this issue. *Compare, e.g.*, *In re* Amy Unknown, 701 F.3d 749, 771–72 (5th Cir. 2012) (en banc) (holding Eighth Amendment not applicable to § 2259 because the purpose of restitution "is remedial, not punitive"), *with* United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) ("[R]estitution under the [Mandatory Victim Restitution Act ("MVRA")] is punishment" and subject to Eighth Amendment limitations "because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes." (citation omitted)). We believe that restitution is nonpunitive for the reasons articulated in *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1318–23 (D. Utah 2004) (Cassell, J.). *See also* Amicus Brief of Vicky and Andy, *U.S. v. Paroline*, No. 12-8561 (explaining why restitution is not punitive).

65. Cortney Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 346 (2013).

66. *Id.* at 382. Federal law affords child pornography victims the right to receive (and

to opt out of receiving) notifications when a defendant is arrested or charged in connection with their images or videos. *See* Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771(a) (2012); Crime Control Act of 1990, 42 U.S.C. § 10607(b)–(c) (2006); *see also* DEP'T OF JUSTICE, CHILD PORNOGRAPHY VICTIMS ASSISTANCE (CPVA) PROGRAM: A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS, *available at* http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf (describing victims' opt-out rights). According to Professor Lollar, victims would be better off not being notified about the circulation of their images and not receiving restitution for the losses associated with their injuries because:

> Money is not going to make the young women depicted in child pornography emotionally whole or restore what was lost. Yet by notifying child pornography victims of all known uses of their images and then ordering compensation, legislators and courts are reinforcing the message that a young woman's worth is in her body and is linked to the sexual acts in which she participates. . . . Notification and restitution reaffirm the damaging messages the young women learned during their abuse.

Lollar, *supra* note 65, at 382. Vicky herself has pointedly responded to such criticism in her victim impact statement, however, explaining:

> I have a right to know who has my pictures and who is trading them. While it hurts to know, not knowing makes me feel more in danger. To be criticized for wanting to know what is going on with the humiliating pictures of me, to exercise the few rights I have under the law, only makes the hurt that much worse. How can such people not understand, or care?

Vicky's 2011 Impact Statement, *supra* note 36, at 1.

67. In fact, Dr. Smith calculated hedonic damages (reduction in the value of life) for Vicky to be an additional $2,615,542 on top of the economic losses he calculated in light of her lost earnings. *See* Vicky's Economic Loss Report, *supra* note 36, at 7. Vicky, however, has never requested restitution in a criminal case on the basis of such losses.

68. Lollar, *supra* note 65, at 348 n.10. Notably, although they deny responsibility, even the defendants in these cases have not challenged the calculation of the losses. *See, e.g.*, United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) (noting defendant did not challenge the district judge's calculation of Amy's and Vicky's losses, which were $3,367,854 and $1,224,697.04 respectively).

69. *See* 18 U.S.C. § 2259(b)(3)(A)–(F) (2012) (specifying economic-based losses available to victims of child pornography).

70. United States v. Kennedy, 643 F.3d 1251, 1263 (9th Cir. 2011) (citation omitted).

71. *Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014).

72. United States v. Monzel, 641 F.3d 528, 537 (D.C. Cir. 2011).

73. *Id.* at 538.

74. United States v. Burgess, 684 F.3d 445, 458 (4th Cir. 2012).

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

76. *Id.* at 1727–28.

77. *See* Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS U.L. REV. 45, 57 (1992).

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

79. 2 FOWLER HARPER & FLEMING JAMES, THE LAW OF TORTS 1124 (1956) (hereinafter *Harper & James*).

80. United States v. Monzel, 641 F.3d 528, 538 (D.C. Cir. 2011).

81. *Id.* at 538–39.

82. *Id.* at 538.

83. *Paroline*, 134 S. Ct. at 1727.

84. United States v. Crisostomi, CR 12-166-M, 2014 WL 3510215 (D.R.I. July 16, 2014).

85. In Amy's brief to the U.S. Supreme Court, she estimated that approximately 70,000 men around the world had viewed her sexual abuse images, relying on 2009 data from NCMEC and the U.S. Justice Department. Brief for Respondent Amy, *United States v. Paroline*, No. 12-8561, at 65. More current data from NCMEC would place the number of men at around 140,000. *See* Brief for Amicus National Center for Missing and Exploited Children, *United States v. Paroline*, No. 12-8561, at 11 (noting doubling of Amy's images found at American crime scenes from 35,000 to 70,000 over the period 2009 to 2013).

86. *See generally* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 88–92 (2005) (explaining development of the "multiple sufficient causal sets" rule which emerged as the "dominant theory of causation among tort scholars").

87. THE AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f (2000) (hereinafter cited as *Restatement*).

88. *See id., Restatement* § 27 cmt. f, Rptrs. Note at 391 (collecting authorities discussing this point).

89. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 267 n.25 (5th ed. 1984).

90. *Cf. Burrage v. United States*, No. 12-7515 (U.S. Jan. 27, 2014) (concluding that for purposes of a mandatory minimum statute, death does not "result" from illegal distribution of heroin to a victim unless that death was the but-for cause of death).

91. *Restatement, supra* note 87 at § 27 cmt. f at 381.

92. *Restatement, supra* note 87 at § 27, cmt. g, Rptrs. Note at 392 (*citing, e.g.,* Borel v. Fibreboard Paper Prods., 493 F.2d 1076, 1094 (5th Cir. 1973); Ingram v. ACandS, Inc., 977 F.2d 1332, 1340 (9th Cir. 1992); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1073 & n.384 (1988) (collecting authorities)).

93. *Restatement* § 27 cmt. g, Rptrs. Note at 393 (*citing* Bollinger v. Am. Asphalt Roof Corp., 19 S.W.2d 544, 552 (Mo. Ct. App. 1929) ("If there was enough of smoke and fumes definitely found to have come from defendant's plant to cause perceptible injury to plaintiffs, then the fact that another person or persons also joined in causing the injury would be no defense; and it was not necessary for the jury to find how much smoke and fumes came from each place.")); *see also* Phillips Petroleum Co. v. Hardee, 189 F.2d 205, 212 (5th Cir. 1951) ("According to the great weight of authority where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act

of the other tortfeasor." (*quoting* AMERICAN JURISPRUDENCE)); Northrup v. Eakes, 178 P. 266, 268 (Okla. 1918) (where "separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it"); The "Atlas," 93 U.S. 302, 315 (1876) ("Nothing is more clear than the right of a plaintiff, having suffered . . . a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.").

94. Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1792 (1985) (discussing various cases).

95. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26.

96. Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213 (6th Cir. 1974); *see also* Wright, *supra* note 94, at 1792 & n.239 (explaining that courts have allowed plaintiffs in pollution cases, including *Michie*, to recover from "each defendant who contributed to the pollution that caused the injury, even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury").

97. *Michie*, 495 F.2d at 215.

98. *Id.* at 217.

99. *Id.* at 216 (quoting Maddux v. Donaldson, 108 N.W.2d 33, 36 (Mich. 1961)) (internal quotation marks omitted).

100. *Maddux*, 108 N.W.2d at 37; *accord* John Henry Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458, 459 (1923) ("Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each *for the whole*." (emphasis removed)).

101. In his Seventh Circuit opinion, Judge Posner curiously recognized that this principle applied to child pornography cases, but only if the defendant was convicted of *distributing* child pornography, not just possessing it. He explained:

> The number of pornographic images of a child that are propagated across the Internet may be independent of the number of distributors. A recipient of the image may upload it to the Internet; dozens or hundreds of consumers of child pornography on the Internet may download the uploaded image and many of them may then upload it to their favorite child-pornography web sites; and the chain of downloading and uploading and thus distributing might continue indefinitely. That would be like the [indivisible injury] case.
>
> United States v. Laraneta, 700 F.3d 983, 992 (7th Cir. 2012).

Judge Posner distinguished distribution from possession, explaining that if Laraneta did not upload any of Amy and Vicky's images to the Internet, "then he didn't contribute to those images 'going viral.'" *Id.* at 991. He continued, "If we consider only [Laraneta] having seen those images, and imagine his being the only person to have seen them, Amy's and Vicky's losses would not have been as great as they were." *Id.* But this logic does not provide any clear reason to distinguish between distributors and possessors, especially because it is each act of possession that creates the harm to a child pornography victim.

Further, this misses the implication of what it means to "go viral." A video, for example, can be "distributed" by being put on YouTube where the general public can view it, but it only "goes viral" once many people *actually view* it.

102. Brief of American Law Professors as Amici Curiae Supporting Respondents at 17, Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003) (No. 01-963), 2002 WL 1964118 [hereinafter Brief of American Law Professors].

103. 74 AM. JUR., 2D TORTS § 65 (2013).

104. W. Page Keeton et al., *supra* note 89, at 267–68.

105. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36.

106. *Id.* cmt. b at 599.

107. 18 U.S.C. 2259(b)(4).

108. *Paroline*, 134 S. Ct. at 1723.

109. *Id.* at 1724.

110. *Id.*

111. *Id.*

112. *Id.* at 1737 (Sotomayor, J., dissenting).

113. *Id.* at 1740 (Sotomayor, J., dissenting).

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

115. S. 2301 (113th Cong., 2014).

116. United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007).