LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 5 FALL 2017 ISSUE 1

PAROLINE: THE DAMAGES AND THE DAMAGES DONE

Erin V. Wallin

I. INTRODUCTION

In Genesis 34, the Bible details a story commonly referred to as "The Brothers of Nablus."[1] In this graphic and disturbing story, Jacob's daughter, Dinah, believed to have been fifteen years old, is raped by the son of a foreign ruler.[2] Notably, the Bible states that this act is "a thing that should not be done."[3] According to the story, after Schechem raped Dinah, he became obsessed with her and demanded that his father acquire the girl for him as his wife.[4] When Dinah's father, Jacob, heard what happened, he decided to do nothing until his sons

[1] *See generally* Wikipedia, *Vayishlach*, WIKI 2 WIKIPEDIA REPUBLISHED, https://wiki2.org/en/Vayishlach (last visited Jan. 24, 2018).
[2] Biblica, *The Holy Bible: New International Version,* Genesis 34:2 (2011).
[3] *Id*. at Genesis 34:7(b).
[4] *Id*. at Genesis 34:4.

returned from the fields.[5] When Dinah's brothers returned and heard what happened, they were outraged.[6] Later, Schechem and his father approached Jacob and his sons with a proposal of marriage and stated, "make the price for the bride and the gift I am to bring as great as you like, and I'll pay whatever you ask me. Only give me the young woman as my wife."[7] When Dinah's brothers realized that their father would acquiesce to this, they concocted their own plan. The brothers of Nablus demanded that Schechem's entire tribe be circumcised before Dinah would be allowed to marry.[8] Schechem agreed, and each male was quickly circumcised.[9] While the newly circumcised men were still in recovery, Dinah's brothers stormed the entire city and killed every male, including Dinah's rapist.[10] After all the men were slaughtered, the brothers plundered the town and carried off its wealth, because their sister had been defiled there.[11] When Jacob realized what they had done, he rebuked them, fearing that other tribes might band together to seek revenge for the slaughter.[12] In Jacob's mind, the safest course of action was to take the money and let Dinah be married to Schechem, rather than to risk war over a girl who had no other prospects of marriage because of the defilement. However, the

[5] *Id*. at Genesis 34:5.
[6] *Id*. at Genesis 34:7.
[7] *Id*. at Genesis 34:12.
[8] *Id*. at Genesis 34:15-16.
[9] *Id*. at Genesis 34:18, 24.
[10] *Id*. at Genesis 34:25-26.
[11] *Id*. at Genesis 34:27-29.
[12] *Id*. at Genesis 34:30.

chapter does not end that way. Instead, it ends with these brothers taking revenge on their sister's rapist, as well as the other men with him, who perhaps merely watched. The story also ends with these poignant words from Dinah's brothers: "Should we have treated our sister like a prostitute?"[13]

Unfortunately, Dinah's plight is both ancient and modern. It is estimated that more than 199,000 children are sexually exploited each year in the United States alone.[14] Although sexual exploitation of minors has occurred since well before biblical times, the methods of violation have advanced technologically. In fact, between the years of 1994 and 2006, "child pornography accounted for 82% of the growth in sexual exploitation crimes referred to federal prosecutors."[15] Nowadays, Dinah's rape might have been recorded and uploaded onto the internet as child pornography. The recording of her rape could generate untold amounts of revenue as individuals pay a fee to have it downloaded to their home computer. This act would subject Dinah to unwanted exposure and revictimization, as she would be unable to prevent the

---

[13] *Id*. at Genesis 34:31.

[14] *See* Richard J. Estes & Neil Alan Weiner, *The Commercial Sexual Exploitation of Children in the U. S., Canada and Mexico*, UNIVERSITY OF PENNSYLVANIA SCHOOL OF SOCIAL WORK, CENTER FOR THE STUDY OF YOUTH POLICY (September 18, 2001, revised February 20, 2002), *available at* https://www.thenightministry.org/070_facts_figures/030_research_links/060_homeless_youth/CommercialSexualExploitationofChildren.pdf.

[15] Robert William Jacques, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1174 (2011).

video's mass publication. Because federal law makes it a crime not only to produce child pornography, but also to possess it,[16] anyone who downloaded the video would face federal charges. If convicted, that person would serve jail time and could be forced to pay restitution to Dinah.

Restitution is court-ordered financial payment to a victim of a crime and may be awarded in any federal case.[17] The goal of restitution is to provide compensation to victims for the harm done to them. In Dinah's case, the money might be used to pay for therapy, loss of wages, medical expenses, etc. [18] In 1994, the Violence Against Women Act ("VAWA") was promulgated and made it possible for victims to seek restitution against their attackers.[19] In 1996, Congress went further and made restitution for certain crimes mandatory.[20] One of the crimes listed in the Mandatory Victim Restitution Act of 1996 ("MVRA") is the sexual exploitation of children.[21] However, the MVRA requires that a "victim" under the act be someone who has been "'directly and proximately harmed'" by the underlying crime.[22] Proximate cause requires more than a mere "factual link" between the offender's actions and the harm

---

16 *See* 18 U.S.C.A. § 2252A(5)(A)-(B) (West, WestlawNext through P.L. 114-316).
17 *See* Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 22 (2016).
18 *See* 18 U.S.C. § 2259(b)(3)(A)-(F) (1996).
19 *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 827 (4th Cir. 1999), *aff'd sub nom,* United States v. Morrison, 529 U.S. 598 (2000).
20 *See* 18 U.S.C.A. § 3663A (West, WestlawNext through P.L. 114-316).
21 *See id*.
22 Bennardo, *supra* note 17 (quoting 18 U.S.C. § 3663A(a)(2) (2012)).

suffered; victims must show a "specific connection" between the offender's actions and a particular financial harm suffered.[23] This requirement created an interesting question concerning child pornography: could someone who merely possessed the pornographic video be made to pay the full amount of a victim's harm, as the statute allows, as a proximate cause of the injury? The Supreme Court attempted to answer this question in *Paroline v. United States*, a 2014 plurality opinion, which has perhaps created more confusion than clarity.[24]

This paper continues in five parts. Part II examines the *Paroline* decision itself, including Justice Kennedy's plurality opinion, as well as Chief Justice Roberts and Justice Sotomayor's vastly different dissents. Part III analyzes the aftermath of the *Paroline* decision, and its effect on lower courts and victims. Part IV attempts to tackle these problems by proposing that Congress adopt another scheme entirely for providing financial relief to victims. From this analysis, Part V concludes that Congress can and should amend 18 U.S.C. § 2259 in order to make calculating restitution in child pornography cases not only simpler for the courts, but more honoring of the victims.

II. THE *PAROLINE* DECISION DECONSTRUCTED

---

[23] Janet Lawrence, *The Peril of Paroline: How the Supreme Court Made It More Difficult for Victims of Child Pornography*, 2016 BYU L. REV. 325, 343 (2016).

[24] *See generally* Paroline v. United States, 134 S. Ct. 1710 (2014).

Defendant, Doyle Paroline, pleaded guilty to possessing child pornography. Specifically, Paroline owned between 150-300 pornographic images of children.[25] For this crime, Paroline was sentenced to serve 24 months in prison and 120 months of supervised release.[26] One of the children depicted in his collection of pornography, called "Amy" for purposes of litigation, sued Paroline for restitution under the statute.[27] Amy was eight and nine years old when her uncle sexually abused her on camera.[28] The images of her abuse were uploaded to the internet and eventually went viral, with untold thousands now in possession of these images.[29] Amy provided the court with a victim impact statement detailing her story. According to her statement, Amy underwent two years of therapy after her uncle was sent to prison, and did very well until she discovered that the images of her abuse were circulating on the internet.[30] Amy told the court, "'[m]y 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.'"[31]

---

[25] *Id*. at 1716.
[26] Alanna D. Francois, *Paroline v. United States: Mandatory Restitution an Empty Gesture, Leaving Victims of Child Pornography Holding the Bag*, 42 S.U. L. REV. 293, 302 (2015).
[27] Paroline, 134 S. Ct. at 1716.
[28] *Id*. at 1717
[29] *Id*.
[30] *Id*.
[31] *Id*. (quoting United States Sentencing Comm'n, P. Saris et al., Federal Child Pornography Offenses 3 (2012)).

Though Amy admitted that she and Paroline had never met, she sought to recover nearly $3.4 million (the total amount of her damages) from Paroline, arguing that the statute allowed for such a ruling.[32] The District Court for the Eastern District of Texas denied her recovery, and this ruling was affirmed by the Fifth Circuit on appeal.[33] Later, however, at a re-hearing en banc, the Fifth Circuit held that the statute did not require proof of proximate cause and that each possessor of child pornography could be held liable for a victim's entire loss.[34] Paroline appealed the ruling, and the Supreme Court of the United States granted certiorari to determine whether § 2259 limited restitution to losses proximately caused by the defendant.[35] This case split the court in a 5-4 decision.

A. JUSTICE KENNEDY'S PLURALITY OPINION

Justice Kennedy authored the Court's decision and was joined by Justices Ginsburg, Breyer, Alito, and Kagan.[36] The Court began with the paradox of the statute's language. First, § 2259 makes restitution mandatory in cases of sexual exploitation, and specifically states that courts are to order defendants to "'pay the victim … the *full amount* of the victim's losses as determined by the court….'"[37] However, the statute

---

[32] *Id*. at 1718.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*. at 1716.
[37] *Id*. at 1718 (quoting 18 U.S.C. § 2259(b)(1)) (*emphasis added*).

also appears to include a proximate cause requirement, which states that "'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.'"[38] The Court noted the confusion this caused various lower courts and stated, "All parties agree § 2259 imposes some causation requirement."[39] After analyzing the statute's construction, the Court held that restitution under the statute was proper only to the extent that the defendant's offense proximately caused the losses of the victim.[40] But answering this statutory question did not answer the practical question of how to calculate restitution in such a case.

First, the proper legal framework for analyzing proximate cause in each case was needed. The Court looked to tort law for answers but found that none of the existing schemes fit these unique circumstances. For example, the traditional "but for" analysis would make recovery for Amy nearly impossible because she could not show a direct causal link between her losses and Paroline's download.[41] Moreover, even if Paroline had never downloaded her images, her losses would remain virtually unchanged because of the thousands of other offenders who also illegally possessed the images.[42] The Court also looked at alternative causal tests involving more than one offender, but the Court noted these tests also proved

[38] *Id*. at 1719 (quoting 18 U.S.C. § 3664(e)).
[39] *Id*. at 1720.
[40] *Id*. at 1722.
[41] *Id*.
[42] *Id*. at 1723.

insufficient because a defendant could be held liable for the actions of thousands of other law breakers, and these defendants were not working in concert.[43] Under the existing frameworks, restitution would not be appropriate; however, it's clear that Congress wanted restitution for these victims. So, the Court adopted a more general view of proximate cause for these cases. "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."[44] But yet again, there was still the question of practical application.

In extremely vague terms, the Court left restitution calculations to the discretion of district courts, listing the following factors for consideration: the victim's losses, the number of offenders, reasonable predictions of future offenses, the defendant's actions and connections to the original production and distribution, or other relevant facts.[45] The Court stated these factors should not be made into a "rigid formula," but were just guideposts for determining the appropriate amount to be awarded.[46] Amy argued that this type of approach would entangle her in litigation for decades to come, but the Court responded by stating that Congress had not promised her "full and swift restitution at all costs."[47] The Court concluded

---

[43] *Id*. at 1724.
[44] *Id*. at 1726.
[45] *Id*. at 1728.
[46] *Id*.
[47] *Id*. at 1729.

by acknowledging the difficulties inherent in this type of analysis and advised lower courts to do their best.[48]

B. CHIEF JUSTICE ROBERT'S DISSENT

Two vastly different dissenting opinions were written for this case. The first was written by Chief Justice Roberts, who was joined by Justices Scalia and Thomas.[49] Justice Roberts agreed that Amy should have restitution and that Congress wanted to give it to her, but he stated that the way Congress drafted the statute makes recovery impossible. He stated Congress should have tailored the statute to meet the unique needs of child pornography victims, rather than borrowing language from other restitution statutes that impose a proximate cause requirement which cannot be met in such instances.[50] He further faulted the Court for essentially engaging in legal gymnastics in order to craft a proximate cause analysis under the statute. "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."[51] In conclusion, he noted that although Amy did not *lose* this case, she certainly did not win it either. "The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it."[52] Accordingly, Chief Justice Roberts and his two

[48] *Id*.
[49] *Id*. at 1730.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 1735.

colleagues would deny Amy recovery, hoping that decision would prompt Congress to revise the statute.

C. JUSTICE SOTOMAYOR'S DISSENT

Justice Sotomayor also disagrees with the plurality opinion, but her conclusions are opposite of Justice Robert's dissent, as she champions Amy's position.[53] Justice Sotomayor states that the Court's approach does not comport with the language of the statute, which awards victims "'the full amount of [their] losses.'"[54] She remedies any unfairness to individual defendants by use of the partial payment option, and the fact that defendants are allowed to seek contribution from other offenders.[55] As for the proximate cause requirement, Justice Sotomayor believes that the alternative causation approach discussed and dismissed by the plurality (where multiple offenders are involved) is the appropriate analysis, which provides for full restitution with contribution; further proof to Justice Sotomayor that this approach best effects Congress's intent.[56] Justice Sotomayor cites the case of *Wheelock v. United States*[57], involving a thirteen year old girl who was gang-raped by several men.[58] She draws an analogy between these cases stating that the young girl could recover her losses from any of

---

[53] *Id*. at 1735.
[54] *Id*. at 1731 (quoting 18 U.S.C. § 2259(b)(1)).
[55] *Id*.
[56] *Id*. at 1737.
[57] No. 13-C-0588, 2013 WL 2318145 (E.D. Wis. May 28, 2013).
[58] *Id*. at 1739. *See* Wheelock v. United States, No. 13-C-0588, 2013 WL 2318145 (E.D. Wis. May 28, 2013).

the men without having to prove a specific causal link between their individual action and a particular expense.[59] In that case, it would be sufficient to show that a defendant participated in the ultimate harm. Justice Sotomayor believes the same is true for Amy, i.e. Paroline participated in the harm that was ultimately done to her and he should ultimately be held responsible under the statute.[60] Finally, Justice Sotomayor believes Congress understood what they were doing when they promulgated the statute, and she hoped that in light of the Court's decision that Congress would act again to clarify the full extent of damages it intended to make available to victims like Amy.[61] Unfortunately, that has not happened yet.

II. POST-PAROLINE PERPLEXITY

A. DISPARITY IN THE DISTRICT COURTS

One of the first district court decisions issued post-*Paroline* was a Rhode Island case, *United States v. Crisostomi*.[62] The defendant, David Crisostomi, pleaded guilty to possessing thousands of images of child pornography, including 88 series of known victims.[63] Like Amy in *Paroline*, two of the series victims, in this case, submitted requests for restitution. These victims are known as "Vicky" and "Cindy."[64] Vicky's impact

[59] *Id*.
[60] *Id*.
[61] *Id*. at 1744.
[62] 31 F. Supp. 3d 361 (D.R.I. 2014).
[63] Crisostomi, 31 F. Supp. 3d at 363.
[64] *Id*.

statement showed damages in excess of $1.3 million, with 53% of that amount outstanding.[65] Before *Paroline*, she would have asked the court for the entire amount, but afterwards she chose a much smaller amount. She petitioned the court for $10,000 from the defendant.[66] Cindy made no specific monetary request.

Judge McConnell recited the *Paroline* holding and attempted to apply its suggested factors with noticeable discomfort. His ruling stated that many of the factors were "virtually unknown and unknowable, regardless of the detail available in the record."[67] Most notably, the district judge stated:

> 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. The Court is not entirely comfortable making such calculations in this or similar situations but believes it compelled to do so by the U.S. Supreme Court opinion in *Paroline*.[68]

Because the court was forced to make a determination, the Judge noted that 500 offenders had been convicted for possessing images of Vicky.[69] He supposed, without evidence, that this number could double to one thousand, and therefore awarded Vicky 1/1000 of her outstanding damages, which

---

[65] *Id*.
[66] *Id*.
[67] *Id*. at 364.
[68] *Id*.
[69] *Id*. at 365.

totaled $713.68.[70] The same formula was applied to Cindy's request and resulted in about $500 in recovery.[71] But, this is only one court's attempt at a *Paroline* calculation.

A nearly identical case was handled somewhat differently by a district court in Virginia. In the 2016 case, *United States v. Miltier*, Vicky again requested restitution from a convicted possessor of her images in the amount of $10,000.[72] The district judge, in that case, referenced the calculation method applied in *Crisostomi*, but opted to calculate damages a little differently.[73] Like *Crisostomi*, the judge doubled the number of known offenses (from 830 to 1660), but instead of awarding the victim 1/1660 of the damages as the prior court did, Judge Doumar lumped the defendant into the additional 830 offenders and awarded Vicky 1/830 of her remaining damages; which equaled around $400.[74]

Post-*Paroline* research indicates varying methods of calculating restitution among the district courts. Most commonly, courts divide a given measure of the victim's losses by a "guesstimate" of the number of total offenders.[75] Others use a comparative approach—awarding similar amounts of money for similar numbers of possession.[76] And these are the

---

[70] *Id*.
[71] *Id*.
[72] No. 2:15CR151, 2016 WL 6821087, at *1 (E.D. Va. Nov. 17, 2016).
[73] *Id*. at *6.
[74] *Id*.
[75] Isra Bhatty, *Navigating Paroline's Wake*, 63 UCLA L. REV.. 2, 35-36 (2016).
[76] *Id*.

courts that even mention *Paroline*. Research shows that *Paroline* is so imprecise and confusing that a vast majority of courts do not even cite the case in their restitution opinions, opting instead for some "reasonable" method of calculation or agreement prior to sentencing.[77]

B. WHAT THIS MEANS FOR VICTIMS

Research shows that restitution is rarely awarded in cases of possession of child pornography.[78] According to recent data, in 62% of the cases where no restitution was awarded, the reason was that no victim requested it.[79] A more staggering statistic is that currently there are 8,500 children that have been identified as victims of child pornography in the database of the National Center for Missing and Exploited Children (NCMEC), and yet only fifteen have made federal restitution claims.[80] Of those fifteen claims, one victim made the claim individually, while "the remainder had retained counsel to manage what DOJ considered to be a burdensome process of litigating claims

---

[77] *Id.* at 34 (Of 240 sampled restitution cases, only nine cases mentioned *Paroline* by name, and five of those citations came from the report prepared by the Probation Office).
[78] Isra Bhatty, *Navigating Paroline's Wake*, 63 UCLA L. REV. 2, 32 (2016).
[79] *Id.*
[80] David Bungard, *Defending Restitution Claims in Child Pornography Cases in A Post-Paroline World*, Champion, March 2016, at 16, 18.

around the country."[81] These calculations expose the following problem: in order to recover under the statute, victims must first be identified, and then they must "lawyer-up" across the country as they are constantly notified of new offenders, whose addition to their "numbers of offenders" will gradually lessen their individual recovery over time. Under such an emotionally and financially demanding scheme, it is not surprising that most victims forgo restitution at all.

However, Congress has been working on a solution. In fact, in 2015, the "Amy and Vicky Child Pornography Restitution Improvement Act of 2015" unanimously sailed through the Senate.[82] This new bill addresses the aforementioned ambiguities by imposing a mandatory minimum restitution amount ($25,000 per image for possessors) and imposing joint and several liability on all defendants (not just the possessors) with a five-year limit on a right of contribution.[83] This legislation has stalled in the House of Representatives, with the Department of Justice becoming one of its most vocal opponents.[84] The Justice Department objected to several parts of the legislation, including the potential violation of the Eighth Amendment's prohibition against excessive fines (for example, "a defendant who possessed images of 10 different victims would owe a minimum restitution amount of a quarter of a million dollars").[85] As an

[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

alternative, they suggested an additional special assessment fee for possessors of child pornography, which would go into an administrative fund and be allocated to victims as they petitioned for it in specific cases, with a one-time restitution award option as well.[86]

The problem with Congress' solution is that it creates constitutional issues for defendants, without solving the real problems of identification and financial relief for victims. The solution suggested by the Department of Justice is easier for courts to administrate and would create consistent results across the board. But, like the *Paroline* decision, it is vague in the details, i.e., the amount of the additional special assessment fee is undisclosed, whether amounts would differ for differing levels of possession is not addressed, and there may be constitutional issues with an assessment fee. For example, is a court-imposed fee really restitution or is it more of a tax?

None of these restitution proposals have addressed how to give individual justice to these victims without the need to prove proximate cause, without tying them up in endless litigation, and without creating wildly different results across a spectrum of defendants. The answer may be in how we view the crime itself, with clues from our Bible story from thousands of years ago.

III. A NOVEL PROPOSAL

A. THE 'NABLUS' APPROACH AND WHY IT DOESN'T WORK

[86] *Id.*

Interestingly, the name "Dinah" means "justice."[87] However, providing justice for Dinah and victims like her is not a simple task. Whether in ancient or modern days, the type of damage done to Dinah, Amy, Vicky, and countless others remains "a thing that should not be done."[88] And there still remains a majority of people who want to deal with the wrongdoers as the Brothers of Nablus did – punish them to the fullest extent possible and to take all of their wealth. In today's society, this approach applies not only to rapists, but also to those thousands whose appetite for watching the rape creates a demand, which inevitably leads to more production. In the biblical story, the men connected with Dinah's rapist suffered his same fate. Even today, few object when those who purchase footage of a rape suffer nearly the same financial fate as the actual rapist. However, there are some who have questioned whether this kind of approach is more akin to retribution than to restitution.[89] Likely, the majority of people simply do not care if the financial penalty is further punishment because of the heinous nature of each crime. This is precisely why the current state of legislation could be coined as "The Nablus Approach."

If Congress were to take a role in our biblical story, it would undoubtedly be that of Dinah's big brothers. Time and again, Congress has sought to provide harsher penalties on the

---

[87] Bible Gateway, https://www.biblegateway.com/resources/all-women-bible/Dinah (last visited Jan. 31, 2018).
[88] Genesis 34: 7(b).
[89] *See* Melanie Reid & Curtis L. Collier, *When Does Restitution Become Retribution?*, 64 OKLA L. REV.. 653 (2012).

perpetrators and allow for more resources for the victims of child sexual exploitation. After all, this is perhaps the most bi-partisan of issues: protecting children and punishing monsters. The Judiciary, much like Jacob in the story, has provided little guidance, and therefore, has likely failed to direct or temper the wrath and outrage that will eventually make its way into more exacting legislation. I fear the coming legislation will clear the way for astronomical recoveries for a minority of victims, who will only be allowed to recover by endless litigation and revictimization.

There are three glaring problems that are left unaddressed by any of the current proposals. First, there is the problem of identification. Admittedly, this isn't a problem that legislation can fix. Unfortunately, many times child victims are video-taped and are either never identified, or they do not have any advocates in their life to help them pursue the resources that Congress has allocated to them. Of course, larger recovery amounts could bring awareness and even incentivize some attorneys to seek out these victims through advertising. But the nature of the crime, and the shame often associated with it, lends itself to anonymity. Dinah was not mentioned again after Genesis 34. We are not told what happened to her, and sadly, the same is true for most of these victims.

The second problem is one of human dignity. Because the current statute and case law requires victims to show proximate cause between the offense and the damages done, the restitution awards could be viewed as some sort of "pay-per-view" penalty. The problem, of course, is that proximate

cause, in this context, is a legal fiction. No victim can actually show how one download out of thousands has cost them a particular dollar amount in damages. So, we pretend that we can draw a proximate cause line in child pornography cases, despite being nebulous, because the crime is so horrific. It's a bit like gravity; we can't see it, but we know it's there. Perhaps the reason that courts have such a difficult time coming up with appropriate restitution amounts is that there is no amount of money that can truly right this type of wrong. In fact, as Dinah's brothers could attest, the idea of payment itself can be insulting after such an offense. "Should he have treated our sister like a prostitute?"[90] Accordingly, should legislatures and courts treat victims as if what was done to them was agreed upon for a price? That is essentially what happens when a proximate cause requirement is imposed, and then ignored. And yet, these victims do need resources.

The third problem is consistency in results. As *Paroline* is currently applied, there is some consistency among jurisdictions following a similar approach, but not among all jurisdictions because so many different approaches to calculating damages are being employed. Congress's proposed solution is a mandatory minimum, which would provide more uniformity of results, but not necessarily more justice. It also perpetuates a "pay-per-view" penalty mentality. Although Congress's proposal removes a proximate cause inquiry, its answer is that possession of all types of sexually exploitive

[90] Biblica, *The Holy Bible: New International Version,* Genesis 34:31 (2011).

materials involving minors are worth at least $25,000. If the difficulty of *Paroline* was ambiguity, there is something much more unsettling in knowing concretely what a person may be sold for online.

And so, the proper proposal should somehow encourage identification of victims, and provide financial restitution without never-ending litigation and without putting a price on an individual's victimization. Furthermore, it should also create uniformity in results without removing individual case analysis.

B. "DINAH'S LAW": HOW COPYRIGHT INFRINGEMENT CAN GIVE POWER BACK TO VICTIMS

I propose that that best answer to these concerns is found in Intellectual Property law; specifically, in the laws of copyright infringement. Copyright law protects "original works of authorship fixed in any tangible medium of expression."[91] Mediums that qualify for copyright protection are literary works, musical creations, sculptures, paintings, and much more.[92] As time and technology advanced, Congress and the courts expanded the protection to include things like photography and motion pictures.[93] Now, a copyright holder maintains the exclusive rights to ownership, use, and

---

[91] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (quoting 17 U.S.C.A. § 102(a)).
[92] Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law,* 39 WM.. & MARY L. REV.. 1585, 1602 (1998).
[93] *See generally* Eldred v. Ashcroft, 537 U.S. 186 (2003).

reproduction of the protected work.[94] Consequently, anyone who uses or authorizes use of a protected work is an infringer.[95] "The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work," including injunction, actual damages, profits realized by the infringer, statutory damages, and attorney's fees.[96] In situations where an owner would prefer not to prove actual damages or profits, Section 504(c) of the Copyright Act of 1976 permits recovery in "a sum of not less than $500 or more than $20,000 as the court considers just."[97]

In the case of child pornography, the producers of the illicit material do not seek to register their videos or photographs with the U.S. Copyright Office because what they produce is illegal material. However, even without registration, works created after January 1, 1978, have a built-in common law copyright that usually vests with the creator.[98] This article proposes that Congress should statutorily grant copyright ownership of the video or photograph to the identified victims. This type of approach theoretically deals with each of the aforementioned concerns.

First, the giving of a copyright to child pornography victims best preserves their human dignity, because instead of

---

[94] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. at 433.
[95] *Id.*
[96] *Id.*
[97] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 342 (1998).
[98] Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law,* 39 WM. & MARY L. REV. 1585, 1603 (1998).

being paid a randomly calculated amount "per view," where they feel powerless to prevent the spread of the material, this approach gives power back to the victims. It literally gives them legal ownership over what was done to them. This gives the victims the power to choose whether or not to pursue legal remedies against anyone who produced, sold, distributed, shared, or possessed their property. Potentially, they could even go after webmasters who allow their property to be displayed using their servers. No longer would the victims have to appear in court and prove a proximate cause link between the possession and their damages (although that option is not foreclosed because actual damages are permissible). Rather, victims need only prove infringement, which is implicit if the possessor is convicted for possession, and then the victim is free to choose between their arsenal of protections. If the victim sues a producer or distributor, he or she may recover actual damages, profits, or a statutory amount from the defendant depending on which is most beneficial. For webmasters, producers, and distributors, an injunction can also be issued. Even in the case of possessors, a victim may simply choose the statutory amount allotted, which may not be less than $500 (more than many of the awards currently being given). However, this article suggests that Congress go further and lay out specific statutory amounts for various offenses. This type of legislation would not run afoul of the Eighth Amendment, because it is not technically a fine, it is an award based upon infringement.

Second, this kind of approach may help to identify victims. If a clear path to financial recovery is established, this will incentivize attorneys to advertise in order to find victims and make sure that this kind of case is pursued in conjunction with a conviction because attorney's fees are included. Moreover, if webmasters are implicated, it is possible that real progress could be made in shutting down child pornography sites and exchanges.

Finally, this kind of approach would create consistent results. If amounts are statutorily imposed, then most results would be the same, regardless of jurisdiction. However, this approach does not foreclose options of recovering actual damages or profits earned from the sale of the material. Leaving that option open, as Copyright law does, ensures that each is dealt with on an individual basis, and that more recovery could be obtained in severe cases. Furthermore, this approach allows the victims to choose litigation without revictimization. The victims would know that they do not have to prove proximate cause, the victims would know how much recovery they should get at a base level, and the victims would know that attorney's fees would be compensated.

IV. CONCLUSION

"Dinah's Law" would give victims control over their story. For all of the aforementioned reasons, Congress should either amend the existing statute or draft a new law granting a copyright interest to all victims of child pornography, with specific infringement penalties for various offenses. This

property right would allow victims to pursue injunctions and financial remedies without revictimization, and without endless legal fees. Like the Brothers of Nablus, a well-intentioned Congress wants to punish the horrors created when children are exploited, as well as provide financial help for the victims. Like the wise father, Jacob, the judiciary knows that the methods they are currently using to accomplish that result will only create more problems. No one in Genesis 34 asked Dinah what she wanted. She, like so many of these victims, had no voice. So perhaps, now is the time for Congress to put the authority in her hands, and let her decide what justice looks like in a modern technological age.