# Criminal Law & Procedure

## *Paroline v. United States*: The Question of Restitution

*By Dean A. Mazzone**

In *Paroline v. United States*, 134 S.Ct. 1710 (2014), the United States Supreme Court considered the perennial and vexing question of how precisely to ascertain the proper amount of restitution owed to a victim by a person convicted of possession of child pornography. Doyle Randall Paroline pleaded guilty to possessing between 150 and 300 images of child pornography; two of those images depicted the abuse of "Amy" (a pseudonym) by her uncle when she was eight or nine years old.[1] At 17, and with the prosecution of her uncle behind her, Amy learned that video images of her abuse were widely available on the internet, with unknown possessors (and viewers) numbering in the thousands.[2] The precise number can never be known.

In her victim impact statement to the Court, following Paroline's plea, and in anticipation of his sentencing, Amy said the following:

> 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. . . . 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.[3]

As noted, one of those abusers was Paroline, the admitted possessor of two of Amy's images.

Pursuant to the Mandatory Victim Restitution Act (MVRA), federal district courts must award restitution in certain cases, including cases of child sexual exploitation and child pornography.[4] Specifically, § 2259 of the statute commands that courts shall order the defendant "to pay the victim . . . the full amount of the victim's losses as determined by the court" and that "[t]he issuance of a restitution order under this section is mandatory."[5] § 2259 also references and incorporates a later section of the MVRA which directs that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."[6] This later section, however, applies generally to restitution in all types of criminal cases, and has no distinct provisions for crimes of child exploitation in cases such as Amy's.

Pursuant to § 2259, Amy sought restitution from Paroline. Amy's request: approximately $3.4 million dollars, with about $3 million of that sum attributable to lost income, and the remainder to future treatment and counseling costs.[7] All parties agreed that Amy did not know Paroline at all, except to the extent that he pleaded guilty in the federal proceeding to possessing two unlawful images of her that he accessed through the internet.[8]

After a hearing, the district court denied Amy's request for restitution from Paroline. Noting that "everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute[s] to [the victim's] ongoing harm" nonetheless, where the government must prove the amount of the victim's losses "directly produced by Paroline that would not have occurred without his possession of her images" the government simply failed to meet that burden.[9] It could not show by a preponderance of the evidence what precise losses of Amy's were caused by Paroline's specific conduct, and Amy was thus entitled to no restitution whatsoever.[10]

Amy sought review of the district court's decision, and the case wound its way eventually to the United States Court of Appeals for the Fifth Circuit. Hearing the case en banc, the Fifth Circuit held that § 2259 should be read strictly and plainly, and determined that each and every defendant who possessed the victim's images was liable for the entirety of the victim's losses, even if other possessors concededly contributed to those losses. It was a windfall for Amy. Paroline, in turn, sought review of the Fifth Circuit's judgment in the United States Supreme Court, which granted cert in short order to resolve a circuit split, and authoritatively determine the meaning, reach, and scope of § 2259, as applied to cases of child sexual exploitation. As often happens, however, perfect clarity did not necessarily result.

The majority opinion, written by Justice Kennedy, grappled with what seemed (and, after the opinion, may still seem) an impossible dilemma: in a case such as this one, how do you determine what particular portion of harm was caused by the defendant, where the total quantum of harm suffered by the victim was undoubtedly caused by a vast and effectively unknowable number of mostly anonymous persons. As the Court early in the opinion quite movingly puts it:

> The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever increasing number of wrongdoers witnessed the crimes committed against her.

*Senior Trial Counsel, Criminal Bureau, Massachusetts Attorney General's Office.

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If all that is true, how should liability be apportioned where a sentencing court is faced with one defendant convicted of two counts of simple possession of child pornography, and a statute commands that he be ordered to pay "the full amount of the victim's losses"?

The Court first determined that the plain language of Section 2259 limits restitution only to those losses proximately caused by the defendant in the context of the crime with which he is charged.[11] The Court explored the history and conceptual underpinnings of the familiar legal doctrine of proximate causation. Noting both its criminal and tort law pedigree, the Court recognized that "[e]very event has many causes [] and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result."[12] Thus, proximate causation is, as some may have learned in law school, another way of saying legal causation, that is, causation sufficient to be recognized in law. The statute requires proximate causation, the Court held, and indeed the statute plainly states as much.[13]

Implicit in such a doctrine, of course, is the premise that, before a cause can be considered proximate, that is, legally sufficient, it must first be found to be a factual cause of the result, a cause in fact. As the majority observed: "a requirement of proximate cause is more restrictive than a requirement of factual cause alone."[14] The Court provided an illustrative example:

> [S]uppose the traumatized victim of a [sex] offender needed therapy and had a car accident on the way to her therapist's office. The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs.[15]

In other words, the cause, while factual, cannot be considered proximate. It would not be just to hold the defendant liable for such far-reaching results.

The *Paroline* case, troublingly, presents precisely the opposite problem. There is no doubt that Paroline increased Amy's injury by some degree. And it is plain that Paroline should be held accountable somehow for his conduct, in both the legal and the moral sense. But, as the Court noted, "a showing of but-for causation cannot be made."[16] That is, "it is not possible to prove that [Amy's] losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate."[17] Simply put, restitution, properly understood, cannot be determined in such circumstances. Standard but-for causation just cannot do the work the statute calls for. Was the district court correct, then, in declining to award Amy any restitution whatsoever?

The Court carefully considered all contrary arguments raised by the parties. For example, the Government put forward an "aggregate causation" theory, "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."[18] The theory, imported from the law of torts, would seem a perfect fit for Paroline. But, the Court noted, "[i]f the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome."[19] Such legal fictions in fact are a poor fit for the criminal law. While such an outcome might appear just in some sense, it is, again, pure fiction, and not an accurate reflection of what actually occurred.

In addition, as the Court went on to observe, such "alternative causal standards, though salutary when applied in a judicious manner, also can be taken too far."[20] Amy's position in the case served as just such an example. Indeed, she insisted that, under the aggregate causation theory, for instance, "each possessor of her images is a part of a causal set sufficient to produce her ongoing trauma, so each possessor should be treated as a cause in fact of all the trauma and all the attendant losses incurred as a result of the entire ongoing traffic in her images."[21] Indeed, and as noted, Amy sought over three million dollars from Paroline alone, who possessed but two of those images. The majority was not exactly comfortable with such a theory, to say the least.

> 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—illustrates why the court has been reluctant to adopt aggregate causation logic in an incautious manner, especially in interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach.[22]

The Court, simply put, could not abide such an outcome. It would not be "sensible to embrace the fiction that this victim's losses were the 'proximate result' . . . of a single possessor's offense."[23] Indeed, to do so would mean applying the statute in "a manner contrary to the bedrock principle that restitution should reflect the consequences of the defendant's own conduct . . . not the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact."[24]

At oral argument, Justice Breyer summed up the dilemma in the plainest of language:

> There's a problem in child pornography cases. Congress clearly wants restitution. Makes sense to me. But if a thousand people look at it, then each one can say: But I didn't cause more than a tiny fraction at most, and so there virtually is no restitution; right? Now, every one of the thousand says that, truthfully, and so therefore the victim gets no restitution—opposite of what Congress wanted.[25]

Or, as Chief Justice Roberts put it in his dissent (joined by Justices Scalia and Thomas), although Congress undoubtedly *wanted* to provide restitution to victims of child pornography, that is not what, in the end, they did.

> Unfortunately, the restitution statute that Congress wrote for child pornography offenses makes it impossible to award that relief to Amy in this case. Instead of tailoring the statute to the unique harms caused by child pornography, Congress borrowed a generic restitution standard that makes restitution contingent on the Government's ability to prove . . . 'the amount of the loss

> sustained by a victim as a result of the defendant's crime. . . . When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that 'amount.' And arbitrary is not good enough for the criminal law.[26]

Congress' failure, then, according to Chief Justice Roberts and the Justices who joined him, leaves Amy with no recourse, and there is nothing the judiciary can do about it. "Amy's injury is indivisible, which means that Paroline's particular share of her losses is unknowable. And yet it is proof of Paroline's particular share that the statute requires."[27] Thus, the statute, read in context and by its very own terms, suffers from an irremediable internal contradiction. "When Congress conditioned restitution on the Government's meeting that burden of proof, it effectively precluded restitution in most cases involving possession or distribution of child pornography."[28] The majority opinion, as noted, agrees completely with this diagnosis of the problem: a defendant like Paroline simply cannot appropriately be held liable for the totality of Amy's injuries, although that is just what the language of the statute appears to provide for. But the Chief Justice penned a dissent. Where Congress has set an impossible task, he says, that must be the end of the matter. The majority, however, saw things somewhat differently.

Flatly rejecting the notion that Paroline could be held responsible for all of Amy's injuries, the majority explained that such a circumstance in fact

> does not mean the broader principles underlying the aggregate causation theories the Government and the victim cite are irrelevant to determining the proper outcome in cases like this. The cause of the victim's general losses is the trade in her images. And Paroline is a part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily identifiable incremental loss he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses. Just as it undermines the purposes of tort law to turn away plaintiffs harmed by several wrongdoers, it would undermine the remedial and penological purposes of [the statute] to turn away victims in cases like this.[29]

Thus, the majority determined that a complete denial of restitution under such circumstances was unnecessary.

The majority instead concluded that the statute did not command a strict showing of but-for causation. Indeed, if that were the case, "it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach."[30] This is of course not at all consonant with the thinking of Justices Roberts, Scalia, and Thomas. Whether or not a plain reading of the text would undermine the statute's purpose is irrelevant, where the Court had

> previously refused to allow 'policy considerations'—including an 'expansive declaration of purpose,' and the need to 'compensate victims for the full losses they suffered'—to deter us from reading virtually identical statutory language [in a previous case] to require proof of the harm caused solely by the defendant's particular offense.[31]

There could be no remedy because the statute did not actually provide one, and it was not the judiciary's job to rewrite statutes. The majority refused, however, to "simply throw up its hands." It instead came up with the following formulation:

> In this special context, 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, 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.[32]

Of course, this is easier said than done. Noting that determining restitution in cases like Paroline's "cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment,"[33] the Court set out a series of factors that it believed could be helpful, including:

> 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 causal role.[34]

Again, easier said than done. The majority foreswore any "rigid formula" and cautioned that the above factors were only "rough guideposts."[35] It expressed faith in and support for a trial court's capacity to achieve a just result under less than ideal conditions. The principal dissent nonetheless expressed dismay at the majority's resolution and guidance.[36] Chief Justice Roberts reiterated that the majority's formula was not what Congress established. The statute very simply, and very straightforwardly,

> requires restitution to be based exclusively on *the losses that resulted from the defendant's crime*—not on the defendant's relative culpability. The majority's plan to situate Paroline along a spectrum of offenders who have contributed to Amy's harm will not assist a district court in calculating the amount of Amy's losses—*the amount* of her lost wages and counseling costs—that was caused by Paroline's crime (or that of any other defendant).[37]

Moreover, and putting the plain language of the statute to one side, even the most skilled and conscientious trial judge would, in the end, have to resort to arbitrary application of the statute. The Chief Justice wrote:

> It is true that district courts exercise substantial discretion

> in awarding restitution and imposing sentences in general. But they do not do so by mere instinct. Courts are instead guided by statutory standards: in the restitution context, a fair determination of the losses caused by the individual defendant under section 3664(e); in sentencing more generally, the detailed factors in section 3553(a). A contrary approach—one that asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault—would undermine the requirement that every criminal defendant receive due process of law.[38]

The ad hoc solution proposed by the majority, in addition to being unfaithful to the law's text, will do no one any favors.

In *Paroline*'s wake, and as predicted by the principal dissent, district courts have struggled with the majority's guidance in formulating mandatory restitution orders in child pornography cases. As one district judge noted, "[t]he tools provided by *Paroline*, while seemingly useful in a theoretical sense, have proven to have very difficult, and very limited, practical application."[39] Perhaps, though, it cannot be put any better than this, in the words of another district judge:

> Though commentators may quarrel over the astuteness of the Supreme Court's professed confidence in the skill of the district courts to divine a true course through this thicket, and whatever the value of the balm its words of praise provide . . . the task seems akin to piloting a small craft to safe harbor in a Nor'easter. With the bulk of compensable loss long suffered, with potential responsible parties at varying levels of criminal culpability (from physical participant, to producer, to distributor, to consumer/voyeur), to catch as catch can prosecutions and the logical construct that the totality of restitution cannot exceed the totality of actual loss suffered by the identified victim, 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. The task of charting passage through these unknown waters is overwhelming.[40]

In the end, the district courts appear to have settled for now on a relatively straightforward process for determining restitution. A trial court will take the amount of general losses and divide that amount by the number of restitution orders already entered in other cases with other defendants, and the defendant before the court simply pays his evenly apportioned share. That is, a court considers:

> [T]he amount of psychological treatment/counseling costs, plus educational and/or vocational losses following the offense conduct, less those costs directly related to another defendant or litigation [that is, another unlawful possessor of the images in the "continuing traffic" of those images], plus costs arising after the offense conduct that are impossible to trace to an individual defendant alone.[41]

Of course, as the district court in *DiLeo* noted, while this formula may be simple and relatively easy to apply, "this quotient, if adopted whole hog would effectively nullify other *Paroline* factors."[42] The court was of course referring to the *Paroline* majority's suggestion that trial courts should consider "reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses [and] any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted) [.]"[43] The district court understandably characterized any such "reasonable predictions" as nothing more than "the sheerest of speculation" and "a wild guess."[44] With this de facto concession to the logic of the principal dissent in *Paroline,* and surveying the work of other trial courts, the court in *DiLeo* simply ejected any predictive considerations based on the government's (understandable) failure of proof.

The *DiLeo* court went on to find:

> In other similar ordinary cases, that is, lacking proof of most *Paroline* factors, resort was made first and foremost to some type of simple division of the known loss by the then known total number of responsible offenders. In these case, where proof of other factors was unknowable and, therefore, unavailable, those courts have provided common law precedents effectively setting a benchmark methodology for the calculation of non-token restitution awards as *Paroline* requires in child pornography cases.[45]

The resulting award of restitution, while not trivial ($2000), was surely not what the *Paroline* majority had hoped for in terms of precision. But that may have been unavoidable with such ad hoc jurisprudence and vague guidance. As always, the district courts do the best they can.

Finally, it should be noted that a federal bill introduced and passed in the United States Senate, the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015 (S. 295/H.R. 4981), deals with many of the issues discussed above, and was specifically written to address the concerns of the *Paroline* majority. For example, the bill provides that if a victim is harmed by a single defendant, that defendant must pay full restitution for all the losses. If a victim is harmed by multiple defendants, including those not yet identified, a judge may order restitution for the entire amount of the victim's losses to be paid by a single defendant, or may order certain minimum fines depending on the defendant's particular conduct, such as producing or distributing images as opposed to simple possession. Importantly, the bill also provides a mechanism for a defendant subject to an order of restitution to seek contribution from another offender and thereby spread out the cost, a remedy considered by the *Paroline* majority[46] but one ultimately rejected where there was no extant statutory basis for such a right.

In the end, Congress will have to fix the statute it wrote. Well intentioned guidance by the Supreme Court is simply no substitute for the hard work of legislating. And in the meantime, busy trial courts will work with what they have, and do their best to dispense justice under difficult circumstances, and in often heartbreaking cases. Congress, however, appears to believe that Amy deserves better.

## Endnotes

1 Paroline v. United States, 134 S.Ct. 1710, 1716-1717 (2014).

2 *Id*. at 1717.

3 *Id*.

4 18 U.S.C. § 2259.

5 18 U.S.C. § 2259(b)(1); 2259(4)(A).

6 18 U.S.C. § 3664(e).

7 *Paroline*, 134 S.Ct. at 1718.

8 *Id*.

9 *Id*.

10 *Id*.

11 *Id*. at 1722.

12 *Id*. at 1719.

13 *Id*. at 1720. ("[T]he requirement of proximate cause is in the statute's text.").

14 *Id*.

15 *Id.* at 1721.

16 *Id*. at 1722.

17 *Id*. at 1723.

18 *Id*. at 1723-1724.

19 *Id*. at 1724.

20 *Id*.

21 *Id*.

22 *Id.*

23 *Id.* at 1725.

24 *Id.*

25 Transcript of Oral Argument at 9, Paroline v. United States, 134 S.Ct. 1710 (No. 12-8561).

26 *Paroline*, 134 S.Ct. at 1730 (internal citation omitted).

27 *Id.* at 1733.

28 *Id*.

29 *Id.* at 1726.

30 *Id.* at 1727.

31 *Id.* at 1734 (citing Hughey v. United States, 495 U.S. 411, 420-421 (1990).

32 *Id*. at 1727.

33 *Id*. at 1728

34 *Id*.

35 *Id*.

36 Justice Sonia Sotomayor, in a lone dissent, found fault with the majority not for its remedy, but for its determination that there was any problem with the statute in the first place. Of course a single defendant like Paroline could, and should, be liable for the entirety of the injuries suffered by a victim such as Amy. "The Court's approach . . . cannot be reconciled with the law that congress enacted. Congress mandated restitution for the full amount of the victim's losses, and did so within the framework of settled tort law principles that treat defendants like Paroline jointly and severally liable for the indivisible consequences of their intentional, concerted conduct." *Id*. at 1735. Justice Sotomayor noted that there was "every reason to think" that congress incorporated an aggregate causation theory into the statute, rather than "a but-for requirement [that] would set § 2259's 'mandatory' restitution command on a collision course with itself." *Id.* at 1737. Put colorfully, the remaining justices apparently believed they had no choice but to recognize and accept the several-car pileup that resulted. But the majority, quite unlike the principal dissent, nonetheless believed it could salvage something from the legislative wreckage.

37 *Id*. at 1733-34 (emphases in original).

38 Id., at 1734.

39 United States v. Campbell-Zorn, 2014 WL 7215214, at * 2-3(Dec. 17, 2014) (D. Mont.) (collecting cases).

40 United States v. Dileo, 2014 WL 5841083, at *5 (Nov. 4, 2014) (E.D.N.Y.).

41 Campbell-Zorn, 2014 WL 7215214, at *5 (citing United States v. Wencewicz, 2014 WL 5437057 at *3.

42 *DiLeo*, 2014 WL 5841083, at *8.

43 *Paroline*, 134 S.Ct. at 1728.

44 *DiLeo*, 2014 WL 5841083, at * 6.

45 *Id.* at *9.

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