

1-1-2013

Proximate Cause, Joint and Several Liability, and Child Pornography Possession: Determining and Calculating Restitution Awards under 18 U.S.C. § 2259

Dianne Weiskittle
University of Dayton

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Weiskittle, Dianne (2013) "Proximate Cause, Joint and Several Liability, and Child Pornography Possession: Determining and Calculating Restitution Awards under 18 U.S.C. § 2259," *University of Dayton Law Review*. Vol. 38: No. 2, Article 3.

Available at: <https://ecommons.udayton.edu/udlr/vol38/iss2/3>

This Comment is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

Proximate Cause, Joint and Several Liability, and Child Pornography Possession: Determining and Calculating Restitution Awards under 18 U.S.C. § 2259

Cover Page Footnote

I owe tremendous thanks to: Professor Susan Brenner for her guidance, encouragement, editing, and enthusiasm during the many months I worked on this Comment; Professor Jeff Morris for his mentoring and precise editing; and, the editors and staff writers of the *University of Dayton Law Review* for their tireless work and late nights spent polishing this Comment. I would also like to thank my husband, Keith, for graciously offering the encouragement, love, and support that has sustained me through law school. Finally, I would like to thank my parents. Bonny and Bill Sartoris, and my sister, Sharon Ragan, for being my steadiest, loudest cheerleaders; I was truly blessed to be born into our family.

PROXIMATE CAUSE, JOINT AND SEVERAL LIABILITY, AND CHILD PORNOGRAPHY POSSESSION: DETERMINING AND CALCULATING RESTITUTION AWARDS UNDER 18 U.S.C. § 2259

Dianne Weiskittle¹

I. INTRODUCTION	276
II. BACKGROUND.....	279
<i>A. The Definition of Child Pornography</i>	279
<i>B. A Brief History of Criminal Restitution</i>	280
<i>C. Restitution In Child Pornography Possession Cases</i>	283
III. ANALYSIS	285
<i>A. Courts Split When Applying Section 2259</i>	285
1. The Majority: Section 2259 Requires a Showing of Proximate Cause.....	286
2. The First Split: The Fifth Circuit’s Approach to Interpreting Section 2259.....	289
3. The Second Split: Calculating the Amount of Restitution..	290
i. The Rationale Behind Awarding Full Restitution	291
ii. The Rationale Behind Awarding a Set Amount of Restitution	292
iii. The Rationale Behind Awarding No Restitution.....	295
<i>B. Restitution in Child Pornography Possession Cases Is Often Improperly Applied</i>	296
1. How the Fifth Circuit Has Gone Wrong in Interpreting Section 2259	296
2. Beyond the Scope of Section 2259: Restitution for Purely Emotional Harm.....	298
<i>C. Restitution Properly Applied Makes Sense</i>	301
IV. PROPOSAL TO REFORM RESTITUTION IN CHILD PORNOGRAPHY POSSESSION CASES.....	302
1. Modifying When to Grant Restitution Awards.....	302

¹ Comment Editor 2012–2013, Staff Writer 2011–2012, University of Dayton Law Review. J.D., *summa cum laude*, University of Dayton School of Law, 2013; B.A., Miami University, 1998. I owe tremendous thanks to: Professor Susan Brenner for her guidance, encouragement, editing, and enthusiasm during the many months I worked on this Comment; Professor Jeff Morris for his mentoring and precise editing; and, the editors and staff writers of the University of Dayton Law Review for their tireless work and late nights spent polishing this Comment. I would also like to thank my husband, Keith, for graciously offering the encouragement, love, and support that has sustained me through law school. Finally, I would like to thank my parents, Bonny and Bill Sartoris, and my sister, Sharon Ragan, for being my steadiest, loudest cheerleaders; I was truly blessed to be born into our family.

2. Modifying the Calculation of Restitution Awards.....	303
3. Benefits Resulting from This Reform of Section 2259.....	303
V. CONCLUSION	304

I. INTRODUCTION

In 2009, Detective Neil Spector was working as an undercover officer² in an online chat room.³ In the chat room, he crossed paths with Arthur Weston Staples, III.⁴ Staples used the internet to send Detective Spector a pornographic image of a child.⁵ Based on this exchange, a search warrant was executed for Staples' home in Virginia and his computer was seized.⁶ A forensic examination of the computer revealed hundreds of images of child pornography, including six images of "Amy"⁷ being sexually abused as a child.⁸

Staples later pled guilty to distribution and possession of child pornography, as well as transportation of visual depictions, via interstate commerce, of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252.⁹ The government filed a request on "Amy's" behalf, seeking restitution¹⁰ from Staples based on the images Staples had of her sexual abuse on his computer.¹¹ The court ordered Staples to pay "Amy" restitution in the amount of \$3,680,153, holding Staples jointly and severally liable¹² for this amount along with other defendants who currently, or will in the future, pay restitution to "Amy" for possessing, receiving, and/or

² It is a common practice for police officers to enter child pornography chat rooms and look for those who are obviously producing, distributing, or possessing child pornography.

³ *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla. Sept. 2, 2009).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ "Amy" is a pseudonym for the victim, now an adult, to protect her privacy. "Amy" is also known as "Misty" in the series of videos containing her images. Pornographic pictures and videos of the same child are often referred to as a "series"; a series is a collection of pictures or videos taken over a period of time that contains both pornographic and non-pornographic depictions of the same child or children. Brief of National Center for Missing & Exploited Children as Amici Curiae at 5, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 11-85); Michael A. Kaplan, Note, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531, 536 (2011). Each victim depicted within a series is typically given a pseudonym to protect her identity. Kaplan, at 536; *Paroline*, 672 F. Supp. 2d at 783.

⁸ *Staples*, 2009 WL 2827204, at *1.

⁹ *Id.* at *1.

¹⁰ See discussion *infra* Part II (defining restitution and its application in child pornography possession cases).

¹¹ *Staples*, 2009 WL 2827204, at *1.

¹² "Joint and Several Liability" is "[l]iability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties." BLACK'S LAW DICTIONARY 927 (9th ed. 2009).

disseminating the pornographic images of her abuse.¹³

In a different case, in 2004, a computer repair shop in Virginia contacted police to report that it had been hired to repair a computer that contained child pornography.¹⁴ An investigation revealed that the computer belonged to Mark Church, who subsequently admitted that he possessed approximately 700 images of child pornography.¹⁵ Several of these were images of “Amy.”¹⁶ Church was charged in late 2009 for this possession of child pornography, in violation of 18 U.S.C. § 2252, and pled guilty.¹⁷ The government filed a restitution request on “Amy’s” behalf based on the images of her found on Church’s computer.¹⁸ In considering the restitution request, the court held that Church’s actions harmed “Amy” by violating her privacy.¹⁹ However, because there was a lack of evidence upon which the court could base a factual finding that the full amount of the victim’s losses were proximately caused by Church, the court ordered Church to pay “Amy” only a “nominal figure of restitution” in the amount of \$100.²⁰

The facts in these cases were quite similar.²¹ Both involved defendants convicted of possession of child pornography images in violation of the same statute; both involved the same victim who claimed to suffer the same total loss as a result of each crime; and neither defendant was alleged to be a producer of child pornography. So what, then, explains the vastly disparate outcomes in the amount of restitution awarded? The different outcomes are the result of a split in the courts in determining whether restitution orders under 18 U.S.C. § 2259²² (“Section 2259”) require proximate²³ causation between the victim’s loss and the defendant’s crime

¹³ *Staples*, 2009 WL 2827204, at *1.

¹⁴ *United States v. Church*, 701 F. Supp. 2d 814, 816 (W.D. Va. 2010).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 817.

¹⁸ *Id.* at 816.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Likewise, these cases are also typical of the relatively recent, but increasingly common, practice of seeking restitution from those convicted of possession of child pornography.

²² Any offense under 18 U.S.C. §§ 2251-60 is an offense that requires mandatory restitution under 18 U.S.C. § 2259 (1996).

²³ The Supreme Court has defined “proximate cause” as “shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes.” *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011). Similarly, Prosser and Keeton define proximate cause as:

[M]erely the limitation which the courts have placed upon the actor’s responsibility for the consequences of the actor’s conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 (5th ed. 1984). Finally, Black’s Law Dictionary defines proximate cause as “[a] cause that directly produces an event and without which the event would not have occurred.” BLACK’S LAW DICTIONARY 234 (9th ed. 2009).

of possessing the victim's image, or do not require proximate causation at all. This split has resulted in inconsistent restitution orders, both as to the amount of the award and as to whether any award is given.

This Comment argues that many restitution orders are erroneously granted in child pornography possession cases because they are granted for purely emotional harm and despite a lack of proximate causation between the victim's harm and the defendant's possession of her²⁴ image. The crux of this problem is that Section 2259 applies broadly to most sex crimes involving children, including child pornography possession.²⁵ Child pornography possession is different from these other sex crimes, however, because its perpetrators usually do not directly or indirectly come into contact with the victim; such perpetrators often commit the crime in their own home, without the victim initially even knowing the crime occurred.²⁶ Therefore, many courts find it complex and problematic to apply traditional restitution concepts to possession cases.²⁷

Furthermore, the calculation of restitution awards in child pornography possession cases is often arbitrary and excessive, resulting in excessive and unconstitutional punishment under the Eighth Amendment. This Comment does not dispute the necessity for restitution orders in child pornography possession cases, but argues that courts are only statutorily authorized to grant such orders when the government sufficiently proves proximate causation between the victim's actual losses and the defendant's crime. Moreover, this Comment proposes an amendment to Section 2259 that will give courts a consistent method for calculating the amount of restitution.

Part II defines child pornography and briefly examines the legislative history regarding criminal restitution for child pornography possession offenses. Part III analyzes the split in the courts regarding: (1) whether Section 2259 requires a showing of proximate cause between the victim's loss and the defendant's crime before a restitution order can be granted; and (2) assuming such an order is granted, how to calculate the amount of restitution to be paid. It also argues that restitution in many child pornography possession cases is improperly ordered because there is no proximate harm, and such awards are based purely on emotional harm. Finally, it discusses the benefits of properly applied restitution orders in certain child pornography possession cases.

Part IV proposes a solution to the restitution issue, and argues that

²⁴ While both genders are victims of child pornography, this Comment will generically refer to victims as female. This feminine reference is both for the sake of simplicity and because, to date, all of those seeking restitution in child pornography possession cases have been female.

²⁵ See *infra* note 70 and accompanying text.

²⁶ See *infra* note 176 and accompanying text.

²⁷ See *infra* text accompanying notes 157–61.

Congress should amend Section 2259 to order a defendant to pay restitution to the victim only in cases where the government establishes proximate cause between the victim's loss and the defendant's crime. Moreover, where proximate cause can be established, courts should abandon nominal and joint and several liability restitution awards, and instead should calculate the award based on the loss that the defendant proximately caused the victim. However, in keeping with the punitive purpose of restitution, society's general contempt for child pornography, and Congress' intent to represent the interests of victims, all defendants convicted of child pornography possession should face a separate monetary penalty regardless of whether proximate harm is established or the government meets its burden of proving the precise harm the defendant caused the victim. To penalize possessors, Congress should amend Section 2259 to require courts to charge the possessor a flat fine to be paid into a victim's fund (as it has already done for offenders convicted of certain drug crimes categorized as "victimless").²⁸ Additionally, this section explores the benefits the proposed solution offers to victims, as well as society as a whole. Part V briefly concludes this Comment.

II. BACKGROUND

A. *The Definition of Child Pornography*

Child pornography is revolting, and its production, distribution, and possession have been condemned as reprehensible.²⁹ Child pornography is statutorily defined as "any visual depiction . . . of sexually explicit conduct . . . [that] involves the use of a minor engaging in sexually explicit conduct[.]"³⁰ Under the Sexual Exploitation and Other Abuse of Children Chapter of Title 18, it is a violation of federal law both to knowingly³¹

²⁸ See *infra* note 59.

²⁹ See *New York v. Ferber*, 458 U.S. 747, 781, n. 8. (1982); *Osborne v. Ohio*, 495 U.S. 103, 107 (1990); *United States v. Norris*, 159 F.3d 926, 927 (5th Cir. 1998); *United States v. Tillmon*, 195 F.3d 640, 642 (11th Cir. 1999); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002); Richard Wortley & Stephen Smallbone, *Child Pornography on the Internet*, PROBLEM-SPECIFIC GUIDE SERIES: PROBLEM-ORIENTED GUIDES FOR POLICE, at 8 (U.S. Dep't of Justice Office of Comty. Oriented Policing Servs., No. 41, 2006), <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>; see generally 153 CONG. REC. S8641, S8709 (daily ed. June 28, 2007) (statements of Sen. Joe Biden).

³⁰ 18 U.S.C. § 2256(8) (2008).

³¹ Courts analyzing the meaning of "knowingly," as related to child pornography possession, generally consider four factors:

(1) whether images were found on the defendant's computer, see *United States v. Irving*, 452 F.3d 110, 122 (2d Cir. 2006); (2) the number of images of child pornography that were found, see *id.* (finding defendant's possession of 76 images relevant); (3) whether the content of the images 'was evident from their file names,' *United States v. Payne*, 341 F.3d 393, 403 (5th Cir. 2003) (finding 'number of images in [defendant's] possession, taken together with the suggestive titles of the photographs' established knowing receipt); and (4) defendant's knowledge of and ability to access the storage area for the images, see [*United States v.*] *Romm*, 455 F.3d 990, 997[–]1001 (9th Cir. 2006) (addressing

possess child pornography and to knowingly access it with intent to view.³² For example, it is illegal to deliberately access an image or video of child pornography on the internet with the intent to look at it, as well as to download such an image or video.

B. A Brief History of Criminal Restitution

Restitution has been “an integral part of virtually every formal system of criminal justice, of every culture[,] and every time.”³³ The principle of restitution “holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to . . . her prior state of well-being.”³⁴ Prosecutors have only relatively recently begun seeking restitution in child pornography possession cases, whereby defendants convicted of possessing images of child pornography pay restitution to the victims depicted in those images.³⁵ However, while it may be a fairly new concept in child pornography possession cases, criminal restitution has been an integral part of criminal justice for centuries, dating back to biblical times.³⁶ Historically, restitution required the offender to pay more than the victim was actually damaged.³⁷ This “double-payment” philosophy implies that restitution was originally used as a form of punishment.³⁸ With the passage of time, restitution payments to victims were used less commonly in the criminal law context and used more frequently in tort or civil law.³⁹ Nevertheless, restitution was still sometimes ordered by English common law courts in criminal sentences and was also used as a punitive tool in early United States federal criminal law.⁴⁰

defendant's ability to access cache files in hidden subdirectory); cf. [United States v.] Kuchinski, 469 F.3d 853, 861[–]63 (9th Cir. 2006) (same).

United States v. Miller, 527 F.3d 54, 67 (3d Cir. 2008).

³² 18 U.S.C. § 2252(a)(4)(B) (2008).

³³ S. REP. NO. 97-532, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2536.

³⁴ *Id.*; see also Catharine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, FED. PROBATION, Dec. 1998, at 95; United States v. Renga, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *5 (E.D. Cal. Aug. 19, 2009) (“[T]he ordinary meaning of ‘restitution’ is restoring someone to a position he occupied before a particular event.” (citing *Hughey v. United States*, 495 U.S. 411, 416 (1990))).

³⁵ Adam D. Lewis, *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, 413 (2011); 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, 207 (2010).

³⁶ Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2719 (2005); see *Exodus* 22:9 (King James).

³⁷ See *Exodus* 22:9; see also STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 4 (Patterson Smith Publ'g Corp. 2d ed. 1970).

³⁸ SCHAFER, *supra* note 37.

³⁹ See SCHAFER, *supra* note 37, at 7.

⁴⁰ See Kleinhaus, *supra* note 36, at 2719; see also An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, 2 Stat. 139 § 4 (1802) (imposed restitution as punishment on any U.S. citizen who committed robbery, larceny, or trespass on Indian tribal territory);

In the twentieth century, there was a resurgence in criminal restitution as courts were given the discretion to order criminal restitution as part of a probationary sentence.⁴¹ The Federal Probation Act of 1925 gave courts the authority to grant criminal restitution.⁴² However, courts were only authorized to require a defendant to pay restitution “to aggrieved parties for actual damages or loss caused by the offense for which conviction was had[.]” and such orders were “infrequently used and indifferently enforced.”⁴³

The victims’ rights movement of the 1970s and 1980s revived interest in restitution.⁴⁴ The victims’ rights movement arose out of a national fear of crime in the United States, and its goal was to “force the justice system to realign itself to better represent the interests of victims.”⁴⁵ In 1982, fueled by this movement, President Ronald Reagan authorized a task force on crime.⁴⁶ In its final report, the task force urged the implementation of mandatory restitution orders in cases in which the victim suffered a monetary loss.⁴⁷ Furthermore, the task force recommended that if a court denied restitution in such cases, the court should be required to state on the record the reasons for its denial.⁴⁸

The victims’ rights movement also fueled Congress to act, and it passed the Victims Witness and Protection Act of 1982 (“VWPA”).⁴⁹ One of the purposes of the VWPA was to encourage courts, when punishing a defendant, to ensure that the defendant restored the victim to her prior state of well-being, to the best degree possible.⁵⁰ Accordingly, the VWPA permitted a court to order restitution as a separate and distinct part of the criminal sentence, as opposed to the historical practice of tying restitution

see also WILLIAM BLACKSTONE, 4 BLACKSTONE’S COMMENTARIES 362–63 (St. George Tucker ed., 1803) (The Lawbook Exch., Ltd. 1996).

⁴¹ See Federal Probation Act of 1925, 18 U.S.C. §§ 3651–56 (2000) (repealed 1984); see also Goodwin, *supra* note 34, at 95.

⁴² See Goodwin, *supra* note 34, at 95.

⁴³ S. REP. NO. 97-532, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2512, 2536; see also *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir. 1962) (citing Probation Act, 18 U.S.C. § 3651 (1958) (repealed 1987)).

⁴⁴ See Kleinhaus, *supra* note 36, at 2719; see also BURT GALAWAY & JOE HUDSON, JUSTICE, RESTITUTION, AND RECONCILIATION 1 (Burt Galaway & Joe Hudson eds., 1990).

⁴⁵ See Kleinhaus, *supra* note 36, at 2719–20; see also ROBERT REIFF, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM’S FORGOTTEN RESPONSIBILITY 21–22 (1979) (arguing that the number of violent crimes in the United States in 1976 was double what the FBI statistics claimed).

⁴⁶ See LOIS HAIGHT HERRINGTON ET AL., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT ii (1982), <http://www.ovc.gov/publications/presdntstskforcprpt/87299.pdf>.

⁴⁷ *Id.* at 66.

⁴⁸ *Id.* at 72.

⁴⁹ See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in sections of 18 U.S.C., with the restitution provision at 18 U.S.C. § 3663 (2008) [hereinafter VPWA]). Because the Act was passed in 1982, prior to the widespread adoption of the Internet, it clearly did not contemplate the use of the Internet in the commission of the crimes with which it was concerned. Therefore, it can be inferred that Congress was concerned only with crimes in which there was a physical nexus between the offender and the victim.

⁵⁰ See S. REP. NO. 97-532, at 13 (1982).

orders to probationary sentences.⁵¹ Nonetheless, while the VWPA expanded a court's authority to order restitution, it also retained limits on judicial authority. First, it required the court to ensure that restitution orders did not exceed a defendant's ability to pay.⁵² Second, it limited restitution to "the loss caused by the specific conduct that [was] the basis of the offense of conviction."⁵³ Additionally, it did not allow restitution for purely emotional harm.⁵⁴ Eight years later, Congress passed amendments to the VWPA that authorized courts to order restitution in cases where the victim was harmed by the defendant's scheme, conspiracy, or pattern of conduct, but still did not expressly permit restitution for emotional harm.⁵⁵

In 1996, Congress significantly amended the VWPA by passing the Mandatory Victims Restitution Act ("MVRA") to help the courts move "toward a more victim-centered justice system."⁵⁶ The MVRA was intended to address the perception that the VWPA's restitution framework was inadequately compensating victims,⁵⁷ and it aimed to combat this by "ensur[ing] that criminals pay full restitution to their victims for all damages caused as a result of the crime."⁵⁸

As such, the MVRA modified the law to mandate restitution orders in most federal criminal proceedings in which the victim suffered a monetary loss (including the cost of psychiatric and psychological care necessary to heal from the physical injury of a crime), and it required the court to make such awards without consideration of the defendant's ability to pay.⁵⁹ Additionally, it expanded discretionary restitution by allowing courts to order "community restitution" for certain drug offenses that had no identifiable victim, with the corresponding restitution payments to be split between agencies that assist crime victims and substance abuse programs.⁶⁰ Finally, it modified the definition of "victim" for discretionary and mandatory restitution by changing "victim of the offense" to "person directly and proximately harmed as a result of the commission of an offense

⁵¹ See *id.*; see also 18 U.S.C. § 3663(a)(1)(A); Boe, *supra* note 35, at 209.

⁵² See VPWA, *supra* note 49, at 1255; see also Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009).

⁵³ *Hughey v. United States*, 495 U.S. 411, 416–22 (1990). In *Hughey*, the Supreme Court clarified the scope of the VWPA, holding that its language authorizing courts to compensate victims "harmed as a result of the offense" limited restitution to losses caused by the specific conduct for which the defendant was convicted. Goodwin, *supra* note 34, at 95 (quoting 18 U.S.C. §3663A(a)(2) (2006)); see also *Hughey*, 495 U.S. at 416–22; VWPA, *supra* note 49.

⁵⁴ Cf. *United States v. Hicks*, 997 F.2d 594, 600 (9th Cir. 1993).

⁵⁵ Crime Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4863 (1990); 18 U.S.C. § 3663(a)(2) (2008).

⁵⁶ Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); S. REP. NO. 104-179, at 13 (1995).

⁵⁷ See H.R. REP. NO. 104-16, at 4 (1995); Robert William Jacques, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework For Child Pornography Victims*, 45 GA. L. REV. 1167, 1180 (2011).

⁵⁸ H.R. REP. NO. 104-16, at 4.

⁵⁹ *Id.*; 18 U.S.C. § 3663(a) (2006); 18 U.S.C. §§ 3663A(b)(2)(A), (f)(1)(A) (2000).

⁶⁰ See 18 U.S.C. § 3663(c) (2006); Kleinhaus, *supra* note 36, at 2728.

...⁶¹ Interestingly, while its legislative history arguably makes reference to restitution for all of the victim's losses,⁶² the MVRA did not authorize restitution for *purely* emotional harm.⁶³ Rather, it mandated restitution only for losses related to physical or mental injury or property loss.⁶⁴

C. Restitution In Child Pornography Possession Cases

As part of its efforts to move "toward a more victim-centered justice system,"⁶⁵ Congress also enacted Section 2259 to make restitution orders mandatory in crimes that sexually exploit children.⁶⁶ This statute requires a court to order restitution for any losses "suffered by the victim as a proximate result of the [specified child sexual exploitation] offense[s]."⁶⁷ Like the MVRA, this statute prohibits the court from considering a defendant's economic circumstances and corresponding ability to pay when issuing a restitution order.⁶⁸ Section 2259 also prohibits the court from declining a restitution order because the victim already has or will receive compensation for her injuries from any other source.⁶⁹

Section 2259 is the basis for restitution orders granted in child pornography possession cases, as child pornography possession is one of the sexual exploitation offenses covered by the statute.⁷⁰ Under Section 2259, "victim" is defined as "the individual harmed as a result of a commission of a crime under [18 U.S.C. §§ 2251–2260]"⁷¹ The statute requires a defendant convicted of child pornography possession to pay "the full amount of the victim's losses," including costs the victim incurs for:

(A) medical services relating to physical, psychiatric, or psychological care;

⁶¹ See 18 U.S.C. § 3663A(a)(2) (mandatory restitution); 18 U.S.C. § 3663(a)(2) (discretionary restitution).

⁶² See H.R. REP. NO. 104-16, at 4 (criminals should pay full restitution to their victims for all damages caused as a result of the crime).

⁶³ See 18 U.S.C. § 3663A(b) (2000). Cf. *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1301–02 (D. Utah 2004), *rev'd* on other grounds and *remanded sub nom.* *United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005) ("[T]he term 'harm' is conventionally defined as embracing both 'physical and mental damage.' Consistent with that understanding, the MVRA recognizes that restitution may be appropriately ordered for, among other things, 'psychiatric[] and psychological care.' To be sure, the statute is limited in that it does not authorize some open-ended award of restitution for pain and suffering or emotional distress.").

⁶⁴ *Bedonie*, 317 F. Supp. 2d at 1301–02.

⁶⁵ S. REP. NO. 104-179, at 13 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 926.

⁶⁶ 18 U.S.C. § 2259 (1994).

⁶⁷ 18 U.S.C. § 2259(a)–(b)(3)(F) (2006).

⁶⁸ 18 U.S.C. § 2259(b)(4)(B)(i) (1994).

⁶⁹ 18 U.S.C. § 2259(b)(4)(B)(ii) (2006).

⁷⁰ See 18 U.S.C. § 2259(a)–(b). Child pornography possession is illegal under 18 U.S.C. § 2252(a)(4)(B), which makes it a crime if one "knowingly possesses, or knowingly accesses with intent to view" minors engaged in sexually explicit conduct. 18 U.S.C. § 2252(a)(4)(B) (Supp. 2008). Because § 2259 encompasses offenses under 18 U.S.C. §§ 2251–60, it mandates restitution for proximate losses suffered as a result of such possession. § 2259(b)(3)(F) (2006).

⁷¹ 18 U.S.C. § 2259(c) (2006).

- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorney's fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.⁷²

Restitution orders under Section 2259 are issued in accordance with 18 U.S.C. §§ 3664 and 3663A.⁷³ The decision to make a restitution claim rests with the government; if the government determines that such a claim is warranted, it files the claim.⁷⁴ A victim cannot, via her own attorney, raise such a claim herself.⁷⁵ A victim is made aware that a defendant has been found in possession of her pornographic images because she is notified by The National Center for Missing and Exploited Children ("NCMEC").⁷⁶ The NCMEC, through its Child Victim Identification Program, analyzes seized images of child pornography, attempts to identify the victim(s) depicted, and notifies the victim each time someone is arrested in possession

⁷² 18 U.S.C. § 2259(b)(3).

⁷³ 18 U.S.C. § 2259(b)(2).

⁷⁴ 18 U.S.C. § 3664(d)(1) (2000); see John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES, Feb. 3, 2010, at A19.

⁷⁵ 18 U.S.C. § 3664(d)(1). A victim can file a request with the U.S. Attorney's office to request that the government make a restitution claim on her behalf. Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1331–32 (2011). However, the decision to make the restitution claim ultimately rests with the government. *Id.*

⁷⁶ See *United States v. Aumais*, 656 F.3d 147, 150 (2d Cir. 2011); Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at *1–2 *Amy v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011) (Nos. 11-85), 2011 WL 3664461, at *1–2.

The National Center for Missing and Exploited Children ("NCMEC") was established in 1984 as a private, non-profit organization and designated by Congress as 'the official national resource center and information clearinghouse for missing and exploited children.' 42 U.S.C. § 5773(b)(1)(B). In this capacity, NCMEC assists law enforcement and families to find missing children, reduce child sexual exploitation, and prevent child victimization NCMEC works with federal, state, local, and international law enforcement agencies, state missing children clearinghouses, and private corporations....

Pursuant to its congressional authorization, NCMEC serves as a central repository in the United States for information relating to child pornography reports. NCMEC's statutory functions include the establishment and operation of specific programs to help stop the sexual exploitation of children, including: providing technical assistance and training to law enforcement agencies relating to investigations of child sexual exploitation; working with law enforcement and the private sector to reduce the proliferation of child pornography; operating a child victim identification program to assist law enforcement to identify victims of child pornography; and operating the CyberTipline®, the '9-1-1 for the Internet,' to which the public and electronic service providers can report child sexual exploitation.

Id.

of her image.⁷⁷

Once the government files a restitution request, it has the burden of proving, by a preponderance of the evidence, the losses sustained by a victim “as a result of the offense[.]”⁷⁸ If the court finds that more than one defendant has contributed to the loss of the victim, the court has the discretion to either: (1) hold each defendant jointly and severally liable⁷⁹ for the victim’s losses; or (2) apportion liability between each defendant based on his contribution to the victim’s losses and the defendant’s own economic circumstances.⁸⁰

III. ANALYSIS

A. Courts Split When Applying Section 2259

When applying Section 2259, courts use three steps to determine appropriate restitution orders for defendants convicted of child pornography possession: (1) whether there was a victim; (2) if there was a victim, whether the defendant should be ordered to pay the victim restitution; and (3) if the defendant should pay restitution, the exact amount of restitution that should be ordered.⁸¹ The courts agree that each defendant’s possession of child pornography victimizes the child depicted in the pornography,⁸² causing harm distinct from the initial perpetration of sexual abuse by injuring the child’s reputation and emotional well-being and violating the child’s right to privacy.⁸³ Furthermore, courts are generally in sync

⁷⁷ See *Aumais*, 656 F.3d at 150; Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at *3 *Monzel*, 641 F.3d 528 (No. 11-85), 2011 WL 3664461, at *3.

⁷⁸ 18 U.S.C. § 3664(e) (2006).

⁷⁹ See *supra*, note 12 and accompanying text.

⁸⁰ 18 U.S.C. § 3664(h). For example, Defendant 1 sexually abuses a child and posts a pornographic image of that abuse on the Internet and Defendant 2 downloads and views that image. If the child victim has \$10,000 in total damages that were proximately caused by the defendants, the court can either order both defendants to pay the entire \$10,000 (holding them jointly and severally liable, with each defendant able to sue the other defendant to recover the portion of the damages that the other defendant caused), or order Defendants 1 and 2 to each pay a percentage of the \$10,000 (based on their respective contributions to the victim’s total damages).

⁸¹ See, e.g., *United States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011).

⁸² See, e.g., *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (“[I]t seems to us scarcely debatable that the children depicted – many as young as 5 years old – were the primary ‘victims’ of [the defendant’s] criminal conduct[.]”); *United States v. Sherman*, 268 F.3d 539, 544 (7th Cir. 2001) (refusing to draw a distinction between producing child pornography and receiving it when determining the victim of the crime); *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) (finding that passive consumer who merely possesses images of child pornography contributes to ongoing victimization); *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) (“[C]hildren depicted in the child pornography . . . possessed . . . by [a] defendant who are the primary victims of the crimes of [possession]”); *United States v. Church*, 701 F. Supp. 2d 814, 819–20 (W.D. Va. 2010) (“Without hesitation, the court finds that [the child depicted in the pornography] is a ‘victim’ of this offense under § 2259.”); 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, 305–06 (2011).

⁸³ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002); *New York v. Ferber*, 458 U.S. 747, 749, 759–760 (1982); *Norris*, 159 F.3d at 929–30; *Church*, 701 F. Supp. 2d at 820–21.

regarding how to determine whether the defendant should be ordered to pay the victim restitution.⁸⁴ However, courts are widely split in calculating the exact amount of restitution to be paid.⁸⁵

1. The Majority: Section 2259 Requires a Showing of Proximate Cause

Section 2259(b)(3) sets out six categories of a victim's losses for which restitution is available.⁸⁶ Only one category—a catchall of other non-enumerated losses—explicitly requires a finding of proximate cause.⁸⁷ Nonetheless, most courts interpreting the statute hold that the proximate causation requirement applies to all categories of the victim's losses listed in Section 2259(b)(3).⁸⁸ Therefore, prior to ordering restitution under Section 2259,⁸⁹ these courts require the government to prove, by a preponderance of

⁸⁴ United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011) ("We agree with the majority of circuits and hold that under § 2259, a victim's losses must be proximately caused by the defendant's offense."); 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. Llamas, 599 F.3d 381, 390–91 (4th Cir. 2010) ("[T]he focus of [a sentencing] court in applying the MVRA must be on the losses to the victim *caused by the offense*." (emphasis in original); United States v. Laney, 189 F.3d 954, 965 (9th Cir.1999) ("Section 2259 . . . requires a causal connection between the offense of conviction and the victim's harm."); United States v. McDaniel, 631 F.3d 1204, 1208 (11th Cir. 2011) ("[S]ection 2259 limits recoverable losses to those proximately caused by the defendant's conduct."); United States v. Monzel, 641 F.3d 528, 537 (D.C. Cir. 2011) (Section 2259 requires restitution only for victim's losses proximately caused by defendant.).

⁸⁵ See, e.g., United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *4 (S.D. Fla. Sept. 2, 2009) (court granted restitution order of \$3,680,153 to child pornography possession victim to cover loss of future wages and employee benefits, and future treatment and counseling costs); United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *5 (W.D.N.C. Jan. 12, 2010) (court awarded only a small amount of total restitution requested, \$1,500 and \$6,000, respectively, to two child pornography possession victims because it found that most of the victims' losses were caused by the initial abuser and not the defendant's possession of the child pornography); United States v. Renga, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (court awarded \$3,000 in restitution because this is two percent of the \$150,000 reflected in § 2255 (the civil remedy statute) and a lesser amount would be "inconsistent with Congress's findings on the harm to . . . victims of child pornography."); *Church*, 701 F. Supp. 2d at 835 (court awarded nominal restitution of \$100 because the government did not prove that the full amount of the victim's losses were proximately caused by the defendant child pornography possessor); *Aumais*, 656 F.3d at 153–55 (reversed lower court's \$48,483 restitution award to \$0 because of lack of proximate cause between defendant's child pornography possession and victim's harm); United States v. Berk, 666 F. Supp. 2d 182, 191–92 (D.Me. 2009) (no restitution awarded because of a lack of proximate cause between defendant's child pornography possession and victim's harm); *but see In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011), *reh'g en banc granted*, 668 F. 3d 776 (5th Cir. 2012) WL 248829 ("The structure and language of § 2259(b)(3) impose a proximate causation requirement *only* on miscellaneous 'other losses' for which a victim seeks restitution[,] and requires no proximate cause showing for physical, psychiatric, or psychological care.) (emphasis added).

⁸⁶ 18 U.S.C. § 2259(b)(3) (1996).

⁸⁷ 18 U.S.C. § 2259(b)(3) (2000). The statute requires a defendant convicted of child pornography possession to pay the "full amount of the victim's losses," including costs the victim incurs for:

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

Id. (emphasis added).

⁸⁸ See *supra* note 84, and accompanying text; see also Jacques, *supra* note 57, at 1181–83.

⁸⁹ 18 U.S.C. § 3664(e) (2000) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.").

the evidence, “a causal connection between the offense of conviction and victim’s harm[,]”⁹⁰ effectively demonstrating that the victim’s losses would not have occurred without the defendant’s possession of her images.⁹¹ These courts justify this “proximate cause” interpretation of the statute by relying on the Eighth Amendment,⁹² the Supreme Court’s previous rulings regarding statutory interpretation,⁹³ the plain text of the VWPA,⁹⁴ and the legislative history of the MVRA.⁹⁵

Courts that interpret Section 2259 as requiring restitution only for a victim’s losses proximately caused by the defendant do so, in part, to avoid a violation of the Eighth Amendment. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁶ Courts find that awarding restitution for losses not tied to a defendant’s conduct would clearly be an excessive fine and in violation of the Eighth Amendment.⁹⁷ Because the canon of constitutional avoidance prohibits courts from interpreting a statute as violating the Constitution if any other possible construction is available, Section 2259 is typically interpreted as requiring proximate causation.⁹⁸

⁹⁰ *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999).

⁹¹ *United States v. Paroline*, 672 F. Supp. 2d 781, 792–93 (E.D. Tex. 2009).

⁹² *See Paroline*, 672 F. Supp. 2d at 788 n.9; *contra In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011), *reh’g en banc granted*, 668 F.3d 776 (5th Cir. 2012) (“Given the statute’s built-in causation requirement [because § 2259(c) defines ‘victim’ as ‘an individual harmed as a result of a commission of a crime under this chapter’] and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced. We therefore do not share the district court’s concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment.”).

⁹³ *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) (“When 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.”); *United States v. Standard Brewery*, 251 U.S. 210, 218 (1920) (“As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.”).

⁹⁴ To be a victim under the VWPA, an individual must have been “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . .” 18 U.S.C. § 3663 (B)(ii)(2) (Supp. 2008).

⁹⁵ When Congress passed the MVRA and amended the federal restitution laws, it:

[R]equire[d] that there be an identifiable victim who suffers a physical injury or pecuniary loss before mandatory restitution provisions would apply. The committee intend[ed] this provision to mean . . . that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss *directly and proximately caused* by the course of conduct under the count or counts for which the offender is convicted.

S. REP. NO. 104-179, at 29–30 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 926 (emphasis added).

⁹⁶ U.S. CONST., amend. VIII.

⁹⁷ *See, e.g., United States v. Paroline*, 672 F. Supp. 2d 781, 789 (E.D. Tex. 2009).

⁹⁸ *Paroline*, 672 F. Supp. 2d at 789; *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.”); *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”) (emphasis omitted); LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* 271 (New York Univ. Press, 2001)

The Supreme Court has also offered guidance that supports this interpretation of Section 2259.⁹⁹ In *Porto Rico Ry., Light & Power Co. v. Mor*, the Court held 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.”¹⁰⁰ Although the Court in *Porto Rico Ry.* was analyzing the proper interpretation of a *sentence* in a statute rather than *separate subsections* of a statute,¹⁰¹ as is the case with Section 2259, the majority of courts still find the Court’s rationale in *Porto Rico Ry.* compelling.¹⁰² Accordingly, they interpret Section 2259’s language “as a proximate result of the offense,” which is found only in Section 2259(b)(3)’s catchall provision for categories of victim loss, as modifying not only the catchall provision but also all five preceding categories of loss.¹⁰³

Courts also point to the plain text of the VWPA and the MVRA, as well as the legislative history of the MVRA, to justify their proximate cause interpretation of Section 2259.¹⁰⁴ To be a victim under the VWPA, an individual must have been “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”¹⁰⁵ It is not enough for a victim’s injury to be related to the defendant’s crime.¹⁰⁶ To justify restitution under the VWPA, direct and proximate causation is required.¹⁰⁷ The MVRA’s definition of “victim”¹⁰⁸ is “substantively identical” to the definition of “victim” in the VWPA, as it also requires direct and proximate harm.¹⁰⁹

The MVRA’s legislative history is offered as further support of its plain meaning. According to its legislative history, Congress intended “that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss

(The Supreme Court “operates with a presumption in favor of [constitutional] avoidance, urging federal courts to ‘pause’ and ask if a constitutional ruling is really necessary.”).

⁹⁹ See, e.g., *United States v. Church*, 701 F. Supp. 2d 814, 826 (W.D. Va. 2010).

¹⁰⁰ *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

¹⁰¹ See *Church*, 701 F. Supp. 2d at 826.

¹⁰² *Id.* at 826–27; *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Patton*, No. 09 43 (PAM/JSM), 2010 WL 1006521, at *2 (D. Minn. Mar. 16, 2010); *United States v. Van Brackle*, No. 2:08 CR 042 WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009); *United States v. Paroline*, 672 F. Supp. 2d 781, 787–88 (E.D. Tex. 2009); *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009).

¹⁰³ See *Church*, 701 F. Supp. 2d at 826–27.

¹⁰⁴ See *id.* at 828.

¹⁰⁵ 18 U.S.C. § 3663(a)(2) (2006).

¹⁰⁶ See *In re: Doe*, 264 F. App’x 260, 263 (4th Cir. 2007); *Hughey v. United States*, 495 U.S. 411, 413 (1990) (“[T]he language and structure of the [VWPA] make plain Congress’ intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.”).

¹⁰⁷ *In re: Doe*, 264 F. App’x at 263.

¹⁰⁸ 18 U.S.C. § 3663A(a)(2) (2000).

¹⁰⁹ *United States v. Aguirre-Gonzales*, 597 F.3d 46, 51 (1st Cir. 2010) (citing *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008)).

directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.”¹¹⁰ Furthermore, Congress contemplated that there might be cases in which it would be difficult to compute causation of the calculation of a victim’s losses, and specifically sought to exclude such cases from mandatory restitution.¹¹¹

2. The First Split: The Fifth Circuit’s Approach to Interpreting Section 2259

The Fifth Circuit uses an alternative interpretation of the statute in child pornography possession cases,¹¹² holding that the phrase “as a proximate result of the offense” modifies only “any other losses,” and therefore does not apply to the statute’s preceding categories of losses.¹¹³ It bases its interpretation on the contrast between the definition of “victim” under the VWPA (a victim is a “person directly and proximately harmed as a result of a commission of an offense”)¹¹⁴ and under Section 2259, which was enacted fourteen years later (a victim is “the individual harmed as a result of a commission of a crime”).¹¹⁵ The Fifth Circuit finds that the difference between these definitions reveals Congress’s intent to abandon the proximate causation requirement for all categories of a victim’s losses.¹¹⁶ Moreover, it finds this intent consistent with Congress’s overall rationale of awarding restitution more broadly, which fueled Congress to enact “a second generation of restitution statutes” with the MVRA.¹¹⁷ Finally, the Fifth Circuit distinguishes Section 2259 from the Supreme Court’s previous rulings on statutory interpretation¹¹⁸ by pointing to grammatical differences between Section 2259 and the statutes previously interpreted by the Supreme Court,¹¹⁹ as well as to Section 2259’s clear manifestation of

¹¹⁰ S. REP. NO. 104-179, at 19 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 932 (emphasis added).

¹¹¹ *Id.*

In all cases, it is the committee’s intent that highly complex issues related to the cause or amount of a victim’s loss not be resolved under the provisions of mandatory restitution. The committee believes that losses in which the amount of the victim’s losses are speculative, or in which the victim’s loss is not clearly causally linked to the offense, should not be subject to mandatory restitution.

Id.

¹¹² *United States v. Paroline*, 672 F. Supp. 2d 781, 793 n.10 (E.D. Tex. 2009). The Fifth Circuit’s split regarding whether § 2259 requires proximate cause between the victim’s losses and the defendant’s possession exists only regarding child pornography possession cases. Possession cases are distinct from child pornography production cases, in which the defendant abuses the child and produces the pornography. There is no question of causation in production cases because it is clear the defendant proximately caused the victim’s losses. *Id.*

¹¹³ *See In re Amy Unknown*, 636 F.3d 190, 198 (5th Cir. 2011), *reh’g en banc granted*, 668 F. 3d 776 (5th Cir. 2012).

¹¹⁴ 18 U.S.C. § 3663A(a)(2) (2000).

¹¹⁵ 18 U.S.C. § 2259(c) (2006).

¹¹⁶ *See In re Amy Unknown*, 636 F.3d at 199.

¹¹⁷ *Id.*

¹¹⁸ *See supra* note 92 and accompanying text.

¹¹⁹ *In re Amy Unknown*, 636 F.3d at 199 (“From the double-dash that opens the list to the semicolons that separate each of its elements, the grammatical structure of § 2259(b)(3) is unlike the statute in *Porto Rico Railway*.”).

“congressional purpose to award broad restitution.”¹²⁰

3. The Second Split: Calculating the Amount of Restitution

There is an even more significant split among the courts when calculating the appropriate amount of restitution in child pornography possession cases.¹²¹ This issue is tied to the proximate cause analysis above because once it is determined that a defendant proximately caused a victim's losses, the government must prove by a preponderance of the evidence the amount of restitution that should be ordered (i.e., the specific amount of the victim's losses proximately caused by the defendant).¹²² Determining an appropriate amount of restitution is, at best, an “inexact science” because Congress has not provided courts with a formula to calculate restitution awards.¹²³ At worst, it is an “evidentiary nightmare” because, to calculate a fair amount of restitution, many courts try to apportion the victim's damages caused by the initial sexual abuse, the production of the pornographic images capturing that abuse, and the subsequent viewing of such images by hundreds of thousands of internet users.¹²⁴ Accordingly, most courts use a reasonableness analysis to determine the appropriate amount of restitution that a defendant should pay to his¹²⁵ victim.¹²⁶ Nonetheless, restitution awards in child pornography possession cases vary from requiring the defendant to pay for all of the victim's losses (including those caused by the

¹²⁰ *Id.* (“Even if the interpretive approach of *Porto Rico Railway* applied here, so would the Court's comment that the statute in question ‘manifests a general purpose . . . [and i]f the application of the cause were doubtful, we should so construe the provision so as to effectuate the general purpose of Congress.’” (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

¹²¹ See Kaplan, *supra* note 7, at 550–51.

¹²² See 18 U.S.C. § 3664(e) (2000); see also *United States v. Church*, 701 F. Supp. 2d 814, 831 (W.D. Va. 2010).

¹²³ *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir. 1990); *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *4 (E.D. Cal. Aug. 19, 2009) (“The closest Congress has come to providing a formula for determining restitution amounts is in the civil remedies Congress made available to victims of Section 2252 violations[,]” which provide a civil remedy for personal injuries of sexual exploitation of children.); 18 U.S.C. § 2255(a) (2006).

Any person who, while a minor, was a victim of . . . this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, . . . shall recover the actual damages such person sustains. . . . Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.

Id.

¹²⁴ *United States v. Solsbury*, 727 F. Supp. 2d 789, 795 (D.N.D. 2010); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at *4 (E.D. Cal. Aug. 19, 2009) (“Section 2259 leaves the court in a legal quandary: [t]he court must award restitution and the government must show the harm caused by [the defendant], but it is difficult to determine the amount of harm caused by [the defendant].”).

¹²⁵ While either gender can be convicted of possessing child pornography, this Comment generically refers to defendants as male. This masculine reference is both for the sake of simplicity and because, to date, most of those convicted of possessing child pornography have been male.

¹²⁶ See, e.g., *United States v. Paroline*, 672 F. Supp. 2d 781, 791–92 (E.D. Tex. 2009) (being guided by the principle of reasonableness in calculating appropriate restitution); *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (The Ninth Circuit “will uphold an award of restitution under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of victim's loss with some reasonable certainty.”).

original abuser),¹²⁷ a set nominal amount to the victim,¹²⁸ or no restitution at all.¹²⁹

i. The Rationale Behind Awarding Full Restitution

Courts that order a single defendant found in possession of a victim's pornographic image(s) to pay restitution for all of the victim's losses justify this award for several reasons. First, these courts assess those who "merely" or "passively" receive or possess child pornography as being direct contributors to the victim's ongoing harm because the images are a permanent record of the victim's participation, and the harm to the victim is exacerbated by the images' circulation.¹³⁰ These courts do not rely on proximate causation at all, but instead hold that those possessing child pornography directly cause harm to the victim.¹³¹

Additionally, courts rely in part on the testimony of the victim's psychologist that the victim suffers two distinct types of trauma: one

¹²⁷ See, e.g., *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla. Sept. 2, 2009) (defendant convicted of child pornography possession ordered to pay victim restitution of \$3,680,153 to cover her lost wages, employee benefits, and future psychological treatment).

¹²⁸ See, e.g., *United States v. Brunner*, No. 5:08-CR-16, 2010 WL 148433, at *5 (W.D.N.C. Jan. 12, 2010) (defendant convicted of child pornography possession ordered to pay victims restitution of \$1,500 and \$6,000, respectively); *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) (defendant convicted of child pornography possession ordered to pay victim restitution of \$3,525); *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (defendant convicted of child pornography possession ordered to pay victim restitution of \$3,000 because possession was a lesser offense than others listed in the Section 2252 civil statute which provides damages not less than \$150,000); *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009) (defendant convicted of child pornography possession ordered to pay victim restitution of \$3000 because this amount is two percent of the \$150,000 reflected in the Section 2252 civil statute, and anything less would be "inconsistent with Congress's findings on the harm to children victims of child pornography."); *United States v. Church*, 701 F. Supp. 2d 814, 835 (W.D. Va. 2010) (defendant convicted of child pornography possession ordered to pay victim restitution of \$100).

¹²⁹ See, e.g., *United States v. Aumais*, 656 F.3d 147, 155-57 (2d Cir. 2011) (reduced lower court's restitution award in child pornography possession case of \$48,483 to \$0 because of lack of proximate cause between the victim's harm and the defendant's offense); *Paroline*, 672 F. Supp. 2d at 792-93 (holding that the difficulty in proving the amount of the victim's losses proximately caused by the defendant's possession of her image does not negate the government's burden to prove exactly that, and awarding no restitution because the government failed to prove that the victim's losses were proximately caused by the defendant's possession of her images); *United States v. Berk*, 666 F. Supp. 2d 182, 191-92 (D. Me. 2009) (holding that "[t]he losses described the [sic] by the [v]ictims are generalized and caused by the idea of their images being publicly viewed rather than by this particular [d]efendant having viewed their images[.]" and awarding no restitution because of a lack of evidence that the defendant caused the victim any additional loss beyond what she already experienced at the hands of her abuser); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009) (No restitution awarded because the evidence showed a total amount of harm from all of the abuse suffered, did not show the harm that this particular defendant caused to the victim, and any restitution award in this case would be "pure speculation and would risk violating the Eighth Amendment."); *United States v. Chow*, 760 F. Supp. 2d 335, 343-44 (S.D.N.Y. 2010) (no restitution awarded because the government did not prove what damages the defendant caused to the victim by possessing her images); *United States v. Solsbury*, 727 F. Supp. 2d 789, 795 (D.N.D. 2010) (no restitution awarded because the government did not show the portion of the victim's losses that were caused by defendant's possession of five pornographic videos containing her images).

¹³⁰ See *New York v. Ferber*, 458 U.S. 747, 759 (1982); *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007); *United States v. Hardy*, 707 F. Supp. 2d 597, 610 (W.D. Pa. 2010).

¹³¹ See, e.g., *Hardy*, 707 F. Supp. 2d at 610-11.

stemming from her direct abuse and the other stemming from the knowledge that images of her abuse have been disseminated on the internet.¹³² For example, years of counseling helped one victim to heal from the trauma of her childhood sexual abuse, and she was doing well in her recovery and engaging in age appropriate activities.¹³³ However, upon being notified by the NCMEC of the widespread distribution of images of her childhood sexual abuse on the internet, the victim experienced a relapse and began suffering again from post-traumatic stress.¹³⁴ The victim's psychologist (Dr. Silberg) conducted an examination of the victim to determine the psychological effects of this re-victimization.¹³⁵ Dr. Silberg determined that the victim's relapse stress was more resistant to treatment because of the victim's knowledge of the continued existence of the images of her abuse and its "widespread dissemination" on the internet.¹³⁶ The court therefore found that even though the victim did not have personal knowledge of the particular defendant or that he had viewed images of her sexual abuse, the defendant still caused harm to the victim.¹³⁷

Second, these courts find that possessors of child pornography also directly harm the victim by creating a market for victimization by giving producers of child pornography a financial motive to continue producing such materials.¹³⁸ Finally, even when it is clear that hundreds of thousands of others also possessed the victim's pornographic images (and presumably caused the victim similar harm), courts justify ordering a single defendant to pay restitution for all of the victim's losses because the defendant can recover from others convicted in the future of such possession under the theory of joint and several liability.¹³⁹

ii. The Rationale Behind Awarding a Set Amount of Restitution

Courts that order a defendant convicted of child pornography possession to pay a set amount of restitution, but something less than the full amount of the victim's losses, do so primarily because there is no existing mechanism to apportion liability among that defendant, other defendants

¹³² See, e.g., *id.* at 611; *Hicks*, 2009 WL 4110260, at *5.

¹³³ *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *2 (S.D. Fla. Sept. 2, 2009).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *3.

¹³⁸ See *United States v. Hardy*, 707 F. Supp. 2d 597, 611 (W.D. Pa. 2010); *United States v. Goff*, 501 F.3d 250, 260 (3d Cir. 2007).

¹³⁹ See *Hardy*, 707 F. Supp. 2d at 611-14. Courts using this theory of liability perhaps borrow from the tort law theory of joint and several liability. When a victim is harmed and there are concurrent causes, meaning that multiple defendants each commit an individual act that is independently sufficient to cause the victim's harm, the law holds each of the acts to be the cause of the victim's harm. Likewise, in product liability cases, when several defendants manufacture a product that causes a victim injury, the plaintiff need only show that the product caused her injury. Then, the burden shifts to the defendants to prove that they did not cause the harm, else they are held jointly and severally liable. *Id.*

already convicted of possessing the victim's image, and those defendants who will be convicted of the offense at some point in the future.¹⁴⁰ 18 U.S.C. § 3664 ("Section 3664"), the general criminal restitution statute, provides:

If the court finds that more than 1 defendant has contributed to the loss of the 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.¹⁴¹

While the government asserts that defendants who have contributed to the victim's losses should be left to "simply sort it out amongst themselves[.]" some courts express concern that there is no existing mechanism to assist defendants in doing so and the victim could be unjustly enriched as a result.¹⁴² Furthermore, as Section 3664 is a general criminal restitution statute, its joint and several liability provision is typically applied in co-defendant cases of burglary and fraud in which there is an exact monetary loss, and there is no precedent to apply Section 3664 as broadly as the government suggests in child pornography possession cases.¹⁴³ Therefore, courts apportion an appropriate restitution amount "in the interests of justice."¹⁴⁴ These courts determine the total amount of the victim's losses caused by knowledge that others viewed images of her abuse; divide it by the number of defendants they estimate will be successfully prosecuted for possessing her images; and order the defendant to pay restitution for his portion of these losses.¹⁴⁵ Eighth Amendment

¹⁴⁰ See *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009).

¹⁴¹ 18 U.S.C. § 3664(h) (2006).

¹⁴² *Hicks*, 2009 WL 4110260, at *6; *United States v. Aumais*, 656 F.3d 147, 156 (2d Cir. 2011). The court declined to award restitution in part because holding defendant jointly and severally liable would require:

[T]hat the collection of a restitution award would need to be carefully monitored to ensure that total payments by all defendants did not exceed what [the victim] has been awarded for future counseling costs 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.

Id. But see 18 U.S.C. § 2259(b)(4)(B) (1994) ("A court may not decline to issue an order under this section because of — (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source." (emphasis added)). "[A]ny other source" would presumably include restitution from defendants in other cases.

¹⁴³ *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at *6 (E.D. Cal. Aug. 18, 2009); *Aumais*, 656 F.3d at 157. Some circuit courts have held, in unpublished opinions, that joint and several liability is not permissible under 18 U.S.C. § 3664(h). See *United States v. Monzel*, 641 F.3d 528, 539 (D.C. Cir. 2011) (citing *United States v. McGlown*, 380 F.App'x. 487, 490–91 (6th Cir. 2010); *United States v. Channita*, 9 F.App'x. 274, 274–75 (4th Cir. 2001)).

¹⁴⁴ *United States v. Brunner*, No. 5:08-CR-16, 2010 WL 148433, at *4 (W.D.N.C. Jan. 12, 2010).

¹⁴⁵ *Id.*; *United States v. McDaniel*, 631 F.3d 1204, 1207 (11th Cir. 2011) (affirmed restitution order of \$12,700 [as compared to victim's total damages of \$166,000–\$188,000] when defendant's knowing possession of child pornography proximately caused victim "real and identifiable injuries that now require clinical therapy to redress").

concerns regarding excessive fines are dismissed because of the courts' "confiden[ce] that the amount of harm [the defendant] actually inflicted upon [the victim] exceeds the amount awarded[.]"¹⁴⁶

Other courts look to the civil remedies that Congress makes available to victims of certain sexual exploitation offenses, child pornography possession among them, for guidance on defining an appropriate restitution amount.¹⁴⁷ Under the civil remedies statute 18 U.S.C. § 2255 ("Section 2255"), a victim must only show that she suffered a personal injury as a result of the defendant's crime and does not necessarily need to prove the exact damages the defendant caused.¹⁴⁸ Having shown a personal injury, the victim recovers the actual damages sustained but "no less than \$150,000."¹⁴⁹ Courts view this statute as "Congress's decision that a victim is damaged a minimum of \$150,000 for any violation of [child pornography possession,]" and, therefore, use it to guide an assumption that any criminal restitution order under \$150,000 is reasonable.¹⁵⁰ Because child pornography possession is a lesser crime compared to the others in the broad range of crimes that Section 2255 covers, courts award victims a percentage of \$150,000 (theorizing that a defendant who possessed child pornography caused the victim less than \$150,000 in harm).¹⁵¹ Nevertheless, as it stands today, Section 2255 theoretically supports a restitution award of \$150,000 in the case of a defendant convicted only of possessing child pornography and no other crimes.¹⁵²

Some courts simply look at the restitution awards given by other courts and adjust them up or down, depending on whether they feel the award was appropriate.¹⁵³ Finally, other courts award nominal restitution when the government proves that the defendant harmed the victim but fails to prove the amount of the victim's losses that were proximately caused by the defendant.¹⁵⁴

¹⁴⁶ *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009); *Zane*, 2009 WL 2567832, at *5.

¹⁴⁷ *See, e.g., United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *4-5 (E.D. Cal. Aug. 19, 2009).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; 18 U.S.C. § 2255 (2006).

¹⁵⁰ *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009).

¹⁵¹ *See id.* (awarding victim two percent of \$150,000 (\$3,000)).

¹⁵² *See Doe v. Boland*, 630 F.3d 491, 498 (6th Cir. 2011).

¹⁵³ *United States v. Brunner*, No. 5:08-CR-16, 2010 WL 148433, at *4 (W.D.N.C. Jan. 12, 2010) (awarding victim \$1,500, half of what has been awarded in similar cases, because the court believes other awards did not take into account that the most substantial part of victim's loss was caused by her initial abuser).

¹⁵⁴ *See United States v. Church*, 701 F. Supp. 2d 814, 834 (W.D. Va. 2010) (ordering nominal restitution of \$100).

iii. The Rationale Behind Awarding No Restitution

Many courts award no restitution in child pornography possession cases because they find the connection between the defendant's possession of images of the victim's abuse and the victim's losses is too tenuous to warrant a finding of proximate causation.¹⁵⁵ Although these courts acknowledge that Section 2259 does not "impose 'a requirement of causation approaching mathematical precision[,]'" they still require explicit findings of fact to support the calculation of the portion of the victim's losses that were caused by a particular defendant's possession of a victim's pornographic image(s).¹⁵⁶

In many child pornography possession cases, these courts find that the "losses described by the [v]ictim[] are generalized and caused by the idea of their images being publicly viewed rather than caused by this particular [d]efendant having viewed their images."¹⁵⁷ In fact, the courts find that the victim's psychological damage, and the corresponding losses related to it (except for future estimated losses), were already caused by both the initial abuse and the idea that others were viewing pornographic images of her abuse prior to the particular defendant viewing her images.¹⁵⁸ Although these courts express sympathy toward the victims of such offenses and a desire to award them some restitution, they refuse to conduct "pure guesswork"¹⁵⁹ and devise a restitution award based on nothing more than this sympathy.¹⁶⁰ Therefore, these courts make no restitution award.¹⁶¹

¹⁵⁵ See, e.g., *United States v. Kennedy*, 643 F.3d 1251, 1264–66 (9th Cir. 2011); *United States v. Paroline*, 672 F. Supp. 2d 781, 793 (E.D. Tex. 2009); *United States v. Chow*, 760 F. Supp. 2d 335, 340–45 (S.D.N.Y. 2010).

¹⁵⁶ *Church*, 701 F. Supp. 2d at 831 (citing *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)); *Chow*, 760 F. Supp. 2d at 340.

¹⁵⁷ *United States v. Berk*, 666 F. Supp. 2d 182, 191 (D. Me. 2009) ("In the documentation supporting the [v]ictims' restitution requests, there is no mention of the impact that learning of [the defendant]'s offense had on either of the victims. In fact, there is no mention of [the defendant] at all."); *United States v. Solsbury*, 727 F. Supp. 2d 789, 796 (D.N.D. 2010) ("Without more specific evidence, any award of restitution would be an arbitrary calculation based on speculation and guess work, at best.")

¹⁵⁸ *Berk*, 666 F. Supp. 2d at 192; *United States v. Aumais*, 656 F.3d 147, 155 (2d Cir. 2011) ("[W]here 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."); *Paroline*, 672 F. Supp. 2d at 792 ("The losses described in [the victim]'s reports are generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images. No effort has been made to show the portion of these losses specifically caused by [the defendant]'s possession of [the victim]'s two images.")

¹⁵⁹ *Chow*, 760 F. Supp. 2d at 343–44; *United States v. Patton*, No. 09-43 (PAM/JSM), 2010 WL 1006521, at *2 (D. Minn. Mar. 16, 2010) ("[T]he vast majority of her losses have no direct or proximate causal connection to [the defendant]'s offenses. Without more specific evidence, any award in this case would be based on an 'arbitrary calculation.'" (internal citation omitted).

¹⁶⁰ *Chow*, 760 F. Supp. 2d at 343–44 ("[T]he Court is extremely sympathetic to these victims, and recognizes the difficulty of showing that their losses were proximately caused by the offenses of any particular defendant in cases such as this. But, under the statute enacted by Congress, a showing of proximate causation must be made before the Court can order any restitution."); *United States v. Woods*, 689 F. Supp. 2d 1102, 1112 (N.D. Iowa 2010) ("The court acknowledges the profound harm suffered However, it is the court's duty . . . to determine whether Defendant can be ordered to pay restitution to

B. Restitution in Child Pornography Possession Cases Is Often Improperly Applied

In spite of its haphazard application by the courts, Section 2259 permits restitution to be ordered *only* in child pornography possession cases in which the defendant has caused proximate harm to the victim.

1. How the Fifth Circuit Has Gone Wrong in Interpreting Section 2259

There are several flaws with the Fifth Circuit's interpretation that Section 2259 does not require a showing of proximate cause. First, the interpretation violates a "well-established principal in criminal restitution"¹⁶² in that courts applying it could unfairly hold a defendant liable for more harm than his offense caused.¹⁶³ A restitution order under Section 2259 can only encompass more losses than those personally caused by the defendant if the defendant's offense includes "as an element a scheme, conspiracy, or pattern of criminal activity."¹⁶⁴ While some child pornography offenses

[the victim]. To do so, the court must be able to determine, within reason, what losses [the victim] suffered as a result of Defendant's conduct. Unfortunately, in light of the record, the court is unable to make this determination."); *Berk*, 666 F. Supp. 2d at 192 ("The Court is sympathetic to the difficulty of showing a loss proximately caused by the conduct of any particular defendant. But the Court's sympathy does not override the requirement that such a showing be made before the Court can order restitution."); *Solsbury*, 727 F. Supp. at 796 ("The Court is very sympathetic to [the victim] 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 However, the Government has the burden of proof and the Government has failed to meet its burden of proof"); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009) ("[T]he 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.").

¹⁶¹ *United States v. Rowe*, No. 1:09-CR-80, 2010 WL 3522257, at *45 (W.D.N.C. Sept. 7, 2010) (holding that because the victim's original abuser inflicted all of her physical harm and a significant portion of her psychological harm, "it would be absurd to hold, as the Government suggests, the Defendant jointly and severally liable for the entire amount of [the victim]'s damages"); *Solsbury*, 727 F. Supp. 2d at 79596 ("The Court is unable to determine, with any reasonable certainty, what losses are attributable to the egregious acts of sexual abuse committed by [the victim]'s father, what losses are attributable to countless others who have received, distributed, or possessed the images, or what losses were caused by this particular defendant's conduct in possessing the pornographic images"); *Woods*, 689 F. Supp. 2d at 1112 (None of the "evidence before the court permits the court to discern with any reasonable certainty which of [the victim]'s losses were caused by Defendant's conduct."); *Paroline*, 672 F. Supp. 2d at 79192 ("A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct."); *Chow*, 760 F. Supp. 2d at 343 ("[A]lthough . . . Defendant's possession of their images undeniably contributed [the victims]' harm, the Court cannot determine what portion of their loss was proximately caused by Defendant's specific acts.").

¹⁶² *United States v. Church*, 701 F. Supp. 2d 814, 829 (W.D. Va. 2010).

¹⁶³ *See id.*; *see also Berk*, 666 F. Supp. 2d at 189. *Contra In Re Amy Unknown*, 636 F.3d 190, 200 (5th Cir. 2011), *reh'g en banc granted* Jan. 25, 2012, 668 F. 3d 776 (5th Cir. 2012) ("Restricting the 'proximate result' language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim").

¹⁶⁴ 18 U.S.C. § 3663A(a)(2) (2000). *See Church*, 701 F. Supp. 2d at 829; *see Berk*, 666 F. Supp. 2d at 191. *Contra In Re Amy Unknown*, 636 F.3d at 200.

may involve schemes, conspiracies, or patterns of criminal activity,¹⁶⁵ none are elements of the child pornography possession offense.¹⁶⁶

Furthermore, while possession of child pornography is like a conspiracy in that it does not occur in a limited timeframe and can go on for years; it is different from a conspiracy because the pornographic image is still available on the internet; there will likely be additional defendants arrested for possessing that image; and therefore, the offender pool is not closed. More people can still access the pornographic image, be criminally charged with possession of child pornography for doing so, and be ordered to pay restitution. Under the Fifth Circuit's interpretation, defendants are being ordered to pay restitution based on the inferred cumulative harm inflicted by the aggregate creation, dissemination, and viewing of the pornographic images. Instead, possession should be treated as a severable crime, with each possession a distinct crime, and each restitution order based on that distinct crime.¹⁶⁷

A second flaw with the Fifth Circuit's interpretation is that it conflicts with courts' longstanding practice of requiring a showing of proximate cause between the victim's harm and the defendant's offense prior to ordering restitution.¹⁶⁸ The Fifth Circuit improperly relies on the Supreme Court's reasoning in *New York v. Ferber* in finding that possessors of child pornography cause direct harm to the victims depicted in the images.¹⁶⁹ In *Ferber*, the Supreme Court held that child pornography was not protected by the First Amendment, could therefore be banned, and accordingly, child pornography possession could be a crime.¹⁷⁰ However, the Court's reasoning in *Ferber*, and its similar reasoning later in *Ashcroft v.*

¹⁶⁵ *Berk*, 666 F. Supp. 2d at 189 ("Child pornography offenses may seem analogous to crimes involving schemes, conspiracies, or patterns in that the end-user[s]/possessor[s] of child pornography 'create and sustain' a market for pornographic images which, in turn, motivates abusers to produce more images."); *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir.1998).

¹⁶⁶ *Berk*, 666 F. Supp. 2d at 189; 18 U.S.C. § 2252 (Supp. 2008).

¹⁶⁷ Victims claim that the distinct harm they suffer with each new notification that a defendant was found in possession of their image does not diminish with each new notification. *See, e.g., United States v. Woods*, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010).

I learn about each [defendant who possessed [my images]] because of the [NCMEC] Victim Notices. . . . The Notice puts 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. I live in fear that any of [the defendants] may try to find me and contact me and do something to me.

Id. (emphasis added) (quoting victim's statement).

¹⁶⁸ *See Church*, 701 F. Supp. 2d at 827; *see also Berk*, 666 F. Supp. 2d at 187 (D. Me. 2009); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir. 1962) (citing *Karrell v. United States*, 181 F.2d 981, 986 (9th Cir.), cert. denied, 340 U.S. 891 (1950); *United States v. Follette*, 32 F.Supp. 953 (E.D.Pa.1940)) (interpreting Federal Probation Act's [18 U.S.C. § 3651] language allowing courts to impose restitution as a condition of probation but only to "aggrieved parties for actual damages or loss caused by the offense for which conviction was had" as meaning "the amount involved in the particular offense for which the defendant was indicted and of which he was convicted").

¹⁶⁹ *See In re: Amy Unknown*, 636 F.3d at 200-01.

¹⁷⁰ *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

Free Speech Coalition, simply supports the argument that child pornography possession should be a crime.¹⁷¹ While this reasoning can be argued to imply that *producers* of child pornography cause direct harm to victims, it says nothing about whether *possessors* directly harm the victims.¹⁷²

Finally, the Fifth Circuit's interpretation of the statute violates the rule of lenity, which requires ambiguous criminal statutes to be interpreted in favor of the defendant.¹⁷³ The Supreme Court has ruled that "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."¹⁷⁴ Accordingly, the majority of courts correctly refuse to order restitution in child pornography possession cases in which the victim's losses were not proximately caused by the defendant's offense.¹⁷⁵

2. Beyond the Scope of Section 2259: Restitution for Purely Emotional Harm

Today, most restitution awards for child pornography possession are not authorized by statute because they are awards for purely emotional harm.¹⁷⁶ Such awards require a defendant to pay restitution to a victim

¹⁷¹ *Id.*; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) ("[A]s a permanent record of a child's abuse, the continued circulation [of child pornography] 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.").

¹⁷² *Ferber*, 458 U.S. at 763–64; *Ashcroft*, 535 U.S. at 249; John Schwartz, *Court Rejects Restitution for Victim in Porn Case*, N.Y. TIMES, Sept. 9, 2011, at A20.

Douglas A. Berman, an expert on sentencing issues at Ohio State University's law school, said that the [Second Circuit's decision to deny restitution in *United States v. Aumais*] suggests that judges are becoming 'notably less eager to fudge the law' on the question of causation 'to enable an obviously deserving victim to collect from an obviously unpleasant defendant' in these cases. 'The law,' he said, 'does not connect the dots here.'

Id.

¹⁷³ See *Simpson v. United States*, 435 U.S. 6, 14–15 (1978). But see *United States v. Serawop*, 505 F.3d 1112, 1122–23 & n.4 (10th Cir. 2007) (refusing to apply the rule of lenity to its interpretation of the MVRA because the MVRA is not a punitive statute).

¹⁷⁴ *Crandon v. United States*, 494 U.S. 152, 160 (1990). Furthermore, the Supreme Court has rejected attempts to use broad legislative statements of purpose in enacting the VWPA to support the argument that court-ordered restitution should be available for offenses outside of the defendant's offense of conviction. See *Hughey v. United States*, 495 U.S. 411, 422 (1990). The Supreme Court held that it:

[N]eed not resolve the policy questions surrounding VWPA's offense-of-conviction limitation on restitution orders. Even were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in favor of the defendant, preclude our resolution of the ambiguity against [the defendant] on the basis of general declarations of policy in the statute and legislative history.

Id. (internal citation omitted).

¹⁷⁵ See cases cited *supra* note 84.

¹⁷⁶ See *United States v. Hardy*, 707 F. Supp. 2d 597, 614 (W.D. Pa. 2010) ("[d]efendant's conduct is a substantial factor in [victim's] psychological harm . . ."); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009) ("The fact that the victim . . . did not have personal knowledge of this defendant's activities at the time she was evaluated by [her psychologist] does not

whom he has never met nor attempted to contact.¹⁷⁷ In fact, in many of these cases, the victim was not even aware that the defendant existed, much less aware that he looked at her pornographic images, when she was examined by the psychologist who wrote the report detailing her emotional harm.¹⁷⁸ This report, written before the victim was aware of the defendant's existence, is then submitted to the court as evidence of the harm the defendant caused to the victim.¹⁷⁹ Nonetheless, many courts rely on this report as evidence to justify their restitution award, in spite of the fact that courts generally do not award restitution for pain and suffering or loss of enjoyment of life because they are not based on "actual loss."¹⁸⁰

The fact that many restitution awards in child pornography possession cases are actually awards for emotional harm is further bolstered by the difficulty courts are having in calculating the appropriate amount of the award. This is because, unlike actual losses, emotional harm is difficult to gauge with particularity and simply too amorphous to be calculated. Beyond its difficulty to calculate, there are other problems with allowing criminal restitution based on emotional harm.

First, it is unnecessary in criminal proceedings because the victim can sue the defendant civilly to seek redress for emotional harm.¹⁸¹ In a civil proceeding, the victim has the opportunity to present a more complete case than she does in a criminal restitution hearing.¹⁸² In criminal restitution hearings, the victim is not a party and thus has inherently limited input and control.¹⁸³ Furthermore, in criminal restitution hearings, the victim "is not even guaranteed the right to testify about the extent of [her] losses."¹⁸⁴ Moreover, unlike damages available in a civil proceeding, criminal restitution is a limited remedy that has historically included only *actual* damages and losses¹⁸⁵ and excluded difficult-to-quantify losses, such as

negate the harm that [she] suffered and continues to suffer as a result of this defendant's possession of images depicting her sexual abuse as a child.").

¹⁷⁷ See, e.g., *Staples*, 2009 WL 2827204, at *3.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *United States v. Berk*, 666 F. Supp. 2d 182, 191 (D. Me. 2009).

¹⁸⁰ See *United States v. Serawop*, 505 F.3d 1112, 1124 (10th Cir. 2007) ("[T]he MVRA does not provide incidental, consequential, or pain and suffering awards."); *Boe*, *supra* note 35, at 217–18.

¹⁸¹ *McLeod*, *supra* note 75, at 1355–56 ("Given the harm suffered by child pornography victims, it is important that the judicial system provide some remedy to th[ose] victims. But criminal restitution is not the only option. If courts decline to award restitution, child pornography victims seeking redress can use the civil system to vindicate their rights. . . . [A] tort or civil restitution claim may provide victims with a better remedy, and a better chance of redress, than that offered by a Section 2259 restitution claim."); *contra* *REIFF*, *supra* note 45, at 137 ("A victim may sue an offender in civil court to recover his losses. To do so, he must pay for his own attorney, and he is further victimized by additional loss of time from work. Victims know that most offenders are poor and an award arising out of a civil action alone will probably [prove] worthless to them.").

¹⁸² *McLeod*, *supra* note 75, at 1356.

¹⁸³ See *United States v. Brown*, 744 F.2d 905, 910 (2d Cir. 1984); see also *McLeod*, *supra* note 75, at 1356.

¹⁸⁴ *Brown*, 744 F.2d at 910.

¹⁸⁵ See *supra* notes 54, 63–64 and accompanying text.

“[p]ain and suffering...and other unliquidated damages that are particularly susceptible to arbitrary determination[s].”¹⁸⁶

Second, Congress did not intend to make criminal sentencing procedures unduly complex.¹⁸⁷ Yet, when courts interpret Section 2259 broadly so as to permit awards of pain and suffering and emotional distress in child pornography possession cases, the calculation of the award inevitably becomes “both protracted and more complex” as courts struggle to avoid arbitrary and unfair awards.¹⁸⁸ “Although restitution can be an effective criminal sanction, it is not an appropriate punishment for all crimes. When the victim's loss is difficult to quantify[,] . . . restitution may be a less effective and less easily administered penalty.”¹⁸⁹

Furthermore, the MVRA does not apply to certain offenses if “determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.”¹⁹⁰ Although this exclusion applies to property, fraud, or deceit actions, tampering with consumer products, and to violations of the Controlled Substances Act, these are the only offenses included in the statute that do not result in a direct physical injury.¹⁹¹ Therefore, it makes sense that Congress would likewise intend this provision to apply to child pornography possession cases as well, which similarly do not result in a direct physical injury to a victim.

Courts attempt to justify such restitution awards for purely emotional harm by pointing to Section 2259's language allowing restitution for “medical services relating to physical, psychiatric, or psychological care.”¹⁹² However, it is extremely difficult to link a victim's specific psychiatric care costs to a specific defendant's possession of the victim's image. The linkage becomes even more complex because the victim's image has been seen by thousands of people, and will likely continue to be seen by thousands of people going forward.¹⁹³ Likewise, courts often justify these awards under Section 2259's provision that authorizes restitution for “any other losses suffered by the victim as a proximate result of the offense.”¹⁹⁴ However, restitution has not historically been authorized for

¹⁸⁶ McLeod, *supra* note 75, at 1357 (citing *United States v. Berk*, 666 F. Supp. 2d 182, 192 n.9 (D. Me. 2009) (quoting Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937–38 (1984))) (hereinafter *Victim Restitution*).

¹⁸⁷ See *supra* note 110; see also *infra* notes 190–91.

¹⁸⁸ *State v. Jarvis*, 509 A.2d 1005, 1007 (Vt. 1986).

¹⁸⁹ *Victim Restitution*, *supra* note 186, at 933.

¹⁹⁰ 18 U.S.C. § 3663A(c)(3)(B) (2000).

¹⁹¹ 18 U.S.C. § 3663A(c)(1)(a)(ii) (2006).

¹⁹² 18 U.S.C. § 2259(b)(3)(A) (1994).

¹⁹³ See generally Brief, *supra* note 7, at 10 (stating that the Internet permits mass, worldwide circulation of child pornography).

¹⁹⁴ 18 U.S.C. § 2259(b)(3)(F) (1994).

purely emotional harm.¹⁹⁵ Furthermore, according to the canon of statutory interpretation *expressio unius est exclusio alterius*, because Congress did not expressly authorize restitution for emotional harm under Section 2259, it should therefore be assumed that Congress intentionally did not include it.¹⁹⁶ Therefore, Section 2259 should not be interpreted to authorize damages for emotional harm.

C. Restitution Properly Applied Makes Sense

Despite the issues with the current process, restitution in child pornography possession cases is both statutorily sound¹⁹⁷ and makes sense in the right cases. While it is difficult to prove that a defendant convicted of such an offense caused proximate harm to the victim, it is not impossible.¹⁹⁸ For example, if a defendant is convicted of possession or receipt of “made-to-order” or “real-time” child pornography,¹⁹⁹ and it is proven that the defendant ordered or encouraged the creation of this pornography, the proximate cause requirement would be satisfied.²⁰⁰ The proximate cause requirement would be satisfied because the defendant’s pornography order directly produced, or minimally encouraged, at least one instance of the child’s abuse.²⁰¹ Likewise, the proximate cause requirement is satisfied if a defendant views a victim’s pornographic images, contacts her about the images, and that contact causes the victim emotional trauma resulting in additional therapy sessions, missed work, or any expenses as a result thereof.²⁰²

In fact, restitution in such cases supports a progression of the victims’ rights movement and promotes the rehabilitation of offenders. Restitution supports a progression of the victims’ rights movement because it requires the defendant to compensate the victim directly for the harm he has caused.²⁰³ Even if the defendant does not have the economic means to actually pay the victim the entire amount due under a restitution order, the order at least, symbolically, allows the victim to recoup something from the

¹⁹⁵ See *supra* notes 53, 62–63 and accompanying text.

¹⁹⁶ *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

¹⁹⁷ 18 U.S.C. § 2259 (2006).

¹⁹⁸ See, e.g., *United States v. Church*, 701 F. Supp. 2d 814, 832–33 (W.D. Va. 2010).

¹⁹⁹ “Made to order” child pornography is depictions of child sexual abuse that is “created to order for the consumer.” “Real time” child pornography involves streaming live video of abuse, so that consumers watch online the sexual abuse as it is occurring. Consumers of “real time” child pornography may chat with the person streaming the video and encourage that person to abuse the child in specific ways. See *United States v. Williams*, 444 F.3d 1286, 1290 n.4 (11th Cir. 2006), *rev’d*, *United States v. Williams*, 553 U.S. 285 (2008); *United States v. Thielemann*, 575 F.3d 265, 269 (3d Cir. 2009).

²⁰⁰ *Church*, 701 F. Supp. 2d at 833.

²⁰¹ See, e.g., *Thielemann*, 575 F.3d at 269–70.

²⁰² See *United States v. McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011); *Church*, 701 F. Supp. 2d at 833.

²⁰³ Kleinhaus, *supra* note 36, at 2766.

defendant who caused those losses.²⁰⁴ Furthermore, restitution promotes rehabilitation of offenders in the sense that “it forces the defendant to confront, in concrete [economic] terms, the harm his actions have caused” to the victim.²⁰⁵

IV. PROPOSAL TO REFORM RESTITUTION IN CHILD PORNOGRAPHY POSSESSION CASES

Courts should continue to order restitution in certain child pornography possession cases. However, Congress should amend Section 2259 to clarify its intentions, and to reduce the risk that the statute is incorrectly applied. Section 2259 should be amended in several ways to modify both when restitution is ordered, as well as how to appropriately calculate the amount of restitution awarded.

1. Modifying When to Grant Restitution Awards

First, Congress should amend Section 2259(b)(3) to provide that “for purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim *that were proximately caused by the defendant’s offense of conviction.*” This modification will clarify the proximate cause issue and, admittedly, will end restitution awards in most child pornography possession cases.²⁰⁶ Nevertheless, restitution will still be ordered in cases in which the defendant has direct contact with the victim or encourages her abuse.²⁰⁷ In addition to any restitution that might be owed to the victim, Section 2259 should further be amended to require defendants to pay a flat fine per offense of conviction to a specific victim’s fund, such as the NCMEC.²⁰⁸ This fine should be applied to all defendants convicted of possessing child pornography and will serve as a societal sanction of the offense.²⁰⁹

²⁰⁴ *Id.*; Beth Bates Holliday, Annotation, *Who is a “Victim” Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. FED. 2d 283 (2008).

²⁰⁵ *Kelly v. Robinson*, 479 U.S. 36, 49, n.10 (1986) (citing *Victim Restitution*, *supra* note 186, at 937–41).

²⁰⁶ For example, if a pornographic photo of a child was taken thirty years ago and has recently been found to have been viewed by someone, has the viewer/possessor proximately harmed the child depicted in the photo? Under the solution proposed in this Comment, the answer is no. Obviously, sexual offenders/child abusers are in a different category and should continue to be subject to restitution awards for the direct harm that they cause to their victims. *Contra* Kaplan, *supra* note 7, at 553 (“Admittedly, the evidence presented in support of ordering restitution in possession cases is insufficient to quantify the amount of harm that an individual possessor caused. But this does not negate the fact that the possessor has caused the child-victim harm.”).

²⁰⁷ See *supra* notes 199–202 and accompanying text.

²⁰⁸ This proposed mandatory fine for all possessors of child pornography possession should not be confused with the fine proposed by Robert William Jacques, in which the fine would be paid to NCMEC and NCMEC would then distribute monies to victims. This simply shifts the calculation problem from the courts to NCMEC, and therefore fails to truly resolve the issue. See Jacques, *supra* note 57, at 1191–97.

²⁰⁹ *Id.* at 1198. Some “victimless” drug crimes also have a similar fine. See 18 U.S.C. § 3663(c) (2006). In cases in which the defendant does not cause proximate harm to the victim, child pornography

2. Modifying the Calculation of Restitution Awards

Congress should also amend Section 2259 to instruct the courts on how to calculate a restitution award. Accordingly, Congress should include a statement in Section 2259 that “restitution shall not be ordered for damages of emotional harm or loss of enjoyment of life.” This statement will prevent judges who understandably feel sympathy for victims from ordering arbitrary restitution awards for purely emotional harm. Finally, Congress should amend Section 2259 to explicitly prohibit joint and several liability restitution awards for child pornography possession cases, thereby treating each possession as a severable crime subject to its own independent restitution order.²¹⁰

3. Benefits Resulting from This Reform of Section 2259

This reform of Section 2259 will resolve the most significant problems courts face when analyzing restitution orders in cases of child pornography possession. It will eliminate Eighth Amendment concerns by standardizing the amount of restitution and fines defendants are ordered to pay, providing equal treatment for defendants convicted of such offenses, and giving defendants clear notice of the restitution and fines they will be ordered to pay if convicted. This amendment to Section 2259 will also expressly resolve the issue of how to apportion the harm caused by child pornography possession by ordering a defendant to pay restitution to a victim only for those harms he proximately caused and to pay a fine to cover the societal harm caused by child pornography. Moreover, because this proposal will eliminate joint and several liability restitution awards for child pornography possession and only permit restitution awards in cases of proximate harm, it will eliminate the need for establishing a multi-jurisdictional system of tracking restitution awards (which would be an expensive and complex bureaucratic nightmare to establish). The elimination of joint and several liability awards will also ensure that a victim does not receive more compensation than her total losses because the victim will only recover the exact amount of damage that a defendant proximately caused.

Furthermore, this proposal offers direct benefits to victims of child pornography possession. The current victim notification process used today, in which NCMEC notifies the victim each time her image is discovered in possession of a defendant, will largely no longer be necessary. This is

possession is also a crime without a direct victim; but because society wants to discourage the use of child pornography, this fine will serve as both deterrence and punishment to those convicted of its possession. *See generally supra* note 29.

²¹⁰ However, per the Section 2259 amendments recommended in Part IV(1 & 2), restitution in child pornography possession cases should only be ordered if the defendant caused proximate harm to the victim, and the victim suffered actual damages as a result.

because restitution awards will only be permitted in cases where the victim knows of the defendant's offense, which is most cases, because the defendant caused proximate harm to the victim. Victims may still require notification in cases of "custom" or "made-to-order" pornography.²¹¹ However, implementation of the proposed modifications would certainly greatly reduce the unnecessary "slow acid drip" of trauma and emotional distress caused to the victim each time she receives notification that another defendant has viewed images of her sexual abuse.²¹²

Finally, this proposal offers benefits to society in general. Initially, by ordering each defendant to pay a fine to the NCMEC for each child pornography possession conviction, society can more effectively express its condemnation of child pornography and its support for victims. Additionally, this fine will prevent defendants convicted of possession from escaping without monetary consequence, as is occurring frequently today in some courts that, in their struggle to accurately interpret Section 2259, award no restitution.²¹³ This proposal will also allow a cheaper and swifter delivery of justice to defendants convicted of child pornography possession, by eliminating the time and expense currently tying up courts struggling to make sense of Section 2259 in its current state of vagueness. Lastly, by standardizing restitution awards in child pornography possession cases, the implementation of this proposal will eliminate arbitrary restitution awards and help to ensure defendants are treated fairly, returning to the bedrock of our justice system.

V. CONCLUSION

Child pornography possession victims deserve swift justice, but, in its current form, Section 2259 adds time, unnecessary complexity, and often arbitrariness to the delivery of justice. Likewise, the Mandatory Federal Sentencing Guidelines also add unnecessary time and complexity to child pornography possession cases, and these guidelines should also be analyzed for reform. However, reform of these guidelines is outside of the scope of this Comment. The Supreme Court recently denied a petition for writ of certiorari in *Amy v. Monzel*, a child pornography possession restitution

²¹¹ Such notifications may be necessary because the victim may not be aware that the defendants in such cases encouraged or "ordered" her sexual abuse, thereby causing proximate harm to her without her knowledge.

²¹² *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011); *United States v. Woods*, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010) (quoting victim's statement) ("I learn about each [defendant who possessed [my images]] because of the [NCMEC] Victim Notices. . . . The Notice puts 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. I live in fear that any of [the defendants] may try to find me and contact me and do something to me.") (emphasis added); Jacques, *supra* note 57, at 1194 ("[NCMEC n]otifications reinforce victim paranoia").

²¹³ See *supra* Part III(A)(3)(iii).

case.²¹⁴ Yet, this issue is clearly not going away. In fact, as of late 2011, lawyers for one child pornography victim worked with the government to file more than 700 restitution requests in cases of defendants convicted of possessing her pornographic images.²¹⁵ Each one of these requests has sought more than \$3 million.²¹⁶

Therefore, because the Supreme Court is not immediately intervening to resolve this split among the courts, Congress must put aside any concerns it has of appearing sympathetic toward child pornographers and act to clarify Section 2259. Congress should amend Section 2259 to require proximate cause between the defendant's offense and the victim's harm in restitution orders, eliminate joint and several liability awards, eliminate restitution awards for purely emotional harm, and require defendants convicted of child pornography possession to pay a fine to a prescribed victim's fund. Both the victims and our justice system deserve as much.

²¹⁴ Amy, Victim in Misty Child Pornography Series v. Monzel, 132 S. Ct. 756 (2011).

²¹⁵ Warren Richey, *Supreme Court Refuses to Resolve Confusion Over Child Pornography Law*, CHRISTIAN SCI. MONITOR, Nov. 28, 2011, <http://www.csmonitor.com/USA/Justice/2011/1128/Supreme-Court-refuses-to-resolve-confusion-over-child-pornography-law>.

²¹⁶ *Id.*