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PERVERTED JUSTICE: WHY COURTS ARE RULING AGAINST
RESTITUTION IN CHILD PORNOGRAPHY POSSESSION
CASES, AND HOW A VICTIM COMPENSATION
FUND CAN FIX THE BROKEN
RESTITUTION FRAMEWORK

TYLER MORRIS*

“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’ . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.” It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.¹

I found out last summer that if someone downloads a song off the Internet the penalty is three times worse than if someone [downloads] child pornography. I couldn’t believe it. How could this be? . . . I’m more upset about the pictures [of me] on the Internet than I am about what [my abuser] did to me physically.²

* I would like to thank the *Villanova Law Review* and its management for choosing my article for publication and for support throughout the process. I would also like to thank: Anna, my compass, for advice, inspiration, confidence, and love; my father for teaching me the great values of honesty, humility, and hard work; my mother for teaching me the universal element—compassion; and my brothers, because our brotherhood and competition made me strong and taught me to fight. Finally, a simple prayer for the victims of abuse everywhere—may they find a lasting peace.

1. *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 747, 756-58 (1982) (alterations in original)).

2. *Sexual Exploitation of Children over the Internet: What Parents, Kids and Congress Need to Know About Child Predators: Hearing Before the H. Energy and Commerce Comm. Subcomm. on Oversight and Investigations*, 109th Cong. 444, 46 (2006) [hereinafter *Allen Hearings*] (statement of Masha Allen), available at <http://archives.energycommerce.house.gov/reparchives/108/Hearings/05032006hearing1852/Allen.pdf>.

Ms. Allen’s statement is particularly remarkable in light of her circumstances: she was adopted at age five from her birthplace in Russia by her abuser, who then raped her violently for six years before putting images of the abuse on the Internet. See generally *James R. Marsh Testifies Before Congress*, THE MARSH LAW FIRM, P.L.L.C., <http://www.marshlaw.us> (last visited Mar. 4, 2012) (discussing global child pornography); *Child-Porn Victim Brings Her Story to Washington*, ABC NEWS

I. INTRODUCTION: CHILD PORNOGRAPHY'S RISE

For evidence that the internet can be, at its worst, a medium for facilitating human beings' most deplorable tendencies, one need only enter the wrong combination of search terms while browsing.³ Most people know, at least anecdotally through television shows like "To Catch a Predator," that the internet has been increasingly used to facilitate the spread of child pornography and even predatory crimes against children.⁴ One prominent media observer has declared that, due to the internet, we are in the "golden age of child pornography," and one Senator has called child pornography "a plague upon our people."⁵ They are not alone in their concern, as fears about child pornography have been so widespread as to constitute "social panic."⁶ While technology has made child pornography less expensive to produce and disseminate, the financial estimates of

(Aug. 31, 2006), <http://abcnews.go.com/WNT/International/Story?id=1919036&page=1> (discussing Ms. Allen's Testimony). Specifically, the fact that she is more upset by the ongoing circulation of her pictures even after her abuser went to jail than by the initial abuse demonstrates that possessors of such images inflict direct, severe harm. See *Allen Hearings*, *supra*.

3. For a discussion of the nature of the crime of child pornography in the context of the internet, see *infra* notes 24-44 and accompanying text.

4. See *Internet Child Pornography: Hearing Before H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Sec.*, 107th Cong. 6-13 (2002) (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Fed. Bureau of Investigation), available at <http://judiciary.house.gov/legacy/heimbach050102.htm> (describing need to protect children from sexual predation online); JANIS WOLAK ET AL., INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT vii (Nov. 2003), available at <http://www.childcentre.info/projects/internet/abusiveimage/dbaFile10840.pdf> ("The Internet and computers have come to play a growing role in sex crimes that are committed against children . . .") (footnote omitted); Press Release, Nat'l Ctr. for Missing & Exploited Children, Child Porn Among Fastest Growing Internet Businesses (Aug. 18, 2005), available at <http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=enUS&PageId=2064> (describing vast growth of child pornography businesses online); *Child Porn Networks Growing Warns UN*, SYDNEY MORNING HERALD, Sept. 17, 2009, <http://www.smh.com.au/technology/technology-news/child-porn-networks-growing-warns-un-20090917-fscv.html> (same); *UN Expert: Child Porn on Internet Increases*, MSNBC.COM, Sept. 16, 2009, http://www.msnbc.msn.com/id/32880508/ns/technology_and_science-security/t/un-expert-child-porn-internet-increases/# (same). "How to Catch a Predator" was a popular television show that lured sexual predators who had attempted to meet children on the internet to a location where they were interviewed and subsequently arrested on camera. See *To Catch a Predator*, TOP DOCUMENTARY FILMS, <http://topdocumentaryfilms.com/catch-predator> (last visited Oct. 10, 2011).

5. George F. Will, *Nasty Work*, WASH. POST, Jan. 23, 2000, at B7; 141 Cong. Rec. 24,871 (1995) (quoting Senator Orrin Hatch in statement regarding Child Pornography Prevention Act of 1995).

6. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 217 (2001). Professor Adler continues in the next section of the article to document "The Discovery and Rise of Child Pornography." See *id.* at 219-229.

the size of the industry have grown to staggering levels, reaching into the billions of dollars.⁷

As the problem of child pornography has increased, the tools used to combat it have rapidly grown in scale and variety.⁸ Prosecutions have increased.⁹ Blue-chip companies have partnered with the government and devoted resources to developing innovative ways to eliminate images, or freeze the capabilities of distributors.¹⁰ Congress has passed several strict laws proscribing child pornography possession and instituting harsh sentences.¹¹ Further, the Supreme Court has carved out a rare exception

7. See, e.g., *The Financial Coalition Against Child Pornography—Fact Sheet*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3703 (last visited Sept. 10, 2011) (“Child pornography has become a multi-billion dollar commercial enterprise and is among the fastest growing businesses on the Internet. Through the use of digital and web cameras, child pornography has become easier and less expensive to produce. Distribution on the Internet has facilitated instant access by thousands and possibly millions of individuals throughout the world. The ability to use a variety of payment methods to purchase child pornography has made it easier than ever to obtain.”)

8. See *infra* notes 9-12 and accompanying text.

9. See MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 2 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf> (explaining that child pornography constituted 69% of sex exploitation offenses referred to United States Attorneys in 2006 and accounted for 82% of growth in sex exploitation matters from 1994 to 2006). However, concerns about prosecutorial overreach should be quelled by the fact that prosecution rates are “infamously low.” See Robert William Jacques, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1175 (2011); see also YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 131 (2008) (“[Fifty-three] per cent [sic] of total referrals result in prosecution, with an [eighty-seven] per cent [sic] conviction rate during the period 1995-2003.”); MOTIVANS & KYCKELHAHN, *supra*, at 3 (“Thirty-nine percent of all sex exploitation matters were declined for prosecution by U.S. attorneys in 2006.”).

10. See, e.g., Press Release, Nat'l Ctr. for Missing & Exploited Children, Google Joins Industry-Wide Movement to Combat Child Pornography (Aug. 23, 2006), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2629 (describing Technology Coalition, which includes AOL, Yahoo!, Microsoft, EarthLink, Google, and United Online, and which “will work to enhance knowledge sharing among industry participants, improve law enforcement tools, and research perpetrators’ technologies in order to enhance industry efforts and build solutions”).

11. See generally Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996) (codified at 18 U.S.C. §§ 2251-52 (2006)) (outlawing possession of pornographic materials featuring minors); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (codified at 18 U.S.C. § 2251(2)(D) (2006)) (describing repercussions and punishment for possessing and creating child pornography).

to its First Amendment jurisprudence, which allows statutes to prohibit the possession of child pornography.¹²

Yet despite such overwhelming emphasis on the harm caused by child pornography and the need to combat it through all available means, federal courts are split on whether offenders found guilty of child pornography possession should pay restitution.¹³ Those courts denying restitution have generally based their holdings on a finding that the convicted child pornography possessor did not proximately cause harm to a particular victim.¹⁴

This Note argues that the proximate cause issue should be reframed in terms of the concerns that underlie it—namely, fears of windfall profits for victims and the logistical difficulty of dealing with a potentially large volume of claims.¹⁵ Neither of those concerns is a sufficient reason for denying restitution altogether.¹⁶ However, the manner in which some courts have awarded restitution—through joint and several liability—is equally ill-suited to the child pornography possession context, and may reinforce the fears that cause some courts to deny restitution altogether under the current proximate cause framework.¹⁷

This Note endeavors to find middle ground.¹⁸ Part II examines why child pornography possession is harmful to victims, society, and even of-

12. See generally *Osborne v. Ohio*, 495 U.S. 103 (1990) (creating child pornography exception to First Amendment which would otherwise invalidate statutes proscribing child pornography).

13. Compare *United States v. Paroline*, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009) (denying restitution altogether), *rev'd sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh'g granted en banc*, 668 F.3d 776 (5th Cir. 2012), with *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3-4 (S.D. Fla. Sept. 2, 2009) (awarding \$3,680,153 in restitution). For a further discussion on the wide range of outcomes in restitution requests, see *infra* notes 74-86 and accompanying text.

14. See, e.g., *United States v. Simon*, No. 08-CR-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (“[T]here is no evidence of harm to [the victim] caused by defendant [who was only a possessor of pornographic images of the victim].”).

15. See, e.g., *United States v. Aumais*, 656 F.3d 147, 154 (2d Cir. 2011) (noting that victim had “no direct contact” with defendant, her “Victim Impact Statement ma[de] no mention of [the defendant],” and expert’s evaluation of her was done before defendant was arrested; these factors indicate that victim’s attorney was searching for defendants without her realizing any particularized harm).

16. Cf. *infra* notes 24-44 and accompanying text (recounting tremendous and recurring harm suffered by child pornography victims).

17. See *id.* at 156 (“[I]t would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country.”); *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) (“[T]he court must estimate not only a total amount of harm, but must be able to ascertain with reasonable certainty from the evidence presented what proportion of the total harm was proximately caused by *this* defendant and *this* offense.”).

18. See *infra* notes 113-30 and accompanying text (outlining possibilities for finding more suitable means for child pornography victims to recover damages).

fenders.¹⁹ Part III provides a general overview of the history of child pornography possession legislation and jurisprudence with a particular focus on restitution and the proximate cause requirement.²⁰ Part IV recommends a dramatic overhaul of the restitution framework for possession cases.²¹

By accounting for the potential pitfalls of granting restitution while maintaining a focus on the common sense reality of harm to victims resulting from the possession of child pornography, a workable solution emerges: a victim compensation fund.²² Although it initially seems cumbersome, a victim compensation fund will increase enforceability and uniformity while promoting the broader goals of our legal system more effectively than the current restitution framework.²³

II. CHILD PORNOGRAPHY POSSESSION: WHO IT HARMS AND HOW IT HARMS

A. *Harm to Victims*

Public attention on the harm to individuals caused by possession of child pornography has tended to focus on several prominent victims who have filed numerous restitution requests.²⁴ One of the most prominent victims, “Amy,” who was depicted in the “Misty series” of child pornography, has received significant attention due to her more than 250 requests for restitution.²⁵ Amy’s case is instructive as to the potential scope of harm to one victim because in recent years the National Center for Miss-

19. See *infra* notes 24-44 and accompanying text (summarizing child pornography, its impact on victims, and its harm to society).

20. See *infra* notes 45-86 and accompanying text (chronicling child pornography laws’ historical development in the context of cases involving restitution and possession).

21. See *infra* notes 87-130 and accompanying text (arguing benefits of redesigning restitution framework for awarding compensation in possession cases).

22. See *infra* notes 113-30 and accompanying text (proposing alternative to current system of restitution through victim compensation fund).

23. See *infra* notes 121-30 and accompanying text (weighing potential burdens of victim compensation fund with overall benefits to society and entire legal system).

24. See, e.g., John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES (Feb. 2, 2010), <http://www.nytimes.com/2010/02/03/us/03offender.html?ref=US> (describing prominent victims); James Walsh, *Federal Judge Asks Prosecutors to Put a Price on Child Porn*, STAR TRIB. (Jan. 5, 2010), <http://www.startribune.com/local/stpaul/80672902.html?page=1&c=c=y> (describing increase in restitution requests from several victims).

25. See *United States v. Aumais*, 656 F.3d 147, 155 (2d Cir. 2011) (noting that victim sought restitution in over 250 cases); Warren Richey, *A Bold Gambit to Reduce Demand for Child Porn*, CHRISTIAN SCI. MONITOR (Aug. 16, 2009), <http://www.csmonitor.com/USA/JUSTICE/2009/0808/p22s01-usju.html> (documenting victim’s attempts to seek restitution); see also *United States v. Hardy*, 707 F. Supp. 2d 597, 600 & n.3 (W.D. Pa. 2010) (“A ‘series’ is a collection of child pornography images depicting the same victim or victims; they are traded online among those who deal in child pornography.”).

ing and Exploited Children has identified over 35,570 images of Amy in connection with more than 3,227 evidence reviews.²⁶

Although significant emphasis on a select group of victims who have aggressively pursued massive restitution claims from possessors helps raise awareness about the staggering scope of harm caused by child pornography, it may also obscure the more common scenario in which offenses or victims remain unknown.²⁷ It is often difficult to even identify the victim depicted in a particular photo, and a myopic focus on prominent victims results in a lack of emphasis on those who remain unidentified or who choose not to step forward due to embarrassment or lack of financial means.²⁸

For example, due to the difficulty of identification, some courts have declined to even recognize the child as the primary victim of the child pornography offenses.²⁹ That approach is perplexing given that the Supreme Court has emphasized that child pornography is harmful to its victims.³⁰ The Court has stated that “the use of children as . . . subjects of

26. See Brief of Nat'l Ctr. for Missing & Exploited Children as Amici Curiae at 5, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 6:08-CR-0061) (describing extent of circulation of victim's images), *rev'd sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh'g granted en banc*, 668 F.3d 776 (5th Cir. 2012); *id.* at 9-13 (documenting extensive harm caused by incidents of child pornography); see also Susan Donaldson James, 'Misty Series' Haunts Girl Long After Rape, ABC NEWS (Feb. 8, 2010), <http://abcnews.go.com/Health/internet-porn-misty-series-traumatizes-child-victim-pedophiles/story?id=9773590> (“Nearly 35,000 graphic images have now turned up in the collections of arrested pedophiles . . .”).

27. See JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE *National Juvenile Online Victimization Study 1* (2005) available at http://www.missingkids.com/en_US/publications/NC144.pdf (noting that “it is likely most CP possessors never come to the attention of law enforcement, because the Internet allows them to commit their crimes privately and anonymously”).

28. See S. REP. NO. 108-2, at 5 (2003) (describing testimony of National Center for Missing and Exploited Children stating that numerous prosecutors threaten to drop cases unless victims are identified); Dan Koenig, *Investigation of Cybercrime and Technology-Related Crime*, NAT'L EXECUTIVE INST. ASSOCIATES (NEIA) (Mar. 2002), <http://www.neiassociates.org/cybercrime.htm> (“The investigation of Computer Crimes requires highly specialized skills.”); Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 237 (2007) (“The difficulty in identifying child victims is only further complicated . . . by the anonymity of the internet.”).

29. See, e.g., *United States v. Goff*, 501 F.3d 250, 258 (3d Cir. 2007) (discounting district court's claim that possession of images depicting infant being raped by adult and eight-year-old girl performing oral sex on adult male is “truly a psychological crime”); *United States v. Toler*, 901 F.2d 399, 403 (4th Cir. 1990) (holding that child pornography is properly categorized as “victimless” crime because trafficking in child pornography harms “moral fabric of society at large,” not individual depicted).

30. See, e.g., *New York v. Ferber*, 458 U.S. 747, 758 & n.9, 759 & n.10 (1982) (citations omitted) (“It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life. . . . [And] distribution of [child pornography] violates ‘the individual interest in avoiding disclosure of personal matters.’”). For a discussion of how the view that child pornography solely

pornographic materials is very harmful to *both* the children and the society as a whole.”³¹ Thus, denying the existence of individualized harm to victims obscures the common sense reality that, although the harm caused by each subsequent possessor is arguably less than that caused by the initial abuser and producer of the pornography, each new instance of possession violates and harms the victim anew.³² An inability to identify victims depicted in images does not change that reality.³³

Various federal courts have laid out a framework for explaining the specific harm endured by child pornography possession victims.³⁴ For ex-

harms society contrasts with Supreme Court precedent, see Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 855 (2008) (“Lower courts that fail to recognize adequately the actual harm aspect [of child pornography laws as articulated by the Supreme Court] foster the view that possession is a victimless crime.”).

31. *Ferber*, 458 U.S. at 758 n.9 (alteration in original) (emphasis added) (quoting S. REP. NO. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 42).

32. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (“Like a defamatory statement, *each new publication* of the [pornographic images of children] . . . would cause new injury to the child’s reputation and emotional well-being.”) (emphasis added); *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) (“The victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography.”); *United States v. Hardy*, 707 F. Supp. 2d 597, 613-14 (W.D. Pa. 2010) (“[T]he real issue is not whether Defendant has caused Amy harm—he has, because he circulated the images—but whether his doing so is a substantial factor in her overall harm. . . . [I]n this Court’s estimation, Amy has shown [as much] by a preponderance of the evidence”); T. Christopher Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979) (interviewing child psychiatrist who commented, “The victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child”); Rogers, *supra* note 30, at 853-54 (“[V]ictimization [of children depicted in pornography] lasts forever since the pictures can resurface at any time, and this circulation has grown exponentially because of the Internet. . . . At a more fundamental level, child pornography victims’ rights of privacy and human dignity are violated when their images are circulated and viewed by others.”).

33. See *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) (denying defendant’s argument that society at large was victimized because children could not be identified, because “child pornographer, quite simply, directly victimizes the children pictured in such materials [whether or not the victim’s name is known]”); *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (“[Q]uite unlike the drug and immigration offenses mentioned [by defendant]—which are ‘victimless’ crimes in the sense that the harm that they produce is spread evenly throughout society—the harm caused by the distribution of child pornography is concentrated [upon the child].”); S. REP. NO. 95-438, at 40 (1978), reprinted in 1978 U.S.C.C.A.N. 40, 43 (“Of deep concern to the Committee is the effect of child pornography . . . on the children who become involved. . . . Such encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future.”).

34. See, e.g., *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *5 (E.D. Va. Nov. 24, 2009) (describing two types of harm: “‘Type I’ which stem[s] from the direct abuse . . . and ‘Type II’ abuse which stems from the ‘knowledge of

ample, the Fifth Circuit listed three distinct harms created by possession offenses: it “perpetuates the abuse initiated by the producer of the materials”; it is “an invasion of privacy of the child depicted”; and it “instigates the original production of child pornography by providing an economic motive for creating and distributing the materials.”³⁵ Similarly, in response to a defendant who argued that possessors are negligibly exacerbating an existing harm the original producer caused, the Third Circuit stated:

Consumers . . . who ‘merely’ or ‘passively’ receive or possess child pornography directly contribute to this continuing victimization. Having paid others to ‘act out’ for [them], the victims are no less damaged for [the consumers] having remained safely at home, and [their] voyeurism has actively contributed to a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms.³⁶

the dissemination and proliferation of the images of [the victim] at [the] times of greatest humiliation and degradation.’ . . . Type II trauma represents a chronic, toxic condition, the knowledge of which continuously works like corrosive acid on the psyche of the individual.”).

35. *Norris*, 159 F.3d at 929-30; *see also Ferber*, 458 U.S. at 756-60; *United States v. Yuknavich*, 419 F.3d 1302, 1310 (11th Cir. 2005) (“It goes without saying that possession of child pornography is not a victimless crime. A child somewhere was used to produce the images downloaded by [the defendant], in large part, because individuals like [the defendant] exist to download the images.”); *United States v. Paroline*, 672 F. Supp. 2d 781, 786 (E.D. Tex. 2009) (agreeing with Fifth Circuit that “the ‘victimization’ of the children involved does not end when the photographer’s camera is put away”), *rev’d sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh’g granted en banc*, 668 F.3d 776 (5th Cir. 2012). Although the *Paroline* court ultimately denied the \$3,367,854 restitution request made by the victim, the court stated:

The end-user or possessor of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways: (1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child’s continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child’s privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject.

Paroline, 672 F. Supp. 2d at 786.

36. *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007); *see also United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) (stating that “[t]he possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters”); *Hibbler*, 159 F.3d at 237 (“[T]he child pornographer, quite simply, directly victimizes the children pictured in such materials.”); *Boos*, 127 F.3d at 1209-10 (rejecting defendant’s contention that children depicted in his pornographic images were “indirect” or “secondary” victims of his crime).

B. *Offender and Offense Profiled; Restitution and Rehabilitation Conjoined*

Appropriate punitive and rehabilitative measures must account for all aspects of the phenomenon of child pornography, including the nature of the offenders themselves.³⁷ Although the average profile of child pornography offenders may seemingly depict a lesser threat within a community than that of the typical criminal, the extent of offenders' deviance from widespread social norms becomes apparent after a detailed examination of the extremely graphic images they possess.³⁸ While some controversial court decisions have utilized overbroad definitions of child pornography, and federal statutes define child pornography in fairly expansive terms, the vast majority of arrests of child pornography possessors involve highly explicit images showing very young children enduring graphic sexual acts.³⁹ Furthermore, statistics demonstrate that there is often a correla-

37. For a further discussion of the characteristics of child pornography offenders, see *infra* notes 38-40 and accompanying text.

38. See MOTIVANS & KYCKELHAHN, *supra* note 9, at 2 (summarizing general profile of child pornography offenders). In 2006, 89% of those charged with child pornography were white, 99% were male, and 58% had attended some college. See, e.g., *Goff*, 501 F.3d at 251 (stating background information on defendant Stefan Goff). The court noted:

For more than thirty years, Stefan Goff was employed at a private elementary school in Mercer County, New Jersey. Over time, he became a trusted and influential member of the school community. He was the president of his college alumni association and volunteered his time for a number of worthy charitable causes. He was, to all appearances, a respectable, middle-aged man leading a decent, law abiding life. But in Goff's life there was a terrible divergence between appearance and reality, because he was also a frequent customer of a child pornography internet site.

Id.; see also WOLAK ET AL., *supra* note 4, at 9 (explaining extremely graphic nature of images most child pornographers possess).

39. See 18 U.S.C. § 2256(8) (2006) (defining child pornography). The statute states

"[C]hild pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id.; see also *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994) (holding that child pornography includes images of fully clothed children); WOLAK ET AL., *supra* note 4, at 9 (reporting that eighty-three percent of child pornography possessors had images of children between ages of six and twelve, ninety-two percent of child pornographers had images of minors focusing on genitals or showing explicit sexual activity, eighty percent had pictures showing sexual penetration of child, and twenty-one percent had images depicting violent and sadistic sex such as bondage, rape, or torture).

tion between child pornography and sexual abuse, although the precise nature of the connection has been the subject of debate.⁴⁰

Offenders may come into contact with the criminal justice system too late for courts to serve as the primary socializing institution; nonetheless, “it is important that law and the legal system reinforce [social] norms and not undermine them.”⁴¹ That is especially true of those who commit crimes in the potentially dehumanizing realm of the internet, such as possessors of child pornography.⁴² The internet psychologically isolates them from society by offering a place to indulge and reinforce fantasies and behaviors that grossly contradict pervasive social norms.⁴³ Against that backdrop, ordering offenders to pay restitution might contribute to rehabilitating and re-integrating child pornography possessors into society by causing them to acknowledge the impact of their actions on actual human beings.⁴⁴

40. See WOLAK ET AL., *supra* note 4, at 9-10 (explaining statistics and noting that in one-year study, forty percent of those arrested for child pornography-related crimes both sexually abused children and possessed child pornography, and an additional fifteen percent were dual offenders who attempted to abuse children by soliciting undercover investigators who posed online as minors); see also Benedict Carey & Julian Sher, *Debate on Child Pornography's Link to Molesting*, N.Y. TIMES (July 19, 2007), http://www.nytimes.com/2007/07/19/us/19sex.html?_r=2&oref=slogin&oref=slogin (reporting statistics on male inmates and sexual abuse of children). A recent study of 155 male inmates serving sentences for possession or distribution of child pornography at a Federal Correctional Institution in Butner, N.C. found that eighty-five percent of individuals charged with possessing child pornography admitted that they also sexually abused children. See *id.* (same).

41. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 34 (2006).

42. See Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 548 (2006) (noting unique features of internet communities).

43. See *id.* at 549 (“An Internet-based community, because it permits people to isolate themselves into self-reinforcing groups defined by a single shared interest, can create an atmosphere in which members perceive that there is greater lawlessness than actually exists.”). Another fact that suggests isolation may be a factor in child pornography is that most pornographers were unmarried at the time of their offense. See WOLAK ET AL., *supra* note 27, at 1 (explaining that forty-one percent were unmarried because they had never married and twenty-one percent were unmarried because they were separated, divorced, or widowed).

44. See Tonry, *supra* note 41, at 34 (“[T]heorists have long observed that the criminal law’s main function is ‘general prevention’: reinforcement of basic social norms that are learned in the home, the church, the school, and the neighborhood.”). Yet, the fact that the prevention aspect is in some sense generalized should not detract from the importance of the encounter with the criminal justice system for the individuals. See *id.* (noting “it is important that law and the legal system reinforce [social] norms and not undermine them”).

III. TREATMENT OF CHILD PORNOGRAPHY POSSESSION OFFENSES BY COURTS AND CONGRESS

A. *The Supreme Court Stated that Child Pornography Possession Harms Individual Victims*

In order to uphold statutes that proscribe child pornography possession, the Supreme Court carved out an exception to its prior holding that the First Amendment generally protects private collections of lewd material.⁴⁵ The Court based the child pornography exception on states' compelling interest in protecting minors from abuse and exploitation.⁴⁶ It has also emphasized that "pornography's continued existence causes the child victims continuing harm by haunting the children in years to come," and even chastised one Respondent for attempting to "undermine the force of the privacy interests involved."⁴⁷

Beyond the harm caused to each victim, the Supreme Court has also noted the interconnected nature of the child pornography market and has approved of efforts to attack it at all levels of the distribution chain.⁴⁸ In its most recent case dealing with child pornography, the Supreme Court further expanded the scope of the child pornography exception by holding that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment."⁴⁹ Taken in the aggregate, the Supreme Court's child pornography possession jurisprudence prompted one observer to refer to child pornography law as the "least contested area of First Amendment jurisprudence"—a statement that attests to the clarity with which the Court has acknowledged the victims' harm and the government's interest in preventing it.⁵⁰

45. See *Osborne v. Ohio*, 495 U.S. 103, 107 (1989) (upholding prohibition on possession of child pornography as constitutional); *New York v. Ferber*, 458 U.S. 747, 764-65 (1982) (holding that child pornography is not entitled to First Amendment protection).

46. See *Osborne*, 495 U.S. at 109 ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Ferber*, 458 U.S. at 756-57) (internal quotation marks omitted).

47. *Osborne*, 495 U.S. at 111; *Ferber*, 458 U.S. at 759 n.10.

48. See *Osborne*, 495 U.S. at 110-11 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain."). Although the Supreme Court later declined to extend the child pornography possession exception to statutes proscribing possession of virtual child pornography (i.e., images that do not depict real children), the Court's decision hinged on the fact that no real victim or harm was involved in such cases—a conclusion that reaffirms the harm caused to real children when they are depicted in pornographic images. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (noting that in cases where child pornography depicts real children, "each new publication" causes "new injury to the child's reputation and emotional well-being").

49. *United States v. Williams*, 553 U.S. 285, 299 (2008).

50. *Adler*, *supra* note 6, at 210; see also *Rogers*, *supra* note 30, 859-62 (recognizing harm to child victims and arguing that possession of child pornography is not "a victimless crime").

B. *Congress Combats a "Plague upon Our People" by Making Restitution Mandatory; For Some Courts, Mandatory Approximates Conditional*

1. *Child Pornography Laws*

The Child Pornography Prevention Act of 1996 (CPPA) was the first attempt by Congress to address child pornography in the age of the internet.⁵¹ The Judiciary Committee's report on the CPPA affirmed the harm that child pornography causes to victims and emphasized that the harm lasts for years after the initial abuse.⁵² Additionally, the report found that child pornography can be used by possessors to desensitize themselves to victims' humanity and to convince children reluctant to engage in sexual activity with an adult that other children are "having fun" by doing so.⁵³

In addition to solidifying its stance on the psychological harm child pornography causes children, Congress joined the Supreme Court in noting that pornographic images implicate the "privacy and reputational interests" of the children they depict.⁵⁴ Congress further recorded its stance on the harm caused by child pornography by passing the Adam Walsh Child Protection and Safety Act of 2006, in which it stated that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."⁵⁵

2. *The Restitution Revolution*

At the same time that Congress considered legal approaches to child pornography, significant changes were occurring in the realm of restitution for victims of other crimes.⁵⁶ Traditionally, scholars argued that the "principal value [of restitution] is not its ability to make victims whole, but rather its utility as a corrective device [for offenders]."⁵⁷ Modern restitution statutes increasingly cite a duality of rehabilitative and compensatory

51. See generally Child Pornography Prevention Act of 1996, Pub L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (codified at 18 U.S.C. §§ 2251-52 (2006)) (acknowledging that child pornography may be transmitted by computer).

52. S. REP. NO. 104-358 (1996) (affirming that child pornography harms victims and recognizing lasting effects of abuse).

53. *Id.*

54. Child Pornography Prevention Act of 1996 § 121(1)(7).

55. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (codified at 18 U.S.C. § 2251(2)(D) (2006)). The Act also stated: "The illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole." *Id.* § 501(1)(A) (emphasis added).

56. See *id.* (noting developments related to restitution).

57. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 (1984).

purposes—a trend that gained momentum after the victims’ rights movement of the 1970s.⁵⁸

Thus, the restitution movement is indicative of the general trend of modern crime legislation, which tends to be victim-focused.⁵⁹ The Mandatory Victims Restitution Act of 1996 (MVRA) was designed to “ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime.”⁶⁰ Concordant with the MVRA’s mandatory label, Congress required judges to order payment of restitution for victims of child pornography.⁶¹ Furthermore, the MVRA stated “[a] court may not decline to issue an order [for restitution] 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.”⁶² Beyond ensuring that victims received proper compensation, at least one court has noted that Congress also sought to promote uniformity in restitution outcomes.⁶³

58. *See, e.g.*, *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010) (“[R]estitution payments have both compensatory and penal purposes.”); *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001) (“[T]he purpose of restitution under the Mandatory Victim Reparation Act is to compensate victims for their losses and to make them whole.”); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) (“Congress made restitution under the [Victim and Witness Protection] Act a criminal penalty.”); *see also* S. REP. NO. 104-179, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 925–26 (“The principle of restitution is an integral part of virtually every formal system of criminal justice It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.”); Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1702 (2009) (providing history of restitution theory).

59. For a discussion of the focus of restitution, see *infra* notes 60-63 and accompanying text.

60. H.R. REP. NO. 104-16, at 4 (1995).

61. *See* 18 U.S.C. § 2259(a) (2006) (“[T]he court shall order restitution for any offense under this chapter.”); *see also id.* § 2259(4)(A) (“The issuance of a restitution order under this section is mandatory.”); *id.* § 2259(b)(1) (“The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim’s losses as determined by the court”); 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, 283 (2008) (“Congress enacted the Mandatory Victims Restitution Act (MVRA) . . . to reflect a fundamental shift in the purpose of restitution from a means of punishment and rehabilitation to an attempt to provide those who suffer the consequences of crime with some means of recouping their personal and financial losses.”).

62. 18 U.S.C. § 2259(b)(4)(B).

63. *See United States v. Hardy*, 707 F. Supp. 2d 597, 609 (W.D. Pa. 2010) (“Congress clearly intended the MVRA to create a uniform scheme for ordering restitution in criminal cases”).

3. *Prisons or Payment? Restitution as the Solution to the Sentencing Guidelines' Confidence Crisis*

Congress has continually increased statutory minimum and maximum prison terms and Sentencing Guideline ranges for child pornography offenders, even as the Sentencing Commission has recommended lower sentences.⁶⁴ The impact of those congressional directives on actual sentencing outcomes is apparent: mean sentences for non-production offenses (i.e., possession, receipt, and distribution) grew from 26.79 months in 1997 to 92.73 months in 2009—a nearly 350 percent increase in just over a decade.⁶⁵ In response to those increases, approximately seventy percent of district court judges now believe the sentencing guideline ranges for child pornography possession are excessive.⁶⁶ Accordingly, district court judges have liberally exercised their ability to depart downward from the Guidelines.⁶⁷ Moreover, some appellate courts have held that probationary sentences pass their “reasonableness” scope of review even when the Guidelines called for more than three years.⁶⁸ Nevertheless,

64. See generally U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf (describing upward trend due to congressional directives); TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf (same). For example, in response to the Sentencing Commission's 1991 recommendation to lower the ranges, Congress instead ordered the Commission to increase base level offenses and add new enhancements. See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 556 (2011) (describing interactions between Congress and Commission). In the PROTECT Act of 2003, Congress again issued several directives to the Commission to increase ranges and enhancements, and for the first and only time since the creation of the Sentencing Guidelines Congress also unilaterally changed the Guidelines. See THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra*, at 65.

65. *Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/fjsrc/tsec.cfm> (last visited Nov. 27, 2011) (utilizing calculator to determine mean sentences for 18 U.S.C. §§ 2252-2252A (2006)).

66. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 5 (2010), available at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (describing results of Sentencing Commission survey).

67. See U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2010), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm (stating that fifty-four percent of non-production child pornography offenders received sentence below Guideline range in 2009). In about sixty-eight percent of those cases, the judge cited a belief that the ranges were excessive as the reason for sentencing below the Guidelines. See *id.*

68. See, e.g., *United States v. Autery*, 555 F.3d 864, 867-68 (9th Cir. 2009) (affirming probationary sentence despite Guidelines range of forty-one to fifty-one months and defendant's argument for forty-one month sentence); *United States v. Stall*, 581 F.3d 276, 277-78 (6th Cir. 2009) (affirming one day sentence despite range of fifty-seven to seventy-one months for possession); *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (affirming probationary sentence despite forty-

even in cases involving downward departures, sentences are often still substantial due to the severity of the ranges.⁶⁹ And appellate courts have generally not been willing to find sentences that fall within the Guidelines unreasonable.⁷⁰

Against that backdrop, the U.S. Sentencing Commission has promised to issue a “review of the incidence of, and reasons for, departures and variances from the guideline sentence” and to possibly recommend statutory changes to Congress.⁷¹ The Commission should recognize the valid points on both sides: judges advocating for lower prison sentences are correct to point out that societal panic should not impinge on sober analysis of prison terms; yet, many advocates of higher sentences properly note that downward-departing judges often wrongfully belittle or underestimate the harm to victims.⁷² More importantly for purposes of this Note, the Sentencing Commission should emphasize that restitution has the potential to bridge the gap between the two sides of the sentencing argument, because it can both restore victims to their proper standing and

six to fifty-seven month range); *United States v. Huckins*, 529 F.3d 1312, 1314 (10th Cir. 2008) (affirming sentence of eighteen months with range of seventy-eight to ninety-seven months); *United States v. Smith*, 275 F. App'x 184, 184 (4th Cir. 2008) (per curiam) (affirming twenty-four month sentence with range of seventy-eight to ninety-seven months for possession).

69. *See, e.g.*, *United States v. Weller*, 330 F. App'x 506, 507 (6th Cir. 2009) (affirming 120-month sentence where range was 324-405 months); *United States v. Beach*, 275 F. App'x 529, 532 (6th Cir. 2008) (per curiam) (affirming ninety-six month sentence where range was 210-240 months); *United States v. Grossman*, 513 F.3d 592, 596 (6th Cir. 2008) (per curiam) (affirming sixty-six months where range was 135-168 months).

70. *See, e.g.*, *United States v. Guillot*, 383 F. App'x 416, 416-17 (5th Cir. 2010) (affirming 151-month sentence for receipt with 121-151 month range); *United States v. Nikonova*, 480 F.3d 371, 374 (5th Cir. 2007) (affirming thirty-one month sentence within range of twenty-seven to thirty-three months in possession case of female defendant described as “exceptional” student who claimed to be primarily motivated by academic interest); *United States v. Rolfsema*, 468 F.3d 75, 78 (2d Cir. 2006) (affirming fifty-seven month sentence for possession with range of fifty-seven to seventy-one months); *United States v. Branson*, 463 F.3d 1110, 1110-11 (10th Cir. 2006) (sentencing to fifty-one months for possession with range of fifty-one to sixty-three months).

71. Notice of Proposed Priorities, U.S. Sentencing Comm'n, 76 Fed. Reg. 45008 (July 27, 2011). That planned study follows an earlier report on the “History of Child Pornography Guidelines,” in which the Commission noted the “particularly active” control Congress has exercised over it in the area of child pornography—a statement that perhaps obtusely foreshadows more active resistance. *See THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES*, *supra* note 64, at 1.

72. *See, e.g.*, *United States v. Paull*, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting) (“Our ‘social revulsion’ against these ‘misfits’ downloading these images is perhaps somewhat more rational than the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries, but it borders on the same thing.”). For a further discussion of how the nature of child pornography images demonstrate the drastic harm victims suffer, see *supra* notes 24-36 and accompanying text.

offer an alternative to incarceration if the Commission determines that current guideline ranges are excessive.⁷³

C. *Barriers to Restitution:*

The Proximate Cause Conundrum in Federal Courts

The statutory language of the MVRA has proven confusing for courts deciding restitution requests in child pornography possession cases, and the result has been inconsistent outcomes.⁷⁴ Courts are split as to whether proximate causation must exist between a possessor's crime and a victim's

73. See Schwartz, *supra* note 24 (describing controversy surrounding prison sentences and interviewing individuals who suggest restitution as an alternative that more effectively serves victims' needs). For a further discussion of the overlap of rehabilitation and restitution, see *supra* notes 37-44 and accompanying text.

74. See, e.g., United States v. Searle, 65 F. App'x 343, 346 (2d Cir. 2003) (stating that "18 U.S.C. § 2259 provides that a person convicted of sexual exploitation must pay restitution"); United States v. Julian, 242 F.3d 1245, 1246-47 (10th Cir. 2001) (applying mandatory language of § 2259 to include mandatory restitution for even future medical costs after crime of sexual exploitation); United States v. Laney, 189 F.3d 954, 964-65 (9th Cir. 1999) (stating that § 2259 "requires a sentencing court to order a defendant convicted of a crime involving the sexual exploitation of children to pay restitution to the victim of that crime"); United States v. Scheidt, No. 1:07-CR-00293, 2010 WL 144837, at *2 (E.D. Cal. Jan. 11, 2010) (stating "it is clear that restitution is mandatory for any offense in [Chapter 110]"); United States v. Croxford, 324 F. Supp. 2d 1230, 1249 n.101 (D. Utah 2004) (interpreting "shall order" language as signifying that restitution is mandatory for all offenses under Chapter 110); see also 18 U.S.C. § 2259 (2006). The relevant portions of the statute read:

(a) In General. Notwithstanding section 3663 or 3663A . . . the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order.-

(1) Directions. The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for-

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

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.- (A) The issuance of a restitution order under this section is mandatory.

(B) 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.

quantifiable harm in order for courts to order restitution.⁷⁵ Five circuit courts require proximate cause, as do a large majority of district courts.⁷⁶ Only the Fifth Circuit has declined to require proximate cause, joined by at least one district court.⁷⁷

Within that legal framework, restitution outcomes have varied wildly.⁷⁸ Some courts, in seeking to acknowledge harm but avoid overcompensating victims or excessively penalizing defendants, have or-

(c) Definition. For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C. § 2259 (2006).

75. Compare *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009) (“A showing of causation is not specifically enumerated in [§ 2259] as a prerequisite to an award of restitution.”), and *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *1-4 (S.D. Fla. Sept. 2, 2009) (completely disregarding proximate cause in awarding restitution), with *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) (“[Section] 2259 requires the government to show . . . that the defendant’s offense proximately caused a specific loss on the claimants’ part.”), and *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009) (“[T]he plain language of the statute clearly requires that losses—to be recoverable in restitution—must have been proximately caused by the acts which constitute the offense of conviction.”).

76. See *United States v. Aumais*, 656 F.3d 147, 155 (2d Cir. 2011); *United States v. McDaniel*, 631 F.3d 1204, 1208 (11th Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011); *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999). The Second and D.C. Circuits based the requirement on the “bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused,” as well as the fact that “nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause.” *Aumais*, 656 F.3d at 153 (quoting *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011)). The Ninth, Third, and Eleventh circuits, on the other hand, have concluded that the proximate cause language contained in one subsection of the statute modifies the subsection’s entire superior clause, rather than simply the subsection that contains it. See *Aumais*, 656 F.3d at 152 (“These circuits have read the last phrase of § 2259(b)(3)(F) . . . ‘suffered by the victim as a proximate result of the offense’ to apply to all the types of loss in § 2259(b)(3).”); *Hardy*, 707 F. Supp. 2d at 610 (“18 U.S.C. § 2259 does require that a victim’s losses be proximately caused by the criminal acts of the defendant for restitution to be awarded.”); *Van Brackle*, 2009 WL 4928050, at *4 (“[Section] 2259 requires the government to show . . . that the defendant’s offense proximately caused a specific loss on the claimants’ part.”). But see *Staples*, 2009 WL 2827204, at *2-4 (declining to examine proximate cause and holding that victim, “Amy” was harmed and warranted restitution).

77. See *In re Amy Unknown*, 636 F.3d 190, 198 (5th Cir. 2011) (“The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous ‘other losses’ for which a victim seeks restitution.”); *Staples*, 2009 WL 2827204, at *2-4 (emphasizing mandatory language of § 2259 and disregarding proximate causation).

78. See *Aumais*, 656 F.3d at 152-53 (providing most recent overview offered by circuit court of split over proximate cause requirement).

dered token restitution amounts.⁷⁹ Other courts have approved deals that include restitution payments, such as when a former Pfizer executive pled guilty to receipt and distribution of child pornography and agreed to pay \$130,000 in a formal settlement agreement.⁸⁰ Prior to settlement, the judge admitted that he was “dealing with a frontier” and estimated that \$200,000 would be an appropriate award due to the “feeling of revulsion about this type of conduct.”⁸¹ In another instance, a judge avoided writing an opinion on the thorny legal issues when, “in the best interest of justice, judicial expedience[,] and economy in resolving this novel legal issue,” he approved an offender’s stipulation to the amount of restitution.⁸² A few courts have ordered multi-million dollar restitution payments.⁸³ In July 2009, the Northern District of Florida, in one of the largest restitution orders to date, entered an order against a non-production defendant in the amount of \$3,263,758, which included the victim’s

79. See *United States v. Brunner*, No. 5:08-CR-16, 2010 WL 148433, at *2 (W.D.N.C. Jan. 12, 2010) (awarding \$6,000 and \$1,500 to two victims because defendant “participated in an ongoing cycle of abuse and thereby contributed to the victims’ mental and emotional trauma”); *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) (awarding \$3,525); *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (giving victim \$3,000 in restitution because that was consistent with “the actual harm [the] particular defendant caused” and therefore consistent with Congress’s “finding on harm to children victims of child pornography”); *United States v. Zane*, No. 1:08-CR-0369, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009) (awarding two victims \$3,000 each for restitution). The Central District of California adopted \$5,000 as the standard amount of restitution it will award, whereas the Eastern District of California has routinely chosen \$3,000. See, e.g., *United States v. Brown*, No. CR 08-01435, 2009 U.S. Dist. LEXIS 113942, at *1 (C.D. Cal. Oct. 5, 2009) (ordering defendant to pay \$5,000 to victim); *United States v. Ferenci*, No. 1:08-cr-0414, 2009 WL 2579102, at *5 (E.D. Cal. Aug. 19, 2009) (awarding \$3,000 to victim).

80. See Schwartz, *supra* note 24 (stating Pfizer executive paid \$130,000).

81. See *Child Porn Damages Precedent Set*, BBC NEWS (Feb. 24, 2009), <http://news.bbc.co.uk/2/hi/americas/7907053.stm> (explaining judge’s initial suggestion of \$200,000); see also Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1328-29 (2011) (describing Hesketh charges and settlement); John Christoffersen, *CT Sets New Precedent for Child Porn Cases*, NBC CONNECTICUT (Feb. 24, 2009), <http://www.nbcconnecticut.com/news/local/Man-With-Child-Porn-Must-Pay-Victim.html> (same); Warren Richey, *A Bold Gambit to Reduce Demand for Child Porn*, CHRISTIAN SCI. MONITOR (Aug. 8, 2009), <http://www.csmonitor.com/USA/Justice/2009/0808/p22s01-usju.html> (explaining that Hesketh dropped appeal in exchange for reduced settlement of \$130,000).

82. *United States v. Paroline*, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009) (quoting *United States v. Granato*, No. 2:08-CR-198 (D. Nev. filed Aug. 28, 2009)), *rev’d sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh’g granted en banc*, 668 F.3d 776 (5th Cir. 2012).

83. See, e.g., *United States v. Staples*, No. 09-CR-14017, 2009 WL 2827204, at *3-4 (S.D. Fla. Sept. 2, 2009) (ordering possession offender to pay \$3,680,153 under joint and several liability without discussing proximate cause).

lost wages and benefits assuming that she would have worked until age sixty-five.⁸⁴

Those courts that have awarded restitution have generally relied on Congress's explicit intent to make restitution to victims mandatory, as well as the fact that offenders could reasonably anticipate real harm to actual victims.⁸⁵ On the other hand, the courts that have denied restitution altogether have relied on findings of insufficient evidence to assess a specific quantifiable loss caused by the offender, that the victim suffered absolutely no harm at the hands of the defendant, or that the harms caused by child pornography possession were "generalized" or attenuated in nature.⁸⁶

84. See Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 *CARDOZO J.L. & GENDER* 333, 350 (2011) (describing restitution outcome of case in Northern District of Florida).

85. See, e.g., *Brunner*, 2010 WL 148433, at *3 (noting that courts generally require "causal connection" before awarding restitution, but that "no circuit to address the issue has 'imposed a requirement of causation approaching mathematical precision'" (quoting *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007))). The court in *Brunner* utilized a "slightly relaxed standard" of causation, justifying its standard particularly on the basis of "the strong Congressional intent behind section 2259." *Id.* (quoting *United States v. Danser*, 270 F.3d 451, 455 n.5 (7th Cir. 2001)); see also *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007) (stating that court would "uphold an award of restitution under Section 2259 if the district court is able to estimate, based on the facts in the record, the amount of victim's loss with some reasonable certainty"); *United States v. Julian*, 242 F.3d 1245, 1246-47 (10th Cir. 2001) (explaining that, based on plain language of § 2259, district court has discretion in deciding how to calculate restitution amounts for crimes of sexual exploitation); Jacques, *supra* note 9, at 1187 ("[C]ourts that have ordered payment of restitution for non-production child pornography offenses reason that Congress's clear intent is to compensate victims in such situations and that there is reasonably foreseeable harm from the activities of these sex offenders.").

86. See, e.g., *United States v. Faxon*, 689 F. Supp. 2d 1344, 1356-57 (S.D. Fla. 2010) (describing "difficulty attributing any of the acts committed by the Defendant in this case to be a proximate cause of any of the trauma that was suffered or continues to be suffered by either of [the victims requesting restitution]"); *Paroline*, 672 F. Supp. 2d at 791 ("[T]he Government is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of Paroline's conduct. Certainly, Amy was harmed by Paroline's possession of Amy's two pornographic images, but this does little to show how much of her harm, or what amount of her losses, was proximately caused by Paroline's offense."); *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *4-5 (N.D. Ga. Dec. 17, 2009) ("[T]he court must estimate not only a total amount of harm, but must be able to ascertain with reasonable certainty from the evidence presented what proportion of the total harm was proximately caused by *this* defendant and *this* offense. . . ."); *United States v. Simon*, No. 08-CR-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) ("[T]here is no evidence of harm to [the victim] caused by defendant [who was only a possessor of pornographic images of the victim]."); *United States v. Berk*, 666 F. Supp. 2d 182, 191 (D. Me. 2009) (finding that victim's losses "are generalized and caused by the idea of their images being publicly viewed rather than caused by [the] particular Defendant having viewed their images"). The court in *Berk* stated that there was "no evidence . . . the Victims suffered any additional loss above and beyond what they had already experienced." *Id.* at 192. However, the court also said "if there was evidence that the Victims had

IV. RECOMMENDATIONS

A. *Eliminate Proximate Cause Entirely*

The current process for restitution requests in child pornography possession cases does not fulfill the overall goals of our criminal justice system with respect to compensation and healing of the victim, rehabilitation of the offender, or criminal justice in general.⁸⁷ The proximate cause framework is especially ill-suited for the context of child pornography because it developed in grossly different factual and legal circumstances; indeed it has been marginalized even in tort law due to its misleading and confusing concepts.⁸⁸ For example, the seminal proximate cause case taught to most law students in the United States, *Palsgraf v. Long Island Railroad Co.*,⁸⁹ appears exceptionally antique in comparison to the technological sophistication of the modern child pornography market, which relies on an international, virtual web of users, all of whom should reasonably foresee that trading of nude pictures of real children harms those depicted.⁹⁰

to attend even one additional counseling session due to [the defendant's] actions, then restitution may have been appropriate." *Id.*

87. See S. REP. NO. 104-179, at 12, *reprinted in* 1996 U.S.C.C.A.N. 924, 925–26 (“The principle of restitution . . . holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.”); Tonry, *supra* note 41, at 34 (“[C]riminal law’s main function is ‘general prevention’: reinforcement of basic social norms that are learned in the home, the church, the school, and the neighborhood. . . . [I]t is important that law and the legal system reinforce those norms and not undermine them.”) (citation omitted). Incarceration sentences for sex offenders have become increasingly controversial in recent years. See generally Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545 (2011).

88. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (“[T]he term ‘proximate cause’ is a poor one to describe limits on the scope of liability.”). The American Law Institute’s decision to reduce its role in the Third Restatement exemplifies the general level of frustration with the concept. See *id.* Also, the Restatement discusses issues presented by proximate cause in delivering jury instructions. See *id.* § 29 cmt. b, reporters’ note at 224-29; see also Michael L. Wells, *Proximate Cause and the American Law Institute: The False Choice Between the “Direct-Consequences” Test and the “Risk Standard”*, 37 U. RICH. L. REV. 389, 391-92 (2003) (“Proximate cause, or ‘scope of liability,’ as the reporters call it, is a sprawling and unruly topic.”).

89. 162 N.E. 99 (N.Y. 1928).

90. See generally *id.* (establishing principles of proximate causation). *Palsgraf* dealt with a bizarre chain of events that resulted in an unforeseeable harm: a railroad employee pushed a passenger, causing a package to explode, which in turn triggered a scale to fall on the plaintiff who stood a considerable distance away. See *id.* at 99-100 (describing facts of case). Other emblematic proximate cause cases cited by casebooks and law review articles seem to inevitably deal with improbable or unforeseen circumstances like exploding rat poison, wooden planks that spark fires in factories, or other such strange accidents. See, e.g., Wells, *supra* note 88, at 390-93 (describing several seminal proximate cause cases with strange factual circumstances that caused harm to plaintiffs that was totally unforeseeable or difficult to foresee). In comparison, child pornography victims are conspicuously foreseeable to offenders. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)

Ironically, the statute requires a court to decide whether the person requesting restitution qualifies as a “victim” before deciding the matter of proximate causation.⁹¹ The result of that dichotomy is that courts seeking to deny restitution requests must choose between two logically awkward options: either deny that a child depicted in pornographic material is a “victim” at all, or accept as a threshold matter that they were harmed enough to be considered a “victim” but also find that the harm claimed was not directly or proximately caused by the individual who possessed the pictures.⁹²

The judge in *United States v. Paroline*,⁹³ who chose the latter option in denying restitution, lamented the strange choice even as he decided it: he expressed “sympathy” for the victim and explicitly acknowledged that everyone in the child pornography chain of distribution directly harms children.⁹⁴ Thus, the manner in which some courts read the current statutory language creates a logically bizarre and difficult burden of proof for victims by requiring them to prove harm that ought to be self-evident based on Supreme Court precedent, congressional intent, and our most fundamental societal values.⁹⁵ An inability to identify victims should not bar any

(noting that difference between “virtual” child pornography and real child pornography is that latter foreseeably harms real children).

91. See *United States v. Paroline*, 672 F. Supp. 2d 781, 785 (E.D. Tex. 2009) (“The Court’s first task is to determine whether Amy is a ‘victim’ of Paroline’s offense.”), *rev’d sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh’g granted en banc*, 668 F.3d 776 (5th Cir. 2012).

92. See, e.g., *United States v. Berk*, 666 F. Supp. 2d 182, 192-93 (D. Me. 2009) (denying restitution but recognizing harm). The *Berk* court denied restitution altogether but stated that “if there was evidence that the Victims had to attend even one additional counseling session due to [the defendant’s] actions, then restitution may have been appropriate.” *Id.* at 192. Under this extremely literal and stringent interpretation of the proximate cause requirement, it is difficult to imagine how any victim could demonstrate which counseling sessions were due to which possessor; that standard seems excessive, especially when viewed in light of Supreme Court emphasis on the harm to victims and congressional emphasis on the mandatory nature of restitution. See *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (stating that 18 U.S.C. § 2259 does not require highly specific showing of injuries and costs incurred as result of defendant’s crime in order to recover restitution). The *Danser* court emphasized that it did “not believe that Congress sought to create such a cumbersome procedure for victims to receive restitution.” *Id.* But see *United States v. Church*, 701 F. Supp. 2d 814, 830 (W.D. Va. 2010) (quoting BLACK’S LAW DICTIONARY 234 (8th ed. 2004)) (utilizing proximate cause standard of “cause that directly produces an event and without which the event would not have occurred”).

93. 672 F. Supp. 2d 781 (E.D. Tex. 2009), *rev’d In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh’g granted en banc*, 668 F.3d 776 (5th Cir. 2012).

94. See *id.* at 792-93 (“The Court is sympathetic to Amy and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life However, the Court’s sympathy does not dispense with the requirement that the Government [establish proximate causation]. Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.”).

95. See, e.g., Ashleigh B. Boe, Note, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography*

form of payment by possession defendants because the court can nonetheless identify the number of victims depicted in the images and thus estimate the amount of harm the offender has caused regardless of whether each victim stands before the court.⁹⁶

To deny restitution is to suggest that possession of child pornography is a victimless crime, or at least a crime that harms children only indirectly.⁹⁷ In that way, denying restitution perpetuates the antisocial tendencies of the offenders because it forgoes an opportunity to counterbalance the encouragement they receive in online pornographic communities with society's determination that child pornography is harmful to real victims.⁹⁸ Conversely, awarding restitution would seem to reinforce the rehabilitative process.⁹⁹

Thus, the esoteric proximate cause framework should be reframed in terms of the actual, legitimate concerns that underlie it—namely, fears of windfall profits for victims and the logistical difficulty of dealing with a potentially large volume of claims.¹⁰⁰ Judges are justifiably intimidated by the logistical difficulties that might result from a large volume of restitution requests in disparate locations around the country.¹⁰¹ Because judges fear the prospect of offending victims and do not want to appear to trivial-

Victims, 86 N.D. L. REV. 205, 222-23 (2010) (“Courts are needlessly opining as to the correct causation standard under the statute. . . . [Based on explicit Supreme Court precedent and congressional intent], when a defendant possesses pornographic images of a child, the defendant is clearly causing the victim harm.”).

96. For a further discussion of the ability of courts to calculate restitution in this manner, see *infra* note 97 and accompanying text.

97. For a further discussion of courts suggesting that child pornography possession is a victimless crime, see *supra* note 29 and accompanying text.

98. For a further discussion of the importance of reinforcing the humanity of victims with respect to offenders who committed crimes on the internet, see *supra* notes 41-43 and accompanying text.

99. For a further discussion of the overlap of rehabilitation and restitution, see *supra* notes 37-44 and accompanying text.

100. See *infra* notes 102-03 and accompanying text.

101. See generally *United States v. Aumais*, 656 F.3d 147, 156 (2d Cir. 2011) (stating collection of restitution would need to be carefully monitored and would “pose significant practical difficulties”). The Second Circuit, which most recently addressed the issue, expressed concerns about the lack of clarity as to “what government body, if any, is responsible for tracking payments that may involve defendants in numerous jurisdictions across the country.” *Id.* The *Aumais* court stated:

§ 2259(b)(2)—dealing with the enforcement of the restitution order—cross references § 3664. Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); so it would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country.

Id.; see also *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *4-5 (N.D. Ga. Dec. 17, 2009) (“[T]he court must estimate not only a total amount of harm, but must be able to ascertain with reasonable certainty from the evidence presented what proportion of the total harm was proximately caused by *this* defendant and *this* offense.”).

ize their suffering, they also hesitate to make explicit their discomfort with the prospect of victims essentially fishing for defendants or potential “windfall” or excessive awards.¹⁰² Although those are legitimate considerations with respect to how to ensure that victims are properly compensated, they are not sufficient reasons for denying restitution altogether; victims should not be punished for the fact that the internet enables widespread dissemination of their image and therefore creates logistical difficulties.¹⁰³

Restitution advocates often note the contradiction between awarding substantial civil remedies for songwriters whose songs are illegally downloaded, and yet denying restitution for children who were abused on camera and whose images are then circulated against their will.¹⁰⁴ Al-

102. See, e.g., *Aumais*, 656 F.3d at 154 (noting that victim had sought restitution in over 250 cases, victim had “no direct contact” with current defendant, Victim Impact Statement “ma[de] no mention of [defendant],” and expert’s evaluation of her was done before defendant was arrested—factors giving impression that victim’s attorney was searching for defendants without her realizing any particularized harm); *United States v. Faxon*, 689 F. Supp. 2d 1344, 1356-57 (S.D. Fla. 2010) (“This Court bases this finding [of an absence of proximate causation] upon the fact that . . . neither of these victims even knows the underlying facts of this particular case. Neither Vicky nor Amy know of this Defendant. Neither know of the criminal acts he perpetrated.”). This concern is also highlighted by the fact that in many cases denying restitution the judges express concern mostly with the disproportionality of the victim’s attempt to recover several million dollars from a single possession defendant under a theory of joint and several liability. See, e.g., *United States v. Paroline*, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (noting that it is “clear that significant losses are attributed to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline,” but refusing to find defendant responsible for \$3,367,854 in restitution because he possessed two images), *rev’d sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh’g granted en banc*, 668 F.3d 776 (5th Cir. 2012).

103. For a further discussion of the harm child pornography causes victims, see *supra* notes 24-36 and accompanying text. See also *United States v. Brunner*, No. 5:08-CR-16, 2010 WL 148433, at *3 n.4 (W.D.N.C. Jan. 12, 2010) (“[Amy] is expected to require residential therapy at a trauma recovery facility . . .”). The Second Circuit’s acknowledgment of concerns about windfall profits and logistics in *Aumais*, coupled with the fact that the Court refused to “categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images,” suggests that the *Aumais* court did not believe that no harm was proximately caused, but rather the court was concerned with proportionality and logistics. *Aumais*, 656 F.3d at 155. The court’s restatement of its holding supports that conclusion as well: “[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.” *Id.*

104. See 151 CONG. REC. S14187-03 (daily ed. Dec. 20, 2005) (statement of Sen. Kerry) (“Nothing will ever compensate [victims for the horrific experiences they have] had, but the penalties provided in current law are embarrassingly low—they are one-third of the penalty for downloading music illegally.”). It is important to note that Senator Kerry was discussing recovery under statutes providing for civil remedies, discussion of which resulted in Masha’s law. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 707(b), 120 Stat. 587, 650 (codified at 18 U.S.C. § 2251(2)(D) (2006)). Masha’s Law modified an earlier statute to

though that analogy has its limitations because of the two distinct legal contexts, it nonetheless demonstrates that, as a matter of policy, child pornography victims deserve the same level of protection that our legal system confers on musicians, especially because child pornography defendants potentially reap large profits in the process of their crime.¹⁰⁵ The comparison also highlights the fact that, at the core of the debate over whether to award restitution to victims of child pornography, society faces a fundamental question of policy.¹⁰⁶ It would seem, however, that society has already answered that question in the clearest of terms through its democratic institutions, its highest court, and general public opinion with respect to child pornography.¹⁰⁷ Consequently, the proximate causation framework, which is confusing courts and denying the common-sense harm that victims suffer, should be eliminated altogether in child pornography possession cases.¹⁰⁸

B. *Ensure That Notice to Victims Is Optional*

The current process for awarding victim restitution, which requires that victims receive notice every time an image of them is found and then petition courts if they want to seek restitution, may in fact exacerbate the psychological harm to victims caused by the knowledge that individuals possess images of their abuse.¹⁰⁹ The question of whether receiving no-

increase minimum civil statutory damages from \$50,000 to \$150,000. *See id.* It also extended the time period in which victims may sue those who downloaded their images. *See id.* As a result, the statutory time period continues after the victim turns eighteen. *See id.* Thus, although Senator Kerry's comments concerned civil matters, the discussion of Masha's law reinforces Congress's broader recognition that victims of child pornography possession are directly harmed to a degree that warrants substantial financial recovery. *See* Rothman, *supra* note 84, at 347 (explaining that Masha's law "shows that Congress recognized the damage incurred by these victims and intended for victims to receive compensation [via criminal restitution requests] without putting the burden on the victims to prove every aspect of their financial loss").

105. For a discussion of the considerable profit made by those involved with child pornography, see *infra* note 128 and accompanying text. Some may argue that civil remedies are a more appropriate avenue for victims to seek compensation than restitution requests. *See, e.g.,* United States v. Strayer, No. 8:08-CR-482, 2010 WL 2560466, at *15 (D. Neb. June 24, 2010) (denying restitution, but suggesting that victim could "pursue a civil action for damages under 18 U.S.C. § 2255"). One recent article countered that stance by arguing there is no reason to believe that "a claim for damages under this statute would not suffer the same issues that arise under § 2259" due to similar statutory construction. Jacques, *supra* note 9, at 1190 n.119.

106. *See, e.g.,* Osborne v. Ohio, 495 U.S. 103, 109-10 (1990) (emphasizing policy justifications in upholding child pornography laws).

107. For discussion of societal responses to child pornography, see *supra* notes 9-12 and accompanying text.

108. For a further discussion of the excessive burden of proof faced by victims in the current restitution framework and a proposed alternative solution, see *infra* note 94 and accompanying text.

109. *See* United States v. Hicks, No. 1:09-CR-150, 2009 WL 4110260, at *5 (E.D. Va. Nov. 24, 2009) (describing chronic, toxic condition" caused by "knowl-

tice is psychologically beneficial or harmful probably depends on the victim.¹¹⁰ Yet, although victims' preferences and ideal therapy may vary by case, and even if victims themselves might struggle to formulate their preferences, the choice should belong to victims themselves.¹¹¹ Notice of each additional offender should be optional, and victims should be able to recover restitution without attaching requests to the trials of the innumerable defendants who possess their images.¹¹²

C. A Victim Compensation Fund

1. The Proposal

Having highlighted the basic criticisms of the status quo, this Note proposes that Congress should create a mechanism to ensure that victims receive appropriate compensation for the harm that occurs when someone illegally possesses a pornographic image of them.¹¹³ Specifically, Congress should create a national victim compensation fund, which would ensure compensation for all victims and assuage due process concerns of offenders.¹¹⁴ That solution has been proposed by at least two sources,

edge of the dissemination and proliferation of the images of [the victim] at her times of greatest humiliation and degradation"); U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 20 (2005), available at http://www.justice.gov/olp/pdf/ag_guidelines.pdf (explaining victim notification process).

110. See *United States v. Woods*, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010) ("I learn about each [defendant] because of the Victim Notices. I have a right to know who has the pictures of me. The Notice puts [a] name on the fear that I already had and also adds to it. When I learn about one defendant having downloaded the pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about it.").

111. See Jacques, *supra* note 9, at 1194 (noting that opt-out notifications would "mitigate the harm" because "victims would have the option to circumvent being notified of the certain, continuous stream of offenders").

112. See *id.* at 1193 (stating that "[notification] reaffirms the paranoia involved with the lasting psychological harm of child pornography"). Jacques specifically suggests a victim compensation fund as a solution to the "Problem of Notice," among other issues. See *id.*

113. For a discussion regarding the merits of a proposed national victims compensation fund, see *infra* notes 117-30 and accompanying text.

114. For a further discussion regarding the merits of a proposed national victims compensation fund, see *infra* notes 117-30 and accompanying text. Courts have addressed concerns that awarding restitution without regard to proximate cause would violate the Eighth Amendment, with differing results. Compare *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011) (stating that "[the court does] not share the [lower] court's concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment" because "fears over excessive punishment are misplaced" as evidenced by "the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography"), and *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (awarding \$3,000 because court was "confident [that amount] is somewhat less than the actual harm [the] particular defendant caused" and therefore balances Congress's "findings on the harm to

including a judge who wrote an opinion denying restitution.¹¹⁵ Such a program would not be without its logistical challenges, but it is necessary to resolve the current dysfunction and inconsistency that plagues the justice system's child pornography restitution decisions.¹¹⁶

2. *The Current Victim Compensation Fund Landscape*

By one estimate, existing compensation programs pay approximately \$500 million annually to more than 200,000 victims nationwide.¹¹⁷ These programs are generally not funded with taxpayer dollars, but rather rely heavily on offender fines.¹¹⁸ Moreover, child sexual abuse victims already "comprise 29% of the victims helped by compensation programs."¹¹⁹ Regarding the amount each individual can recover from compensation funds, most states cap restitution at \$25,000 per victim.¹²⁰

3. *Designing a Fund in the Child Pornography Possession Context*

Various sections of standard sentencing guidelines provide a framework that could be replicated to determine how much a particular defendant should pay.¹²¹ The amount of funds that could be withdrawn by a

children victims of child pornography" against due process concerns), *with* United States v. Paroline, 672 F. Supp. 2d 781, 789 (E.D. Tex. 2009) ("This Court is of the opinion that a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment."), *rev'd sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh'g granted en banc*, 668 F.3d 776 (5th Cir. 2012), and United States v. Van Brackle, No. 2:08-CR-042, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009) (stating that "[the victim's] restitution request seeks to recover from defendant all losses resulting from all acts by all abusers, without regard to proximate causation," and deciding that "[granting such an award here] would be pure speculation and would risk violating the Eighth Amendment").

115. See *Paroline*, 672 F. Supp. 2d at 793 n.12 (lamenting that court was bound by unwieldy framework and seemingly "impossible burden for the Government," and noting that "[p]erhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259"); Jacques, *supra* note 9, at 1189-98 (discussing merits of uniform and centralized fine system to compensate victims of child pornography).

116. For a further discussion of the merits of a victim compensation fund, see *infra* notes 117-30 and accompanying text.

117. *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=14> (last visited Sept. 6, 2011).

118. See *id.* ("[A] large majority of states fund their programs entirely through fees and fines charged against those convicted of crime. Federal grants to compensation programs, providing about 35% of the money for payments to victims, also come solely from offender fines and assessments.")

119. *Id.*

120. See *id.*

121. See, e.g., United States v. Slater, 348 F.3d 666, 670 (7th Cir. 2003) (applying sentencing guidelines to determine fine for defendant who sold counterfeit goods). A similar process could be used in determining a fine for a defendant

particular victim should be capped, but at an amount sufficient to ensure that victims receive adequate compensation for the dissemination and possession of their image.¹²² Typically, insurance proceeds preclude recovery from victim funds—an approach that should probably not be replicated for a child pornography possession fund, given that Congress decided against that approach in the MVRA.¹²³ Moreover, recovery should not be limited in any way based on amounts already recovered from pornography producers, because those cases present completely different theoretical and practical issues with respect to victim compensation.¹²⁴

Although existing victim compensation funds are generally state-administered, due to the nature of child pornography possession and the inherently interstate nature of the internet, the child pornography possession victim fund should be federally administered.¹²⁵ The interconnected nature of the child pornography market and the violation of victims that the market perpetuates warrant a comprehensive, national solution.¹²⁶ A national fund would account for a wide range of victims who are currently disadvantaged by the restitution framework: those who the National Center for Missing and Exploited Children cannot identify, those who cannot afford to bring numerous restitution claims, or those who simply do

convicted of possession of child pornography; *see* Jacques, *supra* note 9, at 1191 (“Congress should mandate a fine (e.g., \$3,000) that could increase or be mitigated due to certain variables (e.g., the offender’s involvement in the proliferation of child pornography and the amount of pornographic material possessed).”).

122. *See* NAT’L ASS’N OF CRIME VICTIM COMPENSATION BOARDS, *supra* note 117 (stating that most states cap restitution at \$25,000).

123. *See id.*; *see also* 18 U.S.C. § 2259(4)(B) (2006) (“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 injuries from the proceeds of insurance or any other source.”).

124. *See, e.g.*, *United States v. Doe*, 488 F.3d 1154, 1160-62 (9th Cir. 2007) (upholding order for producers of pornography to pay \$16,475 restitution to eight victims for future expenses); *United States v. Searle*, 65 F. App’x 343, 346 (2d Cir. 2003) (upholding \$17,582.85 restitution order to victims’ guardians for counseling, transportation to counseling, and other costs incurred in taking custody of victim after victim’s father was convicted of receiving and producing child pornography); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (upholding \$304,200 in restitution to compensate victim for anticipated costs of future therapy where victim’s father was convicted of improper sexual contact with his daughter); *United States v. Johnston*, 707 F. Supp. 2d 616, 621 (E.D.N.C. 2010) (ordering \$1,662,930 in restitution for manufacturing child pornography); *United States v. Estep*, 378 F. Supp. 3d 763, 770-74 (E.D. Ky. 2005) (ordering \$221,480.10 to three victims of sexual abuse and exploitation); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1249 (D. Utah 2004) (ordering \$79,698 for sexual exploitation of child under 18 U.S.C. § 2251(a)).

125. *See* McLean, *supra* note 28, at 236 (describing National Center for Missing and Exploited Children’s role in identifying victims). Alternatively, or perhaps additionally, a coalition of government and private actors could be formed to administer it, similar to The Financial Coalition Against Child Pornography.

126. *See* *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (“Given the importance of the State’s interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.”).

not wish to repeatedly revisit the harm that possessors inflict on them by receiving multiple notices.¹²⁷ The fact that some possessors and disseminators of child pornography make large profits, given that some child pornography websites charge in excess of one thousand dollars per month for membership, demonstrates the need to ensure that offenders are not enriched while victims experience costly trauma.¹²⁸

Calculating restitution in a systematic manner, similar to sentencing guidelines, will ensure that the offender considers the impact of his crime on victims and will address concerns of proportionality.¹²⁹ Therefore, a national fund is preferable to the current system because it would ensure that victims will not be denied restitution altogether, it would have the benefits of a functional and uniform system, and it would eliminate concerns about whether an offender might be forced to pay a disproportionate amount of restitution.¹³⁰

V. CONCLUSION

In sum, a compensation fund would lessen the burden on victims who receive psychologically damaging notifications, ease fears about windfall

127. See, e.g., Jacques, *supra* note 9, at 1193 (“[N]otice of defendants could sometimes be therapeutic for victims; however, forcing victims to learn the identities of their offenders to receive compensation might cause more harm than good.”); Rothman, *supra* note 84, at 347 (noting that current statutory framework, including MVRA, “indicates that Congress intended to make these remedies available to all victims, especially those for whom attorney’s fees would have been prohibitive”).

128. See, e.g., NAT’L CENTER FOR MISSING & EXPLOITED CHILDREN, *supra* note 7 (“There has been a significant increase in the price of child pornography [I]n 2006, it was common to see subscription prices of \$29.95 per month. Today, the price points have increased dramatically. It is not unusual to find sites that cost up to \$1,200 per month, and rare to find sites for much less than \$100 per month.”).

129. See *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) (“Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.”). Because payments made to the national fund will reflect an assessment of the real harm a defendant has caused, it will actually be more personalized than a traditional fine paid to the state. See Jacques, *supra* note 9, at 1195 (“[B]y spreading payments across all offenders, the average payment and burden on individual defendants should become more proportional to the harm of their individual offense.”).

130. See Jacques, *supra* note 9, at 1189-90 (“The central difficulties that face courts come from the established principle in criminal restitution that a restitution amount should not exceed the actual loss that the defendant’s offense caused the victim . . . and the requirement that there be a preponderance of the evidence with “explicit findings of fact” supporting [a] calculation of “the full amount of the victim’s losses.”. . . Due to the inherent difficulty of calculating damages for non-production child pornography offenses, a nominal award could be the most effective solution for the courts and Congress.”).

profits, and ensure that offenders compensate victims in a manner proportionate to the overall harm they have caused regardless of whether victims are all readily identifiable.¹³¹ It would also require offenders to acknowledge the humanity of victims and reinforce both social norms and the goals of the criminal justice system.¹³² Logistical complexity is no excuse for failing to provide victims with restitution; the current framework is broken and discordant with congressional intent to make restitution mandatory by passing the MVRA.¹³³ Although a victim compensation fund may initially seem unwieldy, an extremely impressive array of actors has already begun to collaborate for creative financial and technical solutions to combat child pornography.¹³⁴ Thus, existing, large-scale efforts to combat child pornography demonstrate the feasibility of creative and effective solutions; such resources could be similarly brought to bear to implement a victim compensation fund.¹³⁵

131. See *supra* notes 87-130 and accompanying text.

132. For a discussion of the way in which restitution causes offenders to confront the effects of their crime, see *supra* note 129 and accompanying text.

133. See *United States v. Aumais*, 656 F.3d 147, 156 (2d Cir. 2011) (“[I]t is not entirely clear what government body, if any, is responsible for tracking payments that may involve defendants in numerous jurisdictions across the country. In addition, determining what amount Amy has received would entail collecting data about hundreds of cases, ascertaining what money has actually been paid, and determining what losses that money was intended to cover.”); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (utilizing loose requirement of causation for restitution because under § 2259 “Congress chose unambiguously to use unqualified language in prescribing full restitution for victims.”).

134. See, e.g., NAT’L CENTER FOR MISSING & EXPLOITED CHILDREN, *supra* note 7 (bringing together coalition of thirty-five prominent financial institutions and internet industry leaders, who have joined with National Center for Missing & Exploited Children and its sister organization, the International Centre for Missing & Exploited Children (ICMEC), “to eradicate the commercial viability of child pornography by following the flow of funds and shutting down the payment accounts that are being used by these illegal enterprises.”). For those who argue that it would be difficult to get Congress to act on a compensation fund, they need look no further than the FCACP, because “Richard C. Shelby (R-AL), former Chairman and current Ranking Member of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, was the catalyst in bringing these industry leaders together to address this problem.” *Id.*; see also GOOGLE JOINS INDUSTRY-WIDE MOVEMENT TO COMBAT CHILD PORNOGRAPHY, *supra* note 10 (describing Technology Coalition, which includes AOL, Yahoo!, Microsoft, EarthLink, Google, and United Online, and which will “work to enhance knowledge sharing among industry participants, improve law enforcement tools, and research perpetrators’ technologies in order to enhance industry efforts and build solutions”).

135. See *supra* note 134 and accompanying text (describing creative financial and technical solutions already taken to combat child pornography).

