

Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015

# Amy and Vicky Act Update

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## Academics Both Left and Right Endorse Congressional Action to Fix the Supreme Court's Decision in Paroline

Oct 27, 2015 11:47 pm | Child Victims

Seldom has an issue—*any issue*—garnered such bi-partisan support as the Amy and Vicky Act which [passed the Senate in February 98–0](#). Unfortunately the bill remains stalled in the House Judiciary Committee [despite a March hearing](#) and bi-partisan vows of quick Congressional action.

Perhaps most surprising of all is that the AVA has near universal support (except from child pornography defendants) from both Republicans and Democrats, and liberal and conservative academics.

Consider [this piece](#) from one of the 100 most influential lawyers in America, [Professor Richard L. Hasen](#), at the University of California Irvine School of Law:

Today the Supreme Court decided a statutory interpretation case, *Paroline v. U.S.* with no easy answer, an unusual cross-ideological divide among the Justices, an interpretation offered by the majority which [Adam Liptak](#) rightfully describes as “a new and vague legal standard,” and a Chief Justice in his dissenting opinion begging Congress to fix the problem (“The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it.”). **Even though Congress rarely overrides [the Supreme Court] these days, I predict an override in this case, and probably relatively quickly...**

But thinking about this from the point of view of Legislation, **this seems the ideal case for a Congressional override**. As I've noted in a [recent law review article](#), Congress now rarely overrides the Court, and when it does,

there tend to be partisan overrides (as when Republicans overrode the Supreme Court in cutting back habeas for detainees in *Hamdan* or when Democrats overrode the Supreme Court in allowing more employment remedies in *Ledbetter*). I attribute the decline of bipartisan overrides to increasing political polarization in Congress....

**But even in an era of intense partisanship, as we are in right now, there is room sometimes for bipartisanship, and this looks like the perfect opportunity** for two reasons. First, everyone hates child pornographers and wants to look tough on crime. Unless Congress is satisfied with the vague standard of the majority, **it could look good for all of Congress to get tougher than the Court was willing to be on child pornographers—particularly when the Court’s ruling means that many victims are undercompensated....**

Second, though related to the first point, taking a stand in favor of fixing the statute won’t be seen as going up against the Supreme Court. If all the conservatives were on one side and all the liberals on the other in a 5-4 decision, then an override of a Supreme Court statutory case looks like an attack on one wing of the Court. Here, you have a case with a cross-ideological majority throwing up its hands as to an administrable rule, and three of four dissenters asking Congress to step in.

In an era where Congress can do so little thanks to ideological polarization, a new Amy Act looks to be a no-brainer.

Similarly, [this piece](#) in The Federalist Society’s journal *Engage*, calls on Congress to fix the statute that three conservative justices in *Paroline* found “impossible:”

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.

Finally, [Professor Marci Hamilton](#), who clerked for Supreme Court Justice Sandra Day O’Connor, best sums up the need for Congressional action in the wake of the *Paroline* decision:

This is a hard case, in part because we are still not very good at dealing with the evils of the Internet. As Justice Kennedy’s majority opinion and Justice Sotomayor’s dissent agreed, it just cannot be that a victim should have to prove that she knew the identity of the possessors and traders in her images when the distribution network is the Internet. That is an impossible task. And, without question, she was harmed by *Paroline*, even if she did not know about him.

**But it is even more of a hard case, because Congress’s language is not clear, and the system it laid out does not comport with anything we**

**have seen before.** There is a simple two-part fix, if you parse Justice Kennedy's and Justice Sotomayor's views closely enough: (1) Congress should enact a federal rule of contribution among child pornography defendants and (2) replace "proximate cause" with "aggregate causation." That would make it possible for the many Amys of our world to obtain restitution from even one perpetrator in the marketplace and obtain full restitution. The best part of this solution is that it would then incentivize the one defendant forced to pay it all to identify others as contributors. Let the defendants go after their many contacts in the market for contribution. That reduces the restitution, even if levied against a single person, from an excessive personal fine, and **puts the burden of parsing out blame on the bad guys, not the victims who never asked to be on the Internet in the first place.**

The AVA incorporates both of Professor Hamilton's suggestions with a federal rule of contribution among child pornography defendants and by replacing proximate cause with aggregate causation.

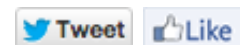
Most of these articles were written over 18 months ago. The Congressional "hard work of legislating" which seemed like such a bi-partisan "no-brainer" back in 2014 to fix a "system [which] does not comport with anything we have seen before" remains tragically elusive.

It's time for the House to get moving to finally pass the AVA! With 38 Republican co-sponsors and 35 Democrat co-sponsors, the AVA completely lacks "ideological polarization." And maybe that's the problem. But with an election approaching in just 12 months "it could look good for all of Congress to get tougher than the Court was willing to be on child pornographers—particularly when the Court's ruling means that many victims are undercompensated."

[Contact House Judiciary Chair Bob Goodlatte](#) [R-VA] and ask him to vote S.295/H.R. 595 out of the House Judiciary Committee for a swift vote by the full House.

**It's time for the House to pass the AVA. Child pornography victims have waited long enough!**

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# About the AVA – S.295 / H.R.595

A federal statute ([18 U.S.C. §2259](#)) requires that, in child sexual exploitation cases, a defendant must pay restitution for “the full amount of the victim’s losses.” That works for crimes in which a defendant directly causes specific harm to a victim, but child pornography crimes are different. A child pornography victim is harmed by the initial abuse, then harmed by the distribution and possession of images of that abuse.

The Supreme Court has recognized that victims are harmed by the ongoing “trade” and “the continuing traffic” in child sex abuse images. “In a sense,” the Court said, “every viewing of child pornography is a repetition of the victim’s abuse.” On the Internet, that abuse never ends.

Each step in the child pornography process—production, distribution, and possession—increases the harm to a victim but makes it more difficult to identify those responsible. Victims of this kind of crime are especially in need of restitution to help put their lives back together. Meeting that challenge is the purpose of the **Amy and Vicky Child Pornography Restitution Improvement Act of 2015**.

“Amy” and “Vicky” are the victims in two of the most widely-distributed child pornography series in the world. On April 23, 2014, in [Paroline v. United States](#), which reviewed Amy’s case, the

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concretely harmed an individual victim. That standard puts the burden on victims to forever chase defendants and recover next to nothing.

The Amy and Vicky Act creates an effective, balanced mandatory restitution process for victims of child pornography that responds to the Supreme Court’s decision in *Paroline v. United States*. It does three things that reflect the nature of these crimes.

**First**, it considers the total harm to the victim, including from persons who may not yet have been identified.

**Second**, it requires real and timely restitution.

**Third**, it allows defendants who have contributed to the same victim’s harm to spread the restitution cost among themselves.

- A victim’s losses include medical services, therapy, rehabilitation, transportation, child care, and lost income
- If a victim was harmed by a single defendant, the defendant must pay full restitution for all her losses
- If a victim was harmed by multiple individuals, including those not yet identified, a judge can impose restitution on an individual defendant in two ways depending on the circumstances of the case
  - the defendant must pay “the full amount of the victim’s losses” or, if less than the

full amount,

- at least \$250,000 for production, \$150,000 for distribution, or \$25,000 for possession
- Federal law already provides a mechanism for creating a restitution payment schedule
- Multiple defendants who have harmed the same victim and have paid at least those minimum amounts are jointly and severally liable and may sue each other for contribution to equalize the restitution cost (the Supreme Court said in *Paroline* that this is important)

Those who continue a victim's abuse should not be able to hide in the crowd; there should be no safety in numbers. Victims should not be abused again by putting the burden on them to prove the impossible. Instead, the Amy and Vicky Act creates a practical process, based on the unique kind of harm from child pornography, that both puts the burden on defendants where it belongs and provides actual and timely restitution for victims.

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