

FEATURES

Pricing Amy: Should Those Who Download Child Pornography Pay the Victims?

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“Amy” was just 4 years old when her uncle first trained his sights on her. He gave her rides on his motorcycle and bought her treats, including her favorite, beef jerky—gaining her trust before he started doing the unspeakable.

It wasn’t until Amy was 7 or 8 years old, according to court records, that her parents discovered the terrible truth about the years of sexual abuse.

It started like so many other instances of child exploitation: Amy’s uncle showed her pornography and then began raping her on a regular basis.

Amy recalls telling him the penetration hurt, but it kept happening. And like most child victims, she trusted him when he told her it was a normal thing adults do with children, that he loved her and that it was their special secret, according to her victim impact statement. The uncle was eventually arrested and incarcerated. Amy grew into her teenage years and, with the help of therapy, seemed to be growing into a relatively happy, healthy, normal teenager, according to court documents. Then the other shoe

Illustration by Mark Smith

dropped: Amy learned that her uncle had photographed the abuse and put the images online, creating a permanent record of her agonizing abuse.

It's not exactly clear when Amy's pictures began circulating online, but court records indicate the digital images date back to as early as 1998.

Amy, now in her early 20s, began sliding backward in her recovery. Court filings indicate that she suffers from depression, is withdrawn and anxious, and has a history of alcohol abuse. She's been unable to succeed in college or work and is reluctant to socialize. While some experiences still trigger bad memories, she's more concerned about being recognized in public by people who downloaded "her" images.

"Now I always know that there is another 'little me' being seen on the Internet by other abusers," she wrote in her statement. "I don't want to be there, but I am. I wish I could go back in time and stop my uncle from taking those pictures, but I can't."

Amy and her lawyer are, however, fighting back. Her battle is part of a series of cases—now wending their way through the federal courts—trying to help the victims of child pornography by seeking financial restitution, not from the perpetrator but from the untold number of people who subsequently download their pornographic images.

Amy could be considered the leader in this legal trend. Her pictures are among the most widely traded in the underground world of online child pornography.

Under the Crime Victims' Rights Act, the government must notify Amy and other child pornography victims anytime anyone is arrested by federal authorities for possessing their images. Her attorney, James Marsh of New York City, says his office has received at least 1,500 required notices of federal prosecutions for possession of those images. "The day after we were retained in 2008, we had someone open up all these notices she received in the calendar years 2006 and 2007," Marsh says. "It took two days just to open the envelopes."

Using the restitution provisions of the Violence Against Women Act, Marsh has begun utilizing the courts to request financial restitution from those convicted of possessing images of Amy's child sexual abuse.

The novel and controversial requests don't seek to hold possessors responsible for the original exploitation of Amy. Rather, they seek restitution under VAWA, as authorized by the Crime Victims' Rights Act, for harm done to Amy each time someone downloads her uncle's pornographic images of her.

Almost any time Marsh receives a notice of prosecution on Amy's behalf, he files a formal request for more than \$3 million to cover all of Amy's psychological treatment, lost income and attorney fees. Marsh believes Amy is the first child pornography victim to use federal crime victim restitution laws in this way, and one of a very few nationwide. He knows of two other victims pursuing this strategy, including "Vicky," another young woman whose victimization as a child is recorded in widely traded images. A third victim's lawyer pursuing a similar strategy did not return calls for this article.

The law is clear that victims have the right to request full compensation when they are harmed "as a result of a commission of a crime under this chapter"—but it provides less guidance for determining whether the harm to Amy and Vicky is truly a result of child pornography possession. As a result, federal courts have come up with a full range of responses. Most have awarded restitution in less than the full amount requested. A few have ordered no restitution. But some have granted the entire amount. "I think it's an unsurprising reaction to a really hard set of questions," says Douglas Berman, a criminal law professor at Ohio State University. "Connecting the causation dots between the suffering of the victim and the nature of the offense is textured, to say the least."

At least seven federal appellate courts have weighed in on cases involving Amy or Vicky, and a split has developed on the question of whether the victim's losses must be proximately caused by the possession. The U.S. Supreme Court has denied certiorari in at least two cases.

PROXIMATE RESULT

The Violence Against Women Act requires courts to order restitution for "the full amount of the victim's losses." The law allows victims to recover "costs," including medical bills, attorney fees and lost income, as well as "any other losses suffered by the victim as a proximate result of the offense."

Though Congress may have intended this catchall provision as an afterthought, it has become the basis of the split between the federal appellate courts. Standing alone is the 5th U.S. Circuit Court of Appeals at New Orleans, which ruled in 2011's *In re Amy Unknown* that the proximate-result language applies only to the catchall provision. It found that Congress did not intend to apply a proximate-result requirement to the other listed items, under which all of Amy's claims fell. As a result, the 5th Circuit said, the judge in the Eastern District of Texas who rejected Amy's petition was "clearly and indisputably wrong."

(The case was reheard en banc, but there had been no ruling as of early August.)

On the other side, the 1st, 2nd, 3rd, 9th, 11th and D.C. Circuits have each found a proximate-cause requirement. But, as the Boston-based 1st Circuit observed in a Feb. 29 opinion, “this seeming agreement on a standard suggests more harmony than there is” after the standard is applied to the facts of individual cases. Three circuits—the 2nd, 9th and 11th—have awarded no restitution after finding not enough causal connection between the defendant’s actions and the harm to the victims. All three courts left the door open for restitution in future cases—indeed, the 9th and 11th had previously awarded it—but said prosecutors had not made their cases. In particular, the 2nd Circuit at New York City noted that the psychological evaluations supporting restitution had been completed before the defendant had even been arrested.

Restitution requests may be made independently or by prosecutors; either requestor has the burden of proving the restitution amount is valid, using documentation of past costs or expert opinions.

George Washington University law professor Jonathan Turley (http://www.abajournal.com/blawg/jonathan_turley/) favors this stricter approach. A constitutional law expert and criminal defense attorney, he believes that in the case of child pornography possession the law requires a more direct show of harm to victims like Amy.

“The interpretation of proximate cause in these restitution judgments is so broad as to be practically indefinable,” he says. “But proximate causation, both in criminal law and tort law, has always required more than conjecture. There is an understanding that some threshold showing or nexus has to be made.”

Berman says he would feel more comfortable with a closer causal connection. However, he points out that the legal issues are complicated by judges’ emotional reactions to the situation: a sympathetic victim and a series of offenders who may provoke feelings of disgust.

“Federal judges know they can’t let that overwhelm attentiveness to the law,” he says. Perhaps as a result, “we’re seeing a number of awards in district courts that are picking small awards out of the air. That is a reflection of judges trying to balance emotional influences, but I’m not sure the law provides” that solution, Berman says.

DIVIDING THE PAIN

The restitution portion of VAWA requires full compensation for victims’ losses, regardless of the defendant’s ability to pay. The D.C. Circuit noted this in April 2011 in *U.S. v. Monzel*, when it remanded a partial restitution order so the trial court could calculate “the full amount of the victim’s losses.”

However,
the full-
restitution



Illustration by Mark Smith

requirement creates another problem with using VAWA in cases like Amy's: how to split the restitution payment among all of the defendants who may be charged with possession of the same images. The act provides for joint and several liability among defendants in the same case, but what about defendants in multiple cases, in numbers nobody can predict? How should responsibility be apportioned between each of them, plus the original maker of the child pornography? And how can the justice system track what the victims actually receive?

Legal experts say there's no precedent for these questions under VAWA or anywhere else in criminal law or in tort law. Several appeals courts have dedicated parts of their opinions to the problem, and federal district courts have struggled, with some developing a flat-rate scheme on their own. These include the Eastern District of California, which in three cases awarded \$3,000 per victim, extrapolating from a provision in 18 USC § 2255 that minor victims of sexual exploitation may be deemed to have suffered civil damages no less than \$150,000. In another case, a court in the Western District of Washington awarded \$1,000 per image in *U.S. v. Kennedy* (later reduced to zero by the 9th Circuit at San Francisco).

Marsh says it's his policy to file for full restitution—the full amount of Amy's lost income, past and future psychiatric treatment, loss of enjoyment of life and attorney fees—in nearly every case, regardless of what other orders his client has received and regardless of the defendant's means. He says Amy doesn't care where the money comes from as long as she is made completely whole. He and Carol Hepburn of Seattle, Vicky's attorney, argue that the system should not put the burden of working out these details on victims. Complicating matters further, Hepburn says, is the problem of collecting.

“Just because an order is entered doesn’t mean one is going to get payment,” she points out. “In fact, I can remember early on a prosecutor telling me: ‘I got you a \$10,000 order, but good luck getting anything because this guy’s going to get deported after he gets out of jail.’ ”

Even without immigration problems, defendants may have no money left after their defense, and no way of earning it while serving the long prison sentences typical in child pornography cases.

Hepburn and Marsh say they receive some large checks as well as a few regular payments from prison wages. In some circumstances, particularly when the defendant is indigent, they may also work out arrangements with prosecutors or defense counsel.

VICTIMS’ RIGHTS EXPANSION

Marsh took an unusual route to victim advocacy: He started out as a specialist in international adoptions. Through his practice, he was approached by a girl with a sad and unusual story. The girl, Masha Allen, had been adopted from a Russian orphanage at the age of 5 by a single man, Michael Mancuso of Pittsburgh. Mancuso sexually abused Masha over the next five years, taking more than 200 pictures of the abuse and putting the images online. Those pictures ultimately led to Mancuso’s arrest and Masha’s rescue.

When 13-year-old Masha and her new foster mother approached Marsh, he says, Masha was most upset about the fact that the pictures were still out there.

“She said, ‘What I really want you to do is take my pictures off the Internet because that’s something that’s never going to go away,’ ” he recalls. “I didn’t know what to say other than ‘We’ll do our best.’ ”

That was 2005, when the news was full of recording industry lawsuits over illegal downloads. Marsh quickly saw an analogy. By holding those who download child pornography civilly liable, he thought he could stop the spread of the images as well as get some compensation for his client. That work eventually turned him into an advocate for Masha’s Law, part of the 2006 Adam Walsh Child Protection and Safety Act, which permits young adults to sue those who download images of their childhood sexual abuse.

Masha never used Masha’s Law. Marsh says she was abused again and he no longer knows where she is. But the experience gave Marsh a background in victims’ rights law and made him aware of legal developments that made his work with Amy possible. Those developments started with the Supreme Court’s 2002 decision in *Ashcroft v. Free Speech Coalition*, which legalized “virtual” child pornography that

depicts only computer-generated children. As a result, prosecutors began having to prove that the victims in child pornography cases were real people. That, in turn, launched a push by federal agencies to identify the victims.

Being able to identify victims made it possible later to notify them of pending prosecutions, a requirement of the 2004 Crime Victims' Rights Act. This created all of the many, many notices received by victims like Amy and Vicky.

Perhaps even more important, the CVRA expanded the right to criminal restitution.

A VIABLE THEORY

When Amy's family first hired Marsh, he wasn't thinking of criminal restitution, but of Masha's Law litigation. Then came *U.S. v. Hesketh*, in which a patent executive at Pfizer was accused of possessing child pornography, including images of Amy. Marsh soon realized that while British-born Alan Hesketh had significant assets, they were spread among countries with strict banking secrecy laws.

"My client [was] living on welfare," he says. "We [didn't] have the resources, time or money to pursue this guy in the Channel Islands."

So instead of filing a lawsuit, he did some more research into criminal restitution—which, he notes, puts the collections burden on the federal government. Though he knew of no similar restitution requests and didn't know what the court might do, Marsh pulled together the victim impact statement, an economic report and a psychological evaluation.

"It sort of hit like a nuclear bomb, I guess," Marsh says. "Nobody knew what to do. The judge, who was on senior status, had never seen it; the U.S. attorney had never seen it."

Jonathan Einhorn, a criminal defense attorney in New Haven, Conn., represented Hesketh in the case. He says restitution never came up in his talks with prosecutors, but then he received Marsh's demand letter, which set off extensive further briefing. After a hearing, the court ultimately awarded about \$200,000 in criminal restitution.

The experience showed Marsh that restitution claims were viable.

"I said, 'Wow, this is one case. Let's send these out here and there and see [how it works],'" Marsh says. "They ended up all over the country."

ONGOING HARM

As of late January, Marsh estimated that Amy had filed claims in 744 cases and been identified in more than 1,500. Hepburn says Vicky's family had two 55-gallon drums full of notices when they first approached her in 2009, and there's been no real

slowdown.

“It’s not uncommon for me to get 30 or 40 notices on a Monday, for example,” she says. “That in itself is traumatizing.”

These are only the federal cases with notices coming through the Justice Department’s victim notification program. Marsh notes that there could be many more state cases for which victims receive no notice. (Though at least two states, Florida and Virginia, have victim notification for child pornography possession, those notices are typically sent only to identified in-state victims. Virginia also requires mandatory court-determined restitution for certain child pornography offenses.)

Marsh says Amy and Vicky may receive more notices than others because images of them happen to be in sets of photos that are widely traded in the online child pornography world. Carolyn Atwell-Davis, director of legislative affairs for the National Center for Missing and Exploited Children, confirms that photos with Amy in them appear quite frequently, though the agency doesn’t count how often individuals appear.

And once child pornography is online, experts say, it’s on the Internet for good. Roy Shepherd, a Richland, Wash., police detective who was involved in Vicky’s case, estimates that he’s testified in as many as 50 prosecutions involving images of Vicky over the past five years. “Unless you shut down the Internet,” he says, “there’s just no way that it would ever be stopped.”

That means there’s no way to give victims the anonymity that Masha wanted to recover, at least among consumers of child pornography. Despite the number of cases Marsh has pursued on Amy’s behalf, he says there’s no indication that distribution of her images has stopped.

And Atwell-Davis says that because child pornography has grown exponentially with the advent of the Internet, more children are being victimized. In fact, the pictures become currency traded for other pictures, and for social status.

“It’s not just that they’re seeking images, but we know from federal prosecutions of rings that are a membership club ... [that members] have to submit a certain number of new images,” she says. “That’s an incentive.”

Experts say molesters use child pornography to “groom” new victims. That adds to the trauma experienced by victims of child pornography, who are upset and afraid that their pictures could be used to seduce other children, Marsh says.

Psychologist Robert Geffner, president of the Institute on Violence, Abuse and Trauma at Alliant International University in San Diego, says a typical diagnosis for someone like Amy or Vicky might be post-traumatic stress disorder. Patients experience chronic, severe anxiety, which causes them to rearrange their lives to avoid reminders. Depression and substance abuse can follow.

“When you’ve had a trauma like this ... you don’t ‘get over it’ where it’s never a part of your life,” he says. “For victims, it’s always a part of their life; they’ve just learned how to cope.”

And when something comes along that reminds them of the abuse—such as the federal prosecution notices—Geffner says it can trigger an emotional and physiological reaction. For someone who’s coping well, he says this might require “booster sessions” of therapy to strengthen coping skills. For someone who hasn’t recovered sufficiently, the trigger could make symptoms worse. That’s the story told in court by both Amy and Vicky, who say the continued dissemination of the images causes trauma independent of the initial abuse, including fear of being recognized. For Vicky, this was worsened when “fans” attempted to contact her through the Internet several times; one man was even convicted of stalking her.

Victims’ rights advocates believe many victims simply don’t know they have a right to pursue restitution. But Marsh adds that victims like Amy are reluctant to be identified, even years later, because of shame, embarrassment and the original abusers’ efforts to intimidate them into staying silent.

COMPETING INTERESTS

Critics of these restitution requests don’t dispute that child pornography victims have suffered real harm. But like the federal appeals courts, they raise a mix of practical, philosophical and legal concerns about holding defendants responsible for harm to victims they’ve never met. That’s especially true when the restitution payment is very large, as it was for defendant Arthur Weston Staples. According to his attorney, Jonathan Shapiro of Fairfax, Va., Staples had no criminal history when he was caught in possession of child pornography. Because those images included some of Amy, the U.S. District Court for the Southern District of Florida ended up ordering Staples to pay \$3.68 million, the entire amount Amy claimed. That’s an unusually high restitution order in a case involving Amy, and it was in addition to 210 months in prison for the 66-year-old Staples.

Like all restitution defendants, Staples can lower the total amount he must pay through joint and several liability—but Shapiro points out that this is an impractical burden for a prisoner. All in all, he says, the situation is “completely wrong on a

number of levels.”

“This young woman’s harm was caused by the fact that she was [abused] by her uncle,” Shapiro says. “He distributed her pictures around the world 10 years before Arthur Staples came on the scene. I don’t doubt that she was damaged, but that was not Arthur Staples’ doing.”

On his blog, Turley has expressed concern that the restitution order in Hesketh’s case “rips the purpose of restitution from its legal moorings.” This could create an unworkable statutory scheme if it’s expanded to other areas of criminal law, he says. He also believes expanding who may claim restitution could reduce payments for those who were victimized most directly.

“When you expand the concept of proximate cause to this extreme, it means that fewer resources are going to go to the core victims,” he says.

Berman, who runs the Sentencing Law and Policy blog, adds that the incentives created by restitution in child pornography cases could create further harm to victims by keeping reminders of the abuse alive through new restitution cases. Though he doesn’t intend to cast aspersions on victims’ attorneys and experts, he notes that they get paid more when they demonstrate more harm to victims.

“I don’t want to suggest that there’s inappropriate behavior going on, but I do want to suggest that the more [harm victims show], the stronger their case for restitution becomes,” he says. “And the more a victim says ‘Don’t inform me,’ the less basis there is to claim restitution.”

Berman and Turley both express concern that restitution orders pile further penalties onto an area of criminal law where very long sentences are already routine. In fact, appropriate sentencing in child pornography cases is a widespread concern among criminal practitioners.

LEGISLATIVE COURAGE

Judges depart downward from sentencing guidelines more often in child pornography cases—43 percent of the time—than in any other area, according to the U.S. Sentencing Commission. The commission held a hearing in February to discuss sentencing reform (a ruling is expected by the end of the year), but Congress has a history of legislating sentences upward.

And that history, observers say, is the most durable obstacle to any legislative remedy. In *Kennedy*, the 9th Circuit expressly called on Congress to create a standard allowing restitution from child pornography possessors, without the joint and several liability problems posed by Section 2259.

“This cries out for a congressional response,” says Berman. “Whatever the Supreme Court does, if it takes up the split, will be less satisfactory than a legislative solution.”

Atwell-Davis of the National Center for Missing and Exploited Children says clarity would make it easier for child victims to get the restitution they need. That’s why the center filed an amicus brief in an unsuccessful 2011 certiorari petition, *Amy v. Monzel*.

“I know that some issue experts have raised the possibility of a victims’ restitution fund,” she says. “There would be a set amount of fine to be paid by each defendant and the victims could then apply to this fund for restitution. I think that idea holds a lot of promise.”

Even Hepburn, Vicky’s attorney, says she sees the value in the flat-amount scheme that some district courts have created.

Unfortunately, the issue of child pornography is so emotionally charged that observers agree congressional action is unlikely. Because voters may see any action to limit restitution as a gift to pedophiles, politicians who depend on voters for their jobs may not have the courage to take action.

“That’s part of the broader challenge of these cases,” Berman says. “It has to get really high-profile and really bad before the legislature will step in.”

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