RETHINKING RESTITUTION IN CASES OF CHILD PORNOGRAPHY POSSESSION

by
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Child pornography is increasingly prevalent in today's society and is now one of the fastest growing Internet activities. Unlike producers, possessors of child pornography do not actively engage in the physical and sexual abuse of children. However, possessors are viewers of this documented abuse and rape, and can be, therefore, similarly responsible for the perpetual victimization of innocent youth. In 1994, Congress sought to protect victims of sexual exploitation and child pornography with the passage of the Mandatory Restitution Provision, 18 U.S.C. § 2259. While the meaning of § 2259 seems to unambiguously require restitution from defendants convicted of production, distribution, and possession of child pornography, courts' interpretations of the provision have been less clear. Courts unhesitatingly order restitution in cases where the offender is responsible for the production of child pornography and is, therefore, directly linked to identifiable victim harm. More problematic, however, are cases where a victim seeks restitution against a defendant who did not produce the pornography but rather possessed it. In these cases, courts confront the issue of whether a victim must prove a causal connection between the defendant's possession of the pornography and the victim's alleged harm. To date, the literature has focused on whether § 2259 contains a proximate cause requirement. I seek to advance this discussion, arguing that regardless of the interpretation of § 2259, the statute is not an appropriate means of compensating victims while also ensuring fairness for defendants. Accordingly, the statute as it currently operates is inefficient and unjust. This Article addresses that injustice, evaluating the underlying controversy regarding restitution for victims of child pornography possession under § 2259, discussing the judiciary's approach to the issue, analyzing the difficulty in awarding restitution under § 2259 in cases of child pornography possession, and advocating a reformed system for issuing restitution in these cases.

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INTRODUCTION

In 1994, the Mandatory Restitution for Sex Crimes statute, 18 U.S.C. § 2259, commonly known as the Mandatory Restitution Provision,[1] imposed a mandatory requirement on federal courts to award restitution to victims of certain enumerated crimes, notwithstanding, and in addition to, any other civil or criminal penalty imposed.[2] As defined in the statute, victims are entitled to relief if they are harmed as a result of the commission of a crime under Chapter 110 of Title 18 of the U.S. Code,[3] which includes the crimes of production, distribution, and possession of child pornography.[4]

For nearly twenty years, courts have frequently awarded restitution under 18 U.S.C. § 2259 against individuals who produce or sell child pornography or otherwise have a direct and easily identifiable causal link to the harm suffered by their victims.[5] However, before February 2009, no circuit court had considered the issue of awarding restitution against an individual who possessed but did not produce child pornography.[6] Since that time, victims in hundreds of cases across the country have sought restitution as recompense for harms they allege they suffer as a result of the continued viewing and dissemination of their images.[7]

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[1] United States v. Faxon, 689 F. Supp. 2d 1344, 1356 (S.D. Fla. 2010).

[2] 18 U.S.C. § 2259(a), (b)(4)(A) (2006) ("The issuance of a restitution order under this section is mandatory.").

[3] 18 U.S.C. § 2259(c).

[4] 18 U.S.C. §§ 2251(a), 2252(a)(2).

[5] *See* United States v. Pearson, 570 F.3d 480 (2d Cir. 2009); United States v. Searle, 65 F. App'x 343, 346 (2d Cir. 2003); United States v. Danser, 270 F.3d 451 (7th Cir. 2001); United States v. Julian, 242 F.3d 1245 (10th Cir. 2001); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999); *see also* United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *3 (N.D.N.Y. Jan. 13, 2010), *aff'd in part and rev'd in part*, 656 F.3d 147 (2d Cir. 2011).

[6] *See* Transcript of Restitution Hearing at 23, United States v. Hesketh, No. 3:08-CR-00165 (WWE) (D. Conn. Feb. 23, 2009). *Hesketh* was the first case in which "Amy," a victim of child pornography, received a restitution award. This award was in the amount of $150,000, through a settlement between the parties. *Id.* at 23, 26. *See also* United States v. Solsbury, 727 F. Supp. 2d 789, 791 (D.N.D. 2010) ("Until recently, child pornography victims had not sought restitution in criminal cases where a defendant was convicted of accessing, distributing, receiving, or possessing these images."); United States v. Paroline, 672 F. Supp. 2d 781, 790 (E.D. Tex. 2009) ("[T]he Court is not aware of any circuit court that has considered a restitution award under section 2259 where the defendant was an end-user or possessor of child pornography. Restitution in possession cases is an issue of first impression in district courts around the nation as the Government has only recently begun seeking restitution from possessors of child pornography on behalf of victims.").

[7] *See* United States v. Hardy, 707 F. Supp. 2d 597, 599 (W.D. Pa. 2010); *In re* Amy Unknown, 701 F.3d 749, 752 (5th Cir. 2012) (noting that the National Center for Missing and Exploited Children reported that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998

Currently the debate centers on whether an award of restitution under 18 U.S.C. § 2259 requires a showing of proximate causation, and if so, whether that showing is met in cases where defendant possessors are not producers of the child pornography.[8] Although the government and victims' advocates[9] continually argue that restitution is mandatory, and that § 2259 does not condition restitution upon a showing of proximate cause, not all federal courts have followed suit. In fact, courts have struggled to develop a principled approach to these claims, adopting a spectrum of divergent and inconsistent opinions ranging from wholesale denials of restitution to awarding millions of dollars of restitution.[10]

The judiciary's current interpretation of § 2259 is, therefore, confused and unsettled. Yet, few scholars have written on the topic of restitution in this context.[11] Furthermore, judicial opinions addressing the question focus primarily on the causation requirement and whether or not such a requirement is met in cases of child pornography possession. Lit-

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and that restitution has been ordered for Amy in at least 174 child pornography cases as of November 2012).

[8] *See* United States v. Burgess, 684 F.3d 445 (4th Cir. 2012); United States v. Kearney, 672 F.3d 81 (1st Cir. 2012); U.S. v. Evers, 669 F.3d 645 (6th Cir. 2012); *In re* Amy Unknown, 636 F.3d 190 (5th Cir. 2011), *aff'd on reh'g*, 701 F.3d 749 (5th Cir. 2012) (en banc); United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011); United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011); United States v. Aumais, 656 F.3d 147 (2d Cir. 2011); United States v. Crandon, 173 F.3d 122 (3d Cir. 1999); United States v. Laney, 189 F.3d 954 (9th Cir. 1999).

[9] When I refer to victims' advocates throughout the Article, I am generally referring to scholars who argue for mandatory restitution for victims of child pornography possession, *see, e.g.*, *infra* note 11, and individuals and organizations submitting amicus curiae briefs in support of restitution, *see, e.g.*, Brief of the Nat'l Ass'n to Protect Children as Amicus Curiae Supporting Petitioner at 10, Amy v. Monzel, 132 S. Ct. 756 (2011) (No. 11-85), 2011 WL 3706750; Brief of the Nat'l Crime Victim Law Inst. as Amicus Curiae Supporting Petitioner at 6–7, *Monzel*, 132 S. Ct. 756 (No. 11-85), 2011 WL 3706751; Brief of the Nat'l Ctr. for Missing & Exploited Children as Amicus Curiae Supporting Petitioner at 17, *Monzel*, 132 S. Ct. 756 (No. 11-85), 2011 WL 3664461.

[10] *Compare* United States v. Faxon, 689 F. Supp. 2d 1344, 1360–61 (S.D. Fla. 2010) (finding the proximate cause requirement is not met and awarding nothing), *with* United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *4 (S.D. Fla. Sept. 2, 2009) (awarding restitution in the amount of $3,680,153) *and* Amended Judgment, United States v. Freeman, No. 3:08CR22-002/LAC (N.D. Fla. Jul. 9, 2009), ECF No. 766 (awarding restitution in the amount of $3,263,758).

[11] *See, e.g.*, Steven Joffee, *Avenging "Amy": Compensating Victims of Child Pornography Through 18 U.S.C. § 2259*, 10 WHITTIER J. CHILD & FAM. ADVOC. 201 (2011); Cortney Lollar, *Child Pornography & the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY (forthcoming 2013), *available at* http://ssrn.com/abstract=2123527; Ashleigh B. Boe, Note, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims*, 86 N.D. L. REV. 205 (2010); Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 CARDOZO L. REV. 297 (2011); Adam D. Lewis, Note, *Dollars and Sense: Restitution Orders for Possession of Child Pornography Under 18 U.S.C. § 2259*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413 (2011).

tle attention has been devoted to the judiciary's struggle to quantify restitution awards. To date, no legal scholarship has fully addressed the uncertainties courts face in calculating restitution awards even where the proximate causation requirement is met. More significantly, no scholarship addresses the deficiencies with applying the statutory scheme of § 2259 to situations where victims have no contact with the perpetrators of the crimes against them and where multiple, unrelated defendants commit virtually identical crimes.[12]

Certainly, Supreme Court review of the issue could settle the proximate causation debate and provide guidance on determining restitution awards. Even so, clarification of the existing law would be only half the solution. Notwithstanding an explicit proximate cause requirement, the current statutory framework of § 2259 as applied to cases of child pornography possession is unworkable: it is insufficient to provide victims with the relief to which they are entitled, and it provides an unjust and unequal mechanism for ordering restitution against criminal defendants. Thus, this Article addresses these inequities and advances the legal scholarship beyond merely advocating for restitution for victims of child pornography possession by analyzing the disconnect between § 2259 and child pornography possession and arguing that congressional action is necessary to promote judicial uniformity, provide victims with an adequate means of recovery, and ensure fairness for criminal defendants.

This Article proceeds in five Parts. In Part I, I discuss the relevant background, including the harms of child pornography, as recognized by Congress and the courts; the status of the two victims who have paved the way for awards of restitution in possession cases under § 2259; and the general history of restitution awards in the United States. In Part II, I summarize the requirements for receiving restitution under § 2259 and survey judicial approaches to interpreting these requirements. Part III analyzes the proximate causation debate as it pertains to child pornography possession under § 2259, examining the divergent and often-inconsistent reasoning courts employ in evaluating this requirement. In Part IV, I assess the ways in which the current framework is insufficient to provide victims of child pornography possession with relief, illuminating often overlooked aspects of the statute that are best suited to crimes where the defendant and the victim have a more clearly defined relationship. Finally, in Part V, I formulate a proposal which responds to these critiques and recommends ways in which Congress can amend the cur-

[12] In this Article, I will refer to perpetrators as "he" and victims as "she." This is not to ignore the fact that possessors, distributors, and producers of child pornography can be women and victims can be boys. *See* JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 1 (2005), *available at* http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf (finding that the overwhelming majority of offenders of child sexual abuse are male).

rent framework to more aptly address the ever-growing crime of child pornography possession.

I. BACKGROUND

A. The Prevalence of Child Pornography Possession

Child pornography is increasingly prevalent in today's society. Despite harsh criminal sanctions and more frequent prosecutions, child pornography persists as advanced technology allows individuals to distribute and access pornographic materials more easily than ever.[13] In 2000, for example, state and local police discovered more than 2,900 incidents of child pornography, and made approximately 1,713 arrests for Internet crimes related to possession alone.[14] Other data suggest that over half of all child pornography cases involve possession or distribution.[15] Of the images found in these cases, 80% depict the sexual penetration of prepubescent children.[16] Moreover, estimates approximate that over 20,000 new images of child pornography are uploaded to the Internet each week.[17] To date, the Child Victim Identification Program, administered through the National Center for Missing and Exploited Children, has identified more than 3,800 child victims depicted in sexually abusive images on the Internet.[18]

B. Recognizing the Harms of Child Pornography

The production, distribution, and possession of pornographic images of youth is a national problem[19] that irreparably harms children and society as a whole.[20] Congress and courts have consistently

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[13] David Finkelhor & Richard Ormrod, *Child Pornography: Patterns from NIBRS*, JUV. JUST. BULL. (U.S. Dept. of Justice), Dec. 2004, at 1, http://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf.

[14] *Id.* at 2; WOLAK ET AL., *supra* note 12, at 1.

[15] WOLAK ET AL., *supra* note 12, at 13.

[16] *Id.* at 5.

[17] Lewis, *supra* note 11, at 415.

[18] *Statistics*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2810.

[19] RICHARD WORTLEY & STEPHEN SMALLBONE, CTR. FOR PROBLEM-ORIENTED POLICING, INC., CHILD PORNOGRAPHY ON THE INTERNET 12 (May 2012 ed.), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf (estimating that there are more than one million images of child pornography on the Internet and that more than 200 new images are added each day).

[20] *See* New York v. Ferber, 458 U.S. 747, 758 & n.9 (1982); *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 ("The illegal production, transportation, distribution, receipt, advertising[,] and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole."); Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUST. STAT. 1

recognized this harm, frequently noting the life-long psychological trauma youth face as victims of child pornography production.[21] Specifically, the Supreme Court, and subsequently lower courts and Congress, has acknowledged the unique harms children face as a consequence of the *distribution* and *possession* of their pornographic images, thereby recognizing that children depicted in pornography are victims of both the producers and possessors of pornography.

The United States Supreme Court first recognized the physiological, emotional, and mental trauma resulting from the exploitation of children through child pornography in the 1982 landmark decision of *New York v. Ferber*.[22] The Court began by discussing the repercussions of child sexual abuse, noting that sexually exploited children are "unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."[23] The Court went on to discuss the repercussions of child pornography possession, noting the intrinsic relationship between the sexual abuse of children and the distribution and possession of photographs and films depicting their abuse.[24] The Supreme Court reinforced these findings in its 2002 decision *Ashcroft v. Free Speech Coalition*, stating that victims of child pornography are harmed initially by the creation of the images and continually each time the images are distributed.[25]

Lower courts have subsequently made similar findings:

(Dec. 2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf (noting that from 1994 to 2006, child pornography accounted for 82% of the growth in crimes of sexual exploitation of children).

[21] United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *1 (W.D.N.C. Jan. 12, 2010) ("Both Congress and the Supreme Court have catalogued the unique harms that the continued existence, possession, and distribution of child pornography inflicts on the individuals depicted."), *aff'd*, 393 F. App'x 76 (4th Cir. 2010).

[22] 458 U.S. 747.

[23] *Id.* at 758 n.9.

[24] *Id.* at 759 ("First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." (footnote omitted)). At one point, the Court cited to scholarship discussing how possession of child pornography may pose a greater harm than the sexual abuse itself. *Id.* at 759 n.10 (citing David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981) ("[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.")).

[25] Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002) ("[A]s a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being.").

> Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims.[26]
>
> [T]he "victimization" of the children involved does not end when the pornographer's camera is put away.[27]
>
> Children are exploited, molested, and raped for the prurient pleasure of [defendant] and others who support suppliers of child pornography. These small victims may rank as "no one else" in [defendant's] mind, but they do indeed exist . . . . Their injuries and the taking of their innocence are all too real. There is nothing "casual" or theoretical about the scars they will bear from being abused for [defendant's] advantage. . . . The simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. . . . Consumers such as [defendant] who "merely" or "passively" receive or possess child pornography directly contribute to this continuing victimization. Having paid others to "act out" for him, the victims are no less damaged for his having remained safely at home . . . .[28]

Congress has similarly recognized the harm inflicted on victims of child pornography. In the legislative history of the Child Pornography Prevention Act of 1996, for example, legislators cited the *Ferber* decision, echoing *Ferber*'s findings that "[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child."[29] Such language was also quoted in the legislative history of § 2259.[30] In enacting the Adam Walsh Child Protection and Safety Act in 2006, Congress again considered the impact of child pornography possession on victims, noting that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."[31]

The harms recognized by Congress and the courts are confirmed by studies that document the continued harm caused to a child by the possession and distribution of her pornographic images. For example, the National Center for Missing and Exploited Children, which serves as the central repository for information related to child pornography

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[26] United States v. Paroline, 672 F. Supp. 2d 781, 785 (E.D. Tex. 2009).

[27] United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998).

[28] United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007).

[29] S. REP. NO. 104-358, at 14 (1996) (quoting *Ferber*, 458 U.S. at 758) (internal quotation marks omitted). "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.* (quoting *Ferber*, 458 U.S. at 758 n.9).

[30] United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001).

[31] Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006).

across the country, found that distribution and possession of pornographic images may further traumatize a victim because of the victim's knowledge that her "pictures are circulating globally on the Internet with no hope of permanent removal."[32] Other studies have come to similar conclusions, finding that the continued distribution of pornographic images on the Internet results in revictimization, a lack of control, and further shame and humiliation.[33]

C. History of Restitution in Criminal Cases

Restitution is an integral part of the criminal justice system.[34] Restitution means "restoring someone to a position [she] occupied before a particular event."[35] Although in its original iteration, restitution served the primarily punitive purpose of holding perpetrators accountable for their crimes,[36] today it is increasingly regarded also as a remedy to make a victim whole.[37] The United States has long provided restitution to victims in some form or another. However, as it was initially conceived, restitution was only partially—and at times, only minimally—designed for victim compensation. Only recently has the United States shifted its focus, espousing a commitment to ensure that full restitution is made to victims

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[32] United States v. Paroline, 672 F. Supp. 2d 781, 786–87 (E.D. Tex. 2009) (quoting WOLAK ET AL., *supra* note 12, at 27).

[33] *Id.* at 787 (citing ETHEL QUAYLE ET AL., ECPAT INT'L, CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 59–60 (2008), *available at* http://www.ecpat.net/WorldCongressIII/PDF/Publications/ICT_Psychosocial/Thematic_Paper_ICTPsy_ENG.pdf).

[34] CATHARINE M. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION §§ 1:1–1:4 (2008).

[35] Hughey v. United States, 495 U.S. 411, 416 (1990).

[36] *See id.* at 418; Kelly v. Robinson, 479 U.S. 36, 53 (1986) ("Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate 'for the benefit of' the State . . . not . . . 'for . . . compensation' of the victim." (third omission in original)).

[37] *Hughey*, 495 U.S. at 418 (holding that restitution is "tied to the loss caused by the offense of conviction" because it is meant to compensate the victim for her loss); United States v. Aguirre-González, 597 F.3d 46, 51–52 (1st Cir. 2010) (finding that the purpose of restitution has shifted from being primarily penal and rehabilitative, to substantially compensatory); United States v. Battista, 575 F.3d 226, 229 (2d Cir. 2009) ("The goal of restitution, in the criminal context, is 'to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.' In the context of the [Mandatory Victims Restitution Act], we have observed that 'the statutory focus' is 'on the victim's loss and upon making victims whole.'" (quoting United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006); United States v. Coriaty, 300 F.3d 244, 253 (2d Cir. 2002)); United States v. Hardy, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010). *But see* United States v. Edwards, 162 F.3d 87, 91–92 (3d Cir. 1998) ("While one purpose of restitution under the Federal Probation Act is to make the victim whole, restitution . . . is imposed as a part of sentencing and remains inherently a criminal penalty." (omission in original) (quoting United States v. Sleight, 808 F.2d 1012, 1020 (3d Cir. 1987)) (internal quotation marks omitted)).

to help them address the monetary and emotional costs of victimization.[38] In particular, restitution for victims of child pornography from individuals who possess but do not produce such pornography is a relatively new concept. The following Part addresses the United States' history of awarding restitution to victims of crime with emphasis on the Mandatory Restitution for Sex Crimes statute.[39]

Federal courts do not inherently possess the power to award restitution; rather, they may do so only to the extent authorized by statute.[40] Congress first introduced restitution for victims of federal criminal offenses in 1925 with the Federal Probation Act, which allowed courts to impose restitution upon criminals, but only as a condition of their supervised release.[41] In 1982, Congress incorporated restitution into sentencing with the passage of the Victim Witness Protection Act ("VWPA") and what is now § 3663, which allows judges discretion to award restitution as a separate component of sentencing.[42] The VWPA requires judges to balance the harm caused to the victim with the defendant's ability to pay.[43]

In 1994, Congress significantly expanded victims' rights with regard to restitution awards with the passage of § 2259,[44] enacted as part of the Violence Against Women Act.[45] Section 2259 was the first federal statute to require sentencing courts to impose mandatory restitution for sexual offenses against children. Two years later, Congress passed the Mandato-

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[38] *Compare Kelly*, 479 U.S. at 53 ("Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders . . . operate 'for the benefit of' the State. Similarly, they are not assessed 'for . . . compensation' of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State." (second omission in original)), *with Aguirre-González*, 597 F.3d at 51–52 (discussing the shift in Congress's focus on restitution as a means to provide victims with compensation).

[39] The following discussion will focus on restitution as it is awarded by federal courts.

[40] United States v. Kennedy, 643 F.3d 1251, 1260 (9th Cir. 2011).

[41] Federal Probation Act of 1925, ch. 521, 43 Stat. 1259, 1259–60; *see also* Catharine M. Goodwin, Admin. Office, U.S. Courts, *Restitution in Federal Criminal Cases: Summary Training Outline*, U.S. SENT'G COMM'N 3 (July 2011), http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/trainnew.pdf.

[42] Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, sec. 5(a), §§ 3579–80, 96 Stat. 1248, 1253–56, (codified as amended at 18 U.S.C. §§ 3663, 3664 (2006)); *see also Hardy*, 707 F. Supp. 2d at 602 (explaining that prior to 1994, "federal courts awarded restitution in criminal cases at their discretion, pursuant to the Victim and Witness Protection Act, 18 U.S.C. § 3663"); Goodwin, *supra* note 41, at 3.

[43] 18 U.S.C. § 3664(f)(1)–(2).

[44] Often referred to as the "Mandatory Restitution Provision" or the "mandatory restitution provision of the Protection of Children Against Sexual Exploitation Act," *see* United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999), or the "Mandatory Restitution for Sex Crimes section," *see* United States v. Simon, CR-08-0907 DLJ, 2009 WL 2424673, at *4 (N.D. Cal. Aug. 7, 2009).

[45] Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40113, 108 Stat. 1902, 1907.

ry Victim Restitution Act of 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996, which amended § 2259 and § 3663 and created a new provision, 18 U.S.C. § 3663A, which mandates restitution for a broad range of violent crimes and crimes against property.[46]

Under the current version of 18 U.S.C. § 2259, a court must order mandatory restitution for the "full amount of the victim's losses" for any offense under Chapter 110 of Title 18 of the United States Code.[47] Offenses for which restitution is mandatory include any crime under 18 U.S.C. § 2252, which prohibits "certain activities relating to material involving the sexual exploitation of minors."[48] Generally, courts award restitution in cases under 18 U.S.C. § 2252 where defendants are convicted of sexually abusing a child or producing child pornography.[49] Yet, as the language of § 2252 makes clear, possession of child pornography, even in the absence of production or distribution charges, is a crime under Chapter 110, which could subject the possessor to the imposition of mandatory restitution.[50] Still, prosecutors have not sought restitution in child pornography possession[51] cases until recently.[52]

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[46] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 204–05, 110 Stat. 1227, 1227–32; *Hardy*, 707 F. Supp. 2d at 602.

[47] 18 U.S.C. § 2259(b)(1)(c). The statute defines the "full amount of the victim's losses" to include "(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." § 2259(b)(3). The statute also directs that it is to be interpreted in conjunction with Title 18, United States Code, Sections 3663A and 3664. § 2259(b)(2).

[48] 18 U.S.C. § 2252.

[49] *See, e.g.*, United States v. Doe, 488 F.3d. 1154, 1156, 1158, 1160–62 (9th Cir. 2007) (upholding a $16,475 restitution order for counseling, alternative education programs, and vocational training where a defendant was convicted of producing child pornography and engaging in sex with minors); United States v. Danser, 270 F.3d 451, 453, 456 (7th Cir. 2001) (upholding a $304,200 district court restitution order for a victim where her father was convicted of improper sexual relations); United States v. Julian, 242 F.3d 1245, 1247–48 (10th Cir. 2001) (awarding restitution for past medical and counseling expenses and future counseling or treatment costs where the defendant was convicted of sexual abuse and sexual exploitation of children); United States v. Baker, 672 F. Supp. 2d 771, 772 (E.D. Tex. 2009) (ordering a defendant to pay restitution in the amount of $462,000 for producing child pornography of his children).

[50] 18 U.S.C. § 2252(a)(2), (4) (criminalizing knowing receipt, possession, or access of child pornography in various situations).

[51] Unless otherwise specified, where I refer to "child pornography *possession*" cases, I am referencing cases in which an individual is charged with possession of child pornography but not sexual molestation or production of child pornography.

[52] *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 790 (E.D. Tex. 2009).

D. "Amy" and "Vicky" Stories

Although it has long been uncontroversial to order restitution where the defendant is responsible for the production of pornographic images,[53] only recently have victims begun seeking restitution for crimes of child pornography possession. "Amy" and "Vicky"[54] are two of the first young women to seek such awards and, as such, are at the heart of the current controversy around the subject.[55] Although their original abusers were charged and convicted years ago,[56] the images of Amy's and Vicky's abuse continue to circulate on the Internet as some of the most common and sought-after series of pornographic images.[57] In fact, the National Center for Missing and Exploited Children reports that at least 35,000 images documenting Amy's abuse have been recovered in over 3,200 child pornography cases since 1998.[58] As a result of this perpetual dissemination and possession of their images, both women claim severe psychological, physical, and emotional harm.

Amy, who is now 23 years old, was sexually abused from the age of four by her uncle, who documented such abuse and posted it to the Internet.[59] The pornographic images of Amy, which continue to be traded and distributed on the Internet as the popular "Misty" child pornography series, depict "rape, cunnilingus, fellatio, and digital penetration."[60] Vicky was similarly sexually abused by her biological father

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[53] *Doe*, 488 F.3d at 1157–58; *Julian*, 242 F.3d at 1247–48.

[54] "Amy" and "Vicky" are pseudonyms used to protect the victims' privacy.

[55] As of 2010, Amy and Vicky were the only identified victims to have filed claims for restitution against the possessors of their images. *See* John Schwartz, *Pornography, and an Issue of Restitution at a Price Set by the Victim*, N.Y. TIMES, Feb. 3, 2010, at A19.

[56] United States v. Faxon, 689 F. Supp. 2d 1344, 1349 (S.D. Fla. 2010); United States v. Simon, CR-08-0907 DLJ, 2009 WL 2424673, at *5 (N.D. Cal. Aug. 7, 2009) (noting that Amy's uncle was convicted of sexual abuse, sentenced to federal prison, and ordered to pay approximately $6,000 in restitution, none of which was paid directly to Amy).

[57] Katherine M. Giblin, Comment, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109, 1110 n.8 (2011) (finding that the National Center for Missing and Exploited Children encountered over 35,750 images of the video series featuring Amy in 2009, whereas images of Vicky have been identified in over 8,000 cases).

[58] *In re* Amy Unknown, 701 F.3d 749, 752 (5th Cir. 2012) (en banc).

[59] United States v. Paroline, 672 F. Supp. 2d 781, 783 n.3 (E.D. Tex. 2009); *see also Faxon*, 689 F. Supp. 2d at 1351–52 ("Amy told Dr. Silberg that at approximately age 4 an uncle across the street from her began showing her images of child pornography and told her that it was 'okay for her to do that.' He had oral and genital contact with Amy. Also, the uncle arranged for other persons to have sexual relations with Amy. Her uncle would film her as well. At approximately age 9 the uncle traded some photographs he had of Amy which were child pornography and the uncle was arrested. He has since gone to prison.").

[60] *Paroline*, 672 F. Supp. 2d at 783 nn.1, 3.

beginning at the age of five.[61] Like Amy, images of Vicky's rape were posted on the Internet and now constitute one of the most frequently downloaded series of child pornography.[62]

In seeking restitution from courts across the country, Amy and Vicky argue that the dissemination and possession of their pornographic images result in continuing revictimization and severe trauma, which, as the women's psychologists note, is separate and distinct from the harm experienced as a result of the initial abuse. In particular, Amy reports psychological distress[63] associated with the knowledge that disturbing images of her rape and humiliation are "circulating against her will on the Internet and there is nothing she can do to stop it."[64] Amy also reports revictimization:

> It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I'm being abused over and over again.[65]

Similarly, Vicky, who reports night terrors, anxiety disorder, depression, insomnia, migraine headaches, panic, blackouts, and gastrointestinal problems,[66] notes that the knowledge that her images are viewed on the Internet every day causes severe paranoia:

> I wonder if the people I know have seen these images. I wonder if the men I pass at the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control. . . . It feels like I am being raped by each and every one of them.[67]

Vicky's psychologist estimates that to cope with this trauma Vicky's future psychological treatment will cost somewhere between $166,065 and $188,705.[68]

In addition to the psychological harms resulting from their continued trauma, both women report experiencing economic loss

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[61] *Faxon*, 689 F. Supp. 2d at 1349 ("Dr. Green testified that Vicky told him the sexual abuse began with her biological father exposing her to images of child pornography and children being abused in an attempt to convince her that this is normal behavior. He would have her take off her clothes, take showers with him, touch his penis, fondle him and have sexual relations with him. He would also introduce other adults into scripted sexual related scenarios, some of which were videotaped or photographed.").

[62] United States v. Hicks, No. 1:09 cr 150, 2009 WL 4110260, at *1 (E.D. Va. Nov. 24, 2009).

[63] *Faxon*, 689 F. Supp. 2d at 1352.

[64] *Paroline*, 672 F. Supp. 2d at 783.

[65] United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009).

[66] *Faxon*, 689 F. Supp. 2d at 1350.

[67] *Hicks*, 2009 WL 4110260, at *3 (omission in original) (quoting Victim Impact Statement) (internal quotation mark omitted).

[68] *Faxon*, 689 F. Supp. 2d at 1350.

stemming from the knowledge that their pictures are still distributed and possessed. Amy, for example, attempted to go to college but dropped out during her first semester, in part due to the fear that someone would recognize her and in part due to her learned distrust of authority.[69] Although Amy has stated a desire to become a teacher or a psychologist, her own psychologist has testified that it is unlikely that she will be able to overcome her psychological problems in order to obtain the advanced degrees required for such professions.[70] Amy's economist and child clinical psychologist estimate that her future losses are extensive, finding that she will require $512,681 for future psychological counseling and $2,855,173 for lost income up to the age of 67.[71] Finally, both Amy and Vicky express concern that the possessors of their pornography will utilize their images to groom other children for child pornography in the same way they were.[72]

Consequently, Amy and Vicky seek restitution from the possessors of their pornographic images in the form of psychological counseling fees, lost income, and attorneys' fees.[73] To date, Amy and Vicky combined have filed over 540 claims for restitution in United States district courts across the country.[74] In over 200 of these cases, courts have granted their restitution requests.[75]

II. Requirements for Restitution Under 18 U.S.C. § 2259

Sections 2259(a) and 2259(b)(1) of Title 18 of the United States Code provide that a court "shall" order a defendant to pay restitution for the "full amount of the victim's losses" for any offense in violation of 18

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[69] *Id.* at 1352 ("Amy is having a difficult time separating appropriate use of authority at work or at school because of her uncle's position as an authority figure when he committed these acts of abuse on her.").

[70] *Id.*

[71] *Id.* at 1353–54.

[72] *Id.* at 1352 ("[Amy] has shame and blames herself that maybe some of her photographs depicting child pornography are now being used by other adults to 'groom' other minor children to attempt to have those minor children believe such acts are normal as her uncle did with her."); United States v. McDaniel, 631 F.3d 1204, 1207 (11th Cir. 2011) ("[Vicky] also suffers knowing that pedophiles are using images of her abuse to groom future victims.").

[73] *See, e.g.*, *Faxon*, 689 F. Supp. 2d at 1350–54; United States v. Paroline, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009).

[74] As of 2010, Vicky had sought restitution in 200 federal cases. *Faxon*, 689 F. Supp. 2d at 1351. Amy had sought restitution in about 340 cases. *Id.* at 1353.

[75] Government's Motion and Memorandum in Support of a Restitution Order for Victim of the "Vicky" Child Pornography Series at 13, United States v. Hill, No. 10-05044-CR-1-DGK (W.D. Mo. Dec. 21, 2012), ECF No. 77 [hereinafter Government's Motion]. To date, Vicky reports that she has collected more than $550,000 from 204 different defendants. Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. Times (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?pagewanted=all.

U.S.C. § 2251 *et seq.*[76] Where the statutory requirements are met, restitution is mandatory, and the court must order restitution to the victim without consideration for the defendant's financial condition or the victim's receipt of compensation from other sources.[77] There are two clear requirements for a victim to obtain mandatory restitution under the Act. First, the government[78] must request restitution after the defendant is convicted of an offense under Chapter 110 of Title 18 of the United States Code.[79] Second, the individual requesting restitution must be a "victim" as defined by 18 U.S.C. § 2259(c). Additionally, the majority of courts impose a third requirement, demanding that victims make a showing of proximate cause linking a defendant's convicted offense to the victim's identified harm. However, courts do not conclusively concur on this issue. This Part will address the three requirements for obtaining restitution for victims under § 2259, with a discussion of how courts have evaluated each requirement in cases of child pornography possession.

A. Possession of Child Pornography Under § 2252

To obtain restitution under § 2259, an individual must seek recovery from a defendant convicted of a crime under Chapter 110 of Title 18 of the United States Code. Possession of child pornography is one such crime. Under 18 U.S.C. § 2252, entitled "Certain activities relating to material involving the sexual exploitation of minors," Congress criminalized the knowing receipt or distribution of any visual depiction if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[80] While most restitution awards are ordered for crimes committed under § 2251, where the defendant is convicted of producing the visual depiction of a minor engaging in sexually explicit conduct, courts regularly find that possession of child pornography under § 2252(a)(2) is a crime subject to the Mandatory Restitution Provision.[81]

B. Child Pornography Victims

The individual requesting restitution must also be a victim as defined by 18 U.S.C. § 2259(c). Courts consistently find that individuals whose pornographic images are viewed on the Internet are victims as defined in

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[76] United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *1 (N.D. Ga. Dec. 17, 2009).

[77] *Id.* (citing 18 U.S.C. § 2259(b)(4) (2006)).

[78] Victims may not seek restitution under § 2259 without government assistance. Victims must send their claims to the appropriate United States Attorney's Office, which can then advise the prosecutor to present the claim to the court or decline to seek restitution in the case. *See* 18 U.S.C. § 3664(d)(1).

[79] 18 U.S.C. § 2259(c).

[80] 18 U.S.C. § 2252(a)(2).

[81] *See, e.g.*, United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998); *Van Brackle*, 2009 WL 4928050, at *3.

the Mandatory Restitution Provision.[82] To be considered a victim for purposes of § 2259, an individual must be "harmed" as a result of the defendant's commission of a crime under Chapter 110.[83]

In determining whether individuals whose pornographic images are viewed online are "victims" for purposes of the Act, courts generally begin with the foundational proposition that receipt of child pornography is a crime in violation of a 18 U.S.C. § 2252(a)(2)(A).[84] Next, courts evaluate whether such alleged "victims" were harmed by the receipt and possession of pornography containing their images.[85] In conducting this analysis, courts generally articulate three primary means by which receipt and possession of child pornography "harms" the victims depicted therein.

First, courts find that the possession and viewing of pornographic images of children further victimizes the child whose images are viewed. The United States Supreme Court, in *New York v. Ferber*, was the first court to recognize the harm of this revictimization, noting that the distribution of child pornography "is intrinsically related to the sexual abuse of children" because, among other things, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[86] The Supreme Court went on to note that "[b]ecause the child's actions are reduced to a recording, the pornography may haunt [the child] in future years, long after the original misdeed took place."[87] Lower courts similarly recognize such harm, explaining that "the consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization."[88]

Additionally, courts focus on how receipt and possession of pornography violate the privacy rights of those whose images are viewed. Again in *New York v. Ferber*, the Supreme Court noted that distribution of pornographic material violates an individual's interest in "avoiding disclo-

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[82] *See* United States v. Hagerman, 827 F. Supp. 2d 102, 109–10 (N.D.N.Y. 2011) (finding that "the Government has proved, by a preponderance of the evidence, that (1) Defendant received pornographic images . . . and (2) Vicky has sustained, and continues to sustain, significant psychological damage as a result of her knowledge that unidentified individuals have downloaded pornographic images of her from the Internet"); *see also* United States v. Wright, 639 F.3d 679, 688–89 (5th Cir. 2011) (finding that "[e]very other federal court addressing this issue has followed the reasoning of *Ferber* and *Norris* in holding that Amy and similar children are 'victims'" and that "[t]his is usually not a seriously contested issue and is a given"), *aff'd on reh'g sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir.) (en banc).

[83] 18 U.S.C. § 2259(c); *Van Brackle*, 2009 WL 4928050, at *2.

[84] *Van Brackle*, 2009 WL 4928050, at *2.

[85] *Id.*

[86] New York v. Ferber, 458 U.S. 747, 759 (1982).

[87] *Id.* at 759 n.10.

[88] United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998).

sure of personal matters."[89] Because the recipient of child pornography perpetuates the images, lower courts also find that the recipient of child pornography "may be considered to be invading the privacy of the children depicted, directly victimizing these children."[90]

Finally, courts recognize how receipt and possession of child pornography further enables the creation and production of pornography by "providing an economic motive for creating and distributing materials."[91] As Congress explained in its findings related to the Child Pornography Prevention Act, and as recognized by courts considering the issue:

> [T]he existence of and traffic in child pornographic images . . .
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> . . . inflames the desires of child molesters, pedophiles, and child pornographers, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials[.][92]

Thus, courts frequently find that "children portrayed in pornography are harmed 'as a result of' the receipt and possession of such pornography," and are, therefore, victims within the meaning of § 2259.[93] As best summarized by the Eleventh Circuit in *United States v. McDaniel*:

> Like the producers and distributors of child pornography, the possessors of child pornography victimize the children depicted within. The end users of child pornography enable and support the continued production of child pornography. They provide the economic incentive for the creation and distribution of the pornography, and the end users violate the child's privacy by possessing their image. All of these harms stem directly from an individual's possession of child abuse images.[94]

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[89] *Ferber*, 458 U.S. at 759 n.10.

[90] *Norris*, 159 F.3d at 930.

[91] *Id.*

[92] *Id.* (alterations and omissions in original) (quoting Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(10), 110 Stat. 3009-26, 3009-27 (codified as note to 18 U.S.C. § 2251)).

[93] United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *3 (N.D. Ga. Dec. 17, 2009); *see also Norris*, 159 F.3d at 929–30 ("The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways. *First*, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. . . . The consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization. *Second*, the mere existence of child pornography represents an invasion of the privacy of the child depicted. . . . *Third*, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials. . . . [T]he victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography.").

[94] United States v. McDaniel, 631 F.3d 1204, 1208 (11th Cir. 2011).

C. Proximate Causation

The potential third and final requirement to obtain restitution under § 2259 is proving proximate causation between the defendant's convicted offense and the victim's alleged harm. There are two primary judicial camps within the causation debate.[95] The minority position maintains that § 2259 does not require a showing of proximate causation, and, therefore, victims should be allowed to recover restitution from possessors of child pornography absent a link between their identifiable harm and the defendant's convicted offense.[96] The majority of courts, on the other hand, find that § 2259 explicitly requires evidence of proximate causation between the defendant's actions and the victim's quantifiable harm.[97]

1. Section 2259 Contains No Proximate Cause Requirement

Advocates of mandatory restitution for victims of child pornography possession, absent a showing of proximate cause, generally advance a simple argument: the Mandatory Restitution Provision mandates restitution for crimes under Chapter 110 of Title 18 of the United States Code; possession of child pornography falls within the purview of Chapter 110, as a crime under § 2252; therefore, restitution is mandatory for any individual convicted of possessing child pornography.

Behind this basic premise, victims' advocates advance more nuanced arguments. The first is that the Mandatory Restitution Provision contains no specific language evidencing a proximate cause requirement for awarding damages under § 2259.[98] Therefore, the statute does not condition relief upon a victim proving that her alleged harm is directly or identifiably linked to the defendant's conduct. Rather, courts should award restitution once a claimant is identified as a "victim" under § 2259(c) because such identification involves the requisite showing under the Act, namely that the individual was harmed as the result of the defendant's violation of enumerated acts.[99]

A second argument against a proximate cause requirement relies on an interpretation of congressional intent in enacting § 2259. Although the phrase "directly and proximately harmed" appears in other criminal

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[95] *See* United States v. Evers, 669 F.3d 645, 657 (6th Cir. 2012) ("The nature of the requisite causal connection is the subject of an ongoing debate in the federal circuits.").

[96] *See, e.g.*, United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009).

[97] *See, e.g.*, *Evers*, 669 F.2d at 658; United States v. Simon, CR-08-0907 DLJ, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009).

[98] Others who support mandatory restitution for possessors of child pornography argue that even if the statute contains a proximate cause requirement, it is met in possession cases. *See infra* Part II.C.2.

[99] *See* United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *3 (N.D. Ga. Dec. 17, 2009) (discussing the government's position in advocating for restitution).

restitution statutes, including 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2), and 3771(e),[100] the language is absent from § 2259.[101] Accordingly, advocates argue that because those statutes define "victim" as "a person directly and proximately harmed" as a result of the commission of an offense for which restitution may be ordered and § 2259 does not, this evidences Congress's intent that courts analyze causation under § 2259 using a less stringent standard.[102]

Finally, advocates argue in the alternative, maintaining that even if § 2259 contains a proximate cause requirement, it applies in only a limited manner. Section 2259(b)(3) lists all losses for which a victim must be compensated, including "(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." The final subsection of 2259(b)(3), requiring that victims be compensated for "any other losses suffered by the victim *as a proximate result of the offense*," is the only section explicitly containing the proximate cause requirement.[103] Therefore, advocates argue that because only subsection F contains the words "proximate result," those words apply only to "any other losses" for which the victim seeks to recover and not to the enumerated categories listed in subsections A through E.[104]

As support for all three of these arguments, advocates reiterate the underlying purpose of § 2259, relying on case law finding that "[s]ection 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."[105] They further argue that the Act's legislative history evidences "that Congress intended to provide victims of sexual abuse with expansive relief for 'the *full* amount of . . . [their] losses.'"[106]

The Southern District of Florida, in the 2009 case of *United States v. Staples*, was one of the first courts to not require claimants to prove proximate causation between their alleged harm and the defendant's actions in a child pornography possession case. However, rather than adopting the reasoning above, the court forewent a discussion of the proximate cause requirement entirely. Although this case is frequently cited by victims attempting to obtain restitution awards, it is the only judicial opin-

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[100] These sections define "victim" for purposes of discretionary restitution, mandatory restitution for certain crimes, and crime victims' rights in proceedings, respectively.

[101] *Evers*, 669 F.3d at 657.

[102] *See Van Brackle*, 2009 WL 4928050, at *3; *see also Evers*, 669 F.3d at 657–58.

[103] 18 U.S.C. § 2259(b)(3)(F) (emphasis added).

[104] *See, e.g.*, *In re* Amy Unknown, 701 F.3d 749, 761–63 (5th Cir. 2012) (en banc); Brief of the Nat'l Crime Victim Law Inst., *supra* note 9, at 7.

[105] United States v. Laney, 189 F.3d 954, 966 (9th Cir. 1999).

[106] United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001) (omission and alteration in original) (quoting 18 U.S.C. § 2259(b)(1)).

ion to award restitution to victims of child pornography without any discussion of a proximate cause requirement.

In rendering its decision, the court first found that the language of § 2259(a), requiring that the court "shall order restitution for any offense under this chapter," was explicit and not to be interpreted as precatory.[107] The court next determined that the offenses for which the defendant was convicted, specifically "Distribution of Child Pornography, in violation of Title 18, United States Code § 2252A(a)(2) and Possession of Child Pornography in violation of Title 18, United States Code § 2252A(a)(5)(B)," are crimes subject to the Mandatory Restitution Provision as codified in § 2259.[108] The court went on to find that the defendant possessed pornographic images of Amy, that Amy was a victim as defined in the Act, that Amy was harmed by the criminal conduct of the defendant's possession, and that Amy should be awarded the full amount of her losses, including counseling and treatment costs, lost future wages, and employee benefits.[109]

For nearly two years after the *Staples* decision, it appeared that no other district court, let alone appellate court, would follow suit. In fact, soon after the *Staples* decision, several district and circuit courts considered the issue and found that § 2259 does contain a proximate cause requirement. However, in March 2011, the Fifth Circuit, in *In re Amy Unknown*, became the first and only circuit court to analyze § 2259 and find that a victim's recovery is not conditioned upon a showing of proximate cause.[110]

In rendering its decision that "[t]he structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous 'other losses' for which a victim seeks restitution," the Fifth Circuit relied on the statutory construction of § 2259 and the "congressional purpose to award broad restitution."[111]

In analyzing the structure of the statute, the Fifth Circuit discussed the grammar of § 2259, referencing two Supreme Court cases interpret-

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[107] United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *2 (S.D. Fla. Sept. 2, 2009) ("There are no provisions that the Court is aware of in either Title 18, United States Code § 2259 or in § 3664 that relieves the Court of its mandatory obligation to order restitution or inures to the benefit of the defendant in a restitution proceeding for ordering restitution because of any alleged procedural defect.").

[108] *Id.* at *2.

[109] *Id.* at *2–4.

[110] *In re* Amy Unknown, 636 F.3d 190, 198–99 (5th Cir. 2011), *aff'd on reh'g*, 701 F.3d 749 (5th Cir. 2012) (en banc).

[111] *Id.* In April 2011, another panel of the Fifth Circuit questioned *In re Amy Unknown*'s holding "that § 2259 does not limit the victim's recoverable losses to those proximately caused by defendant's offense," noting in a concurrence that such a holding is "at odds with the conclusion of every other circuit court considering this issue." United States v. Wright, 639 F.3d 679, 689 (5th Cir. 2011) (Davis, J., concurring). In 2012, these two cases were consolidated for rehearing en banc and *In re Amy Unknown* was affirmed. *In re Amy Unknown*, 701 F.3d 749.

ing statutory lists[112] and noting that unlike the statute at issue in the Supreme Court case of *Porto Rico Railway*, § 2259 listed six categories of recoverable costs that were separated by semicolons, not commas. This counseled against applying a proximate cause requirement located in only one category to all the others.[113] The court also distinguished § 2259 from the statute at issue in the Supreme Court case *Seatrain Lines*, where the Court applied a condition present in six categories to one remaining category which was ambiguous.[114] In § 2259, the court noted that, unlike in *Seatrain*, the issue was not whether to "apply a condition present in all but one category to the sole outlier" but rather to apply "a restriction present in only one category to all the others."[115]

The Fifth Circuit also relied upon an analysis of congressional intent. The court reasoned that:

> [I]t makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.[116]

The court also compared the language of § 2259 with other restitution statutes, noting that while similar statutes require a person to be "directly and proximately harmed" to meet the definition of victim, § 2259 contains no such requirement.[117] The Fifth Circuit thus concluded that a comparison of these statutes revealed Congress's intent to abandon "the proximate causation language that would have reached all categories of harm via the definition of a victim" and to comport with its victims' rights purpose of enacting a second generation of restitution statutes.[118]

Finally, the Fifth Circuit addressed the defendant's concern that restricting the "proximate result" language to the catchall category of § 2259(b)(3)(F) would result in "limitless restitution" and violate the Eighth Amendment, by concluding that "[t]he statute itself includes a general causation requirement in its definition of a victim."[119] Because the definition of victim requires a showing that the victim was harmed as

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[112] Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 732, 734 (1973); Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920).

[113] *In re Amy Unknown*, 636 F.3d at 199.

[114] *Id.* at 200 (citing *Fed. Mar. Comm'n*, 411 U.S. at 733–34).

[115] *Id.*

[116] *Id.* at 198.

[117] *Id.* at 198–99 (comparing the language of § 2259 with the Victims Witness Protect Act).

[118] *Id.* at 199 (citing United States v. Ekanem, 383 F.3d 40, 44 (2d Cir. 2004) (noting "the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy"); United States v. Perry, 360 F.3d 519, 524 (6th Cir. 2004) ("The new law unquestionably reflects a dramatically more 'pro-victim' congressional attitude . . . .")).

[119] *In re Amy Unknown*, 636 F.3d at 200–01.

a result of the commission of a crime under Chapter 110, the court concluded that the statute contained a general "built-in causation requirement." This general causation requirement, coupled with the "volume of causation evidence" in the context of child pornography possession cases, allayed the Fifth Circuit's fears of potentially excessive punishment.[120]

Only one month after the Fifth Circuit rendered its decision in the *Amy Unknown* case, a subsequent panel of the Fifth Circuit, in considering an appeal from a district court's order of restitution, issued a special concurrence criticizing the decision and urging the Fifth Circuit to grant rehearing en banc and to abandon its minority position that § 2259 does not limit recoverable losses only to those proximately caused by the defendant's offense.[121] In January 2012, the Fifth Circuit granted rehearing en banc of the *Amy Unknown* decision[122] and in November upheld it.[123] As of December 2012, no appellate courts have adopted the Fifth Circuit's approach to proximate causation in § 2259, and many have been critical of its analysis.[124]

2. Section 2259 Contains a Proximate Cause Requirement

Aside from the Fifth Circuit and the Southern District of Florida, all other courts to consider restitution in cases of child pornography possession have held that § 2259 requires the prosecution to show proximate causation between the defendant's actions and the victim's alleged harm.[125] In rendering their decisions, courts have utilized varying lines of

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[120] *Id.* at 201.

[121] United States v. Wright, 639 F.3d 679, 687 (5th Cir. 2011) (Davis, J., concurring) ("*In re Amy's* reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway* which makes it clear that the clause is equally applicable to all categories of loss. Furthermore, this interpretation of § 2259(b)(3) is directly contrary to the enforcement procedures of § 3664(e) placing the burden of demonstrating the 'amount of the loss' sustained by a victim 'as a result of the offense' on the government. *In re Amy* is inexplicably silent about § 3664(e) and its role of supporting § 2259(b)(3)'s requirement of proximate causation. Thus, the *In re Amy* panel erred in concluding that § 2259's *only* causation requirement is found in the statute's definition of 'victim.'").

[122] *In re* Amy Unknown, 668 F.3d 776, 777 (5th Cir. 2012) (en banc).

[123] *In re* Amy Unknown, 701 F.3d 749, 774 (5th Cir. 2012) (en banc) ("For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse.").

[124] *See* United States v. Evers, 669 F.3d 645, 658 (6th Cir. 2012); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011). *But see* United States v. Hagerman, 827 F. Supp. 2d 102, 111–17 (N.D.N.Y. 2011). In late 2011, the Northern District of New York found that although it was required to "faithfully apply the law as the Second Circuit has pronounced it," it found flaws in the Second Circuit's rationale regarding proximate causation and suggested that Section 2259 does not contain a proximate cause requirement. *Id.*; *see also* United States v. Lundquist, 847 F. Supp. 2d 364, 369–70 (N.D.N.Y. 2011).

[125] *See Evers*, 669 F.3d at 658; United States v. Aumais, 656 F.3d 147, 153–54 (2d Cir. 2011); United States v. Kennedy, 643 F.3d 1251, 1261–62 (9th Cir. 2011); United States v. McDaniel, 631 F.3d 1204, 1208–09 (11th Cir. 2011); *Monzel*, 641 F.3d at 535;

analysis, some relying on the text of the statute, some grounding their reasoning in general principles of criminal and tort law, and others resting on policy or constitutional considerations. In all, different courts have: rejected the argument that the "proximate result" language of § 2259(b)(3)(F) applies only to that subsection and not to the other categories enumerated in sections (A) through (E);[126] reasoned that § 2259 incorporates the requirements of § 3664, which the Supreme Court has held requires courts to limit the amount of restitution awarded to the "loss caused by the specific conduct that is the basis of the offense of conviction;"[127] and expressed concern that interpreting the statute without a proximate cause requirement would render § 2259 a strict liability statute[128] or violate the Eighth Amendment's prohibition against cruel and unusual punishment.[129]

First, examining the plain language of the statute and applying principles of statutory construction, courts have rejected the argument that the "proximate result" language of § 2259(b)(3)(F) applies only to that subsection and not to the other categories enumerated in sections (A) through (E).[130] Under the doctrine of *ejusdem generis* and relying on Supreme Court case law in *Porto Rico Railway* and *Seatrain Lines*,[131] courts have found that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[132] Accordingly, courts, have found that the phrase "as a proximate result of the offense" applies to each enumerated category of loss in § 2259(b)(3).[133]

United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999) ("[Section 2259] requires awarding the full amount of the victim's losses suffered as a proximate result of the offense."); United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999) ("Section 2259 . . . incorporates a requirement of proximate causation . . . requir[ing] a causal connection between the offense of conviction and the victim's harm.").

[126] *See, e.g.*, United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009).

[127] United States v. Paroline, 672 F. Supp. 2d 1344, 1357 (S.D. Fla. 2010) (quoting Hughey v. United States, 495 U.S. 411, 413 (1990)) (internal quotation mark omitted), *rev'd sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc).

[128] United States v. Faxon, 689 F. Supp. 2d 1344, 1357 (S.D. Fla. 2010).

[129] *Paroline*, 672 F. Supp. 2d at 789.

[130] *Van Brackle*, 2009 WL 4928050, at *4.

[131] *See* United States v. Hardy, 707 F. Supp. 2d 597, 607–08 (W.D. Pa. 2010) (discussing the doctrine of *ejusdem generis* which "applies when general words follow, or are surrounded by, specific words").

[132] United States v. McDaniel, 631 F.3d 1204, 1209 (11th Cir. 2011) (citing Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S.345, 348 (1920)).

[133] *Id.*; *Hardy*, 707 F. Supp. 2d at 609. The Fifth Circuit in *In re Amy Unknown*, 701 F.3d 749, 762–66 (5th Cir. 2012) (en banc), expressly rejected this argument finding that the statute in *Porto Rico Railway* and *Seatrain* are significantly different than § 2259, and accordingly, such cases are inapplicable in interpreting § 2259.

Furthermore, courts have studied the congressional intent and legislative history of § 2259, reasoning that because § 2259 incorporates the requirements of § 3664, which the Supreme Court has held requires courts to limit restitution awards to "loss caused by the specific conduct that is the basis of the offense of conviction," § 2259 similarly contains a proximate cause requirement.[134] As articulated by the Second Circuit in *United States v. Aumais*, 18 U.S.C. § 2259(b)(2) cross-references 18 U.S.C. §§ 3664 and 3663A, both of which define victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[135] Thus, courts have interpreted proximate causation as a component of proving victim status under the Mandatory Restitution Provision of § 2259.[136]

Courts have also held, even in the absence of the catchall provision of § 2259(b)(3)(F) and the statute's reference to § 3663, that § 2259 requires a showing of proximate cause based on "traditional principles of tort and criminal law and on § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense."[137] The D.C. Circuit was the first to adopt this reasoning, accepting that the "bedrock rule of both tort and criminal law [is] that a defendant is only liable for harms he proximately caused," and arguing that it would "presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply."[138] The court went on to find that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause."[139] Instead, the court found that, to the contrary, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense, the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused."[140] The Second Circuit endorsed this interpretation of § 2259,

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[134] Hughey v. United States, 495 U.S. 411, 413 (1990); *Van Brackle*, 2009 WL 4928050, at *3 ("A restitution order encompassing losses stemming from acts other than that to which the defendant pleaded guilty would be invalid.").

[135] United States v. Aumais, 656 F.3d 147, 153–54 (2d Cir. 2011).

[136] United States v. Faxon, 689 F. Supp. 2d 1344, 1357–58 (S.D. Fla. 2010) ("In *United States v. Vaknin*, 112 F.3d 579 (1st Cir. 1997), the court was analyzing the Victim [a]nd Witness Protection Act, 18 U.S.C. § 3663, which is referenced in § 2259 this Court is dealing with herein. . . . This Court believes that a reading of § 3663 et seq., is helpful because its provisions are virtually the same as those set forth in § 2259 which this Court is applying in this instance.").

[137] United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011); *see also* United States v. Kearney, 672 F.3d 81, 96 (1st Cir. 2012) ("Perhaps Congress meant to incorporate general common-law principles of tort law for all the loss causation categories of § 2259, although it did not say so explicitly, and Congress surely did not mean to adopt principles at odds with its objectives.").

[138] *Id.* at 535–36.

[139] *Id.* at 536.

[140] *Id.*

finding that "proximate cause is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259."[141]

Aside from statutory construction and congressional intent, courts have expressed constitutional concerns that adopting an approach that does not require proximate cause to obtain restitution under § 2259 would violate the Eighth Amendment's Excessive Fines Clause, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[142] Although few courts have analyzed the Eighth Amendment's prohibition against excessive fines with regard to restitution orders,[143] the Ninth Circuit, in *United States v. Dubose*, held that it is applicable to such orders.[144] In *Dubose*, the Ninth Circuit reasoned that a restitution order would not be violative of the Excessive Fines Clause if it was not "grossly disproportional to the crime committed."[145] Traditional restitution statutes guard against such disproportionality by including a requirement that the "victim's loss caused by the defendant's illegal activity" be causally connected to the amount the defendant is required to pay.[146] Courts express concern that if this proximate cause "safeguard" is removed, restitution awards may

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[141] United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011) (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) ("Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction" here "[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them.")); *see also* United States v. Evers, 669 F.3d 645, 658–59 (6th Cir. 2012) ("Had Congress meant to abrogate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so." (quoting *Monzel*, 641 F.3d at 536–37) (internal quotation marks omitted)). The Fourth Circuit in *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012), and the First Circuit in *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012), also adopted this reasoning in finding that § 2259 requires a showing of proximate cause: "It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution." *Kearney*, 672 F.3d at 95.

[142] United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *3 (N.D. Ga. Dec. 17, 2009) (citing U.S. CONST. amend. VIII); *see also* United States v. Patton, No. 09-43 (PAM/JSM), 2010 WL 1006521, at *2 (D. Minn. Mar. 16, 2010); United States v. Paroline, 672 F. Supp. 2d 781, 788–89 (E.D. Tex. 2009); United States v. Berk, 666 F. Supp. 2d 182, 188 n.5 (D. Me. 2009).

[143] *Van Brackle*, 2009 WL 4928050, at *3.

[144] United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) ("Although one district court has held that restitution is not punishment, restitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes." (citation omitted)). *But see In re* Amy Unknown, 701 F.3d 749, 771–72 (5th Cir. 2012) (en banc) (finding that restitution is not "a punishment subject to the same Eighth Amendment limits as criminal forfeiture").

[145] *Id.* at 1145.

[146] *Van Brackle*, 2009 WL 4928050, at *3 (citing United States v. Siegel, 153 F.3d 1256, 1260 (11th Cir. 1998)).

run afoul of the Constitution's prohibition on excessive fines.[147] Thus, given two possible interpretations of the statute, one of which may be constitutional and the other of which is not, courts frequently give effect to the interpretation that renders the statute constitutional.[148]

Finally, courts have expressed policy concerns that any interpretation of § 2259 that does not include a proximate cause requirement would turn the Mandatory Restitution Provision into a strict liability statute, "wherein anyone who was convicted of a crime under the . . . chapter would automatically be responsible for . . . [a victim's] damages even if [her] damages pre-date the criminal conduct for which a particular Defendant was charged and convicted."[149] In discussing this concern, courts have noted that a mere finding that a defendant's possession of child pornography contributes to or exacerbates existing harm conflates the determination that an individual is a "victim" under § 2259 who was harmed as a result of the commission of the defendant's crime with the proximate cause requirement which necessitates a showing that the victim's damages relate in some way to the criminal conduct of the defendant.[150] This conflation in turn makes § 2259 a strict liability statute, "'wherein anyone who [is] convicted of a crime under the applicable chapter would automatically be responsible for' the victim's damages."[151]

III. Varying Judicial Approaches to the Proximate Causation Requirement

As seen from the discussion above, whether restitution is mandatory for possessors of child pornography depends on how courts evaluate § 2259's proximate cause requirement and how they determine victims must prove the requisite causal connection. As the current trend shows, it is becoming increasingly well-settled that § 2259 requires a victim to show proximate causation in connecting her alleged loss to a defendant possessor's offense conduct. Still, even in spite of this trend, one circuit has held that § 2259 does not require proximate causation. And, even those circuits requiring a proximate cause showing apply differing standards

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[147] *Id.* at *3. *But see In re Amy Unknown*, 701 F.3d at 772 (arguing that "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional" (quoting United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008) (internal quotation marks omitted)).

[148] United States v. Paroline, 672 F. Supp. 2d 781, 789 (E.D. Tex. 2009).

[149] United States v. Faxon, 689 F. Supp. 2d 1344, 1357 (S.D. Fla. 2010).

[150] United States v. Covert, No. 09-332, 2011 WL 134060, at *7 (W.D. Pa. Jan. 14, 2011) (citing *Faxon*, 689 F. Supp. 2d at 1360–61). This concern is not unfounded. *See In re Amy Unknown*, 701 F.3d at 762 ("Once a district court determines that a person is a victim, that is, an 'individual harmed as a result of a commission of a crime' under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim.").

[151] *Covert*, 2011 WL 134060, at *8 (quoting *Faxon*, 689 F. Supp. 2d at 1357).

for evaluating whether such a requirement is met and, as a result, award varying levels of restitution.[152]

On one end of the spectrum, courts have awarded joint and several liability for the full amount of the victim's restitution request. On the other end, courts award no restitution, finding that a victim has failed to carry her burden on the proximate cause requirement. Between these two views lies a third, more moderate contingent which finds that while the proximate cause requirement is met, the victim is not entitled to the full amount of her restitution request and should be awarded some lesser amount. In this Part, I will evaluate various judicial approaches to determining *whether* a victim has made the requisite showing necessary to prove proximate causation between her specific injury and the defendant's convicted conduct. I will also discuss representative judicial opinions awarding restitution where such a requirement is met.

A. Approaches to Evaluating the Proximate Cause Requirement

Proximate cause is defined as "[t]hat which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred."[153] "Proximate causation is a generic label for the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"[154]

As a general rule, courts use the concept of proximate causation as a method of limiting liability.[155] However, there is no one judicial approach to determining proximate causation; rather, courts employ a variety of standards, including, *inter alia*, a reasonable foreseeability test, a substantial factor test, a proximity or factual directness test, and more recently, a risk standard.[156] Regardless of the standard used, in the context of restitu-

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[152] *See* United States v. Wright, 639 F.3d 679, 690 (5th Cir. 2011) ("These district courts have come to different conclusions regarding the amount of restitution owed in light of § 2259's proximate causation requirement."), *aff'd on reh'g sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc).

[153] BLACK'S LAW DICTIONARY 1225 (6th ed. 1990); *see also* Ashley County, Ark. v. Pfizer, Inc., 552 F.3d 659, 666 (8th Cir. 2009); State v. Jackson, 697 S.E.2d 757, 759 (Ga. 2010).

[154] United States v. Monzel, 746 F. Supp. 2d 76, 85 (D.D.C. 2010) (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992)), *mandamus granted in part and appeal dismissed*, 641 F.3d 528 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011); *see also* United States v. Hagerman, 827 F. Supp. 2d 102, 117 (N.D.N.Y. 2011) ("[R]esolving the issue of whether 'proximate causation' exists requires a *policy* determination rather than a purely *factual* determination—whether a defendant's conduct was of such a nature that he or she *should be* held responsible for it.").

[155] *Monzel*, 746 F. Supp. 2d at 85.

[156] *Id.* (discussing different standards for evaluating proximate causation); *see also Hagerman*, 827 F. Supp. 2d at 117–18 (discussing different standards); David A.

tion, most courts hold that an order of restitution must be limited to losses actually caused by the defendant's specific conduct.[157] Additionally, courts frequently find that they have broad discretion in ordering restitution awards.[158] Specifically, "[t]he determination of an appropriate restitution amount is by nature an inexact science,"[159] and "[a] sentencing court may resolve restitution uncertainties with a view towards achieving fairness to the victim, so long as it still makes a reasonable determination of appropriate restitution rooted in a calculation of actual loss."[160] Thus, while the government bears the burden of proving the full amount of a victim's losses with "some reasonable certainty," courts generally find that this requirement need not involve "mathematical precision."[161] Rather an award will be upheld as long as it does not rely on "arbitrary calculations."[162]

While some earlier circuit cases contained language suggesting that "mere" possession of child pornography directly harms a victim,[163] no court to consider a restitution request in the context of child pornography possession has found that possession alone, without a showing of proximate cause, is sufficient to award restitution under § 2259.[164]

The Ninth Circuit has issued one of the most unequivocal opinions in addressing how courts should evaluate whether victims meet the prox-

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Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 279–81 (2005–06) (analyzing the "substantial factor test" and "but-for test").

[157] *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (citing United States v. Tencer, 107 F. 3d 1120, 1135 (5th Cir. 1997)).

[158] United States v. Laney, 189 F.3d 954, 966 (9th Cir. 1999); United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009).

[159] *Paroline*, 672 F. Supp. 2d at 791–92 (quoting United States v. Teehee, 893 F.2d 271, 274 (10th Cir. 1990)) (internal quotation marks omitted).

[160] *Id.* at 792 (alteration in original) (quoting United States v. Fallah, No. H-07-155, 2008 WL 5102281, at *2 (S.D. Tex. Dec. 1, 2008)) (internal quotation marks omitted).

[161] United States v. Kennedy, 643 F.3d 1251, 1261 (9th Cir. 2011) (quoting United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007); *Laney*, 189 F.3d at 967 n.14) (internal quotation marks omitted).

[162] *Id.* (quoting *Laney*, 189 F.3d at 967 n.14) (internal quotation mark omitted).

[163] *See* United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007) ("Consumers such as [defendant] who 'merely' or 'passively' receive or possess child pornography directly contribute to this continuing victimization. Having paid others to 'act out' for him, the victims are no less damaged for his having remained safely at home, and his voyeurism has actively contributed to a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms."); United States v. Norris, 159 F.3d 926, 929–30 (5th Cir. 1998) ("The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions . . . . [T]here is no sense in distinguishing, as [the defendant] has done, between the producers and the consumers of child pornography.").

[164] United States v. Hardy, 707 F. Supp. 2d 597, 611 (W.D. Pa. 2010) ("However, in most recent cases where Amy has sought restitution, district courts have found that the proffered evidence was not sufficient to prove that the defendants' conduct proximately caused Amy's losses.").

imate causation requirement of § 2259.[165] Starting with the proposition that a court must identify "a causal connection between the defendant's offense conduct and the victim's specific losses," the Ninth Circuit conducted an in-depth analysis of the scope of the proximate cause limitation.[166]

In articulating its standard, the Ninth Circuit began by analyzing § 2259's proximate cause requirement in light of other statutory restitution schemes, including the Victim and Witness Protection Act of 1982 ("VWPA")[167] and the Mandatory Victims Restitution Act of 1996 ("MVRA").[168] Because these two restitution provisions have also been interpreted by courts to contain a proximate causation requirement,[169] because the text of § 2259(b)(2) directs courts to look to the VWPA and the MVRA for guidance in issuing restitution orders under § 2259, and because all three statutes have similar restitutionary purposes, the Ninth Circuit found that case law on proximate cause in the context of the VWPA and the MVRA may inform its development of a standard for restitution under § 2259.[170]

Under both the VWPA and the MVRA, the Ninth Circuit noted that it had "attempted to steer a middle course" to avoid "imposing liability on defendants whose conduct is too remote from or too tangential to a victim's specific losses, while still ensuring that defendants pay restitution for the losses to which their offense conduct contributed."[171] In its review of the case law awarding and denying restitution, the court found that it denied restitution where victims sought consequential losses, where losses were too remote from the offense of conviction,[172] and where intervening causes, unrelated to the defendant's convicted offense, were responsible for the victim's loss.[173] On the other hand, it approved restitution awards where losses were "at least one step removed from the offense conduct itself"[174] as long as the intervening cause was "directly related to the offense conduct."[175] Furthermore, the court found that "even where factors other than the defendant's conduct contributed to a specific loss,

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[165] *Kennedy*, 643 F.3d at 1261.

[166] *Id.* at 1262.

[167] *Id.* at 1261 (citing 18 U.S.C. §§ 1512–15; 3663–64 (2006)).

[168] *Id.* at 1261 (citing 18 U.S.C. §§ 3613A, 3663A).

[169] *See* United States v. Peterson, 538 F.3d 1064, 1074–75 (9th Cir. 2008); United States v. Hackett, 311 F.3d 989, 993 (9th Cir. 2002).

[170] *Kennedy*, 643 F.3d at 1261–62.

[171] *Id.* at 1262.

[172] *Id.* (citing United States v. Rodrigues, 229 F.3d 842, 845 (9th Cir. 2000)).

[173] *Id.* (citing United States v. Meksian, 170 F.3d 1260, 1263 (9th Cir. 1999)).

[174] *Id.* (quoting United States v. Gamma Tech Indus., 265 F.3d 917, 928 (9th Cir. 2001)) (internal quotation marks omitted).

[175] *Id.* (quoting *Meksian*, 170 F.3d at 1263) (internal quotation marks omitted) (citing United States v. Keith, 754 F.2d 1388, 1393 (9th Cir. 1985)).

a defendant may be held liable for restitution so long as the defendant's conduct was a 'material and proximate cause' of the loss."[176]

With this guidance, the Ninth Circuit concluded that for purposes of meeting the requirements of § 2259, a victim must identify a material and proximate causal connection "between the defendant's offense conduct and the victim's specific losses."[177] Additionally, although there may be multiple sources in the causal chain such that the defendant's conduct is not the sole cause of the victim's losses, the chain "may not extend so far, in terms of the facts or the time span, as to become unreasonable."[178] "[A]ny subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant's conduct."[179]

Although other courts have not conducted as in-depth an analysis into the proximate causation standard required under § 2259, many courts reinforce the Ninth Circuit's reasoning, looking to the requirements imposed by the VWPA and the MVRA,[180] and finding that to show proximate causation, the victim must prove: (1) specific losses;[181] (2) calculated with reasonable certainty;[182] (3) that are materially and proximately caused by the defendant's offense of conviction; and (4) if such losses are not solely caused by defendant's offense, any intervening causes are directly related to the defendant's conduct.[183]

While most courts follow the Ninth Circuit's standard in whole or in part, the Third Circuit has adopted a different approach, finding a defendant has proximately caused a victim's losses under § 2259 such that he can be responsible for restitution if his actions were a "substantial fac-

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[176] *Id.* (quoting United States v. Peterson, 538 F.3d 1064, 1076 (9th Cir. 2008)).

[177] *Id.* at 1262–63.

[178] *Id.* at 1262 (quoting *Gamma Tech Indus.*, 265 F.3d at 928) (internal quotation marks omitted).

[179] *Id.* at 1263 (quoting *Gamma Tech Indus.*, 265 F.3d at 928).

[180] *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 789 (E.D. Tex. 2009) (quoting Hughey v. United States, 495 U.S. 411, 412–13 (1990)) (finding that in determining restitution the court should look to the Victim and Witness Protection Act of 1982 and the Mandatory Victims Restitution Act where restitution is authorized only for "loss caused by the specific conduct that is the basis of the offense of conviction")).

[181] United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) (finding that to meet the proximate cause requirement "the government must show by a preponderance of the evidence that defendant's offense proximately caused a specific harm to claimants"); United States v. Simon, CR-08-0907 DLJ, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (finding that a "restitution order in [an end-user possession] case must be based upon the identification of a specific injury to the victim that was caused by the specific conduct of the defendant").

[182] *Van Brackle*, 2009 WL 4928050, at *4 (finding that the court must be able to estimate with reasonable certainty what amount of losses are attributable to the defendant and his offense).

[183] *Id.* (finding that the court must be able to ascertain "what proportion of the total harm was proximately caused by *this* defendant and *this* offense").

tor" in the victim's losses.[184] The Third Circuit has not illuminated this "substantial factor" requirement for proving proximate causation. However, it did uphold a district court's award of restitution based on a social worker's expert opinion that the defendant "exacerbated" the victim's depression, and that, therefore, the defendant's actions were a "significant contributing factor" to the victim's emotional troubles and financial loss.[185]

The district court for the District of Columbia, on the other hand, has explicitly rejected the "substantial factor" test as the standard for evaluating proximate causation under § 2259. In *United States v. Monzel*, the court declined to adopt the commonly applied substantial factor test, noting that it had "fallen into disfavor because its lack of concreteness has caused considerable confusion."[186] Instead, the court adopted the American Law Institute and Third Restatement of Tort's two-pronged approach, which looks to see "(1) whether the actor's conduct was a necessary condition of the harm (but-for or factual cause) and (2) whether the harm was the product of the risks that made the actor's conduct unlawful (scope of liability or proximate cause)."[187] Under this test, the court essentially determines whether there is a logical connection between the defendant's conduct and the victim's harm.[188]

Finally, in the most recent circuit decisions on the issue, the First and Fourth Circuits have held that proximate cause need not be construed narrowly to apply only when an additional instance of possession increases harm.[189] Rather, those circuits have held that proximate causation exists when "the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort."[190]

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[184] United States v. Crandon, 173 F.3d 122, 126 (3d Cir. 1999); *see also* United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) (discussing the substantial factor test and suggesting that the court adopt such a test for its determination of proximate cause); United States v. Hardy, 707 F. Supp. 2d 597, 611 (W.D. Pa. 2010) (discussing *Crandon*, 173 F.3d at 126); United States v. Barkley, No. 1:10 CR 143, 2011 WL 839541, at *4 (M.D. Pa. Mar. 7, 2011).

[185] *Crandon*, 173 F.3d at 126.

[186] United States v. Monzel, 746 F. Supp. 2d 76, 85 (D.D.C. 2010), *mandamus granted in part and appeal dismissed*, 641 F.3d 528 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011).

[187] *Id.* at 85–86. *But see* United States v. Covert, No. 09-332, 2011 WL 134060, at *8 (W.D. Pa. Jan. 14, 2011) (criticizing the *Monzel* opinion and finding that "it remains unclear to us how the 'harm within the risk' approach used by the *Monzel* Court . . . differs from the initial finding that the victim was harmed under the statute, rather than harmed by the particular defendant").

[188] *Monzel*, 746 F. Supp. 2d at 86.

[189] United States v. Kearney, 672 F.3d 81, 98 (1st Cir. 2012); United States v. Burgess, 684 F.3d 445, 459 (4th Cir. 2012).

[190] *Kearney*, 672 F.3d at 98.

B. Courts That Find the Proximate Cause Requirement Is Not Met

Regardless of the proximate cause standard employed, a majority of courts to consider the requirement under § 2259 find that the victim failed to make an appropriate connection between her quantifiable loss and the defendant's conduct. Courts generally find that the proximate causation requirement is not met for two reasons: the government fails to provide a link between the victim's loss and the defendant's conduct, or the government fails to apportion the requested damages between the victim's overall loss and the loss attributable to the individual defendant.[191] Although few courts disagree that a defendant's possession of child pornography harms the victims whose images are portrayed therein, courts note that generalized notions of harm do little to prove how much of a victim's suffering or amount of loss is proximately caused by one possessor's offense.[192]

One of the most common ways for courts to find that the proximate cause requirement is not met is to find that the government has presented no evidence that the victim was aware of the defendant's conduct or that the individual defendant caused the victim any specific harm.[193] In

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[191] In finding that the proximate causation requirement is not met, courts also often reference the conflation of the proximate cause requirement and the requirement that the victim be harmed as a result of the defendant's conduct. *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009).

[192] *See id.*

[193] *See, e.g.*, United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) ("This opinion does not categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images. . . . But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested—or might as well have been—we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image."); United States v. Kennedy, 643 F.3d 1251, 1263 (9th Cir. 2011) ("The government has not carried its burden here, because it has not introduced *any* evidence establishing a causal chain between Kennedy's conduct and the specific losses incurred by Amy and Vicky. . . . Indeed, the government introduced no evidence that Amy and Vicky were even aware of Kennedy's conduct."); United States v. Faxon, 689 F. Supp. 2d 1344, 1359 (S.D. Fla. 2010) (discussing United States v. Simon, CR-08-0907, 2009 WL 2424673 (N.D. Cal. Aug. 7, 2009), which held that in order to "justify a restitution order in such a case there must be some basis upon which there is an identification of a specific injury to the victim that was caused by the specific conduct of the defendant"); United States v. Chow, 760 F. Supp. 2d 335, 343 (S.D.N.Y. 2010) ("[T]he Government has not alleged that Amy and Vicky were aware of this Defendant's possession before the Government advised them of such."); *Paroline*, 672 F. Supp. 2d at 792 (noting that the losses the victim alleged were only generalized in nature, caused by a combination of her initial abuse and by the continued existence and dissemination of her pornographic images); United States v. Berk, 666 F. Supp. 2d 182, 191 (D. Me. 2009) ("The losses described . . . by the Victims are generalized and caused by the idea of their images being publicly viewed rather than caused by this particular Defendant having viewed their images. In the documentation supporting the Victims' restitution requests, there is no mention of the impact that learning of Mr. Berk's offense had on either of the Victims. In fact, there is no mention of Mr. Berk at all.").

the majority of these cases, the victim provides an impact statement regarding the general trauma she experiences as a result of her molestation and the pain and suffering she continues to experience as a result of the dissemination of her images. However, in most cases denying restitution entirely, the victim fails to make any showing that she was aware of the defendant's possession of pornography, that such awareness led to physical or psychological harm, or that there is any causal link between her specific injury and the defendant's conduct of conviction. Thus, courts frequently find that the government has not satisfied its burden of showing that the victim suffered specific, rather than generalized, losses that were proximately caused by the defendant's actions.

In *Faxon*, for example, the Southern District of Florida found that the victims had not established that any of the losses they suffered were a proximate result of the criminal acts of the defendant-possessor. Specifically, the women had failed to show that they were aware of the defendants' conduct or that their alleged harms were the result of it.

> This Court has difficulty attributing any of the acts committed by the Defendant in this case to be a proximate cause of any of the trauma that was suffered or continues to be suffered by either of these victims. . . . Neither Vicky nor Amy know[s] of this Defendant. Neither know[s] of the criminal acts he perpetrated. Neither know[s] that this hearing was even taking place. . . .
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> . . . .
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> . . . . As a result, this Court finds it difficult to believe that any acts for which this Defendant has been convicted in this proceeding could reasonably have caused any of the continued psychological trauma to either Vicky or Amy. The totality of the evidence received by this Court clearly indicates that their respective continued psychological trauma would occur regardless of whether or not this Defendant committed the criminal acts in this case in viewing and/or sharing the photos/videos of Vicky and Amy.[194]

Courts also commonly find that victims fail to satisfy the proximate cause requirement where the victim provides no evidence properly apportioning her damages between the harm caused as a result of the initial abuse and the harm caused by the continued dissemination of her images.[195] In these situations, courts may rather easily be able to estimate

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[194] *Faxon*, 689 F. Supp. 2d at 1356–58.

[195] *See, e.g.*, *Kennedy*, 643 F.3d at 1264–65; United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009) ("The government has presented ample evidence of tragic harms both past and future, and the court is profoundly aware of what the claimants have and will continue to suffer as victims of child abuse and child pornography. However, the government has not presented any evidence whatsoever that would permit the court to estimate with reasonable certainty what portion of the claimants' harm was proximately caused by defendant's act of receiving child pornography, as opposed to the initial abuse or unknown other acts of receipt and distribution that occurred before and independent of defendant's act."); *see also Berk*, 666 F. Supp. 2d at 191 ("It is undisputed that everyone involved

a victim's total amount of harm, but they are less equipped to ascertain with reasonable certainty what proportion of the total harm a particular defendant's offense conduct proximately caused.[196] The Eastern District of Texas in *United States v. Paroline*, for example, found that the government failed to provide evidence apportioning the victim's losses between the loss caused by her initial abuse, the loss caused by the general dissemination and possession of her pornographic images, and the loss caused by the defendant's possession of her images.[197] Thus, although the court expressed sympathy for the victim's harm and recognition of the difficulty in establishing the amount of her losses caused by one defendant convicted of possession, the court denied her request for restitution.[198]

The Southern District of New York came to a similar conclusion in *United States v. Chow*, finding that the government failed to meet its burden of proving what losses the victims sustained as a result of the defendant's possession of child pornography that were "separate and apart from the losses caused to the victim[s] by the abuse and the creation of [their] images."[199] While the court found that the government had presented sufficient evidence of the victims' total losses, the court held that the government had "not quantified the amount of damage caused by each act of Defendant's possession of the materials."[200] The court suggested that had the victims presented evidence that they required extra counsel-

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with child pornography—from the abusers and producers of the images to the end-user/possessors such as the Defendant in this case—contributes to the victims' ongoing harm. The difficulty lies in determining what portion of the Victims' loss, if any, was proximately caused by the specific acts of this particular Defendant.").

[196] *See Van Brackle*, 2009 WL 4928050, at *4.

[197] *Paroline*, 672 F. Supp. 2d at 792, *rev'd sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc).

[198] *Id.* at 792–93 ("The Court is sympathetic to Amy and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. The Court also realizes that it is incredibly difficult to establish the amount of a victim's losses proximately caused by any one defendant convicted of possession. However, the Court's sympathy does not dispense with the requirement that the Government satisfy its burden of proving the amount of Amy's losses proximately caused by Paroline's possession of her two images."); *see also* United States v. Solsbury, 727 F. Supp. 2d 789, 796 (D.N.D. 2010) ("The Court is very sympathetic to Vicky and acknowledges the profound and detrimental harm suffered by her and all children who have been sexually abused, and whose victimization has been recorded and disseminated worldwide on the Internet. The Court also recognizes the difficult task the Government has in establishing the amount of a victim's losses proximately caused by a particular defendant convicted of a possession charge in federal court. The legal briefs and arguments submitted by counsel for the Government in support of a restitution award are excellent and the effort laudable. However, the Government has the burden of proof and the Government has failed to meet its burden to prove what losses sustained by Vicky were a proximate cause and result of Louis Solsbury's criminal conduct.").

[199] United States v. Chow, 760 F. Supp. 2d 335, 342 (S.D.N.Y. 2010) (quoting United States v. Rowe, No. 1:09CR80, 2010 WL 3522257, at *5 (W.D.N.C. Sept. 7, 2010)).

[200] *Id.*

ing based upon their knowledge of the defendant's crimes, this might have been sufficient to support an award of restitution.[201] However, in the absence of this evidence, the court was unable to find proximate cause. Thus, even though the court found that the defendant's possession of pornographic images of the victims "undeniably contributed to [their] harm," it ultimately determined that it could not award restitution because it had no means of "reasonably determin[ing] what portion of [their] losses were proximately caused by Defendant's specific offense."[202]

Similarly, the Ninth Circuit issued guidance on apportionment, holding that it is not sufficient for a district court to apportion liability based on a "reasonable" estimate of the harm caused by the defendant without any evidentiary basis. In *United States v. Kennedy*, the government argued that a district court's attempt to order restitution based on a "reasonable guess" should be enough because "the harm caused by one possessor of child pornography is not easily divisible from the harm caused by [all] others."[203] However, like the Southern District of New York, the Ninth Circuit suggested that without some evidence, such as testimony that the defendant's conduct necessitated additional therapy sessions or contributed to additional pain and suffering, the court could not authorize an award of restitution.[204]

C. Courts That Find the Proximate Cause Requirement Is Met

While a majority of courts find that victims fail to establish a causal connection between the defendant's offense and the victim's losses, a healthy minority find that with some evidence, a victim can satisfy the proximate cause requirement.

A handful of courts find that the proximate cause requirement is met even where the victim fails to introduce evidence of her knowledge of the defendant's possession of pornography and her subsequent harm. For example, in *United States v. Brunner*, the Western District of North Carolina found that by possessing pornographic images of the victims, the defendant "participated in an ongoing cycle of abuse and thereby contributed to the victims' mental and emotional trauma."[205] In making this finding, the court noted that the record, including the victims' im-

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[201] *Id.* at 343; *see also* United States v. Berk, 666 F. Supp. 2d 182, 191–92 (D. Me. 2009) ("If, for example, an expert had originally opined that 'Amy' or 'Vicky' would need monthly counseling sessions and, upon learning of Mr. Berk's possession of her images, she would instead need weekly sessions, then the Court could order restitution for this additional loss.").

[202] *Chow*, 760 F. Supp. 2d at 343.

[203] United States v. Kennedy, 643 F.3d 1251, 1264 (9th Cir. 2011) (alteration in original).

[204] *Id.* at 1265 ("But picking a 'reasonable' number without any explanation is precisely the kind of arbitrary calculation we rejected in *Laney* and *Doe*.").

[205] United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *2 (W.D.N.C.), *aff'd*, 393 F. App'x 76 (4th Cir. 2010).

pact statements and the psychological reports, unequivocally showed that that the defendant caused specific harm to the victims.[206] Yet, like the cases discussed above, there was no evidence in *Brunner* that the victims had knowledge of the defendant's possession of their images. Rather, the government presented only generalized evidence of the victims' harm caused by the continued possession of pornographic images "by individuals *such as* [the defendant]."[207]

The Northern District of New York came to a similar conclusion in *United States v. Hagerman*, finding that even where there is no evidence that the victim had contact with or knowledge of the defendant's actions[208] proximate cause can exist if the victim proves that she *knew* that unidentified individuals continued to download her images. The court began by discussing three standards for evaluating proximate cause: the reasonable foreseeability standard, the direct-consequences standard, and the risk standard or potential harms test.[209] The court then determined that because the defendant received and possessed pornographic images of the victim and because the victim sustained and continued to sustain psychological damage as a result of unidentified individuals downloading these images from the Internet, the defendant's crime was the proximate cause of the victim's losses under any of the three articulated standards.[210] Specifically, the court found: that it was "*reasonably foreseeable*" to pornography viewers like the defendant that the victim would sustain psychological losses based on the downloading of her images; that there was a "*direct causal connection*" between the defendant's actions and the victim's losses stemming from her knowledge that unidentified individuals downloaded her images; and that the losses the victim suffered fell within the "*potential harms*" that made the defendant's conduct criminal.[211]

Importantly, the *Hagerman* court distinguished the case from the Second Circuit's case of *United States v. Aumais*. In *Aumais*, the court concluded that the proximate cause requirement was not met because the psychologist's evaluation of the victim's harm occurred before the defendant was arrested.[212] Although the psychologist in *Aumais* was able to

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[206] *Id.*

[207] *Id.* (emphasis added).

[208] The court did note that Vicky's representative discovered the existence of the current action and dutifully communicated this information to Vicky. United States v. Hagerman, 827 F. Supp. 2d 102, 122 n.31 (N.D.N.Y. 2011). However, the court's primary analysis rests on the reasoning that proximate cause would be appropriate even if Vicky were not aware of the defendant's actions. *Id.* at 120–21.

[209] *Id.* at 118 & n.19 (discussing the "risk standard" as one where an actor is "held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious.").

[210] *Id.*

[211] *Id.* at 119.

[212] *See* United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) ("But where the Victim Impact Statement and the psychological evaluation were drafted before the

describe the general harm the victim suffered from knowing individuals possessed her images, the court found he was not able to speak to the impact on the victim caused by this particular defendant.[213]

Similarly in *Hagerman*, there was no evidence that the victim had any contact with the defendant or was aware of his possession of her images; in fact, the defendant was arrested *after* the victim submitted verified victim impact statements detailing her loss and traumatization.[214] However, the court found the proximate cause requirement satisfied even though the victim impact statements and psychological evaluations were drafted *before* the defendant was arrested, because they were drafted *after* the defendant "might as well have been [arrested]" for the crimes at issue, i.e., after he received the images and could have been arrested for such receipt.[215] In this way, the *Hagerman* court refuted *Aumais*'s reasoning that proximate cause can never exist where the victim lacks knowledge that a particular defendant downloaded a particular image on a particular occasion.[216]

The *Hagerman* opinion also addressed courts' concerns with awarding restitution where the government does not "precisely quantify the amount of harm [the d]efendant caused separate and apart from the harm caused by (a) the other individuals who downloaded her images on the Internet, and (b) individuals involved in producing the images."[217] For many of the same reasons as the court found a victim need not show knowledge of a particular defendant's possession in order to prove proximate cause, the court found that an inability to prove which damages were attributable to a particular defendant was not fatal to a proximate cause showing. First, the court found that it is not necessary to consider the harm caused by individuals who produce the images when the government proves that all the losses sought are due to the victim's revictimization, i.e., those losses caused by individuals downloading her porno-

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defendant was even arrested—or might as well have been—we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image.").

[213] *Id.*

[214] *Hagerman*, 827 F. Supp. 2d at 120 & n.26.

[215] *Id.* at 119–120 & n.25 (alteration in original).

[216] *Id.* at 120–21. Such logic, the *Hagerman* court held, is flawed for three reasons: (1) such knowledge is not required in situations, as here, where the injuries claimed stem in large part from the fear that the victim does not know who is downloading her images from the Internet; (2) to construe § 2259 as requiring victim knowledge of the defendant's actions would construe the statute in a way that makes relief extremely difficult if not impossible to grant; and (3) construing § 2259 in this way would violate the spirit of 18 U.S.C. § 3664, which prohibits victims from having to participate in any phase of restitution. Thus, the court left open the opportunity that restitution may be appropriate in situations where the victim has no knowledge of the defendant's actions but can prove that her trauma results from knowledge that unidentified individuals are downloading her images. *Id.*

[217] *Id.* at 122 (emphasis omitted).

graphic images.[218] Additionally, the court found that "'mathematical precision' is not required in order to show . . . causation" under § 2259, that requiring such precise quantification violates the spirit of the statute, and that construing the statute to require such calculations makes it nearly impossible for courts to grant restitution.[219]

Aside from debunking the traditional arguments against proximate causation, courts within the Third Circuit have relied upon the "substantial factor" test to find that the government has adequately proven that a defendant's actions were the proximate cause of a victim's harm.[220] In *United States v. Hardy*, for example, the Western District of Pennsylvania found that the defendant's viewing of the victim's images was a proximate cause of her harm:

> It is undoubtedly true that harmful images of Amy would be circulating on the internet even if it were not for the conduct of Defendant. But, in this Court's estimation, Amy has shown by a preponderance of the evidence that Defendant's conduct aided in the circulation of said images, that the circulation has harmed her, and that, therefore, Defendant's conduct caused at least part of her overall harm. She has, therefore, shown that Defendant's conduct is a substantial factor in her psychological harm and economic losses.[221]

In addition to the above district court analysis, four circuit courts have found the proximate cause requirement met in cases of child pornography possession. Two circuit courts have upheld findings of proximate cause with little analysis. In *United States v. McDaniel*, for example, the Eleventh Circuit found that a district court did not "clearly err" in finding proximate cause where the government established that the victim's notification that a defendant viewed her images was "extraordinarily distressing and emotionally painful" and added to the "slow acid drip" of her trauma and emotional issues.[222] Additionally, the Ninth Circuit in *United States v. Baxter* affirmed a district court's restitution order against a possessor of child pornography on the basis that "[t]he United States met its burden of establishing proximate cause by showing how Vicky's harm was generally foreseeable to casual users of child pornography like Baxter."[223] In the most recent decisions on the issue, the First[224] and Fourth Circuits have held that although proximate cause may be difficult to

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[218] *Id.* at 122–23.

[219] *Id.* at 123.

[220] *See, e.g.*, United States v. Hardy, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010); United States v. Crandon, 173 F.3d 122, 126 (3d Cir. 1999).

[221] *Hardy*, 707 F. Supp. 2d at 614.

[222] United States v. McDaniel, 631 F.3d 1204, 1209 (11th Cir. 2011).

[223] United States v. Baxter, 394 F. App'x 377, 379 (9th Cir. 2010).

[224] United States v. Kearney, 672 F.3d 81, 98 (1st Cir. 2012) ("Kearney's conduct contributed to a state of affairs in which Vicky's emotional harm was worse than would have otherwise been the case.").

prove on the individual level, this is not necessary because proximate cause exists on the *aggregate level*.[225]

Thus, a number of courts have used different methods to find that the government has met its burden of proving that the defendant was the proximate cause of the victim's alleged damages. Even within this group, however, there is a split among courts that award the full amount of the victim's requested restitution and those who award a set amount of damages, less than that requested by the victim.

1. Courts That Award Everything

The requirement articulated by § 2259 states that courts must award restitution in "the full amount of the victim's losses," defined as "any costs incurred by the victim" within six categories: "(A) medical services . . .; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees [and other litigation costs]; and (F) [a catch-all category of] any other losses suffered by the victim as a proximate result of the offense."[226] Furthermore, the statute specifically forbids courts from denying restitution based on "economic circumstances of the defendant" or the victim's receipt of compensation from any other source.[227] However, the statute also directs courts to award restitution "as determined by the court . . . in accordance with section 3664 in the same manner as an order under section 3663A."[228]

Under § 3664(h), which governs awards of restitution under § 3663A, and therefore, presumably § 2259:[229]

> If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.[230]

The statute has been interpreted to allow, but not require, a court to apportion restitution in this way.[231] While the express language of § 3664(h) permits apportionment based on proportionality, some courts have

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[225] United States v. Burgess, 684 F.3d 445, 459 (4th Cir. 2012) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268 (5th ed. 1984) (noting that if, as a whole, multiple individuals are a but-for cause of harm, but application of the but-for rule to each would absolve all, each is a cause in fact of the event); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. g (same); *id.* § 36 cmt. a (noting that an insufficient condition may be a factual cause when combined with other acts to constitute a sufficient condition)).

[226] 18 U.S.C. § 2259(b)(3) (2006).

[227] *Id.* § 2259(B).

[228] *Id.* § 2259(b)(2).

[229] United States v. Hardy, 707 F. Supp. 2d 597, 614 (W.D. Pa. 2010).

[230] 18 U.S.C. § 3664(h).

[231] *See* United States v. Zander, 319 Fed. App'x 146, 150 (3d Cir. 2009).

found that this does not apply to § 2259. Rather, once proximate cause is established, a minority of courts find that § 2259 does not allow for a proportionality analysis and instead requires the court to order restitution in the "full amount of the victim's losses."[232]

2. Courts That Award a Partial Amount

Despite § 2259's language that restitution be made "in the full amount of the victim's losses," few courts award restitution for the full amount of a victim's request. Rather, the majority of courts attempt to balance the directive to make a victim whole with the consideration of not disproportionately penalizing the defendant for his contribution to her losses. Accordingly, courts frequently award less than the requested restitution, some choosing a set number determined to be reasonable in the given case, and some attempting to apportion liability based on the number of defendants who have already been ordered to pay restitution to the victim.

The most common method for awarding restitution in less than the full amount requested is for a court to select an award it deems appropriate given the number of prior restitution requests and the individual defendant's involvement in the case.[233] In *Brunner*, for example, the court noted that although there was a causation requirement between the defendant's conduct and the victim's harm, no circuit had yet "'imposed a requirement of causation approaching mathematical precision' when de-

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[232] *See* United States v. Crandon, 173 F.3d 122, 126 n.2 (3d Cir. 1999); *see also* United States v. Hagerman, 827 F. Supp. 2d 102, 128 (N.D.N.Y. 2011); United States v. Lundquist, 847 F. Supp. 2d 364, 381 (N.D.N.Y. 2011); *Hardy*, 707 F. Supp. 2d at 615 (declining to determine the amount of restitution but noting that § 2259 does not provide for a proportionality analysis).

[233] United States v. Baxter, 394 F. App'x 377, 379 (9th Cir. 2010) (affirming the district court's grant of a $3,000 restitution award based on the government's estimate that this amount would cover 18 therapy sessions, and was therefore a reasonable estimate of the harm caused by the defendant in this case); United States v. Scheidt, 1:07-CR-00293 AWI, 2010 WL 144837, at *5 (E.D. Cal. Jan. 11, 2010) ("The court finds that $3,000 should be awarded as restitution in favor of Victim Vicky and $3,000 should be awarded as restitution in favor of Victim Amy. This amount is two percent of the $150,000 amount reflected in Section 2255. Given the high amount of the deemed damages in Section 2255, the court finds an amount less than $3,000 inconsistent with Congress's findings on the harm to children victims of child pornography. At the same time, the court finds $3,000 is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns."), *vacated*, 465 F. App'x 609 (9th Cir. 2012); United States v. Monk, No. 1:08-CR-0365 AWI, 2009 WL 2567831, at *5 (E.D. Cal. Aug. 18, 2009) (awarding an amount of $3,000 because it is 2% of the $150,000 minimum for any violation of Section 2252); United States v. Hicks, No. 1:09 cr 150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) ("The Court believes that at least fifty defendants will be successfully prosecuted for unlawfully possessing or receiving the Vicky series, given the numbers prosecuted to date. If restitution orders of $3,000 per case result, Vicky will be compensated in full.").

termining the amount of restitution that is appropriate."[234] Given this "relaxed standard," and taking into account the strong congressional intent of § 2259 to provide victim relief, the *Brunner* court chose to apply a "rule of reasonableness."[235] The court also looked for guidance in 18 U.S.C. § 3664(h), which provides that "the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."[236] The court then concluded that while both the victims' requests for past and future treatment and lost income, including lost future earnings, were reasonable, it was not reasonable to award the full amount of the requested losses given the relatively minor nature of the defendant's contribution and the difficulty of coordinating joint liability between defendants.[237] Thus, taking into account that the defendant did not have any contact with the victims, that the defendant's crime was "mere possession," and that many other individuals possessed similar images, the court ordered restitution to one victim for $1,500 and to the other for $6,000.[238] Many courts have engaged in a similar analysis to find that a reduced amount, typically between $1,000 and $5,000, is an appropriate award of restitution.[239]

The Eastern District of California used a similar calculus as the *Brunner* court in *United States v. Ferenci*.[240] Instead of relying on the victim's purported total amount of loss, however, the *Ferenci* court adopted a set standard of loss to guard against inconsistencies in victims' restitution requests. Looking to 18 U.S.C. § 2255 for guidance, the *Ferenci* court found that victims have a civil remedy for child abuse and exploitation offenses which applies a presumption that the child has suffered no less than $150,000 in losses.[241] Accordingly, the *Ferenci* court presumed $150,000 in damages suffered by the victim, made a finding that the defendant was the proximate cause of roughly two percent of those damages, and ultimately awarded $3,000 in restitution.[242] Other courts have similarly made findings that any amount of restitution under $150,000 is reasonable.[243]

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[234] United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *3 (W.D.N.C. Jan. 12, 2010) (quoting United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007)).

[235] *Id.*

[236] *Id.* (quoting 18 U.S.C. § 3664(h) (2006)) (internal quotation marks omitted).

[237] *Id.* at *4.

[238] *Id.* Amy received $6,000 and Vicky received $1,500. The court concluded by noting that although the $1,500 award was slightly lower than the $3,000 typically awarded in other cases, this was based on the court's belief that other courts overvalued the amount of restitution owed, failing to recognize that the most substantial cause of the victim's loss was the initial abuse. *Id.*

[239] *See supra* note 233.

[240] No. 1:08-CR-0414 AWI, 2009 WL 2579102 (E.D. Cal. Aug. 19, 2009).

[241] *Id.* at *5 (citing 18 U.S.C. § 2255).

[242] *Id.*

[243] *See, e.g.*, United States v. Monk, No. 1:08-CR-0365 AWI, 2009 WL 2567831, at *5 (E.D. Cal. Aug. 18, 2009).

The District of Columbia Circuit is the only appellate court yet to take issue with a district court's award of a set amount of restitution less than the original amount requested by the victim.[244] In the district court's decision in *United States v. Monzel*, the court noted that the government failed to submit "any evidence whatsoever" regarding the amount of the victim's losses attributable to the defendant.[245] As a result, the district court had no basis from which to calculate the harm the defendant proximately caused, and, therefore, awarded a "nominal restitution" amount of $5,000, which it acknowledged was "no doubt" an award in an amount "less than the actual harm."[246] The court of appeals found that the district court had clearly erred by awarding an amount of restitution it acknowledged was less than the harm caused by the defendant. As the court stated:

> A district court cannot avoid awarding the "full amount of the victim's losses" simply because the attribution analysis is difficult or the government provides less-than-ideal information. The court must order restitution equal to the amount of harm the government proves the defendant caused the victim.[247]

Thus, the D.C. Circuit held that although determining the dollar value of the victim's losses attributable to the defendant would be difficult where the harm was ongoing and the number of offenders was unknown, this was not "fatal" to an award of restitution. Rather, the determination of an award would "involve some degree of approximation."[248]

The Northern District of New York has advocated a more precise way of determining an appropriate award of restitution where a lesser amount must be reasonably quantified under the circumstances.[249] First, the court suggested that courts approve the overall amount of loss claimed by the victim as reasonable. To appropriately parcel the defendant's culpability among the total loss, the court then advocated multiplying the total amount of loss by the fraction created by dividing one (the defendant on trial in the present case) by the number of other defendants successfully prosecuted for unlawfully possessing or receiving the victim's images.[250]

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[244] United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011).

[245] *Id.*

[246] *Id.*

[247] *Id.* at 539–40 (quoting 18 U.S.C. § 2259(b)(1) (2006)).

[248] *Id.* at 540.

[249] United States v. Hagerman, 827 F. Supp. 2d 102, 123–24 (N.D.N.Y. 2011) (advancing this as a possibility even though the court awarded the entire amount requested for restitution); *see also* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) (advocating a method by which "aggregate losses could be reasonably divided (for example, by developing a reasonable estimate of the number of defendants that will be prosecuted for similar offenses over the victim's lifetime, and dividing the total loss by that amount)").

[250] *Hagerman*, 827 F. Supp. 2d at 123–24.

IV. Problems with Restitution Under § 2259's Framework

The preceding discussion explains how courts adopt widely divergent approaches to considering restitution awards in cases of child pornography possession. To date, the literature on this topic has focused on whether 18 U.S.C. § 2259 requires mandatory restitution for possession alone, and, if so, whether such restitution is conditioned upon a causal connection between the unlawful possession and a victim's harm. For the most part, scholars and child pornography victims' advocates argue that courts should interpret § 2259 in a way that does not require a showing of proximate cause between a defendant's convicted offense and a victim's quantifiable loss. Given the current judicial landscape, however, this argument is unlikely to be persuasive in reforming the judiciary's approach to awarding restitution in cases of child pornography possession under § 2259 or in providing consistency across jurisdictions.

Scholars have yet to address the statute's failure to provide a workable framework for relief within which the judiciary can award restitution payments to victims from defendants who possess but do not produce child pornography. As the statute is currently written and interpreted, § 2259 contains a proximate cause requirement; however, the requirement as now applied is not an appropriate fit where victims seek restitution for possession, not production.[251] Furthermore, no literature has moved past the causation debate to assess the distinct yet related problem of determining an exact restitution amount under § 2259 where causation is found.[252]

I seek to expand the current dialogue to argue that no judicial approach to restitution under the current statutory framework is a just and effective means of ensuring that victims are made whole and defendants are treated fairly in cases of child pornography possession. Taking as a given that § 2259 contains a proximate cause requirement, I argue that such a requirement is inappropriate in the context of child pornography restitution cases where apportioning liability is unmanageable, if not impossible. Additionally, even in cases where courts find the causation requirement is met, the current statutory framework for awarding restitution on a joint and several basis is untenable.[253] Thus, as the statute

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[251] *See Kennedy*, 643 F.3d at 1266.

[252] *See* United States v. Burgess, 684 F.3d 445, 460 (4th Cir. 2012) ("The establishment of proximate causation, however, is not the true challenge of the restitution statute. The primary difficulty that will face the district court on remand will be the determination, if the court finds that proximate causation has been established, of the quantum of loss attributable to Burgess for his participation in Vicky's exploitation.").

[253] *See, e.g.*, United States v. Laraneta, 700 F.3d 983, 993 (7th Cir. 2012) (finding 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").

currently operates, restitution in child pornography possession cases is simultaneously insufficient and unjust: the causation requirement prevents recovery or leads to inconsistent awards of restitution, while the joint and several requirement complicates the collection of restitution payments and lacks a mechanism for ensuring that victims are not overcompensated for their losses.

A. Overview of the Problem

Working from the assumption that 18 U.S.C. § 2259 contains a proximate cause requirement,[254] there are three options for a court in determining whether to award restitution in a case of child pornography possession.[255] First, the court can find that the victim has failed to meet the proximate cause requirement and can award nothing. Alternatively, the court can find that the defendant is the proximate cause of some of the victim's losses and can attempt to apportion liability accordingly. Finally, the court can determine that the defendant is the proximate cause of all the victim's losses and can order an award of restitution for the full amount sought.[256] Currently, courts are split on whether apportioning liability is appropriate within the context of § 2259.[257]

None of these three options, however, serves Congress's underlying goals in enacting § 2259 while also being a feasible means of awarding restitution. The problems with each of these approaches are straightforward. Failing to award restitution where victims cannot prove proximate cause undermines Congress's intent that § 2259 provide relief to victims of child pornography. Apportioning liability in cases where the

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[254] This foundation relies on the assumption that courts would adopt one uniform proximate cause standard.

[255] United States v. Wright, 639 F.3d 679, 691 (5th Cir. 2011) ("If the court finds evidence that Wright's possession of the images was a proximate cause of Amy's losses, the court has wide discretion to craft a reasonable restitution order reflecting the losses caused by Wright. . . . The district court could apportion Wright's share of Amy's total losses or render judgment under the joint and several liability provisions of § 3664(h) utilized in some of the above-cited cases. Whatever approach the district court chooses, the court should explain the basis of its award and the order should be constrained by the principle of proximate causation."), *aff'd on reh'g sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc).

[256] United States v. Hardy, 707 F. Supp. 2d 597, 615 (W.D. Pa. 2010) (imposing joint and several liability under 18 U.S.C. § 3664(h) for the full amount of restitution requested, including the portion of restitution owed to her by other unidentified individuals who were not co-defendants in the case).

[257] *See* United States v. Crandon, 173 F.3d 122, 126 n.2 (3d Cir. 1999) ("[O]nce proximate cause is established, the statute requires the court to order restitution for the 'full amount of the victim's losses' [and there] is nothing in the statute that provides for a proportionality analysis." (citation omitted) (quoting 18 U.S.C. § 2259(b)(1))). *But see* United States v. Hicks, No. 1:09 cr 150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) (apportioning restitution notwithstanding the mandatory language of § 2259(b)(1) because of the difficulties inherent in monitoring collection from different defendants in different locations).

court determines that the defendant is responsible for part of a victim's losses poses complications in accurately and fairly calculating restitution amounts and maintaining consistency between restitution awards. Finally, finding that the proximate cause requirement is met as to all the victim's losses and awarding the full amount of restitution requested leads courts to impose joint and several liability,[258] which is inappropriate and unworkable in a situation where hundreds of unrelated defendants all act in concert to harm the victim.

B. Problems with No Restitution: Ensuring Congressional Intent

Courts have consistently recognized the harm that child pornography victims suffer as a result of the dissemination of their images on the Internet.[259] Even where a victim cannot make an adequate showing that her losses were proximately caused by a defendant's offense conduct, courts rarely question that the victim suffers real and tangible loss from the continued viewing of her images.[260] Failing to grant restitution in these cases, therefore, does not reflect a judicial determination that Congress viewed such victims as undeserving of some type of compensatory damages to assist in remedying the harm caused by the possession of their images.

C. Problems with Partial Awards of Restitution: The Proximate Cause Challenge in the Context of Apportioning Liability

Courts are frequently charged with determining the proximate cause of a particular outcome. They are also apt to evaluate whether an overall request for damages is reasonable in light of such causation. However, courts are less equipped to determine a defendant's contribution to a loss where there are hundreds of sources of contributing harm. As the Supreme Court has held, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors."[261] According-

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[258] *See Wright*, 639 F.3d at 686 ("The district court may attempt to craft a joint and several restitution order that conforms to the generally recognized requirements of joint and several liability, as held by *In re Amy*. Alternatively, the district court may attempt to determine the 'fraction' of Amy's losses 'attributable' to Wright, consistent with the *In re Amy* decision.").

[259] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 759 (1982).

[260] *See Statement of Ernie Allen, President and CEO, National Center for Missing & Exploited Children*, U.S. SENT'G COMM'N 12–14 (Oct. 20, 2009), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Allen_testimony.pdf (testimony at the U.S. Sentencing Commission's Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984).

[261] Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269 (1992) ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries.").

ly, courts struggle when they find that the losses of a child pornography victim are only partially caused by a particular defendant and are required to apportion liability based on that defendant's relative causation.[262]

For example, although it may be appropriate to require the government to show that a defendant directly contributed to a victim's loss, a showing of quantifiable causation is often too difficult to prove.[263] To address this dilemma, courts have suggested that the government produce direct evidence of proximate cause, for instance, providing evidence that because of the defendant's possession of the pornographic images the victim required a certain number of additional counseling or therapy sessions.[264] But such a showing is highly speculative, because the government is unlikely to be able to "directly link one defendant's viewing of an image to a particular cost incurred by the victim."[265] Thus, while a victim may be able to prove that a defendant in some way directly and materially contributed to her quantifiable loss (i.e., by requiring *some* additional counseling), proving what portion of that loss for which each defendant is responsible (i.e., *how many* counseling sessions each defendant's possession necessitated) is nearly impossible.[266] Additionally, because of the complexity in allocating losses among potential defendants, most circuit courts fail to provide guidance on how to calculate restitution awards.[267] Still, in the face of their own uncertainty, courts hold steadfast to the requirement that the amount of losses sought be proximately caused by the defendant's actions.

Another problem with the proximate cause requirement is that the difficulty with allocating a specific percentage of the victim's damages to

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[262] *See, e.g.*, United States v. Kennedy, 643 F.3d 1251, 1265 (9th Cir. 2011).

[263] *See, e.g.*, United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *8 (N.D.N.Y. Jan. 13, 2010) ("The harm from the uncle's abuse and that from possession of the images of the abuse by others are closely related for purposes of counseling and cannot be separate[d] to allocate costs between them as it appears that Amy will require counseling for both."); United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (recognizing the extreme difficulty of determining an amount of damage caused by one defendant's viewing of an image of child pornography).

[264] *E.g.*, United States v. Church, 701 F. Supp. 2d 814, 833 (W.D. Va. 2010); United States v. Berk, 666 F. Supp. 2d 182, 191–92 (D. Me. 2009).

[265] *Kennedy*, 643 F.3d at 1266.

[266] Courts have suggested that the government may be able to devise some formula to divide a victim's aggregate losses by each defendant's actions. However, the Ninth Circuit has noted that even with the introduction of such a formula, § 2259's "proximate cause and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in these sorts of cases." *Id.*

[267] *See id.* at 1265 (discussing the Eleventh Circuit and D.C. Circuit's lack of guidance in directing district courts to consider restitution awards); United States v. Monzel, 641 F.3d 528, 540 (D.C. Cir. 2011) (directing the district court to possibly "order the government to suggest a formula for determining the proper amount of restitution" that could account for the fact that the total "number of offenders [is] impossible to pinpoint"), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011).

a defendant is sometimes conflated with the general question of whether a defendant proximately caused *any* of the victim's damages.[268] Typically, restitution cases proceed in three parts. First, the court determines that the individual seeking restitution is a "victim" as defined by 18 U.S.C. § 2259. Next, the court evaluates whether the victim's alleged harms were proximately caused by the defendant's actions. If so, the court proceeds to the third step of deciding how much restitution to award, frequently considering what percentage of loss it can attribute to the defendant's actions. However, in cases where the loss is difficult to allocate (step three), courts are more likely to find that the proximate cause requirement (step two) is not met at all. Thus, it seems that courts are reluctant to find proximate cause because of the allocation issues such a finding would generate. Yet, these are two separate and distinct requirements.[269] While the finding of proximate cause is a necessary condition of allocating damages, the latter should have no impact on the former.

The Second Circuit in *Aumais* demonstrates this effect:

> A proximate cause of injury can be expected to lend itself more easily to assessment and allocation than a cause that is generalized or inchoate. Our conclusion—that Aumais' conduct was not a proximate cause of Amy's injury—is thus confirmed by the baffling and intractable issue that this case would otherwise present in terms of damages and joint and several liability.[270]

Although the Second Circuit had other reasons for finding that proximate cause was not met in *Aumais*, the court's language suggests that the difficulty in ascertaining the amount of loss for which the defendant was responsible influenced the court's calculus in determining whether the defendant was the proximate cause of any of the victim's loss. Put another way, because apportioning damages is so difficult in child pornography possession cases, courts may be more likely to conclude that the proximate cause requirement is not met at all.[271]

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[268] United States v. Burgess, 684 F.3d 445, 460 (4th Cir. 2012) (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing how the majority's reasoning that not requiring proximate causation would lead the victim to recover the amount of her losses many times over "conflates proximate causation with the *allocation* of losses"); United States v. Lundquist, 847 F. Supp. 2d 364, 375 (N.D.N.Y. 2011) ("[C]onstruing 18 U.S.C. § 2259 as requiring the Government to quantify precisely how much harm a defendant caused the victim, in order to prove that the defendant caused any harm at all to the victim pursuant to 18 U.S.C. § 2259(b)(3)(A)–(E), violates the spirit, if not the letter, of the joint-and-several-liability rule imposed by 18 U.S.C. § 3664(h) . . . .").

[269] *Burgess*, 684 F.3d at 462 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant proximately caused some injury is entirely separate from the question of how those proximately caused losses should be allocated among several offenders.").

[270] United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011).

[271] *See, e.g.*, United States v. Chow, 760 F. Supp. 2d 335, 344 (S.D.N.Y. 2010) ("Here, the Government has not presented any evidence as to how much of the victims' losses were caused by Defendant's specific acts or any method the Court

Additionally, any solution that alleviates the difficulty in allocating loss using the proximate cause standard would likely violate 18 U.S.C. § 3664(g)'s prohibition against requiring a victim to participate in any phase of a restitution order.[272] In other words, evidence used to satisfy the proximate cause requirement such that a victim could obtain relief—for example, showing that the victim was aware of the defendant's actions and suffered trauma necessitating treatment as a result—would require that the victim participate in the proceeding to the extent necessary to show her knowledge of the defendant's possession and its effect on her well-being.

Furthermore, such a showing could be more detrimental to a victim than the relief requested would compensate. For instance, one purpose of an award of restitution is to make a victim whole.[273] In the context of child pornography possession cases, this generally includes compensation for losses associated with knowing that hundreds of unknown men are viewing an individual's pornographic images at any time. However, it is unlikely that Congress intended to condition restitution for harm that flows from a victim's knowledge that men *in the abstract* are viewing her images on her awareness of a *particular* defendant's viewing of her images. That the process of compensating a recognized harm would itself further exacerbate harm is an absurd result. However, many courts interpret the proximate cause requirement of § 2259 as imposing such a condition. For example, courts frequently find that the proximate cause requirement is not met and deny restitution where the victim is unaware of the defendant's conduct.[274] But, this solution to proving causation—making the victim aware of the defendant's possession of her images—is contrary to the ameliorative goals of restitution.

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could use to make a reasonable calculation of the damages to Amy and Vicky proximately caused by Defendant. Therefore, attempting to assign a portion of the liability to Defendant, or even awarding nominal damages, would be pure guesswork and inconsistent with the proximate cause requirement of the statute."). *But see* United States v. Faxon, 689 F. Supp. 2d 1344, 1360 (S.D. Fla. 2010) ("This Court agrees with the *Berk* decision not only as to a requirement of causation under § 2259, but also in its particular findings relating to courts which have attempted to 'apportion' damages in respect to these particular claims for restitution. The court in *Berk* stated that it would be highly speculative and impossible to assess a reasonable restitution amount as to the defendant for the images he observed and distributed because there was no evidence in the record before the *Berk* court identifying any specific injury to the victim which was caused by the specific conduct of the defendant. The *Berk* court then denied the government's claim for restitution.").

[272] *Lundquist*, 847 F. Supp. 2d at 375 (finding that "to construe the statute as requiring such a precise quantification, in cases involving a wide audience of users of child pornography, would be to construe the statute as providing for relief that, as a practical matter, is nearly impossible to grant (especially given 18 U.S.C. § 3664's prohibition against requiring victims to participate in any phase of the restitution order)").

[273] *See supra* note 37.

[274] *See, e.g.*, *Aumais*, 656 F.3d at 155.

Thus, a showing of proximate cause at the damages stage of restitution is not appropriate in the context of child pornography possession cases because of the difficulties with allocating loss, the conflation of steps two and three of the restitution analysis, and the contradictory nature of the proximate cause requirement and the ameliorative goals of restitution.

D. Problems with Full Awards of Restitution: The Disconnect with Joint and Several Liability

The above analysis demonstrates the difficulty with the proximate cause requirement where courts determine that a defendant is only partially responsible for a victim's alleged losses and therefore attempt to apportion liability accordingly. However, as courts now interpret the statute, there are also problems where a court finds a defendant responsible for the entirety of a victim's losses and orders restitution for the full amount requested. Where this occurs, the court has two options. The court can either find the defendant solely liable for the entire amount of loss, or it can hold the defendant jointly and severally liable with other possessor-defendants of the same image for the full amount of loss.[275] While the overwhelmingly prevailing view is to hold the defendant jointly and severally liable for the victim's losses,[276] there are challenges to both approaches.[277]

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[275] United States v. Burgess, 684 F.3d 445, 461 (4th Cir. 2012) (Gregory, J. concurring in part, dissenting in part, and concurring in judgment) (noting that where injuries caused by one defendant are not divisible from injuries caused by another, each defendant must be held jointly and severally liable for those injuries) (citing TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008) ("[J]oint and several liability has long been available . . . in which two negligent actors, acting independently of one another, caused a single *indivisible* harm to the plaintiff . . . .")).

[276] *Cf.* United States v. Crandon, 173 F.3d 122, 126 n.2 (3d Cir. 1999) (finding that Section 2259 does not provide for a proportionality analysis and courts should therefore apply joint and several liability to the victim's losses). To date, no court to consider restitution in child pornography possession cases has ordered a defendant to pay the full amount of a victim's requested restitution without imposing joint and several liability. Logically, this makes sense as no cases have yet demonstrated that one possessor defendant is solely and individually responsible for a victim's trauma based on the continued possession of her pornographic images. However, should courts adopt this approach, holding only one defendant liable for the full amount of a victim's loss, they would risk overcompensating her for her losses.

[277] Additionally, given that courts differ on whether joint and several liability applies to cases of child pornography possession under § 2259, imposing such liability in one case and not in others may offend traditional notions of justice. Although courts have found that imposing joint and several liability in child pornography possession cases does not violate the Eighth Amendment's prohibition against cruel and unusual punishment, such judicial discretion whereby one defendant could be fully liable for the entirety of a victim's losses while another defendant, prosecuted and convicted of the same act, could have no liability at all, is unfair.

1. Failure to Impose Joint and Several Liability Results in Victim Overcompensation

Joint and several liability is a common tort concept, generally imposed for the primary purpose of ensuring that a victim is wholly compensated for her loss despite the insolvency or immunity of individual defendants.[278] The imposition of joint and several liability also ensures that if one defendant satisfies the judgment, such satisfaction discharges the obligations of all joint tort-feasors to the plaintiff, thereby avoiding unjust enrichment from full recovery by multiple sources.[279] Thus, where multiple defendants contribute to a victim's loss, an individual defendant may be liable for the full amount of the loss on a joint and several basis to ensure that the victim can collect her entire damages from any one defendant, while also "excus[ing] one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other."[280]

Crimes of child pornography possession, where multiple defendants combine to contribute to a victim's loss and allocating damages between them proves difficult,[281] seem ripe for the imposition of joint and several liability.[282] However, the language of § 2259 itself does not clearly authorize liability on a joint and several basis. In fact, the plain language of § 2259 comports with only the first purpose of joint and several liability: to ensure that a victim receives compensation for "the full amount of [her] losses" without regard to whether "a victim has . . . receive[d] compensation . . . from . . . any other source." The secondary purpose, to ensure that a victim is not overcompensated for her loss by recovering fully from multiple defendants, is not clearly encompassed by the statute. Without imposing joint and several liability and thereby protecting against full recovery from multiple sources, there is no way to ensure that § 2259's directive to compensate a victim for her full amount of loss does not conflict with the common law of most jurisdictions, which precludes

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[278] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A18 cmt. a (2000) ("Joint and several liability has two important consequences. First, a plaintiff may sue and recover all damages from any defendant found liable. This puts the burden of joining and asserting a contribution claim against other potentially responsible persons on the defendant. Second, the risk that one or more legally responsible parties will be insolvent or otherwise unavailable to pay for the plaintiff's injury is placed on each jointly and severally liable defendant—the plaintiff does not bear this risk.").

[279] Velazquez v. Water Taxi, Inc., 403 N.E.2d 172, 173 (N.Y. 1980).

[280] Smith v. Lightning Bolt Prods., Inc., 861 F.2d 363, 374 (2d Cir. 1988).

[281] United States v. Burgess, 684 F.3d 445, 461 (4th Cir. 2012) (Gregory, J. concurring in part, dissenting in part, and concurring in judgment) (discussing the necessity of joint and several liability where injuries from one defendant are not divisible from injuries caused by another).

[282] *See In re* Amy Unknown, 701 F.3d 749, 769–70 (5th Cir. 2012) (en banc) ("The joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm." (citing *Burgess*, 684 F.3d at 461)).

a victim from recovering more than her actual damages.[283] To reconcile this conflict, courts that award the full amount of requested relief against each defendant convicted of child pornography possession are left with few options other than imposing joint and several liability or allowing the possibility that a victim be unjustly enriched.

2. Joint and Several Liability Is Ill-Suited for Restitution in Possession Cases

To avoid the above risks, and to ensure that victims are fully compensated for their losses,[284] courts consistently impose joint and several liability where they find a defendant responsible for the full amount of a victim's alleged loss.[285] Like apportioning liability among defendants, however, holding a defendant jointly and severally liable for all the victim's requested loss in a child pornography possession case is also misguided.

a. Joint and Several Liability May Not Be Statutorily Authorized

The first problem with joint and several liability in cases of restitution for child pornography possession is that courts are not convinced that such liability is authorized under 18 U.S.C. § 2259 where multiple defendants are not before the same court.[286] Section 2259 provides that courts should enforce restitution orders in accordance with 18 U.S.C. § 3664(h), which allows courts to apply joint and several liability "where more than one defendant contributed to the loss of a victim." But, the Seventh Circuit has held, and the Fourth, Sixth, and D.C. Circuits have similarly noted that § 3664(h) does not apply to cases involving only one defendant.[287] Similarly, the Second Circuit and the Northern District of California have suggested that § 3364(h) implies that "joint and several

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[283] *See* United States v. Nucci, 364 F.3d 419, 422–23 (2d Cir. 2004).

[284] Some courts argue that given each defendant's relatively small share of liability coupled with the likelihood that defendants have insufficient funds, the imposition of joint and several liability is the only way to ensure that victims are made economically whole. *See* United States v. Lundquist, 847 F. Supp. 2d 364, 381 (N.D.N.Y. 2011).

[285] *See* United States v. Crandon, 173 F.3d 122, 126 n.2 (3d Cir. 1999) (finding that § 2259 does not provide for a proportionality analysis and courts should therefore apply joint and several liability to the victim's losses).

[286] United States v. Laraneta, 700 F.3d 983, 992–93 (7th Cir. 2012) (finding no statutory authorization in 18 U.S.C. § 2259(b)(2) for the imposition of joint and several liability in cases where there is only one defendant).

[287] *Id.* at 993; United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011). *United States v. Channita,* 9 F. App'x. 274, 274–75 (4th Cir. 2001) also questioned whether joint and several liability was appropriate in cases of child pornography possession, but a recent Fourth Circuit concurrence suggested that joint and several liability applies well in these circumstances where defendants acting separately have caused a single harm. *See Burgess*, 684 F.3d at 461. *But see In re* Amy Unknown, 636 F.3d 190, 201 (5th Cir. 2011) (holding that joint and several liability could be imposed for a single defendant under § 3664(m)(1)(A), which provides that a district court may enforce a restitution order "by all other available and reasonable means"), *aff'd on reh'g*, 701 F.3d 749 (5th Cir. 2012) (en banc).

liability may be imposed only when a single district judge is dealing with multiple defendants in a single case" and accordingly is not appropriate where there are different "defendants in different cases, before different judges, in different jurisdictions around the country."[288] On the other hand, the Fifth Circuit has rejected this reasoning, noting that "nothing in § 3664 forbids [the imposition of joint and several liability]" and that "the fact that it conforms well to this context supports its application."[289]

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[288] United States v. Aumais, 656 F.3d 147, 156 (2d Cir. 2011); United States v. Simon, No. CR-08-0907 DLJ, 2009 WL 2424673, at *6 (N.D. Cal. Aug. 7, 2009) ("[F]or there to be joint and several liability there must be co-defendants."). *But see In re Amy Unknown*, 636 F.3d at 201; *Lundquist*, 847 F. Supp. 2d at 380("[E]ven if the two circuit court decisions in question stand for the above-described point of law, neither of them addresses the fact that the express language of 18 U.S.C. § 3664(h) does not say whether the referenced 'defendants' *must* be in the same case before the same judge, or whether they may be in different cases before different judges. Indeed, at least four district court cases exist supporting the latter interpretation." (footnote omitted)). However, many courts find that joint and several liability is allowed under 18 U.S.C. § 2259, which directs courts to enforce restitution orders in accordance with 18 U.S.C. § 3664. Section 3364(h) provides that joint and several liability may be imposed "[i]f the court finds that more than [one] defendant has contributed to the loss of a victim . . . ." *See Lundquist*, 847 F. Supp. 2d at 381 (concluding that "18 U.S.C. § 3664 does, indeed, permit a district judge to find a defendant (appearing in a case before the judge) jointly and several liable for the losses caused by defendants in other cases, before different judges, in different jurisdictions around the country"). Where this is the case, "the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h) (2006); *see also* United States v. Wall, 349 F.3d 18, 26 (1st Cir. 2003). Additionally, Section 3664(m)'s language that a court may enforce a restitution order "by all other available and reasonable means" may provide the basis for the imposition of joint and several liability. *Lundquist*, 847 F. Supp. 2d at 381 (noting that the Fifth Circuit in *In re Amy Unknown*, found that a district court could order joint and several liability for a single defendant under U.S.C. § 3664(m)(1)(A)).

[289] *In re* Amy Unknown, 701 F.3d 749, 770 (5th Cir. 2012) (en banc); *see also In re Amy Unknown*, 636 F.3d at 201; *Lundquist*, 847 F. Supp. 2d at 380 ("[E]ven if the two circuit court decisions in question stand for the above-described point of law, neither of them addresses the fact that the express language of 18 U.S.C. § 3664(h) does not say whether the referenced 'defendants' *must* be in the same case before the same judge, or whether they may be in different cases before different judges. Indeed, at least four district court cases exist supporting the latter interpretation." (footnote omitted)). However, many courts find that joint and several liability is allowed under 18 U.S.C. § 2259, which directs courts to enforce restitution orders in accordance with 18 U.S.C. § 3664. Section 3364(h) provides that joint and several liability may be imposed "[i]f the court finds that more than [one] defendant has contributed to the loss of a victim." 18 U.S.C. § 3664(h); *see Lundquist*, 847 F. Supp. 2d. at 380. Where this is the case, "the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h); *see also Wall*, 349 F.3d at 26. Additionally, section 3664(m) may provide for the imposition of joint and several liability by holding that a court may enforce a restitution order "by all other available and reasonable means." *Lundquist*, 847 F. Supp. 2d at 381 (noting that the Fifth Circuit in *In re Amy Unknown*,

b. Joint and Several Liability Is Not Feasible for Cases with Hundreds of Unrelated Defendants

Even if the imposition of joint and several liability is statutorily authorized, its application in child pornography possession cases is ill-advised. First, the traditional rationales for joint and several liability are inapplicable to child pornography possession cases. The tort context is one of the most common realms in which courts impose joint and several liability,[290] and it is, therefore, instructive as to the underlying rationales of the doctrine.[291] In the tort context, joint and several liability is appropriate where two or more causes produce a single result and (1) "either cause would have been sufficient in itself to produce the result," or (2) each cause was "essential to the injury."[292] In the case of child pornography possession, however, one defendant's possession of the victim's image is neither necessary nor "sufficient in itself" to cause the type of injury claimed by the victim.[293] Because the victim's alleged damages in these cases result from the knowledge that every day, untold numbers of people are viewing her pornographic images, one defendant's possession alone would not be sufficient to bring about such harm; nor is that one defendant's possession essential to it.[294] Additionally, joint and several liability has recently fallen into disfavor in the tort context, and many states, recognizing the unfairness of holding minimally at-fault defendants liable for the full amount of a victim's loss,[295] have abolished joint and several liability where a defendant is less than 51% at fault.[296]

Even within the realm of criminal restitution, courts generally impose joint and several liability where multiple defendants act in concert

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found that a district court could order joint and several liability for a single defendant under U.S.C. § 3664(m)(1)(A)).

[290] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 1 (2000). Joint and several liability is also common in antitrust, ERISA, environmental, and securities cases. *See* Timothy James Stanley, *An Analysis of the Rules of Contribution and No Contribution for Joint and Several Liability in Conspiracy Cases*, 35 SANTA CLARA L. REV. 1 (1994).

[291] *See Monzel*, 641 F.3d at 535 n.5 ("Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party.").

[292] *Id.* at 538 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 347 (5th ed. 1984)).

[293] *See id.* As the Seventh Circuit noted in a recent opinion, joint and several liability may be more appropriate where a defendant is convicted of possession *and* distribution, rather than just possession. *See* United States v. Laraneta, 700 F.3d 983, 991 (7th Cir. 2012).

[294] *Id.* (quoting from Amy's victim impact statement saying "[t]he truth is, I am being exploited and used every day and every night somewhere in the world by someone").

[295] Walt Disney World Co. v. Wood, 515 So. 2d 198, 199 (Fla. 1987) (upholding imposition of liability against Disney for 86% of Plaintiff's injury even though a jury found Disney only 1% responsible).

[296] 3 STEIN ON PERSONAL INJURY DAMAGES § 19:18 (3d ed. 1997).

to harm a particular victim.[297] Therefore, even in cases where courts impose joint and several liability on defendants in different proceedings, they do so only where the defendants acted together to produce the harm alleged by the victim.[298] Here, because there is usually no conspiracy, no concerted action, and no co-defendants, joint and several liability is less appropriate.

One major exception to this general rule is joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), where multiple defendants can be liable for the full amount of a victim's loss even if they did not act to further a common goal or scheme.[299] Under CERCLA, where the harm caused is "indivisible," meaning the contributions of each defendant cannot be ascertained, the statute grants courts authority to apply joint and several liability to unrelated defendants for the full amount of a victim's loss.[300] In cases of child pornography possession, like cases under CERCLA, there is a "single indivisible harm" the victim suffers from the knowledge that her pictures are continually traded and possessed on the Internet, and multiple defendants act independently to bring about such harm. Thus, if the statute so provides, imposition of joint and several liability in child pornography possession may seem appropriate.

However, unlike in CERCLA cases, the individuals responsible for creating or perpetuating the harm in child pornography possession cases are not determinable. While the harm may be finite, meaning that the psychological costs associated with continued viewing of images can be ascertained over a lifetime, the perpetrators are not. In fact, each day authorities may identify additional perpetrators. Therefore, in addition to the burden of apportioning liability in the face of indivisible harm, defendants face the burden of ascertaining the total number of co-defendants from an interminable pool. In practice, imposing this additional burden makes the administration of joint and several liability impractical. Shifting the burden from the victim to the perpetrators to divide liability among known defendants is logical where there is no reasonable basis of apportionment. But constantly dividing and re-dividing what is a relatively set amount of harm among an indefinitely growing number of perpetrators is inoperable.

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[297] *See, e.g.*, 31A AM. JUR. 2D *Extortion, Blackmail, and Threats* § 160 (2002) ("Where the government is unable to prove how the illegal proceeds of racketeering activity have been allocated among multiple defendants, a District Court may properly impose joint and several liability on the defendants in its forfeiture order."); DiBari, *supra* note 11, at 323 (citing United States v. Martinez, 610 F.3d 1216, 1233 (10th Cir. 2010); United States v. Scott, 270 F.3d 30, 52 (1st Cir. 2001); United States v. Boyd, 222 F.3d 47, 50 (2d Cir. 2000); United States v. Donaghy, 570 F. Supp. 2d 411, 423 (E.D.N.Y. 2008)).

[298] *See, e.g.*, *Martinez*, 610 F.3d at 1233.

[299] 42 U.S.C. § 9607(e)(1) (2006).

[300] United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988).

This argument is best understood in concrete terms. At the time a victim brings a restitution claim, she will estimate a set amount of damages over her lifetime as result of the knowledge that unidentified individuals are downloading and possessing her images. This harm is predicated upon someone continuing to possess her images, but it is relatively uncoupled from the actual number of individuals who possess them. For example, barring extraordinary numbers, she is likely to experience *relatively* the same amount of harm—the psychological trauma of knowing that "people" are viewing her images—if one hundred people view her images or if one thousand people view her images.[301] Thus, the harm, as estimated, is relatively certain. However, while the harm she experiences is relatively certain, the number of persons responsible for such harm is not. Imposing joint and several liability in the present situation would require a defendant not only to seek contribution from hundreds of known—but possibly difficult to identify—current defendants in addition to hundreds to thousands of future defendants. Therefore, theoretically, if one defendant paid the full amount of a victim's restitution request, he would then be entitled to seek reimbursement from all other defendants, coordinating between perhaps thousands of past and future perpetrators.[302]

Thus, joint and several liability is practically unworkable in child pornography possession cases where large numbers of current and future defendants are responsible for the commission of the same crime and resulting harm, and where the possibility of revictimization looms indefinitely.[303] Although the purpose of joint and several liability is to shift the burden of apportionment from plaintiff to defendant, such burden-shifting is appropriate only to the extent that at the time liability is imposed the harm is complete, all damages can be ascertained, and all de-

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[301] Even if this is not true and a victim experiences substantially greater harm from the knowledge that significant numbers of individuals view her images, in obtaining her restitution award, she must estimate a set amount of harm for which all defendants will be liable. Thus, in this regard, such harm would be "determinable."

[302] United States v. Hicks, No. 1:09 cr 150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) ("However, coordination of any potential future awards to avoid unjustly enriching Vicky is unworkable, and there is no mechanism of which the Court is aware—in the U.S. Probation Service or otherwise—which is capable of managing such a scenario."). *But see* United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *9 (N.D.N.Y. Jan. 13, 2010) (finding that "[a]ny difficulty in monitoring or administering collection of multiple restitution awards to the same victim to prevent excess recovery is a matter for administration by the government" because "Amy is represented by counsel in all cases in which she has been identified as a victim and counsel could be directed by the Court to provide current information on the status of awards and collection. Individual defendants may also obtain information on other amounts collected by a victim as restitution in other cases during collection proceedings to offset what may be collected from that defendant. Accordingly, the award of restitution as to Aumais should include the entire and not an apportioned amount.").

[303] *Aumais*, 2010 WL 3033821, at *5 (finding that as of the date of the restitution hearing, Amy had sought restitution in over 250 cases around the country).

fendants are known or will soon become known. As here, where not all defendants are known and where the harm is ongoing, a defendant has virtually no chance of receiving contribution from other defendants with whom he is jointly and severally liable. Accordingly, defendants are left with the responsibility either to seek contribution from an indeterminable number of future "co-defendants" in different jurisdictions or pay more than their share of restitution.[304]

c. Joint and Several Liability May Result in Overcompensation of Victims

Furthermore, although joint and several liability is traditionally imposed to provide full compensation while also ensuring that a victim is not unjustly enriched for her losses, it may yet fail to guard against overcompensation given the unique nature of child pornography possession cases.[305] Unlike typical cases where joint and several liability applies, a child pornography victim may bring hundreds of unrelated claims for restitution over a period spanning many years.[306] Without a comprehensive oversight mechanism, it is impossible to monitor the collection of all restitution awards to ensure that the total payments do not exceed the total requested amount.[307] While courts could hold lawyers responsible for tracking the amount of awards and payments, the ongoing and overlapping nature of these cases would still require constant court oversight and frequent amendments.[308] Some person or entity would have to track hundreds of cases, ascertaining what money has been awarded, what has been paid, and what remains unsatisfied.[309] Thus, although joint and sev-

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[304] 18 AM. JUR. 2D *Contribution* § 10 (2004) (explaining that where one defendant has paid more than his share of liability, he may initiate an action for contribution from the other defendants with whom he is jointly and severally liable).

[305] *See* United States v. Kennedy, 643 F.3d 1251, 1265 (9th Cir. 2011) (finding that ordering one defendant to pay the entire amount of restitution requested would be inconsistent with the purpose of the statute to cover a victim's "actual losses").

[306] *See* United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) (noting that Amy had sought restitution in over 250 cases around the country).

[307] *But see In re* Amy Unknown, 701 F.3d 749, 770 (5th Cir. 2012) (en banc) (arguing that "[a]ny fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted" because "Section 3664 provides 'reasonable means' to defend against theoretical overcompensation that could result").

[308] The Fifth Circuit suggests that § 3664(k) provides a means for ending defendants' joint and several liability once a victim is fully compensated for her losses. *See In re Amy Unknown*, 701 F.3d at 770. However, this section, which allows for the district court "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule," requires, as I argue above, constant court oversight and frequent amendment.

[309] *Id.* at 156 ("As an initial matter, it is not entirely clear what government body, if any, is responsible for tracking payments that may involve defendants in numerous jurisdictions across the country. In addition, determining what amount [the victim] has received would entail collecting data about hundreds of cases, ascertaining what money has actually been paid, and determining what losses that money was intended to cover."). *But see* United States v. Lundquist, 847 F. Supp. 2d 364, 382 (N.D.N.Y.

eral liability is meant to solve the overcompensation problem, it likely will fail to serve this purpose in the context of child pornography possession cases.

d. Joint and Several Liability May Be Used as a Means to Evade the Proximate Cause Requirement

Finally, joint and several liability is inappropriate in the context of § 2259 because it may be used as a way to evade the requirements of proximate causation. Just as difficulties with apportioning liability may lead courts to find that there is no proximate cause between the defendant's actions and the victim's harms, joint and several liability may be a means to impose liability upon defendants without an adequate finding of proximate case. Thus, courts may turn to joint and several liability as a solution to the discomfort of satisfying the proximate cause requirement.

As discussed above, deciphering proximate causation is problematic in a context where hundreds of unrelated defendants combine to cause a single type of injury. Although some courts will use this challenge to deny restitution entirely, others may rely on the imposition of joint and several liability to "cure" proximate cause proof requirements. That is, where a court cannot conclusively determine what percentage of a victim's harm was proximately caused by a particular defendant, rather than denying restitution entirely, it may instead hold the defendant jointly and severally liable. In this way, the court can award restitution without having to engage in the difficult analysis of liability apportionment while simultaneously avoiding the imposition of full liability on one single defendant.

However, the imposition of joint and several liability is clearly inappropriate where proximate cause has not been proved.[310] As the Ninth Circuit has held, "[t]he doctrine of joint and several liability cannot be used to cure a failure of proof on the causal relation between a defendant's conduct and the victims' losses."[311] Thus, while joint and several liability may generally serve as a solution in other contexts where proving

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2011) (finding that "'any confusion about who is responsible for ensuring that Amy' does not receive a 'double recovery' during the enforcement and/or collection of a judgment against Defendant is minimized, or eliminated, by the fact that the Court hereby directs that the Government, the United States Probation Office, and Amy's representative shall fulfill that duty, which includes the duty to 'track[] payments that . . . involve defendants in numerous jurisdictions across the country.'" (quoting *Aumais*, 656 F.3d at 156)). The Fifth Circuit argues that these concerns are unfounded as victims themselves are in the best position to know what restitution they have recovered and what they have yet to receive. *See In re Amy Unknown*, 701 F.3d at 771.

[310] United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011) ("[S]o long as the requirement of proximate cause applies, as it does here, a defendant can be jointly and severally liable only for injuries that meet that requirement. *See* RESTATEMENT (SECOND) OF TORTS § 879 cmt. b (1979). Because the record does not show that Monzel proximately caused all of Amy's injuries, the district court did not clearly and indisputably err by declining to impose joint and several liability on him for the full $3,263,758 she seeks."), *cert. denied sub nom.* Amy v. Monzel, 132 S. Ct. 756 (2011).

[311] United States v. Kennedy, 643 F.3d 1251, 1265 (9th Cir. 2011).

proximate cause is difficult,[312] it is not a viable way to cure defects in proving proximate causation in child pornography possession cases.

E. Problems with Inconsistency in Court Decisions Awarding Restitution

The final problem with § 2259 as it currently exists is that whatever the outcome—not awarding restitution, ordering a partial award of restitution, ordering a full award with joint and several liability, or ordering a full award without joint and several liability—courts have too much discretion and not enough guidance in issuing restitution orders under the statute. What results is inconsistency among cases that are factually almost identical.[313]

There are two ways in which restitution awards are discretionary under § 2259. The major area of discretion involves a choice of which of the four outcomes—no restitution, partial restitution, or full restitution with or without joint and several liability—a court will order.[314] Faced with the

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[312] In *Summers v. Tice*, the plaintiff's injury was caused by the actions of two hunters, each of whom negligently fired in plaintiff's direction. 199 P.2d 1, 1 (Cal. 1948). Because the plaintiff could not prove which defendant was responsible for his injury, the court shifted the burden to each hunter to prove he was not responsible for the plaintiff's injury. *Id.* at 4.

[313] *See* United States v. Baxter, 394 F. App'x 377, 379 (9th Cir. 2010) (agreeing that there was "sufficient context to support the district court's order granting restitution in the amount of $3,000"—the cost of one and one-half years of therapy sessions—"an amount that the government suggested seem[ed] to be more than fair and reasonable for [the defendant] to pay"); United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *7–9 (N.D.N.Y. Jan. 13, 2010) (declining to hold the defendant liable for lost wages, because the Government could not show that the defendant's conduct caused loss to Amy separate from her original abuse, but awarding her $48,483 for future counseling fees because the defendant's actions contributed to her need for counseling); United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *4–5 (W.D.N.C. Jan. 12, 2010) (finding that, given the defendant's "relatively minor" contribution to the victims' losses and the difficulty in coordinating joint liability among many potential offenders, apportioning the damages was appropriate, and requiring the defendant to pay $7,500 to the two victims), *aff'd*, 393 F. App'x 76 (4th Cir. 2010); United States v. Scheidt, 1:07-CR-00293 AWI, 2010 WL 144837, at *5 (E.D. Cal. Jan. 11, 2010) (awarding $3,000 each to Vicky and Amy—an amount that is 2% of the $150,000 minimum damages amount provided in 18 U.S.C. § 2255(a), civil remedy for personal injuries caused by sexual exploitation of children—because awarding less than $3,000 would be "inconsistent with Congress's findings on the harm to children victims of child pornography"), *vacated*, 465 F. App'x 609 (9th Cir. 2012). *But see* United States v. Hardy, 707 F. Supp. 2d 597, 615 (W.D. Pa. 2010) (finding that as "§ 2259 does not provide for a proportionality analysis," joint and several liability for the full amount of any losses proved should be imposed); United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, *4 (S.D. Fla. Sept. 2, 2009) (holding the defendant jointly and severally liable for the full amount of the victim's losses).

[314] *See* United States v. Wright, 639 F.3d 679, 691 (5th Cir. 2011) ("If the court finds evidence that Wright's possession of the images was a proximate cause of Amy's losses, the court has wide discretion to craft a reasonable restitution order reflecting the losses caused by Wright.").

exact same facts, for instance, one court may find that the proximate cause requirement has not been met and deny restitution entirely, while on the other end of the spectrum another court may find the proximate cause requirement satisfied and award restitution for the full amount requested. Even within categories, there is discretion. For example, while two courts may both find that the victim satisfied the proximate cause requirement, one court may make an award for partial restitution of $3,000, while another court faced with almost identical facts may make an award for $6,000.[315]

Discretionary differences in the enforcement of rights under a statute are not necessarily cause for concern. Indeed, discretion is a natural and expected component of judicial decisions. Courts are generally well-positioned to make choices regarding the amount of restitution to award or the length of a sentence to impose, and it is the role of the court to engage in such determinations. In sentencing decisions and awards for restitution, judges are required to take into account the entire circumstances of the case and consider a variety of factors in doing so. Where inconsistencies result, courts can justify their decisions based on the multitude of differing considerations for which the decisions account. In particular, in awarding restitution, the court can focus on the distinctive factors of the victim, and in sentencing, the court can rely on the individual traits of the defendant. In both, the court may justify its decision on the specifics of the crime committed.

But in cases of child pornography possession, discretion is concerning because the relevant factors are almost identical. Unique circumstances rarely separate one case from another. In most instances, an unknown individual views a pornographic image of a child without contact with the child and without the child's knowledge that the image has been viewed. Additionally, as evidenced by the multitude of filings by Amy and Vicky, the victims in restitution cases often make similar, if not identical, requests in hundreds of cases. As a result, although the characteristics of the defendant may differ, the other relevant factors, including the details of the crime, the characteristics of the victim, the impact of the defendant's actions on the victim, and the nature of the restitution request, are the same.

In fact, for no other crimes to which § 2259 restitution applies, including engagement of sexual contact, sex trafficking of children, and the creation of sexually explicit images,[316] are so many cases so factually similar. Also, looking more broadly across the criminal landscape, there is no other factually analogous context in which multiple courts consider the exact same action by similarly situated yet unrelated defendants and

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[315] *See Brunner*, 2010 WL 148433 at *5 (awarding $1,500 to Vicky and $6,000 to Amy); United States v. Monk, No. 1:08-CR-0365 AWI, 2009 WL 2567831, at *5 (E.D. Cal. Aug. 18, 2009) (awarding $3,000 to Vicky and $3,000 to Amy).

[316] 18 U.S.C. §§ 2251–52, 2256, 2259–60 (2006).

how that action impacts a common victim.[317] Therefore, unlike other criminal cases where courts impose sentences of varying lengths or restitution in differing amounts, restitution in child pornography possession cases warrants little discretion because there are few factors that distinguish one case from another. In this context, inconsistencies are not only undesirable, they are also unjustifiable.

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[317] Liability for greenhouse gas emitters to compensate victims of climate change and global warming is one context in which scholars have begun to think about similar issues of proximate causation where thousands of small contributors combine to create one identifiable harm. *See* Matthew D. Adler, Commentary, *Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859, 1863–64 (2007). However, unlike child pornography possession, in imposing liability for greenhouse gas there is a moral collective action problem that arises because there are only bad consequences when the action (carbon emission) is taken by most members of the group. Individually, each member is morally justified in taking the particular action; in the absence of collective action, there is no harm directly traceable to an identifiable victim. Similarly here, each individual possessor causes harm in aggregate with other possessors. However, unlike greenhouse gas emission, each individual possessor also causes substantial harm to the individual whose images he views. *Id.* at 1864.

Some have also compared the liability of child pornography possessors to the liability of those who republish defamatory material. For example, the Supreme Court has likened the *distribution* of child pornography to the republication of defamatory statements whereby the republisher can be held liable to the same extent as the original publisher. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002) ("Like a defamatory statement, each new publication of the [child pornography] would cause new injury to the child's reputation and emotional well-being."). One court has used the Supreme Court's analogy to suggest that defendants who *possess* child pornography should be liable to the same extent as those who originally distribute it. *See Hardy*, 707 F. Supp. 2d at 612–13. However, other courts have found the analogy inapplicable to cases of *possession* rather than *distribution* because defendant possessors do not "distribute" or otherwise "republish" child pornography in the same way that republishers of defamatory information continue to spread the material. United States v. Chow, 760 F. Supp. 2d 335, 341 n.4 (S.D.N.Y. 2010). The law surrounding the republication of defamatory material is of little guidance in this context for a few reasons. First, as the court articulated in *Chow*, possession is distinct from distribution, therefore the law of republication is not directly applicable where the defendant possesses but does not distribute pornography. Second, there is scant defamation case law in which one plaintiff sues more than a discrete number of defendants for defamation; additionally, in most cases, the defendants are working in concert or one is republishing the work of another. There are few cases in which two parties individually and separately publish the same defamatory material. *See, e.g.*, Howe v. Bradstreet Co., 69 S.E. 1082, 1082–83 (Ga. 1911). Finally, the single publication rule, an exception for mass communications which protects defendants from multiple suits by a single plaintiff each time the mass communication reaches a new person, has been read broadly so as to hold far fewer individuals liable for republication. *See* RESTATEMENT (SECOND) OF TORTS § 577A(3) cmt. c (1977); Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639, 640 (2003).

V. REFORM

As noted above, there is considerable uncertainty and inconsistency regarding restitution in cases of child pornography possession. To solve these problems and settle the legal divide among courts across the country, the government and victims' advocates have argued that courts should interpret § 2259 without a proximate cause requirement. In the alternative, they have attempted to prove that the proximate cause requirement is always met in cases of child pornography possession. However, the wide-ranging disparities in judicial decisions demonstrate that the judiciary cannot resolve the current inconsistencies without Supreme Court intervention. It is also clear that no matter how the statute is interpreted, problems will remain.[318]

Although Congress has expressed its intent to provide child victims of sexual crimes with a means of obtaining restitution and has enacted a statute solely for this purpose, the current statutory framework is insufficient with regard to child pornography possession.[319] In order to remedy the inconsistent and contradictory restitution awards and to ensure that the goals of victim compensation, perpetrator punishment, and fairness for defendants are met, Congress must intervene.[320] What follows are two different proposals for providing a practical solution to remedying the

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[318] Even if courts awarded mandatory restitution without a showing of a causal connection, they would not have a set method for determining restitution amounts, and there would be inconsistency regarding whether recovery would be joint and several.

[319] United States v. Solsbury, 727 F. Supp. 2d 789, 796 (D.N.D. 2010) ("For more than 30 years Congress has focused attention on the scope of child pornography offenses and the severity of penalties for offenders. By creating new offenses, enacting new mandatory minimums, increasing statutory maximums, and providing directives to the United States Sentencing Commission, Congress has expressed its will regarding appropriate penalties for child pornography offenders."). As the Supreme Court has held, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." New York v. Ferber, 458 U.S. 747, 757 (1982).

[320] *In re* Amy Unknown, 701 F.3d 749, 780–81 (5th Cir. 2012) (en banc) (Southwick, J. dissenting) ("We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress 'to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses.'" (quoting United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011)); United States v. Burgess, 684 F.3d 445, 460 (4th Cir. 2012) ("We are confident in the skill of the district judges throughout this circuit to ascertain the appropriate amount of restitution in a given case. Nevertheless, we are mindful of the challenges posed in the determination of damages under the restitution statute. Accordingly, we add our voice to that of the Ninth Circuit in *Kennedy* in requesting that Congress reevaluate the structure of the restitution statute in light of the challenges presented by the calculations of loss to victims in the internet age."); *Solsbury*, 727 F. Supp. 2d at 796; *Chow*, 760 F. Supp. 2d at 343–45 ("[T]he Court is limited by the statute as it currently exists, and leaves to those responsible for policy-making to consider such options.").

currently unworkable provisions of 18 U.S.C. § 2259 as they pertain to cases of child pornography possession.

A. Summary of Reform

As a policy consideration, whether restitution should be awarded for victims of child pornography from the possessors of that pornography is beyond the scope of this Article. However, a brief survey of Congress's intent in enacting the various victims' restitution statutes and a review of judicial opinions suggests that both Congress and the courts believe that restitution for victims of child pornography is warranted even in cases where an individual possesses but does not produce the pornography.

Congress has explicitly expressed a broad desire to award restitution to victims of crime generally and to child victims of crimes of sexual exploitation more specifically. For example, in enacting the VWPA in 1982, Congress recognized that the criminal justice system and society as a whole benefit from restitution awards designed to make a victim whole.[321] Congress further evidenced its desire for victims of child pornography to receive restitution by mandating restitution for defendants convicted of child exploitation offenses.[322]

Courts have also expressed a preference for awarding restitution in child pornography possession cases. As noted above, the Supreme Court itself has recognized the detrimental impact of the continued possession of child pornography on the victims whose images are portrayed.[323] Lower courts convey a similar sentiment.[324] Even in cases denying restitution, lower courts frequently express sympathy for victims of child pornography and a desire that they receive restitution payments.[325]

This proposal is, therefore, grounded in the premise that restitution is both a desired and necessary component of compensating victims of child pornography possession, and that the current law, however interpreted, is insufficient to provide such compensation. Thus, as a first step in resolving the current judicial debate regarding proximate causation and the amount of appropriate restitution, Congress should specifically exempt child pornography possession cases from the purview of covered

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[321] Lewis, *supra* note 11, at 421.

[322] *Id.*

[323] *Ferber*, 458 U.S. at 759.

[324] *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 785 (E.D. Tex. 2009).

[325] *See, e.g.*, United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) ("Until Congress makes such a change, we remain bound by the language of the statute and our precedent. Because the district court's restitution order directed Kennedy to pay for losses that the government did not prove were proximately caused by his offense, the order was unlawful under § 2259 and must be vacated."). However, courts also note that their sympathy cannot override their obligation to faithfully apply and abide by the statute. Accordingly, it is the responsibility of Congress, not courts, to evaluate whether § 2259 best serves its policy goal to compensate victims of child pornography. *Id.*

acts in the Mandatory Restitution Provision of § 2259 and instead enact a special statute that specifically addresses the complexities and nuances of child pornography possession.

There are two possible approaches to further developing a workable framework within which to administer restitution for victims of child pornography from the individuals who possess their images. Both address the most relevant critique of the current system: that there is too much uncertainty and inconsistency among awards and denials of restitution.[326] However, both approaches also seek to address the additional concerns of providing proper victim compensation while also ensuring fair outcomes for defendants.

The primary component of both of these proposed approaches is a standard restitution matrix for determining damages that provides courts with a set of guidelines under which they can require defendants to make payments. These guidelines, similar to the sentencing guidelines, should establish a maximum and minimum value for the images viewed while also allowing judges discretion to deviate based on aggravating or mitigating circumstances. Using this schedule as a starting point, Congress could then either require restitution to be made to individual victims under a relaxed proximate cause standard, or eliminate the proximate cause standard entirely and require possessors of child pornography to pay mandatory fines to a common victim compensation fund.

B. Proposal

1. Proposal Foundation: Restitution Guidelines

The central foundation of a new restitution scheme relies upon developing a system to ensure that defendant possessors of child pornography pay restitution that is tied in some logical way to their actions while at the same time ensuring the imposition of fair and consistent awards of restitution around the country. Almost 30 years ago, Congress faced a similar consideration in evaluating the disparities in the imposition of criminal sentences.[327] In an effort to impose fairness and uniformity, Congress passed the Sentencing Reform Act, which requires the United States Sentencing Commission to establish guidelines for federal district courts to use in determining the length and nature of sentences for federal defendants.[328]

Like the sentencing guidelines, guidelines for imposing restitution in cases of child pornography possession could provide guidance to

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[326] Discretion within restitution awards leads to uncertain results for victims and unjust results for defendants.

[327] Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 206 (1993) ("Congress passed the [Sentencing Reform Act] with the primary purposes of decreasing unwarranted sentencing disparity [and] increasing sentencing uniformity and certainty.").

[328] *Id.* at 207.

courts in fashioning restitution amounts and promote uniformity among restitution awards. In fact, guidelines are especially appropriate in the context of child pornography possession cases because such cases are more uniform than other types of criminal cases, with few aggravating or mitigating factors to consider.

In determining what factors to consider in developing the guidelines, Congress should focus on restitution's dual purpose of retribution and rehabilitation.[329] The guidelines should reflect this dual purpose by accounting for both how severely a defendant should be punished for the crime he committed and how significantly the defendant has aggravated the victim's harms.

The guidelines calculation of restitution should begin with a base level value for the number of images viewed.[330] Although some argue that possessors, even in the sentencing context, should not be more strictly penalized for possession of a greater number of images,[331] tying restitution to the number of images possessed is logical.[332] First, basing restitution initially on the number of images provides courts with a good starting point from which to assess award amounts. More importantly, a larger number of images compounds both the severity of the crime committed and the potential harm to the victim.[333] Possessing a larger number of im-

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[329] *Compare* United States v. Rostoff, 164 F.3d 63, 71 (1st Cir. 1999) ("The nature of restitution is penal and not compensatory."), *with* United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) ("[T]he purpose of restitution is essentially compensatory: to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury."). *See also* United States v. Edwards, 162 F.3d 87, 92 (3d Cir. 1998) ("[W]hile criminal restitution resembles a civil remedy and has compensatory as well as punitive aspects, neither these resemblances to civil judgments, nor the compensatory purposes of criminal restitution, detract from its status as a form of criminal penalty when imposed as an integral part of sentencing.").

[330] *See* United States v. Solsbury, 727 F. Supp. 2d 789, 796 n.1 (D.N.D. 2010) ("For example, Congress could consider establishing a restitution schedule in the Sentencing Guidelines under U.S.S.G. § 5E1.1 for child pornography offenses. A restitution schedule or table could be structured similar to the fine schedule for individual defendants under U.S.S.G. § 5E1.2. There could be a minimum and maximum restitution award established based upon the offense level and/or the number of images involved."). Attorneys have advocated this position in seeking restitution for Amy and Vicky. Government's Motion, *supra* note 75 at 13–14 (arguing that the court could assess damages by assigning the minimum statutory amount of $150,000 and multiplying that by the number of images viewed).

[331] Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, 39–43 (2010), http://jolt.richmond.edu/v16i3/article8.pdf.

[332] Robert M. Sieg, *Attempted Possession of Child Pornography—A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263, 268–71 (2005).

[333] Several states, for example, increase criminal sentences based on the number of images a defendant possesses. *See, e.g.*, ALASKA STAT. § 11.61.127(c) (2010); CONN. GEN. STAT. ANN. § 53a-196f (West 2007); FLA. STAT. ANN. § 827.071(5)(a) (West 2011); UTAH CODE ANN. § 76-5a-3(3) (LexisNexis 2008). In addition, the federal

ages, for example, evidences less respect for the law and greater disregard of it.[334] It also more significantly invades a victim's privacy and furthers her trauma, making her more recognizable to the possessor and creating a higher demand for her images.[335]

After calculating a base restitution amount, courts should next consider aggravating and mitigating factors. Like the initial calculation, in considering factors that may enhance or decrease the value of an award, the guidelines should direct courts to consider those factors that are more likely to cause psychological and emotional trauma to victims and factors that will subject the defendant to greater criminal liability. Thus, the most significant enhancements should be for factors that contribute to possessor culpability and victim trauma, whether unique characteristics of the offender, the crime, or the victim.

For instance, judges should have discretion to consider the characteristics of the defendant and the defendant's crime, such as the means by which the defendant acquired the images and how the images were stored. Aggravating factors could include: possessing images through a system of image-sharing,[336] storing images on a peer-to-peer network, and contacting or attempting to contact a victim.[337] If images are downloaded from or saved through a peer-to-peer network, for example, greater restitution should be imposed because such transmittal and storage contributes to and perpetuates the existence of child pornography worldwide.[338] Such collections of pornography are also used by offenders to "normalize" and elicit support for their behavior.[339]

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sentencing guidelines also provide for a sentencing increase for greater numbers of images. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2012).

[334] *See* Sieg, *supra* note 332, at 270.

[335] *See, e.g.*, Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 862 (2008) ("[T]he possessor causes actual harm because re-publication inflicts shame and humiliation upon the child depicted.").

[336] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2 (b)(6) (providing for a sentencing enhancement for offenses involving the use of a computer); *see also* United States v. Solsbury, 727 F. Supp. 2d 789, 796 (D.N.D. 2010) (focusing on whether the defendant distributed or produced the images, contributed to blogs or chat rooms, or attempted to contact the victim).

[337] But note that this may be a separate criminal offense, so enhancing restitution for possession on this ground may not be applicable. *See Solsbury*, 727 F. Supp. 2d at 796. Moreover, some may argue that storage on a peer-to-peer network is so ubiquitous in cases of child pornography possession that it may not make sense as an "aggravating" factor. Instead, lack of file sharing on a peer-to-peer network could be used as a mitigating factor.

[338] United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (finding that a defendant freely allowing others to access his computerized stash of child pornography images and videos openly invited other individuals to take or download such images). Since 2009, police have identified approximately 22 million public I.P. addresses worldwide providing access to child pornography through peer-to-peer file sharing. Bazelon, *supra* note 75.

[339] James R. Marsh, *Masha's Law: A Federal Civil Remedy for Child Pornography Victims*, 61 SYRACUSE L. REV. 459, 460 (2011).

Judges should also have discretion to consider specific characteristics of the victim, including the victim's age and the type of abuse inflicted. As an example, the guidelines should provide enhancements for particularly explicit images depicting children engaged in sexually graphic or violent acts.[340] As witnesses to the acts viewed, possessors who view violent and sexually explicit content evidence a greater disregard for children and their safety; such viewing is also likely to be more traumatic to victims. Judges should also, in some circumstances,[341] have discretion to enhance or reduce restitution awards based on specific evidence that a particular victim suffers greater or lesser psychological, emotional, or economic harm than the standard level of harm for which the guidelines are intended to compensate.[342]

As it stands now, victims of child sexual exploitation often have multiple layers of victimization.[343] Separating out one layer from another is a job for which courts are not well-situated, especially in the absence of congressional direction. Restitution awards based on a set of guidelines, rather than on one judge's interpretation of § 2259, however, will help ensure that restitution awards are not arbitrary calculations, but rather are grounded in thoughtful congressional consideration of how closely a defendant's actions are tied to a victim's harm, or how culpable a defendant is in the charged offense. Such guidelines will, therefore, promote uniformity, protect criminal defendants, and ensure victim compensation.

2. Proposal One: Restitution to Individual Victims Ordered upon a Showing of a Clarified and Relaxed Proximate Cause Requirement

After Congress develops guidelines for restitution values, it has two viable options for determining how courts should dispense the funds. Courts can either order restitution payments paid directly to the victim, or, courts can order defendants to make payments to a general victims' compensation fund. The first option recognizes that victim restitution

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[340] WOLAK ET AL., *supra* note 12, at 27 (finding that 21% of child pornography possessors had images containing some form of sexual violence).

[341] The specific psychological, emotional, or economic loss of a particular victim should only be considered as an aggravating or mitigating factor if restitution is sought by and paid directly to the victim (Proposal One). If fines are paid to a common fund (Proposal Two), the judicial determination of each individual's suffering is unnecessary. Rather, determinations about how much each victim should receive in compensation can be made by the fund administering the monies.

[342] Because the primary purpose of these guidelines is to ensure that victims receive compensation while also standardizing awards of restitution, such guidelines should seek to compensate victims based upon a calculation of an average amount of loss suffered. However, in certain circumstances, where funds are paid directly to a victim and the victim can show that she sustained an extraordinary amount of loss, the court should take into account individualized considerations regarding how severely the victim is traumatized by the possessor's conduct.

[343] *See, e.g.*, Melinda Smith & Jeanne Segal, *Child Abuse and Neglect: Recognizing and Preventing Child Abuse*, HELPGUIDE.ORG, http://www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm.

serves a unique purpose when it is paid to a victim directly and can account for a variety of losses from psychological counseling to lost income. But this option requires Congress to clarify that only a lesser showing of proximate causation is necessary for restitution in cases of child pornography possession.

Given that courts have adopted a variety of standards for determining whether the proximate cause requirement is met in cases of possession, there are clearly many reasonable options from which to choose in fashioning an appropriate award. Under the strictest proximate cause requirement as it has been interpreted, which more closely resembles an actual cause rather than proximate cause requirement, victims would be required to prove that the defendant's conduct directly harmed them, and that, but for the defendant's possession, this harm would not have occurred.[344] Under the most relaxed standard, the determination of whether a defendant's conduct is the proximate cause of the victim's alleged loss is a mere recitation of the question of whether an individual is a "victim" as defined by the statute.[345] Under this conception, victims need only show that they have been harmed in order to recover.

As seen from the above cases, the strictest conception of proximate causation results in continued denials of restitution awards.[346] On the other hand, the most relaxed standard requires only a showing of harm, and is, therefore, not instructive in analyzing whether the defendant's conduct *produced* the alleged damage. Even an intermediate standard, between actual cause and harm-proven, has not been clearly defined by courts, and thus results in denials of restitution in some instances and awards in varying degrees in others.

Accordingly, I advocate adopting a basic and clearly articulated intermediate standard that requires the victim to show that she has been harmed *because* of the continued viewing of her images, and that such harm is *separate and distinct* from the harm she suffers because of the production of the pornography, but does not require that she prove she has specific knowledge of a particular defendant's possession[347] or that she can quantify the loss attributable to a defendant as separate and distinct

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[344] *See, e.g.*, United States v. Paroline, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009); United States v. Berk, 666 F. Supp. 2d 182, 190 (D. Me. 2009).

[345] *See In re* Amy Unknown, 701 F.3d 749, 773 (5th Cir. 2012) (en banc) (noting that there are two steps for awarding restitution: first determining whether a person is a victim under § 2259 and second ascertaining the victim's full amount of loss).

[346] In these instances, courts generally find that the defendant is not a cause of the victim's harms because even in the defendant's absence, the victim would still be harmed by the aggregate actions of other possessor defendants.

[347] This requirement allows prosecutors to inform a victim representative about defendant possessors so that the representative may seek restitution on the victim's behalf without having to inform the victim herself each time a defendant possesses her images.

from the loss attributable to other possessor defendants.[348] Such a standard still conditions recovery on a showing that the victim's losses are, in part, proximately caused by the defendant's actions but also recognizes that the harm resulting from child pornography possession is an aggregate of all viewers possessing these images.[349] This level of causal foundation will be operable but will also serve restitution's goals of deterrence and punishment.

The primary benefit of adopting this intermediate causation standard, apart from clarity, is that it connects the defendant's actions to the victim's losses. Some argue that Congress should amend the statute to dispose of the proximate cause requirement entirely.[350] However, an idea central to the concept of criminal restitution is that the victim be compensated only for such losses that are caused by the defendant's actions.[351] In *Hughey v. United States*, for example, the Supreme Court found that restitution should be ordered "only for the loss caused by the specific conduct that is the basis of the offense of conviction."[352] Where the restitution award does not closely track the offense of conviction, there is reversible error.[353]

Thus, due process considerations dictate that defendants deserve an individualized inquiry into the nature of their crimes such that awards of restitution do not become mere arbitrary numbers.[354] Similarly, victims have a right to have restitution tied to the crimes committed in order to

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[348] See, for example, the "collective causation" theory articulated by the First and Fourth Circuits in *United States v. Kearney*, 672 F.3d 81, 98–99 (1st Cir. 2012), and *United States v. Burgess*, 684 F.3d 445, 459–60 (4th Cir. 2012), and advocated by the dissent in *In re Amy Unknown*, 701 F.3d at 778 (Davis, J., concurring in part and dissenting in part) ("Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." (quoting *Kearney*, 672 F.3d at 98) (internal quotation marks omitted)).

[349] Typically we think of a proximate cause requirement serving a gatekeeping function, separating cases that should be compensated from those that should not. However, there are also several non-gatekeeping functions the proximate cause requirement serves, such as satisfying due process concerns and demonstrating to defendants and victims that the conduct is tied to the harm—which could have deterrence/rehabilitation value. Thus, I advocate maintaining some form of proximate cause not only to weed out "bad cases" but also to serve these other functions.

[350] *See, e.g.*, Boe, *supra* note 11, at 227.

[351] *See, e.g.*, United States v. Henoud, 81 F.3d 484, 488 (4th Cir. 1996) ("A proper restitution award must be limited to the losses caused by the specific conduct of which the defendant is convicted.").

[352] Hughey v. United States, 495 U.S. 411, 413 (1990).

[353] United States v. Batson, 608 F.3d 630, 637 (9th Cir. 2010) ("[T]he district court erred in ordering restitution in excess of that resulting from the offense of conviction.").

[354] United States v. Berk, 666 F. Supp. 2d 182, 192 n.10 (D. Me. 2009) ("[R]estitution has the potential to become indistinguishable from a fine—with the only difference being the payee.").

serve the important retributive purpose of making the victim "whole" by holding the defendant accountable for his direct actions. Thus, victims are entitled to an award that compensates them for their loss and attempts to make them whole, while defendants are entitled to an award that reflects their crime.

This causation requirement is also logical on an individual level. Disconnecting an award of restitution from a causation requirement distances both the defendant and the victim from that award, removing the defendant's sense of personal responsibility and reducing a victim's sense that such an award is intended to provide redress for her damage.[355] Requiring causation, even under a more relaxed standard, gives defendants and victims a sense that the award is connected to the crime committed.

Still, this standard poses challenges for ensuring that victims are not overcompensated for their losses. While the proposed restitution guidelines would provide parameters to judges in calculating restitution and would standardize awards, awarding restitution directly to the victim does not provide a means for addressing the problems courts have tried to solve with the imposition of joint and several liability, which is to ensure that victims are not overcompensated for their losses. This challenge is not fatal to this proposed system—lawyers could be required to track the amount of awards received and to subtract this from their overall amount requested—but it is a concern that must be highlighted at its inception.

3. Proposal Two: Fines Levied to a Common Fund

The second option is to dispense of the proximate cause requirement entirely through the establishment of a general victims' compensation fund. Although eliminating the proximate cause requirement raises concerns as to providing a just outcome for defendants and fashioning an appropriately compensatory award for victims,[356] such a system would be justified if Congress provided that possessors of child pornography pay restitution fines to a common victims' compensation fund rather than to victims directly.[357]

Eliminating the proximate cause requirement may simplify requests for restitution in cases of child pornography possession. The only logical way to circumvent the proximate cause requirement without violating notions of fairness and proportionality, however, is to cast required payments as fines, designed to compensate society for a debt owed by the defendant, rather than as restitution for victims, designed to compensate

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[355] DiBari, *supra* note 11, at 311.

[356] There are also concerns with limiting liability for crimes. While many argue that policing the causation requirement is the only way to ensure that there are rational and reasonable limits upon restitution awards against defendants, *id.* at 317–18, the sentencing guidelines solve this problem. Further concerns with the award of restitution closely tracking the defendant's conduct will be solved by the establishment of sentencing guidelines.

[357] *See An Adult Offender's Guide to Restitution*, CAL. ST. DEP'T CORR. & REHAB. (Apr. 2007), http://www.cdcr.ca.gov/victim_services/docs/Adult_Offender_Guide.pdf.

individuals for wrongs done directly to them. For example, a compensatory fine, unlike an order of restitution to a victim, does not rely upon a direct link between the defendant's conduct and the harm alleged. Rather, it relies on more generalized findings of how the defendant's actions harm victims and society as a whole. As such, it need not account for the victim's harm in the same quantitative way as an award designed to remedy direct losses suffered.

Currently, every state has a crime victim compensation program that serves to assist those who have been victims of violent crimes in obtaining financial assistance.[358] In fact, approximately $500 million is paid each year to over 200,000 victims from these compensation programs.[359] Similar to these general crime victim compensation funds, Congress could establish a specific compensation fund for victims of child pornography offenses.[360] Such a national fund could serve the role of collecting fines and distributing funds to victims for treatment, counseling, and economic losses.[361] Within this fund, any additional money not directly dispersed to victims could aid in general education about child pornography or child abuse prevention.

There are many potential benefits to a fine-based fund approach to restitution in cases of child pornography possession, beyond disposing of the proximate cause requirement. The first is that a fund would prevent speculative damages and overcompensation. Because a fund system would reimburse victims for costs associated with the possession of their pornographic images, it would compensate for present expenses actually incurred rather than uncertain future damages.[362] Moreover, reimbursement would protect against overcompensation, ensuring that once victims have been fully indemnified for their harm (i.e., the harm and its effects had either ceased or been compensated), payments would terminate. And because a fund would rely on defendants paying fines to a center rather than directly to victims themselves, courts could avoid the administrative hassles of coordinating restitution awards.

A fund would also address restitution opponents' criticisms regarding the purpose of restitution payments and the risk of commodifying a victim's harm. Relying on reimbursement rather than direct payment, a fund would alleviate concerns that victims might use com-

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[358] Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1192 (2011) (citing *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., http://www.nacvcb.org/index.asp?bid=14).

[359] *Id.*

[360] *See* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011).

[361] *See* United States v. Solsbury, 727 F. Supp. 2d 789, 796 n.1 (D.N.D. 2010); *see also* United States v. Paroline, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009).

[362] If money is limited, the fund could also prioritize compensable harm, i.e., first compensating individuals for physical and psychological harms and then later compensating for costs such as child care.

pensation for non-rehabilitative purposes other than those for which it was intended.[363] A fund would also resolve the concern that paying victims for others' possession of their images commodifies their sexual abuse.[364] Unlike restitution paid directly to a victim, which some liken to a nominal fee paid to women by the viewers of their sexual acts,[365] a reimbursement fund would compensate for actual and identifiable loss in a way that is explicitly aligned with restitution's goal to make a victim whole.

Finally, a fund would require defendant possessors to compensate victims even in the absence of victim identification. Even where victims are known, it would allow prosecutors to proceed with cases without continual victim notification. Although the National Center for Missing and Exploited Children's Child Victim Identification Program seeks to assist law enforcement in locating unidentified victims of child pornography,[366] in many possession cases, the government struggles to locate victims. This task is especially difficult on the Internet where anonymity masks the identity of child pornography producers, distributors, and possessors, as well as the children they abuse. Thus, the government does not currently seek restitution in all cases of child pornography possession; rather, it does so only where it has clearly identified and contacted a victim and the victim wishes to proceed with a restitution request. Requiring a fine even in the absence of an immediately identifiable victim will hold all possessors equally accountable for their crimes, removing the possibility that offenders can escape liability because the government cannot ascertain victim identities. It would also provide a greater availability of funds for child pornography victims.[367]

In the many instances where the government identifies and locates children, however, a national fund could alleviate the government's responsibility to notify a victim *every* time her image is viewed. Currently, as part of the Crime Victims Rights Act of 2004 ("CVRA"), 18 U.S.C. § 3771, crime victims have the right "to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime," the right to "be reasonably heard at any public proceeding" in-

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[363] *See* Bazelon, *supra* note 75 (discussing how Amy has given some of her restitution money to friends and family to help pay for items such as new kitchen cabinets and a deck). Given these expenditures, some may argue that restitution is not currently used for its intended rehabilitative purposes. However, as compensation for lost wages, victims are entitled to spend restitution money as they would spend a salary.

[364] *See* Lollar, *supra* note 11 (manuscript at 34–39) (arguing that the current system of restitution commodifies victims' pornographic images and their loss of innocence and sexuality).

[365] *See, e.g.*, *id.* at 35–36.

[366] *Child Victim Identification Program (CVIP)*, NAT'L CENTER FOR MISSING AND EXPLOITED CHILD., http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444.

[367] Under this system, later-identified victims could also access funds even after the defendants who possess their images have been convicted and have paid.

volving release, plea, sentencing, or parole, and "[t]he right to full and timely restitution as provided in law."[368] Additionally, the statute requires the government to use its best efforts to notify crime victims of their rights afforded by the act.[369] Per this Act, as of 2009, Amy had received more than 800 governmental notices regarding defendants' possession of her pornographic images.[370]

However, alerting victims to a defendant's possession of their images can be unnerving and traumatic. While knowledge might be therapeutic for some victims, for many, the knowledge that their images continue to circulate out of their control is disturbing and leads to further paranoia and psychological damage.[371] Vicky's psychologist, for example, reports that Vicky receives "thousands of notification letters telling her of new cases in which additional defendants have been caught downloading the images of her sexual abuse" and her psychological harm is "exponentially and repetitively reactivated" by the approximately two to ten letters she receives daily.[372] Although psychologically detrimental, currently these notices are essentially a prerequisite to receiving restitution. With a common fund, victims could opt-out of receiving notices yet still receive reimbursement for psychological and counseling services through the national center as victims of child sexual exploitation and pornography.[373]

Like the first proposal, there are issues with a fine-based fund approach to compensating victims of child pornography possession. First, a national fund could present administrative challenges in determining: (1) what requirements a victim must satisfy in order to access reimbursement; (2) what the process for reimbursement entails; and (3) how the fund apportions limited resources between victims. Second, because a victim's compensation would derive from a fund and not from a defendant, the rehabilitative psychological benefits of restitution, in terms of making a victim feel directly compensated by the person who ag-

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[368] 18 U.S.C. § 3771(a) (2006); *see also* Office for Victims of Crime, *Attorney General Guidelines for Victim and Witness Assistance*, U.S. DEP'T JUST. 20 (May 2005), http://www.justice.gov/archive/olp/pdf/ag_guidelines.pdf (explaining the victim notification process).

[369] 18 U.S.C. § 3771(c)(1).

[370] Schwartz, *supra* note 55.

[371] *See, e.g.*, United States v. Woods, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010) ("I learn about each [defendant] because of the Victim Notices. I have a right to know who has the pictures of me. The Notice puts [a] name on the fear that I already had and also adds to it. When I learn about one 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 it.").

[372] Government's Motion, *supra* note 75 at 5–6.

[373] The first step of this process would entail creating a searchable index for victims to access with information regarding whether their images had been viewed. In this way, law enforcement can satisfy the requirement to "notify" victims without requiring victims to receive notices each time an image is viewed.

grieved her, might be diminished.[374] But this drawback is more theoretical than practical. Although, theoretically, society, not the individual, is the victim in a fine-based scheme, in practice, a fine would serve a substantially similar purpose to compensate an individual victim for harm incurred.

Finally, within a fine-based fund scheme, victims of child pornography would not receive monetary damages for lost income as a result of the possession of their images. Currently, under § 2259, victims may seek restitution for medical services, physical and occupational therapy, necessary transportation, temporary housing, child care expenses, lost income, and attorneys' fees. Under a fine-based fund system, victims would still be reimbursed for costs expended for physical, psychiatric, and psychological care, therapy, and rehabilitation. However, because lost wages are speculative, they would be administratively impracticable to estimate and provide in this context.[375]

C. Problems Solved by a New System

There are at least two viable possibilities for reforming the current restitution system as it pertains to child pornography possession, both of which rely on a standardized system for valuing the amount criminal defendants should be required to pay in the form of restitution. Although these approaches have their benefits and drawbacks, each is substantially superior to the current system in providing accessible and achievable rehabilitation to victims and protection for defendants' rights.

1. Clarification of Current Law

The primary benefit of the above-described proposals is the clarity they provide in determining awards of restitution. As the law is currently applied, judges' two primary concerns with restitution awards in cases of child pornography possession are the proximate cause requirement and the discretionary and often arbitrary nature of award calculations.[376] The above proposals address both of these issues, providing clarification with regard to the proximate causation requirement and providing guidelines for the imposition of restitution awards.

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[374] However, this concern may be less prominent in child pornography possession cases where the harm comes not from the uniqueness of the individual possessor but rather from the knowledge that "people" possess these images. Therefore, identity-based rehabilitative effects may be less salient in this context.

[375] Attorneys' fees for victim representation would be unlikely as victims would no longer need representation because the government would seek payment from defendants in every case. Depending on the fund's capital, it might also be financially unrealistic to provide victims with compensation for lost income.

[376] *See* United States v. Paroline, 672 F. Supp. 2d 781, 787 & n.7, 790 (E.D. Tex. 2009) (struggling with how to determine whether an individual is entitled to restitution under Section 2259, how the restitution amount will be determined, how the court will apportion liability among defendants, and how double recovery would be avoided).

2. Protection of Victims

Another important benefit of the above-described proposals is the ease with which both allow victims to access monetary payments to compensate them for the losses suffered as a result of individuals viewing their pornographic images. Some scholars argue that criminal restitution is not the proper vehicle through which victims of child pornography possession should vindicate their rights.[377] Advocates for alternative means of recovery argue that tort and civil restitution[378] may provide victims with a better remedy that is more uniquely tailored to redressing their harm than the restitution offered under § 2259.[379] However, criminal restitution proceedings are much less rigorous for victims than a full-fledged civil suit. In fact, part of the appeal of criminal restitution is that the government is able to assist victims in bringing claims, sparing victims the time-consuming, expensive, and often emotionally taxing burden of doing so.[380] The above proposals allow victims to continue accessing restitution payments within the criminal justice realm without relegating their claims to unnecessary tort or civil restitution actions.

Both proposals also allow for victims to take a less active role in overseeing the prosecution of individuals who possess their images. As discussed above, this fine-based scheme has no requirement that a victim be aware of a defendant's possession of her images; she may seek counseling and psychological services for the trauma resulting from the circulation of her pornographic images even without a showing that she is aware of individuals who view them. The relaxed proximate cause standard similarly allows victims a less substantial role in seeking restitution. While a victim must have some individual, likely an appointed attorney, who receives notices of victimization and can request restitution on her behalf, the relaxed proximate cause requirement allows her to receive restitution absent a showing that she is aware of every individual defendant's possession of her images.

The issuance of smaller restitution awards may also benefit victims by providing a greater incentive for criminal defendants to pay such

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[377] *See, e.g.*, Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1356 (2011).

[378] Some argue that restitution is unnecessary from possessors of child pornography because individuals can seek payment from their direct abusers. *Id.* at 1343. However, as seen from Amy and Vicky and as is common in situations where individuals seek a vindication of rights through the tort system, defendants are often insolvent and seeking awards can be time-consuming and costly.

[379] *Id.* at 1356 (maintaining an argument for victims of child pornography to bring claims against their possessors as intentional or negligent infliction of emotional distress or a civil claim for restitution).

[380] Some argue that because of their limited involvement in the criminal process, tort proceedings may be more advantageous to victims. However, this neglects to account for the emotional impact such a trial makes on victims and Congress's explicit direction in § 3664 that victims not be required to take part in the restitution proceedings.

amounts. Currently, over 85% of federal criminal defendants are indigent at the time of their arrest.[381] As a result, restitution awards often go unsatisfied.[382] Child pornography possessors, however, are frequently otherwise law-abiding, employed, and contributing members of society. Notably, 73% of child pornography possessors hold full-time jobs: 41% make between $20,000 and $50,000 annually, and 27% make over $50,000 annually.[383] Even though these individuals are not earning salaries while serving often lengthy prison terms, their higher earning power suggests they have greater available resources with which to satisfy awards prior to incarceration, and are, therefore, a viable subset of defendants from which to seek restitution payments.

Where such payments are not grounded in set standards and are astronomically high, however, defendants are less likely to be able to satisfy the full amount and will have less incentive to do so.[384] For instance, when faced with seemingly arbitrary and high awards of restitution, defendants may have little motivation to make more money than is necessary to survive and may also feel victimized by the criminal justice process. Similarly, victims may develop expectations that they will be fully compensated, only to suffer disappointment and dissatisfaction with the rehabilitative process. Ultimately, both defendants and victims feel mistreated. These proposed guidelines can help alleviate these outcomes, by imposing smaller and more standardized amounts that defendants will be more likely to satisfy.

3. Protection of Criminal Defendants

The proposals outlined in this Article also provide protection for defendants. As discussed above, the proposed solutions provide concrete parameters for judges to use in fashioning restitution awards. Such guidelines give defendants a framework for anticipating the value of sanctions they may face prior to the commission of their crime, and ensure that criminal defendants are treated fairly, both individually and in relation to other similarly situated individuals.

The restitution guidelines also ensure that restitution awards levied against defendants do not violate the Eighth Amendment. Because restitution is not only a mechanism to make the victim whole but also part of

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[381] Jacques, *supra* note 358, at 1195.

[382] "Since the MVRA was passed, federal criminal debt has increased from $6 billion in 1996 to $50 billion in 2007, with 80% of the increase due to uncollected restitution orders." *Id.*; *see also* United States v. Faxon, 689 F. Supp. 2d 1344, 1354 (S.D. Fla. 2010) ("The Defendant confirmed that he is serving a fourteen year sentence and does not know what he will do when he gets out of prison. He has no savings or any other monies with which to pay any restitution.").

[383] WOLAK ET AL., *supra* note 12, at 2–3 tbl.1.

[384] *See* Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1701 (2009) (evaluating reasons individuals may be less motivated to pay restitution awards).

the punishment conferred upon the defendant,[385] restitution must also be analyzed under the Eighth Amendment to ensure that it is not an excessive fine and does not constitute cruel and unusual punishment.[386] In analyzing whether an award of restitution is an excessive fine, the Supreme Court has held that the standard is whether the award is not grossly disproportionate to the crime.[387] Furthermore, the Ninth Circuit has held that where the amount of the award is equal to the harm caused by the defendant, an award will not be excessive.[388] Arguments claiming that awards are disproportionate to the crime are rarely successful.[389] And the Supreme Court has not clearly articulated a standard for determining whether a restitution award is cruel and unusual.[390] However, a plurality of the Court has suggested courts must determine whether the restitution is within the prevailing standards of societal decency.[391]

Whether an award of $3 million dollars is grossly disproportional to possession of six images of child pornography is still an open question.[392] However, carefully crafted congressional guidelines that are similarly applied to every case of child pornography possession will not only protect criminal defendants from outlandish award values but will also ensure that such awards are less likely to violate a defendant's constitutional rights.

Conclusion

The United States has a substantial interest in stemming the production and possession of child pornography. Currently, the market for child pornography is expansive, as demand for pornographic images of children grows and child pornography becomes one of the fastest growing Internet industries.[393] Lawmakers, judges, and victims' advocates recog-

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[385] Restitution under § 2259 will only be analyzed under the Eighth Amendment if it is characterized, at least in part, as punishment. *See* 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.").

[386] *But see In re* Amy Unknown, 701 F.3d 749, 771 (5th Cir. 2012) (en banc) (arguing that restitution is not "a punishment subject to the same Eighth Amendment limits as criminal forfeiture" because its "purpose is remedial, not punitive").

[387] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[388] *Dubose*, 146 F.3d at 1146.

[389] Lewis, *supra* note 11, at 418.

[390] *Cf.* Harmelin v. Michigan, 501 U.S. 957, 964–65 (1991) (discussing uncertainty in the Court's jurisprudence on proportionality in sentencing).

[391] *Id.*

[392] United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla. Sept. 2, 2009).

[393] Press Release, Nat'l Ctr. for Missing & Exploited Children, Child Porn Among Fastest Growing Internet Businesses (Aug. 18, 2005), *available at* http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2064.

nize that children depicted in child pornography suffer initial abuse at the hands of their pornographers, but continue to suffer identifiable and distinct long-term trauma throughout their lives as others download and view their images.[394] Restitution is one means of ensuring that victims receive some compensation for the harms resulting from child sexual exploitation, particularly possession of pornography. Aside from facilitating rehabilitation, restitution also serves retributive and deterrent functions.

Currently, § 2259 requires courts to order restitution based on "the full amount of the victim's losses,"[395] and courts have consistently reinforced the mandatory nature of restitution for crimes of direct sexual exploitation of children under Chapter 110 of Title 18.[396] However, in cases of child pornography possession, courts have interpreted the language of § 2259 in a variety of ways, at times requiring restitution only where there is a clear evidentiary showing that the full amount of damages is proximately caused by the defendant's actions and at other times presuming proximate causation for the full amount of damages and imposing joint and several liability. There is, therefore, confusion as to whether restitution requires a causal connection, and if so, how this connection can be proved. As a result, the legal landscape is fraught with uncertainties and disparities, leaving a system where victims are not guaranteed relief for their losses and defendants face indeterminate liability.

Most scholars who have written on the subject have argued for courts to interpret § 2259 to not require a showing of proximate cause. However, I argue that given the disparate treatment of proximate causation by district and appellate courts across the country, it is clear that judicial action will not be sufficient. I also argue that even if § 2259 were clarified, its provisions are a mismatch for crimes of child pornography possession. Rather, Congress must intervene to address this widespread and unsettled issue.

There are multiple goals in enacting a new restitution scheme to address the unique problems with restitution for child pornography possession. The first is a clarification of the existing law, with specific direction regarding proximate causation requirements. The next is developing a standardized method for calculating restitution awards that puts defendants on notice of the possibility of sanctions against them and provides victims some assurance of the relief they will receive. Finally, any scheme must adequately consider the interests of both victims and defendants.

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[394] *See, e.g.*, *Child Pornography Fact Sheet*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. http://www.missingkids.com/missingkids/servlet/PageServlet?LangugageCountry=en_US&PageId=2451 ("Once these images are on the Internet, they are irretrievable and can continue to circulate forever. The child is revictimized as the images are viewed again and again.").

[395] 18 U.S.C. § 2259(b)(1) (2006).

[396] *See, e.g.*, United States v. Searle, 65 F. App'x 343, 346 (2d Cir. 2003) ("18 U.S.C. § 2259 provides that a person convicted of sexual exploitation of a child must pay restitution."); United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999) (noting that restitution is mandatory under § 2259).

While the law must provide victims with valuable compensation, the reprehensible nature of the crime and the desire to protect victims from future victimization cannot negate the justice system's obligation to award restitution fairly and justly.

Thus, I advocate exempting child pornography possession cases from the purview of acts covered by § 2259. As an alternative to § 2259, I advise creating a set of restitution guidelines to provide courts with a baseline from which to determine restitution values. I further advocate either relaxing the proximate causation requirement or removing it entirely while implementing a compensatory fine paid to a national child pornography center.

Overall, Congress has expended significant energy and funds into fighting this growing epidemic; yet, these efforts have been insufficient.[397] Child pornography possessors fuel the demand for production and distribution of images in this industry.[398] The law is ever-changing to address these concerns. However, in the face of increasing prosecutions for child pornography possession and accumulating evidence exposing the harms suffered by victims of this crime, change is again necessary.

[397] Lewis, *supra* note 11, at 423 (citing 153 CONG. REC. 17,900 (2007) (statement of Sen. Joe Biden) ("The FBI and the Department of Justice have testified before Congress that there are hundreds of thousands of people trafficking child pornography in this country and millions around the world. We are not making a dent in this problem.")).

[398] New York v. Ferber, 458 U.S. 747, 761 (1982).