A Right to Contribution and Federal Restitution Orders

Jonathan R. Hornok
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Abstract

Amy and Vicky are victims of two of the most widely traded series of child sex-abuse images. The Violence Against Women Act requires courts to order full restitution for these women. However, with millions of dollars in requested restitution and thousands of defendants, the United States courts of appeals are split over whether to interpret the mandatory restitution provision broadly (providing a victim with comprehensive recovery from each defendant) or narrowly (frequently allowing only limited, expensive, and time-consuming recovery from many defendants). Partially motivating this circuit split are courts’ opposing views on whether a defendant has a right to contribution from other victimizers for restitution payments. Without a right to contribution for defendants, these victims must file suits throughout the country asking courts for restitution. This Note argues that, under the Supreme Court’s holdings in Northwest Airlines, Inc. v. Transportation Workers Union of America, Texas Industries, Inc. v. Radcliff Materials, Inc., and Musick, Peeler & Garrett v. Employers Insurance of Wausau, courts should imply a right to contribution for defendants ordered to pay restitution under 18 U.S.C. §§ 2259 and 3664. Such an interpretation enables a victim to receive comprehensive restitution and permits a defendant who pays full restitution to seek contribution from other liable defendants.

I. INTRODUCTION

Amy and Vicky have the kind of stardom that terrifies every parent; they are the objects of two of the most widely traded series of child sex-abuse images. When Amy and Vicky were young girls, their sexual abusers scripted, performed, and recorded horrific torture “on demand” for pedophiles around the world. Even though the sexual abuse has stopped, Amy and Vicky are revictimized every day as these images pass from pedophile to pedophile. Congress enacted the Violence Against Women Act to help girls like these piece together their shattered lives.¹

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¹ See infra Part II.B.
However, divided courts are hesitant to order the restitution these girls desperately need. This Note argues that courts should imply a right to contribution from the Violence Against Women Act to further Congress’s objective to provide full compensation for victims like Amy and Vicky.

The Violence Against Women Act requires courts to order full restitution for victims of child sex abuse. The act’s mandatory restitution provision lists compensated costs including psychological treatment, lost income, and attorney’s fees. However, a circuit split has developed over whether proximate cause is required for a victim to recover any costs. Animating this circuit split is a disagreement about whether to imply a right to contribution from 18 U.S.C. §§ 2259 and 3664, which define restitution procedures. A right to contribution would allow Amy and Vicky to recover restitution more quickly while ensuring that defendants appropriately share liability. This mechanism, common in tort law, shifts the burden—seeking and waiting for recovery—to liable tortfeasors from innocent victims.

The U.S. Supreme Court has considered whether to imply a right to contribution from a statute three times. The Court’s analysis focuses on congressional intent. When looking for congressional intent, the Court asks three questions: First, does any other provision in the statute apportion liability? Second, does the statute employ an open-ended remedial scheme? Finally, does the statute’s legislative history indicate that a right to contribution should be implied?

Applying the Court’s analysis reveals that courts should imply a right to contribution from 18 U.S.C. §§ 2259 and 3664. The answers to the Court’s three questions evidence the required congressional intent: First, these sections apportion defendants’ liability. Second, these sections give courts discretion to fashion restitution orders. Finally, these sections’ legislative history discusses joint and several liability.

Part II of this Note develops a backdrop of child sex abuse, congressional response, the division among courts over how much restitution to award from each defendant, and a right to contribution. Part III distills the Court’s analysis from three cases considering whether to imply a right to contribution. Part IV applies the Court’s analysis to 18 U.S.C. §§ 2259 and 3664 and argues that courts should imply a right to contribution. Part V concludes.

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2 See infra Part II.C.
4 See infra note 53 and accompanying text.
6 See infra Part III.
7 See infra Part III.A.
8 See infra Part III.B.
9 See infra Part III.C.
II. THE BACKDROP: HORRIFIC ABUSE, CONGRESSIONAL RESPONSE, DIVIDED COURTS, AND A RIGHT TO CONTRIBUTION

A. Horrific Abuse: Amy and Vicky are Victims of Child Sex Abuse

A “special secret”—that is what Amy’s uncle called the sex abuse. As an eight-year-old, Amy’s uncle raped her and forced her to endure oral copulation, anal penetration, and masturbation while telling her that he loved her. Amy’s uncle, however, did not keep their “special secret.” Instead, he began to develop a series of sex-abuse images for pedophiles around the world. He provided “on demand” sex-abuse images and forced Amy to communicate with her “followers” over the Internet. But Amy’s “followers” wanted more, so her uncle took her out into the woods to meet them in person.

When Amy’s uncle was arrested, Amy struggled to move on and reclaim what was left of her shattered childhood, but thousands of sex-abuse images, known as the Misty series, spread through the Internet underworld. The National Center for Missing and Exploited Children (NCMEC), an organization that helps law enforcement identify victims in sex-abuse images, has identified over 35,570 images associated with the Misty series in over 3,227 evidence reviews. Although Amy’s uncle cannot sexually abuse her anymore, countless unknown pedophiles revictimize Amy daily as they revive her abuse through the sex-abuse images. The uniquely anonymous and never-ending character of Amy’s victimization through mass distribution of the Misty series forces Amy to face a long and difficult course of treatment for post-traumatic stress disorder.

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12 See Laird, supra note 10, at 55.
13 Id. at 3–4.
14 Id. at 4.
15 Id. at 3–4 n.2.
16 Id. (citation omitted).
17 Government’s Memorandum of Law Regarding the Victims’ Losses at 8, United States v. Monzel, 746 F. Supp. 2d 76 (D.D.C. 2010) (No. 09-243), 2010 WL 6845823 (“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 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.” (quoting Victim Impact Statement of “Misty,” at 1)).
18 Marsh, supra note 11, at 5. Amy will most likely need weekly therapy for the rest of her life and may require periods of intensive inpatient treatment. Id. at 6.
Like Amy, Vicky was sexually abused as a young girl. Vicky’s abuser took orders from pedophiles over the Internet and forced Vicky to perform in scripted videos of sex abuse, including rape, sodomy, and bondage. Years after the abuse stopped, she learned that these sex-abuse images remained online and were widely traded among pedophiles over the Internet. She described her revictimization in her victim impact statement:

When I learn . . . about [a] defendant having downloaded the pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about. I live in fear that any of them, may try to find me and contact me and do something to me. I have been contacted by some of them and some have said terrible things to me. The fact that each one is out there and has seen me and watched me being raped makes me sicker, makes me feel less safe, makes me feel more ashamed and humiliated.

These young women live in a dark world. They feel shameful because people they trusted thrust horrific abuse upon them as innocent little girls. They feel humiliated because the sex-abuse images revive their abuse as they pass from pedophile to pedophile. They feel fearful because some unknown attacker, infatuated by the images of these little girls, may find them and continue the sex abuse that began so many years ago.


Around the same time that Amy and Vicky were enduring horrific sex abuse, Congress noted that “a rising tide of violence has targeted American women both in the streets and in their own homes. Police, hospital emergency rooms, rape crisis centers, and battered women’s shelters have recorded an increasing incidence of rape, sexual assault, and domestic violence against women in the United States.”

20 Id.
at 1–2.
21 Id.
at 1–2.
22 Government’s Memorandum of Law Regarding the Victims’ Losses, supra note 17, at 10 (quoting Victim Impact Statement of “Vicky,” at 1–2).
23 See Laird, supra note 10, at 51.
24 See Government’s Memorandum of Law Regarding the Victims’ Losses, supra note 17, at 10.
25 Id.
In response, Congress enacted the Violence Against Women Act in 1994. As part of that Act, Congress mandated that courts order defendants to pay full restitution to victims of child sex abuse. Two years later, Congress amended these provisions to streamline general restitution procedures, which are now codified at 18 U.S.C. § 3664.

The mandatory restitution provision for victims of child sex abuse, 18 U.S.C. § 2259, requires that an “order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses.” The “full amount of the victim’s losses” includes any costs the victim incurs for

(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys’ fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense.

Recognizing that many defendants are indigent and likely to persuade a court that a restitution order is futile, Congress specifically provided that “[a] court may not decline to issue an order under this section because of . . . (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.”

C. Divided Courts: Restitution Litigation Has Generated a Circuit Split

The Crime Victim’s Rights Act requires the government to notify a victim whenever a defendant is found to possess sex-abuse images of that victim. Amy

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31 Id. at § 2259(b)(3).
32 See S. REP. NO. 104-179, at 21 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 934 (“The committee recognizes that a significant number of defendants required to pay restitution under this act will be indigent at the time of sentencing.”).
34 18 U.S.C. § 3771(c)(1) (“Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation,
started receiving these letters in 2006, and by 2008, when she hired her attorney
James Marsh, she had over 1,500 notices. 35 Amy’s attorney started filing requests
for restitution under 18 U.S.C. § 2259’s mandatory restitution provision. 36 Her
attorney routinely files restitution requests for the full amount of her losses,
$3,367,854. 37 This amount consists of $512,681 for future treatment and
$2,855,173 for lost future income. 38 Additionally, Amy’s attorney requests
$17,063 for expert witness fees and $3,500 for estimated attorney’s fees. 39

Vicky also receives regular victim notices. Her attorney, Carol Hepburn, files
restitution requests citing the full amount of Vicky’s losses as $497,819.86. This
amount consists of $108,975 for future treatment, $147,830 for lost future income,
$37,874 for expert witnesses, and $203,140 in attorney’s fees. 40

Courts across the country have ordered a wide array of restitution amounts.
Some courts have awarded nothing; 41 some courts have awarded the full requested
amount. 42 But most courts have awarded something in between. 43 These courts do
not dispute the losses these women claim, but instead have varied interpretations of
18 U.S.C. § 2259’s definition of the “full amount of the victim’s losses.” 44
Subsection (b)(3)(F) limits recovery of “other losses” to those that are “a
proximate result of the offense.” 45 However, preceding items in the list, like
medical expenses and attorney’s fees, do not contain similar proximate result
language. 46 Courts of appeals are split over whether the victim must show
proximate cause to recover costs listed in all the categories or just the last catch-all
category. 47 On one side, the Fifth Circuit, sitting en banc, has held that proximate

or prosecution of crime shall make their best efforts to see that crime victims are notified
of, and accorded, the rights described in subsection (a).”).

35 Laird, supra note 10, at 51.
36 Id.
37 Marsh, supra note 11, at 35.
38 Id.
39 Id.
40 Hepburn, supra note 19, at 1.
41 Laird, supra note 10, at 51.
42 Id.
43 Id.
46 Id. at § 2259(b)(3)(A)–(E).
47 United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011) (“There is a circuit
split over whether the proximate cause requirement in the catch-all category also applies
to the preceding categories. Most circuits to consider the issue have held that it does.”); see
also United States v. Fast, 709 F.3d 712, 720 (8th Cir. 2013) (“All but one circuit court to
have addressed the issue read subsections 2259(b)(3)(A) through (E) to require proof of
proximate cause.”); In re Amy Unknown, 701 F.3d 749, 765–66 (5th Cir. 2012) (en banc)
(stating that other “circuits [addressing the proximate cause issue], however, reached [an
opposite] conclusion for reasons we do not find compelling”); United States v. Burgess,
cause is only required to recover costs under the final catch-all category.\textsuperscript{48} However, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. circuits have held that proximate cause is required to recover costs under any of the categories.\textsuperscript{49} With this circuit split on federal law firmly entrenched with an en banc circuit\textsuperscript{50} opposite a majority of circuits, the Supreme Court has taken notice and will resolve this conflict in \textit{Paroline v. United States}.

Despite the vigorous arguments on either side of this circuit split, a subtle underlying question seems to be dividing the courts: whether a defendant ordered

\textsuperscript{48} \textit{In re Amy Unknown}, 701 F.3d at 773 ("[T]he district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)–(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.").

\textsuperscript{49} \textit{See Fast}, 709 F.3d at 721–22 ("The government still has to prove that the defendant proximately caused [all] losses."); \textit{United States v. Laraneta}, 700 F.3d 983, 990 (7th Cir. 2012) ("[T]here is no reason that any limitation on liability imposed in the name of ‘proximate cause’ should not apply equally to the specified and the unspecified losses."); \textit{Burgess}, 684 F.3d at 457 ("[T]he statute's language, which defines a victim as one ‘harmed as a result of a commission’ of a defendant’s acts, invokes the well-recognized principle that a defendant is liable only for harm that he proximately caused."); \textit{United States v. Kearney}, 672 F.3d 81, 99–100 (1st Cir. 2012) ("We hold that the proximate cause requirement must be] satisfied . . ."); \textit{United States v. Evers}, 669 F.3d 645, 658 (6th Cir. 2012) ("We find the reasoning of the circuit majority to be persuasive and follow it."); \textit{United States v. Aumais}, 656 F.3d 147, 153 (2d Cir. 2011) ("We agree with the majority of circuits and hold that under § 2259, a victim's losses must be proximately caused by the defendant's offense."); \textit{United States v. Kennedy}, 643 F.3d 1251, 1261 (9th Cir. 2011) ("We have interpreted this language as allowing restitution only for losses that were ‘proximately’ caused by the defendant’s conduct."); \textit{Monzel}, 641 F.3d at 535 (D.C. Cir. 2011) ("We join the plurality in concluding that all of the categories require proximate cause."); \textit{United States v. McDaniel}, 631 F.3d 1204, 1208 (11th Cir. 2011) ("[W]e hold that section 2259 limits recoverable losses to those proximately caused by the defendant’s conduct."); \textit{United States v. Crandon}, 173 F.3d 122, 125 (3d Cir. 1999) ("The mandatory restitution provision . . . requires awarding the full amount of the victim's losses suffered as a proximate result of the offense.").

\textsuperscript{50} A circuit sitting en banc can only be overturned by the Supreme Court or the circuit sitting again en banc. Ten of the fourteen Fifth Circuit judges held that proximate cause was not required. \textit{In re Amy Unknown}, 701 F.3d at 751, 774. With such a majority, it is unlikely for the Fifth Circuit's holding to be overturned except by the Supreme Court.

\textsuperscript{51} \textit{In Re Amy Unknown}, 701 F.3d 749 (5th Cir. 2012), \textit{cert. granted sub nom. \textit{Paroline v. United States}}, 133 S. Ct. 2886 (2013) (Supreme Court docket number 12-8561; "Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to the following question: What, if any, casual relationship or nexus between the defendant’s conduct and the victim’s harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259.").
to pay restitution has a right to contribution from other defendants who are also responsible for the victim’s harm.52 The Fifth Circuit en banc has held that a defendant has a right to contribution from other defendants.53 However, opposing courts have either dismissed contribution outright or assumed that contribution among defendants is not possible, expressing concern that one defendant might pay more than his share of responsibility.54 Judge Richard Posner, relying on practical considerations and cursory legal analysis, recently overturned a district court’s order that a defendant, convicted of victimizing Amy and Vicky, could seek contribution.55

52 Id. at 768 (citing Burgess, 684 F.3d at 459–61; Aumais, 656 F.3d at 153–54; Kennedy, 643 F.3d at 1265–66; Monzel, 641 F.3d at 537–40) (“The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim’s harm to any single defendant.”).

53 Id. at 769. The restitution statute “offers a ‘means’ to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability.” Id. Justice Davis, joined by three judges, concurring in part wrote: “We have allowed such contribution claims in analogous non-sex offender cases.” Id. at 779. Justice Southwick, dissenting on other grounds, wrote, “Over-compensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.” Id. at 782.

54 Burgess, 684 F.3d at 458–59 (“We also observe that the tort concept of joint and several liability [upon which a right to contribution relies] is not applicable in this context.”); Aumais, 656 F.3d at 156 (“Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); so it would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country.”); Kennedy, 643 F.3d at 1265 (noting that other circuit courts have “not provide[d] a mechanism by which a court could allocate this loss among all potential defendants.”); Monzel, 641 F.3d at 539 (stating that an award of the full restitution requested is not appropriate because “a defendant can be jointly and severally liable only for injuries that” he has proximately caused).

55 United States v. Laraneta, 700 F.3d 983, 992–93 (7th Cir. 2012) (citing Nw. Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95–99 (1981)) (“It is doubtful that the judge had the authority to do this. Contribution in a federal case normally and we assume in a criminal restitution case requires statutory authorization. . . . We add that contribution in a case such as this would be extraordinarily clumsy, when one considers that in all likelihood all the defendants from whom restitution is being sought by Amy and Vicky are in prison and most of them have negligible assets to contribute to our defendant.”); see also Jennifer A.L. Sheldon-Sherman, Rethinking Restitution in Cases of Child Pornography Possession, 17 LEWIS & CLARK L. REV. 215, 267–70 (2013) (expressing similar concerns). While the practicalities of prisoner litigation for contribution must be considered, several anecdotal observations defray the concern. First, defendants can only seek contribution once they have paid more than their responsible share. Since many defendants, especially the ones in prison, are indigent, it is unlikely that they will
The circuit split over the right to contribution for defendants amplifies the proportionality concerns in the circuit split over how to interpret 18 U.S.C. § 2259. The possibility of a large judgment against a defendant without the ability to ameliorate the burden through a right to contribution motivates courts to limit a defendant’s exposure by reading a broad proximate cause requirement in 18 U.S.C. § 2259. These victims are seeking large sums of money. Amy seeks over $3 million and Vicky seeks almost $500,000. Unless a defendant is exceptionally wealthy, a judgment of this size will hang over a defendant’s head for the rest of his life.56 Courts may consider such a judgment unjustly disproportionate. Further, for some courts, more than a simple sense of justice underlies this proportionality concern. A circuit split is emerging over whether the Excessive Fines Clause of the Eighth Amendment57 encompasses restitution.58 Courts that consider restitution outside of the scope of the Excessive Fines Clause have no constitutional problem with ordering a defendant to pay a large amount of restitution, but for courts on the opposite side of the split, a restitution judgment this large could be considered unconstitutionally excessive.

A right to contribution for defendants decouples the Excessive Fines Clause or general proportionality concern from interpretation of 18 U.S.C. § 2259. As a court determines whether to imply a broad proximate cause requirement in 18 U.S.C. § 2259 in the context of a right to contribution, proportionality can be assumed and Excessive Fines Clause concerns defrayed because a defendant have actually paid the required restitution, let alone more than their share. Second, since many defendants are indigent, seeking contribution from them will be a waste of time. The right to contribution is only helpful if a defendant is wealthy. Since few defendants are actually wealthy enough for it to matter, the marginal increase in litigation over that already asserted by victims is probably not substantial.

56 See 11 U.S.C. § 523(a)(13) (2006) (“A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . . for any payment of an order of restitution issued under title 18, United States Code . . . .”); see also James E. Lockhart, Annotation, Debts Arising from Penalties as Exceptions to Bankruptcy Discharge 150 A.L.R. FED. 159, at § 19 (1998) (discussing the dischargeability of debts).

57 U.S. CONST. amend. VIII.

58 Compare In re Amy Unknown, 701 F.3d 749, 771 (5th Cir. 2012) (en banc) (“[W]e are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive.”), United States v. Newell, 658 F.3d 1, 35 (1st Cir. 2011), Necula v. Conroy, 13 F. App’x 24, 26 (2d Cir. 2001), and United States v. Bonner, 522 F.3d 804, 807 (7th Cir. 2008), with United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) (“[R]estitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes.”), United States v. Lessner, 498 F.3d 185, 205 (3d Cir. 2007) (relying on Dubose to find a restitution order not excessive), United States v. Bollin, 264 F.3d 391, 419 (4th Cir. 2001) (equating analysis of restitution with analysis of forfeiture under the Excessive Fines Clause).
ordered to pay a large amount of restitution can seek contribution from fellow defendants.

D. A Right to Contribution: What Is It and Where Does It Come from?

In the earliest recorded consideration of a right to contribution, *Merryweather v. Nixan*, 59 Lord Kenyon remarked that “there could be no doubt but that [a] nonsuit was proper” because “he had never before heard of such an action having been brought . . . .”60 In the over two hundred years since Lord Kenyon rejected “[o]ne Starkey[’s]”61 odd request, most American jurisdictions have recognized a right to contribution.62 The *Restatement (Third) of Torts* summarizes a right to contribution this way: “When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other . . . .”63 However, “[a] person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person’s comparative share of responsibility.”64 Illustration 1 is instructive:

A sues B, C, and D for an indivisible injury sustained in an automobile accident. A obtains a judgment against B, C, and D whereby they are jointly and severally liable to A for $100,000. The factfinder assigns 50 percent responsibility to B, 30 percent responsibility to C, and 20 percent responsibility to D. B pays A the entire judgment. . . . B may recover contribution from C or D for a total of $50,000 ($100,000 x .50), because B’s satisfaction of the judgment extinguished C’s and D’s liability to A.65

The illustration above seems fair to a modern mind; why would Lord Kenyon reject such a situation? Courts opposed to a right to contribution have typically rejected it because they did not want to enable defendants to use the court system to soften their own liability.66 Modern American courts, however, have widely adopted a right to contribution in order to increase fairness among litigants—including liable litigants. Between the *Restatement (Second) of Torts* in 1979 and the *Restatement (Third) of Torts* in 2000, American courts almost universally

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60 Id.
61 Id.
63 *RESTATMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 23(a) (2000).
64 Id. at § 23(b).
65 Id. at § 23 cmt. b, illus. 1.
66 See *RESTATMENT (SECOND) OF TORTS* § 886A cmt. j (1979).
adopted comparative negligence theory, which focuses on assigning a percentage of responsibility to each party involved in an injury.

The right to contribution serves two important interests. Primarily, it benefits plaintiffs because they are able to recover their losses from any of several defendants, thereby increasing the likelihood and ease of recovery. However, to counterbalance this distortive effect, the defendant who pays more than his responsible share is able to recover the overage from joint tortfeasors. The right to contribution satisfies the modern desire to make the injured party whole without holding any defendant unfairly responsible.

III. CONGRESSIONAL INTENT: THE TOUCHSTONE FOR AN IMPLIED RIGHT TO CONTRIBUTION

When determining whether a right to contribution exists in a statute, the Supreme Court looks for evidence that Congress intended the Court to imply a right to contribution. The Court’s focus on congressional intent expressed through statutory schemes is consistent with the Court’s general deference to Congress on statutory construction.

In analyzing whether Congress intended the Court to imply a right to contribution, the Court considers three questions: (A) whether any other provision apportions liability, (B) whether the statute employs an open-ended remedial scheme, (C) whether legislative history indicates that a right to contribution should be implied.

A. Does Any Other Provision Apportion Liability?

Other provisions apportioning liability within the same statutory scheme are significant evidence that Congress intended the Court to imply a right to contribution. However, the Court does not recognize provisions that simply protect a party’s rights as evidence of similar congressional intent. The Court’s narrow focus on other provisions providing relief similar to a right to contribution displays a firm commitment to honor the legislative power vested in Congress. Further, since a right to contribution apportions liability among several parties, parallel relief for these parties found elsewhere in a statute indicates that Congress intended to especially benefit these parties. In contrast, a simple protection against infringement of rights does not necessarily indicate congressional intent to bestow a benefit as much as it indicates congressional intent to punish wrongdoers.

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67 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmt. a (2000).
68 Id. at § 8.
69 See infra Part III.A.
70 See infra Part III.B.
71 See infra Part III.C.
In *Northwest Airlines, Inc. v. Transportation Workers Union of America*, the Court rejected a right to contribution under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The case arose out of a $20 million judgment against Northwest Airlines for paying female cabin attendants less than male cabin attendants. Northwest Airlines sought contribution from the unions representing the female cabin attendants because the unions had negotiated lower pay for females than for their male counterparts. The Court looked to the language of the Equal Pay Act and Title VII of the Civil Rights Act to determine if Congress provided liability apportionment for parties like Northwest Airlines. The Court examined specific provisions “arguably . . . intended to provide special protection for employers.” The Court first referred to section 3 of the Equal Pay Act, which provides that “[n]o labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.” Similar to the Equal Pay Act, Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, makes it unlawful for a labor organization “to cause or attempt to cause an employer to discriminate against an individual in violation of this section.” The Court found that these provisions protect employers from unions; they do not apportion liability between employers and unions who jointly discriminate against a third party on the basis of sex.

Similar to *Northwest Airlines*, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court considered the Sherman Act and the Clayton Act and held that they did not imply a right to contribution. Texas Industries and Radcliff Materials allegedly conspired to raise prices of ready-mix concrete in violation of the Sherman Act. However, Texas Industries was the only named defendant in the original suit, so it filed a third-party complaint against Radcliff Materials for contribution if it were held liable. The Court applied the same analysis as it had in *Northwest Airlines* to these two statutory schemes. The Clayton Act provides

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73 *Id.* at 98.
74 *Id.* at 80–81.
75 *Id.* at 79–81.
76 *See id.* at 92.
77 *Id.* at 92–93.
78 *Id.* at 93 n.27.
81 *Nw. Airlines*, 451 U.S. at 93.
83 *Id.* at 639–40.
84 *Id.* at 632.
85 *Id.* at 632–33.
86 *Id.* at 638.
that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”\(^{87}\) The Court focused on the punitive treble damages asserted and the absence of any provisions to “soften[] the blow on joint wrongdoers.”\(^{88}\) The absence of any provision to ameliorate liability for wrongdoers provided significant weight for the Court against implying a right to contribution.\(^{89}\)

In contrast to *Northwest Airlines* and *Texas Industries*, in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, \(^{90}\) the Court held that the Securities Exchange Act of 1934 implied a right to contribution.\(^{91}\) In that case, a group of stock purchasers settled with Employers Insurance of Wausau for $13.5 million.\(^{92}\) The stock purchasers alleged that the stock offering was materially misleading in violation of section 10(b) of the Securities Exchange Act of 1934.\(^{93}\) Employers Insurance of Wausau sued Musick, Peeler & Garrett, and others, for contribution because of their work as the lawyers and accountants who put together the stock offering.\(^{94}\) The Court looked to other provisions in the Act to determine whether contribution was consistent with the statutory scheme’s operation.\(^{95}\) Those provisions parallel section 10(b) and provide that “[e]very person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.”\(^{96}\) The Court concluded, based on these provisions, that a right to contribution was consistent with congressional intent.\(^{97}\)

In *Northwest Airlines*, *Texas Industries*, and *Musick, Peeler & Garrett*, the Court extensively examined whether apportionment of liability was consistent with the statutory scheme. As seen in *Northwest Airlines* and *Musick, Peeler & Garrett*, the Court will look to the statutory scheme as a whole to determine whether Congress provided apportionment of liability in other provisions to the party seeking contribution. As seen in the Securities Exchange Act, examined in *Musick, Peeler & Garrett*, Congress may choose to apportion liability among violating parties. However, as seen in the Equal Pay Act and Title VII of the Civil Rights Act examined in *Northwest Airlines*, Congress may simply provide protection to multiple parties in a single statutory scheme. Further, as seen in *Texas Industries*,


\(^{88}\) *Texas Indus.*, 451 U.S. at 639.

\(^{89}\) *Id.* at 639–40.

\(^{90}\) 508 U.S. 286 (1993).

\(^{91}\) *Id.* at 298.

\(^{92}\) *Id.* at 288.

\(^{93}\) *Id.*

\(^{94}\) *Id.* at 288–89.

\(^{95}\) *Id.* at 295.

\(^{96}\) 15 U.S.C §§ 78i(e), 78r(b) (2006).

\(^{97}\) *Musick*, 508 U.S. at 298.
Congress may seek to punish a party by imposing treble damages. The Court’s careful examination and contrast of the statutes at issue in these three cases indicates that it will not imply a right to contribution unless a statutory scheme indicates Congress’s willingness to soften the blow for liable parties.

B. Does the Statute Employ an Open-Ended Remedial Scheme?

An open-ended remedial scheme is significant evidence of congressional intent for the Court to imply a right to contribution. However, a comprehensive scheme of express remedies indicates that Congress weighed a variety of options and chose to leave out a right to contribution.

In *Northwest Airlines*, the Court denied Northwest Airlines’ request for a right to contribution from several labor unions even though the unions negotiated the lower pay for female cabin attendants for which the airline had been found liable under the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The Court noted that the Equal Pay Act and Title VII of the Civil Rights Act were comprehensive programs with express remedies for individuals and the federal government. The comprehensive remedial scheme carefully crafted by Congress provided strong indication to the Court that Congress did not intend to imply additional remedies. In deference to Congress, the Court declined to add a remedy to the comprehensive remedial schemes.

In contrast, in *Musick, Peeler & Garrett*, the Court held that Employers Insurance of Wausau had a right to contribution. Employers Insurance of Wausau insured a company that settled a 10b-5 action brought by stock purchasers alleging that the company’s stock offering was misleading. The Court allowed Employers Insurance of Wausau, which had funded most of the settlement, to seek contribution from the lawyers and accountants who helped prepare the misleading stock offering. The Court extensively discussed the underlying action that led to the company’s liability: an implied private cause of action for violation of the securities law. The Court distinguished this scenario from *Northwest Airlines* because, in that case, the private parties seeking contribution had been found liable under an express statutory scheme as compared with a court-created cause of

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100 *Id.* at 93.
101 *Id.* at 93–94.
102 *Id.* at 94.
103 *Musick*, 508 U.S. at 288–89, 298.
104 *Id.*
105 *Id.* at 288, 298.
106 *Id.* at 292 (“The violation of the securities laws gives rise to the 10b–5 private cause of action . . . . Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed.”).
action. However, after appearing to base its decision on an unwillingness to change precedent, the Court examined two recent congressional enactments confirming the open-ended character of the statutory scheme. The Court first noted the explicit recognition of the Court’s implied cause of action, which provided that “[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.” The Court also noted that when Congress acted to limit the retroactive effect of a Court decision, it carefully crafted the language to maintain the open-ended character of the remedial scheme. The Court concluded that the open-ended remedial scheme, confirmed by recent amendments, was significant evidence of congressional intent for the Court to shape the legal remedies.

In Northwest Airlines and Musick, Peeler & Garrett, the Court focused on the care Congress used when crafting the remedial schemes in the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and the Securities Exchange Act of 1934. In the Equal Pay Act and Title VII of the Civil Rights Act of 1964, Congress carefully considered what remedies should be available to private parties and chose to enact a comprehensive remedial scheme. Conversely, in the Securities Exchange Act of 1934, Congress focused on defining the requirements but left the Court to craft an appropriate remedial scheme. After years of jurisprudence implying a remedial scheme, Congress amended the Securities Exchange Act of 1934, but it was careful to leave the remedial scheme open ended.

C. Does Legislative History Indicate that a Right to Contribution Should be Implied?

Legislative history could provide significant weight of congressional intent for the Court to imply or reject a right to contribution. However, the Court considers silence on the subject as weightless in the context of the other factors.

In Northwest Airlines, the Court rejected a request for contribution from labor unions under the Equal Pay Act and Title VII of the Civil Rights Act of 1964.  

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107 Id. (In Northwest Airlines and Texas Industries the parties were “subject to liability under an express remedial provision fashioned by Congress. . . . [Here,] [t]he parties against whom contribution is sought . . . share joint liability for that wrong under a remedial scheme established by the federal courts.”).
108 Id. at 293–94.
109 Id. (quoting 15 U.S.C. § 78t-1(d) (2006)).
110 Id. at 294 (citing 15 U.S.C. § 78aa-1(a), which provides that “[t]he limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991”).
111 Id. at 295.
The Court briefly considered the legislative history of these two acts and held that nothing could be found to support a right to contribution. However, the Court specifically noted that legislative silence is common in cases involving an implied right to contribution and, therefore, cannot be dispositive. The Court concluded that legislative silence confirmed its finding against implying a right to contribution based on the other factors.

Similar to *Northwest Airlines*, in *Texas Industries*, the Court rejected Texas Industries’ request for a right to contribution from Radcliff Materials and others with whom Texas Industries had allegedly conspired to increase the prices of ready-mix concrete in violation of the Sherman Act and the Clayton Act. The Court confirmed Texas Industries’ concession that nothing in the legislative histories of these two Acts supported implying a right to contribution. However, the Court quickly moved on to examine another factor and looked to silence in the legislative history as simple confirmation of a finding against implying a right to contribution based on the other factor.

In contrast to both *Northwest Airlines* and *Texas Industries*, in *Musick, Peeler & Garrett*, the Court granted Employers Insurance of Wausau’s request for a right to contribution against lawyers and accountants who created a materially misleading stock offering in violation of the Securities Exchange Act of 1934. However, having considered the first two factors and finding them dispositive on the issue, the Court did not consider or accord any weight to silence in the legislative history.

As seen in both *Northwest Airlines* and *Texas Industries*, the Court uses silence in the legislative history to confirm a finding against implying a right to contribution based on other factors. However, in *Musick, Peeler & Garrett*, the Court simply did not consider the legislative history after finding the first two factors determinative. These cases illustrate that the Court looks to legislative history, and presumably would accord appropriate weight to whatever was found, but considers silence outweighed by the other factors.

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113 Id. at 94.
114 Id.
115 Id. at 94–95.
117 Id. at 640.
118 Id.
120 See id. at 294, 298 (holding that Congress enacted an open-ended remedial scheme and that a right to contribution was consistent with other provisions).
D. Summarizing the Court’s Congressional Intent Analysis

Congressional intent is the touchstone for determining whether to imply a right to contribution.\(^\text{121}\) The Court considers three questions in determining congressional intent: (1) whether any other provision apportions liability,\(^\text{122}\) (2) whether the statute employs an open-ended remedial scheme,\(^\text{123}\) and (3) whether legislative history indicates that a right to contribution should be implied.\(^\text{124}\)

First, the Court finds significant congressional intent for the Court to imply a right to contribution when other provisions in a statutory scheme apportion liability among parties.\(^\text{125}\) However, the Court does not consider simple protection of a party’s rights adequate indication of congressional intent to soften the blow for that party.\(^\text{126}\) Further, clearly punitive provisions provide substantial weight against implying a right to contribution, which would ameliorate liability for wrongdoers.\(^\text{127}\)

Second, the Court finds significant congressional intent for the Court to imply a right to contribution when Congress enacts a remedial scheme that is open ended.\(^\text{128}\) However, the Court gives deference to the choices Congress makes when a remedial scheme evidences careful crafting.\(^\text{129}\)

Finally, clear evidence in the legislative history could carry significant weight in the Court’s analysis.\(^\text{130}\) However, because legislative history is often silent on this subject, the Court views legislative silence as weightless in the context of the other factors.\(^\text{131}\)

IV. CONGRESS IMPLIED A RIGHT TO CONTRIBUTION IN 18 U.S.C. §§ 2259 AND 3664

Congress expressed one very clear objective in both 18 U.S.C. §§ 2259 and 3664: provide full compensation for victims. Five provisions express this chief objective. First, § 2259(b)(1) requires that an “order of restitution . . . direct the

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\(^{122}\) See supra Part III.A.

\(^{123}\) See supra Part III.B.

\(^{124}\) See supra Part III.C.

\(^{125}\) See Musick, 508 U.S. at 298; cf. Texas Indus., 451 U.S. at 640 (holding that the absence of any provision to ameliorate liability for wrongdoers provided significant weight against implying a right to contribution).

\(^{126}\) See Nw. Airlines, 451 U.S. at 93.

\(^{127}\) See Texas Industries, 451 U.S. at 639–40.

\(^{128}\) See Musick, 508 U.S. at 295.

\(^{129}\) See Nw. Airlines, 451 U.S. at 93–94.

\(^{130}\) See Musick, 508 U.S. at 294, 298.

\(^{131}\) See Nw. Airlines, 451 U.S. at 94–95; Texas Indus., 451 U.S. at 640.
defendant to pay the victim . . . the full amount of the victim’s losses . . . .”

Second, § 3664(f)(1)(A) provides that “[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses . . . .”

Third, § 3664(h) confirms that when multiple defendants are found to have contributed to the loss, “the court may make each defendant liable for payment of the full amount of restitution.”

Fourth, § 3664(i) ensures that when the United States is also a victim, “all other victims receive full restitution before the United States receives any restitution.”

Finally, § 3664(j)(1) requires that “all restitution of victims required by the order be paid to the victims before any restitution is paid to [another] provider of compensation.”

Each of these provisions confirms that full victim compensation is the first congressional priority in these statutes. However, victims cannot receive more than full compensation under these statutes, even if several defendants are each ordered to pay full compensation to the victim under §§ 2259(b)(1) or 3664(h).

Despite a clear message from Congress, victims like Amy and Vicky are left with the burden of filing claims throughout the country asking courts to give them the restitution Congress intended. Even when victims seek restitution in a nearby court for a local matter, they are at the mercy of defendants who are always resistant and often unable to pay ordered restitution. The result is that defendants are able to continue the victimization by forcing victims to wait or fight for the money they need to rebuild shattered lives.

A defendant who can actually afford to pay restitution does not necessarily fix this problem. The victim is only able to recover the amount ordered by the court, and most courts are hesitant to order much restitution. A common concern for courts is that a single defendant might be stuck with more than his fair share. Courts adjudicating tort claims also see this problem, but they have a solution: a right to contribution.

In the context of victim restitution, a right to contribution satisfies the express objective from Congress and the fairness required by courts. Take Amy as an example. Many defendants she encounters are unable to pay their share of

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133 Id. § 3664(f)(1)(A) (emphasis added).
134 Id. § 3664(h) (emphasis added).
135 Id. § 3664(i) (emphasis added).
136 Id. § 3664(j)(1) (emphasis added).
137 United States v. Nucci, 364 F.3d 419, 423 (2d Cir. 2004) (“Because reading the statute to provide recovery in excess of the amount of the loss would be in derogation of the common law, Congress would have to speak clearly and unequivocally to authorize it. Congress has not done so here; accordingly, we apply the common law rule.” (citation omitted)); see also United States v. Stanley, 309 F.3d 611, 613 (9th Cir. 2002); United States v. Dawson, 250 F.3d 1048, 1050 (7th Cir. 2001); S. Rep No. 104-179, at 21 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 934 (“The purpose of this provision . . . is to ensure that the victim is not compensated twice for the same loss.”). 
138 Laird, supra note 10, at 51.
restitution. However, since she has been victimized by thousands of defendants, the odds are very good that at least some are wealthy enough to give her the restitution she needs. Amy’s recovery would be less painful if she could receive full restitution from these wealthy defendants. However, this would leave wealthy defendants having paid more than their fair share. A right to contribution allows wealthy defendants to seek contribution from other defendants, which would shift the burden of seeking restitution from the innocent victim to the liable defendants. Shifting this burden gives Amy the money she needs to rebuild a shattered life and stops the continued victimization caused by delayed compensation.

As discussed in Part III, congressional intent is the touchstone for determining whether to imply a right to contribution. The answer to each of the Court’s questions for determining congressional intent indicates that courts should imply a right to contribution from 18 U.S.C. §§ 2259 and 3664: (A) 18 U.S.C. §§ 2259 and 3664 apportion defendants’ liability,\(^1\) (B) 18 U.S.C. §§ 2259 and 3664 explicitly recognize the court’s discretion to fashion restitution orders,\(^2\) and (C) 18 U.S.C. § 3664’s legislative history discusses joint and several liability.\(^3\)

\(^{A}\) 18 U.S.C. §§ 2259 and 3664 Apportion Defendants’ Liability

Congress implied a right to contribution by apportioning liability in three provisions of 18 U.S.C § 3664.\(^4\) Subsections (h), (j)(1), and (j)(2) soften the blow for defendants.\(^5\) These provisions were originally enacted as part of 18 U.S.C. § 2259 and were later combined with other similar provisions into 18 U.S.C. § 3664 as part of Congress’s efforts to streamline restitution procedures.\(^6\) However,

\(^1\) See infra Part IV.A.

\(^2\) See infra Part IV.B.

\(^3\) See infra Part IV.C.


\(^5\) See id.

\(^6\) At least three original provisions in 18 U.S.C. § 2259 provided apportionment similar to current provisions in 18 U.S.C. § 3664. First, like § 3664(h), § 2259(b)(5) provided that “[w]hen the court finds that more than 1 offender has contributed to the loss of a victim, the court may make each offender liable for payment of the full amount of restitution or may apportion liability among the offenders to reflect the level of contribution and economic circumstances of each offender.” 18 U.S.C. § 2259(b)(5) (1994) (current version at 18 U.S.C. § 3664(h)). Second, like § 3664(j)(1), § 2259(b)(9) provided that “[t]he issuance of a restitution order shall not affect the entitlement of a victim to receive compensation with respect to a loss from insurance or any other source until the payments actually received by the victim under the restitution order fully compensate the victim for the loss.” Id. § 2259(b)(9) (current amended version at 18 U.S.C. § 3664(j)(1)). Third, like § 3664(j)(2), § 2259(b)(8) provided that “[a]ny amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—(A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State.” Id. § 2259(b)(8) (current version at 18 U.S.C. § 3664(j)(2)).
Congress noted that it “intend[ed] no change to the scope of restitution authorized by the mandatory restitution provisions of the Violence Against Women Act.”\textsuperscript{145}

First, subsection (h) provides that “[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may . . . apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.”\textsuperscript{146} A simple example is helpful to understand how this provision may operate. Suppose Bonnie agrees to drive a getaway car for Clyde after he robs the local bank. During the bank robbery, Clyde shoots and paralyzes the bank security guard. Bonnie and Clyde escape with $50,000 but are arrested on their way out of town. Once convicted, Bonnie and Clyde could be ordered to pay restitution to the bank and the security guard under 18 U.S.C. § 3664. Under subsection (h), the court could apportion restitution to the security guard between Bonnie and Clyde based on their individual responsibility for the security guard’s loss, perhaps 70% from Clyde for pulling the trigger and 30% from Bonnie for helping to plan and execute the heist. In this situation, subsection (h) apportions liability between Bonnie and Clyde based on their respective responsibility for the security guard’s loss.

Second, subsection (j)(1) provides that “[i]f a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation.”\textsuperscript{147} However, “all restitution of victims required by the order [must] be paid to the victims before any restitution is paid to such a provider of compensation.”\textsuperscript{148} This provision’s reference to “any other source” indicates a broader applicability than simple insurance. Our example of Bonnie and Clyde can illustrate this point. Suppose that Clyde was sentenced before Bonnie and was ordered to pay the security guard full restitution under subsection (h). Clyde promptly pays the security guard in full. Later, Bonnie is also sentenced and found to have contributed 30% to the security guard’s loss. The court could, under subsection (j)(1), order Bonnie to pay her share of the security guard’s restitution to Clyde because he already “provided . . . compensation” to the security guard.\textsuperscript{149} Like subsection (h), subsection (j)(1) apportions liability between Bonnie and Clyde based on their respective responsibility for the security guard’s loss.

Finally, subsection (j)(2) provides that “[a]ny amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—(A) any Federal civil proceeding; and (B) any State civil proceeding. . . .”\textsuperscript{150} Suppose that based on Clyde’s conviction and order to pay restitution to the security guard, the security

\textsuperscript{147} Id. § 3664(j)(1).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. § 3664(j)(2).
guard sues Clyde for civil damages in state or federal court. Under subsection (l), Clyde cannot “deny[] the essential allegations of th[e] offense,” so the civil jury awards the security guard significant damages.\footnote{Id. § 3664(l).} Further, suppose that Bonnie is ordered to pay 100% restitution to the security guard under subsection (h). Any payments Clyde makes to the security guard pursuant to the civil judgment will reduce the amount of restitution Bonnie must pay. Like subsections (h) and (j)(1), subsection (j)(2) apportions liability between Bonnie and Clyde based on their respective responsibility for the security guard’s loss.

In contrast to the protective provisions in the Equal Pay Act and Title VII of the Civil Rights Act of 1964 examined in \textit{Northwest Airlines}, these sections do not simply protect a party’s rights by punishing wrongdoers.\footnote{Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 93 (1981) (“[T]hose provisions, construed most favorably to petitioner, could at most provide a basis for implying a remedy for harm to an employer caused by union wrongdoing.”).} Additionally, in contrast to the punitive treble damages in the Clayton Act examined in \textit{Texas Industries}, these sections indicate that “Congress was concerned with softening the blow on joint wrongdoers.”\footnote{Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981).} Finally, similar to the contribution provisions in Securities Exchange Act of 1934 examined in \textit{Musick, Peeler & Garrett}, these sections allow the court to “apportion liability among the defendants to reflect the level of contribution to the victim’s loss . . . .”\footnote{18 U.S.C. § 3664(h).}

In sum, 18 U.S.C. §§ 2259 and 3664 expressly apportion liability among defendants. Congress could have required punitive restitution for each defendant. Instead, Congress implied a right to contribution by enacting these statutes that apportion liability among defendants.

\textbf{B. 18 U.S.C. §§ 2259 and 3664 Explicitly Recognize the Court’s Discretion to Fashion Restitution Orders}

Congress implied a right to contribution by enacting the open-ended remedial scheme in 18 U.S.C. § 3664. This section defines procedures for ordering restitution but leaves open-ended discretion to the courts to craft the specific remedies. As originally enacted, 18 U.S.C. § 2259 contained many of the same provisions recognizing the court’s discretion.\footnote{At least three original provisions of 18 U.S.C. § 2259 recognize the court’s discretion in crafting restitution orders similar to current provisions in 18 U.S.C. § 3664. First, like § 3664(f)(3)(A), § 2259(b)(7) provided that “[a]n order under this section may direct the defendant to make a single lump-sum payment or partial payments at specified intervals.” 18 U.S.C. § 2259(b)(7) (1994) (current amended version at 18 U.S.C. § 3664(f)(3)(A)). Second, like § 3664(h), § 2259(b)(5) provided that “[w]hen the court finds that more than 1 offender has contributed to the loss of a victim, the court may make each offender liable for payment of the full amount of restitution or may apportion liability among defendants.” 18 U.S.C. § 2259(b)(5) (1994) (current amended version at 18 U.S.C. § 3664(h)). Third, like § 3664(j)(2), § 2259(j)(2) provided that “[t]he court shall order each defendant to pay restitution to each victim in an amount proportionate to the defendant’s responsibility for the victim’s loss.” 18 U.S.C. § 2259(j)(2) (1994) (current amended version at 18 U.S.C. § 3664(j)(2)).} Further, section 2259(b)(1)
expressly provides that a restitution order may utilize “appropriate court mechanism[s].” This is a clear expression of congressional intent to let the court craft a remedial scheme using court mechanisms such as a right to contribution.

Most of 18 U.S.C. § 3664 describes what others, including the government attorney, the probation office, the defendant, and the victims, must do to assist the court in ordering restitution. Subsection (a) sets the theme for the section by recognizing the court’s “discretion in fashioning a restitution order.” Three subsections, (f), (h), and (i), build on this theme by describing what the court may do as it crafts the restitution order. First, subsection (f) parts (3) and (4) focus on a variety of repayment options the court may select. The composition of this list notably does not limit the court’s options, but simply expresses all of the broad categories from which the court would possibly choose. For example, part (3) provides that the court “may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.” Further, if the defendant is unable to pay, the court “may direct the defendant to make nominal periodic payments.” Additionally, part (4) provides that in-kind payments “may be in the form of . . . (A) return of property; (B) replacement of property; or (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.” This list does not limit the court; instead this list provides express provisions that the court can use to support almost any possible selection the court may wish to make.

Second, subsection (h) provides that when multiple defendants are involved, “the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants.” Third, subsection (i) provides that when multiple victims are involved, “the court may provide for a

among the offenders to reflect the level of contribution and economic circumstances of each offender.” Id. § 2259(b)(5) (current version at 18 U.S.C. § 3664(h)). Finally, like § 3664(i), § 2259(b)(6) provided that “[w]hen the court finds that more than 1 victim has sustained a loss requiring restitution by an offender, the court shall order full restitution of each victim but may provide for different payment schedules to reflect the economic circumstances of each victim.” Id. § 2259(b)(6) (current amended version at 18 U.S.C. § 3664(i)).

157 See id. § 3664.
158 Id. § 3664(a).
159 Id. § 3664(f), (h), (i).
160 Id. § 3664(f)(3), (4).
161 Id. § 3664(f)(3)(A) (emphasis added).
162 Id. § 3664(f)(3)(B) (emphasis added).
163 Id. § 3664(f)(4) (emphasis added).
164 Id. § 3664(h) (emphasis added).
different payment schedule for each victim.” 165 Congress carefully fashioned each of these subsections to expand, not limit, the court’s options.

Additionally, where Congress chose to limit the court’s discretion, it did so only to ensure that victims were actually compensated and not overcompensated. Subsections (f), (i), and (j) limit the court’s discretion to further these two goals. First, subsection (f) provides that “the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court” 166 and that “the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid . . .” 167 The only limit on the court’s discretion these provisions impose is a requirement that a restitution order actually operates as a restitution order—ordering the defendant to pay the amount determined by the court at some predetermined time. Second, subsection (i) provides that “the court shall ensure that all other victims receive full restitution before the United States receives any restitution.” 168 The only limit imposed by this provision is that the court must favor individual victims over the United States. Third, subsection (j) provides that if the victim has been compensated by someone else, “the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation” or if the victim has received a civil judgment that the “order of restitution shall be reduced by any amount later recovered as compensatory damages.” 169 These provisions only impose a limit once the victim has been compensated, but they leave the court’s discretion untouched until full compensation occurs.

The open-ended remedial scheme in 18 U.S.C. §§ 2259 and 3664 could not be considered “comprehensive” 170 as the Court noted in Northwest Airlines when considering the Equal Pay Act and Title VII of the Civil Rights Act of 1964. These sections do not “carefully define[] circumstances” 171 in which various remedies are appropriate, but instead leave this to the discretion of the court. However, these sections are similar to statutes examined in Musick, Peeler & Garrett, which explicitly recognized the court’s discretion. 172 These sections seem to “acknowledge[e the court’s discretion to craft a remedial scheme] without any further expression of legislative intent to define it.” 173

Thus, 18 U.S.C. §§ 2259 and 3664 create an open-ended remedial scheme. Congress could have enacted a formula to determine restitution based on carefully

165 Id. § 3664(i) (emphasis added).
166 Id. § 3664(f)(1)(A).
167 Id. § 3664(f)(2).
168 Id. § 3664(i).
169 Id. § 3664(j).
171 Id.
173 Id. at 294.
defined circumstances. Instead, Congress implied a right to contribution by leaving the courts to define the remedial scheme.

C. The Legislative History of 18 U.S.C. § 3664 Discusses Joint and Several Liability

Congress implied a right to contribution by discussing joint and several liability in the legislative history of 18 U.S.C. § 3664. Further, legislative silence is consistent with implying a right to contribution.

The Senate Committee on the Judiciary noted that 18 U.S.C. § 3664 “gives the court the discretion either to make multiple defendants jointly and severally liable for payment of the full restitution award, or to apportion the restitution order among the various defendants.” 174 The use of this term with the backdrop of tort law indicates that Congress intended for a defendant liable under this section to have a right to contribution from other defendants. 175 Apart from mentioning joint and several liability, Congress did not expressly discuss a right to contribution when considering 18 U.S.C. §§ 2259 and 3664. 176 However, Congress implied a right to contribution by discussing joint and several liability in the legislative history. Further, nothing in these legislative histories contradicts implying a right to contribution based on the first two factors.

V. CONCLUSION

Congress had one objective in crafting 18 U.S.C. §§ 2259 and 3664: provide full compensation for victims. However, this objective has not been fully realized because of confusion among courts of appeals. These courts disagree on whether to imply a right to contribution for defendants. Without this right for defendants, Amy and Vicky must pursue claims throughout the country, seeking restitution from hesitant courts and unwilling defendants.

The Supreme Court has held that congressional intent is the touchstone when determining whether to imply a right to contribution. The Court’s analysis considers three questions when looking for congressional intent: First, does any other provision apportion liability? Second, does the statute employ an open-ended

175 See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 27A cmt. a (March 31, 1998 proposed final draft) (Joint and several liability “puts the burden of joining and asserting a contribution claim against other potentially responsible persons on the defendant.”); see also id. at § 32(a) (“If two or more tortfeasors are or may be liable to a plaintiff for the same harm and one of them discharges the liability of the other . . . , the tortfeasor discharging the liability is entitled to recover contribution from the other . . . .”).
remedial scheme? Finally, does legislative history indicate that a right to contribution should be implied?

Applying the Court’s analysis to 18 U.S.C. §§ 2259 and 3664 reveals that courts should imply a right to contribution for defendants. The answers to the Court’s three questions evidence the required congressional intent: First, these sections apportion defendants’ liability. Second, they explicitly recognize the court’s discretion to fashion restitution orders. Finally, their legislative history discusses joint and several liability.

Congress intended for defendants to compensate victims fully for their losses. Implying a right to contribution will fulfill Congress’s intent for Amy and Vicky.