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Katherine M. Giblin

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CLICK, DOWNLOAD, CAUSATION: A CALL FOR UNIFORMITY AND FAIRNESS IN AWARDING RESTITUTION TO THOSE VICTIMIZED BY POSSESSORS OF CHILD PORNOGRAPHY

Katherine M. Giblin

The presence of child pornography1 on the Internet is astoundingly prolific.2 These explicit materials permeate websites, virtual communities, and peer-to-peer networks.3 With its effortless accessibility and anonymous interface, the Internet serves as an ideal gateway for the expedited circulation

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1. The federal definition of child pornography encompasses:
   [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . 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.

18 U.S.C. § 2256(8) (2006). Further, "sexually explicit conduct' means actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." Id. § 2256(2)(A).


3. See U.S. Gov't Accountability Office, supra note 2, at 6, 15 (noting that peer-to-peer (P2P) file-sharing programs facilitate user interaction to allow for the sharing of information; such programs are "emerging as a conduit for the sharing of pornographic images and videos, including child pornography"); Max Taylor & Ethel Quayle, Child Pornography: An Internet Crime 130–47 (2003) (discussing the role of virtual communities in conjunction with the spread of child pornography); Pornography Industry Is Larger than the Revenues of the Top Technology, CY.TALK Newsblog (Jan. 1, 2010), http://blog.cytalk.com/2010/01/web-porn-revenue/ (announcing that at least one-hundred thousand websites showcase images of child pornography).
of massive quantities of child pornography.\(^4\) Worse yet, as the Internet’s convenience facilitates the child-pornography market, it correspondingly fuels the perpetual victimization of the depicted children.\(^5\)

A significant amount of disseminated pornographic materials exhibit documented childhood abuse.\(^6\) As one attorney emphasized, many of these images are not just “13-year-olds in bras or sexting or 17-year-old girls gone wild—these are kids who are raped.”\(^7\) Using pseudonyms to protect their privacy, “Amy” and “Vicky” are two young women—photographed as children—whose images and videos have become some of the most commonly circulated sets of pornographic materials.\(^8\) Abused by her uncle at a young age, "Amy" was just 13 years old when the abuse began.\(^9\) As announced by Congress and echoed by the Supreme Court: “Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.” New York v. Ferber, 458 U.S. 747, 749 n.1 (1982) (quoting S. REP. NO. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 42); see also YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW 2-3 (2008) (“The global, decentralized and borderless nature of the Internet creates a potentially infinite and unbreakable communications complex which cannot be readily bounded by one national government or even several or many acting in concert.”).\(^10\)

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6. See Bryan McKenzie, Reality of Sexual Abuse Seems So Surreal, THE DAILY PROGRESS, Jan. 8, 2011 (clarifying that child pornography is a “recording of abuse and frequently torture inflicted upon children”).


8. Amy and Vicky are the only identified victims who have filed claims for restitution against the possessors of their images. See John Schwartz, Pornography, and an Issue of Restitution at a Price Set by the Victim, N.Y. TIMES, Feb. 3, 2010, at A19. Attorney James R. Marsh represents Amy and has submitted hundreds of copies of Amy’s filings to state’s attorneys’ offices across the country. Id.; see also Christian Nolan, Paying Dearly for Child Porn Possession, CONN. LAW TRIBUNE, Mar. 2, 2009, at 3 (announcing that although Amy was one of twenty-four victims identified by the National Center for Missing and Exploited Children (NCMEC) on an individual’s hard drive, she was the only one to come forward and claim restitution). Vicky has also sought restitution in over eighty federal cases. Clair Johnson, Fighting Back: Child Porn Victim Seeks Restitution After Years of Exploitation, Shame, BILLINGS...
age, Amy became the principal in a collection of photographs and videos called the Misty series. Described by the National Center for Missing and Exploited Children as an array of “crime scene photos,” the materials document her “perform[ing] a series of extremely graphic acts, including oral copulation, anal penetration, and masturbation, with an adult man.”

Similarly, Vicky’s biological father videotaped and photographed his own sexual abuse of her, as well as abuse by other adults, including some “scripted sexual related scenarios.”

As their images spread, victims like Amy and Vicky wrestle with feelings of helplessness stemming from the perpetual exposure of their images and the constant anxiety that someone will recognize them. They also battle feelings of responsibility at the thought of their abuse inspiring a viewer to similarly

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GAZETTE, May 27, 2010, at 10A. While conducting evidence reviews submitted by law enforcement, NCMEC has encountered over 35,750 images associated with the video series featuring Amy and found images associated with that series 8860 times in 2009 alone. See Brief of the National Center for Missing and Exploited Children on Issues of Restitution for Victims of Child Pornography Under 18 U.S.C. §2259 at 5, United States v. Paroline, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 6:08-cr-61) [hereinafter Brief of the National Center for Missing and Exploited Children]. Comparably, images of Vicky have been identified in over 8000 cases. Johnson, supra note 8, at 10A.

9. James, supra note 7; see also Brief of the National Center for Missing and Exploited Children, supra note 8, at 5 (explaining that the series has been actively collected and exchanged since 1998). “A series is a collection of images and/or video files taken over a period of time and typically containing both apparent child pornography as well as non-pornographic images of a child or children.” Brief of the National Center for Missing and Exploited Children, supra note 8, at 5. Collectors of child pornography find a series to be more desirable than individual images because the completed set “adds value to the collection . . . [and] there is also potential for increasing the capacity to create sexual arousal.” TAYLOR & QUAYLE, supra note 3, at 161.

10. Brief of the National Center for Missing and Exploited Children, supra note 8, at 6.


abuse a child for economic profit.13 In her victim-impact statement, Amy recognized that she is “exploited and used every day and every night somewhere in the world by someone,” which makes her feel like she is “being abused over and over and over again.”14 Vicky, too, explained that “[b]ecause the most intimate parts of [her] are being viewed by thousands of strangers and traded around, [she] feel[s] out of control . . . like [she is] being raped by each and every one of them.”15 While coping with these pains, victims sustain medical and psychological expenses and develop financial problems resulting from their inability to maintain regular employment or meet the demands of a school schedule.16

Seeking recompense for these harms, Amy and Vicky have turned to Internet downloaders—the consumers of their images—for restitution. They have filed suit under § 2259 of Title 18 of the United States Code, which mandates the payment of restitution to sexually exploited children.18 However, before restitution can be awarded, courts must ascertain a finding of proximate causation between victims' injuries and defendants' possession of their images.19

14. Amy's Victim-Impact Statement, supra note 12. Amy warned that she had difficulty explaining "what it feels like to know that at any moment, anywhere, someone is looking at pictures of [her] as a little girl being abused by [her] uncle and is getting some sick enjoyment from it." Id. Amy's statement accurately recognizes that most child pornography is used for the "sexual arousal and gratification of pedophiles." See LANNING, supra note 7, at 28.
15. United States v. Hicks, No. 1:09-CR-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009) (emphasis added); see also Johnson, supra note 8 (quoting Vicky's attorney, Carol Hepburn, who proclaimed that child pornography is a "'horrendous violation of privacy'" because viewing these images is "'just like looking in the window when the abuse was happening'").
16. PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 151 (2d ed. 2010). As a consequence of abuse, Amy suffered many psychological problems that caused her to fail classes and have difficulty keeping a job. Amy's Victim-Impact Statement, supra note 12.
17. See Schwartz, supra note 8, at A19; see also infra Part I.C.
19. Proximate cause is defined as "'[a] cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor, [or a] cause that directly produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY 250 (9th ed. 2009). It has also classically been described as "an unfortunate term [that] is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct." Id. (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)). However, various federal circuit courts have disagreed as to whether § 2259 contains a "proximate cause" requirement. See infra note 78 (surveying the statutory-interpretation arguments that circuits have made).
Although the application of § 2259 to other crimes of sexual exploitation may be straightforward, the recent trend of applying § 2259 to the possession\textsuperscript{20} of child pornography is novel\textsuperscript{21} and has generated much controversy and ambiguity.\textsuperscript{22} Often not the original abusers, producers, or distributors of the pornography, Internet downloaders may nonetheless qualify as possessors of the materials.\textsuperscript{23} However, an end-user might argue that the concrete cause of a

\textsuperscript{20} In the virtual context, possession is a recent concept. \textit{Cf.} FERRARO & CASEY, supra note 4, at 246. In essence, "[p]ossession is accomplished both by virtue of the individual viewing the image and therefore 'possessing' it and by 'downloading' it onto the hard drive of the computer. An affirmative action on the part of the viewer to 'save' the image is not necessary to establish possession." \textit{Id.} Although recently developed, "[t]he vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 624.

\textsuperscript{21} See United States v. Faxon, 689 F. Supp. 2d 1344, 1356 (S.D. Fla. 2010) (acknowledging that the application of § 2259 to Internet child pornography cases is "relatively new" and has not been addressed directly by many appellate courts); United States v. Granato, No. 2:08-cr-00198-RCJ-GWF, slip op. at 9 (D. Nev. Aug. 28, 2009) (resolving the "novel legal issue" by allowing the parties to stipulate the restitution amount).

\textsuperscript{22} See, e.g., United States v. Solsbury, 727 F. Supp. 2d 789, 794 (D.N.D. 2010) ("In production cases there is rarely a question of causation whereas in possession cases the boundaries of proximate cause become far more murky."); \textit{see also} Schwartz, supra note 8, at A19 (discussing opposing views on recent child exploitation cases). One law professor called the first decision granting restitution "highly questionable" because it "stretche[d] personal accountability to the breaking point." \textit{See id.} (quoting Jonathan Turley, \textit{Court Orders Former Pfizer Executive to Pay $200,000 to Woman Photographed as a Child While Being Sexually Abused}, JONATHAN TURLEY (Feb. 24, 2009), http://jonathanturley.org/2009/02/24/court-orders-former-viagra-executive-to-pay-200000-to-womanphotographed-as-a-child-while-being-sexually-abused). An expert in sex crimes agreed with this criticism, stating that the harm caused by possession is less direct than that caused by the abuse and that "there is such a thing as going too far." \textit{Id.}

\textsuperscript{23} One scholar has compared the different levels of participation in child pornography to a "chain of liability." AKDENIZ, supra note 5, at 12. The creators of the images are at the top of the chain, followed by the distributors who circulate the images for either commercial or noncommercial purposes. \textit{Id.} Possessors are at the bottom of the chain because they only download and view the images. \textit{Id.} The crime of possession may also be broken down into an "offending typology," which distinguishes varying patterns of Internet behavior. See RICHARD WORTLEY & STEPHEN SMALLBONE, OFFICE OF CMTY ORIENTED POLICING SERV., U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET, 15-17 (2006). For example, "browsers" come across images of child pornography by chance but "knowingly" save the images, which decreases the possibility of detection. \textit{Id.} at 15. "Trawlers," on the other hand, seek the images through active searches and may engage in networking activities. \textit{Id.} Additionally, typologies also differentiate between nonsecure and secure collectors. \textit{Id.} at 15-16. Nonsecure collectors "do not employ security strategies," whereas secure collectors are "members of a close newsgroup or other secret pedophile ring." \textit{Id.} at 16. Secure collectors "engage in high levels of networking and employ sophisticated security measures to protect their activities from detection." \textit{Id.} Regardless of how they obtain the materials, the most significant aspect of this conduct is that individuals collect the images. That is, they do not "merely view [the] pornography: [t]hey save it. It comes to represent their most cherished sexual fantasies." See LANNING, supra note 7, at 23.
victim’s suffering is at the hands of the original abuser rather than at the click of their mouse, for they did not commit the actual abuse.  

Courts grapple with the issue of whether to award restitution in cases where the proximate causation between an Internet downloader’s possession and the victim’s injuries may not be apparent. Some courts deny restitution, concluding that the victim’s harm derived from a general distress about the widespread circulation of his or her images, which could not have been caused by an individual defendant’s possession. By contrast, other courts award restitution, concluding that the victim’s harm is proximately caused by the defendant’s consumption due to his substantial participation in the market. As a result, courts across the country are splintered—some have awarded millions, while others do not grant an award at all. Thus, the jurisdiction in which the victim files suit considerably influences the victim’s fate. This current state of the law presents an alarming need for uniformity and fairness on behalf of both the victim and the defendant.

This Comment proposes that proximate causation does exist between one defendant’s possession and the victim’s injuries, but that the award of restitution should reflect only the harm caused by that defendant’s personal offense. Part I introduces the historical, theoretical, and statutory development of restitution and explores the dichotomous decisions in which courts have attempted to interpret and apply § 2259 in cases involving the possession of child pornography. Part II then analyzes the differing perspectives that courts have employed to ascertain the individual possessor’s role in causing the victim’s harm. Part III compares the methods of calculating restitution employed by awarding courts. Finally, in Part IV, this Comment concludes that the defendant’s act of possession proximately causes the victim’s harm. However, to calculate a fair award of restitution for both parties, this Comment suggests that courts should engage in a fact-based inquiry focusing on

24. See, e.g., United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at *4 (E.D. Va. Nov. 24, 2009). The defendant in Hicks argued that the direct cause of the victim’s losses was the abuse by the victim’s father, not the defendant’s possession. Id. However, according to one study, “[i]t appears that these offenders are far from being innocent, sexually ‘curious’ men who, through naivete or dumb luck, became entangled in the World Wide Web.” Michael L. Bourke & Andres E. Hernandez, The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders, 24 J. FAM. VIOLENCE 183, 188 (2009). Indeed, this study revealed that many of the defendants in possession cases later disclosed that they had committed hands-on offenses as well. Id. at 189.

25. See infra Part I.C.


27. See infra Part I.C.2.


29. See infra Parts I.C.1–2.
specified aggravating factors, and also proposes that Congress enact legislation setting monetary boundaries to help curb judicial discretion in applying the statutory mandate.

I. THE HISTORICAL, STATUTORY, AND JUDICIAL GROUNDWORK

As advocated by the crime victims' rights movement, the most significant purposes of restitution are retribution and rehabilitation.30 With these objectives in mind, Congress enacted the mandatory restitution provision of Title 18, which establishes the right to restitution for victims of child exploitation.31 When applying this provision to cases involving possession of child pornography, federal courts strive to reconcile the competing concerns of compensating the victim and implementing a mandate limited by the requirement of proximate causation.32 The following sections explore the development of restitution, the theoretical foundation of the governing statute, and the ensuing judicial responses.

A. The Rise of Victims' Rights and the Promotion of Restitution

During the 1960s and 1970s, progressive activism dominated American social and political arenas and incited the civil rights, women's rights, and anti-war movements.33 This dynamic, sociopolitical environment set the stage for the emergence of the crime victims' rights movement in the late 1970s.34 At this time, Americans became increasingly conscious of rising crime rates.35 Additionally, society began to recognize that its disinterested legal system lacked the protections necessary to aid victims in their response to and

30. See infra text accompanying note 41.
31. See infra note 52 and accompanying text.
32. See infra Part I.C.
33. See VALIANT R.W. POLINY, A PUBLIC POLICY ANALYSIS OF THE EMERGING VICTIMS' RIGHTS MOVEMENT 9–10 (1994) (outlining some of the social and political developments of the 1960s and 1970s). The development of "victimology," a new theoretical approach to criminal justice, also influenced victims' rights. TOBOLOWSKY ET AL., supra note 16, at 6. Victimology urges the penal system to focus more on the crime victim. Id. at 6–7. As crime increased during the 1960s, this theory gained momentum, sparking a corresponding increase in public awareness and interest in victimization. Id. at 7.
34. POLINY, supra note 33, at 9–10 (explaining that "it was the merger of identities implicit in women denied political empowerment and women as crime victims" that fueled the victims' rights movement (citations omitted)); TOBOLOWSKY ET AL., supra note 16, at 8.
35. See, e.g., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi (1982) ("The specter of violent crime and the knowledge that, without warning, any person can be attacked or crippled, robbed, or killed, lurks at the fringes of consciousness. Every citizen of this country is more impoverished, less free, more fearful, and less safe, because of the ever-present threat of the criminal . . . . Every 23 minutes, someone is murdered. Every six minutes a woman is raped.").
recovery from crime.\textsuperscript{36} Seeking to address these inefficiencies, the crime victims' rights movement focused on the establishment and recognition of rights and remedies for crime victims.\textsuperscript{37} One of the movement's remedial objectives included restoration of the "restitutive concepts" rooted in both ancient and premodern criminal prosecutions.\textsuperscript{38} Advocates for crime victims consider restitution necessary to offset the costs incurred by both the victim and society.\textsuperscript{39}

As a consequence of its dual role in both civil and criminal legal systems, restitution has evolved to serve several different purposes.\textsuperscript{40} Generally, civil restitution serves as a means of compensation for the aggrieved party, whereas criminal restitution serves as a means of "rehabilitation, deterrence, and retribution."\textsuperscript{41} However, as the victims' rights movement advanced, "[a] restitutive theory of criminal justice . . . developed to justify redress to victims from a philosophical and ethical perspective. Under this theory, a crime is viewed as a violation of the 'rights' of the victim by the offender which creates an imbalance between them . . ."\textsuperscript{42} By "emphasiz[ing] the wrongfulness of

\textsuperscript{36} See id. (noting how the criminal justice system treats victims who are brave enough to come forward as mere "appendages" and offers them little protection in exchange for their vital cooperation).


\textsuperscript{38} Id. at 4–5, 153. The concept of an offender's repayment to his or her victim is rooted in the Code of Hammurabi and the Torah, which proclaim "life for life, eye for eye, . . . wound for wound, stripe for stripe." Id. at 4 (quoting Exodus 21:23–25). As society evolved and governmental and religious authorities developed, the focus shifted from criminal repercussions to private and civil wrongs, reserving criminal penalties for only extreme offenses. Id. at 5. As a result, criminal-legal proceedings focused less on the victim's rehabilitation and more on the government's prosecution of the offender. Id.

\textsuperscript{39} Id. at 151–54. After suffering a crime, victims must confront medical and psychiatric expenses, uncompensated leave from employment, victim services, and the "[i]ntangible costs . . . [of] victim fear, pain, suffering, and lost quality of life." Id. at 151. Society must shoulder the burden of "investigating, prosecuting, and punishing an offender," as well as suffer the loss of the "victims' productivity as a result of their victimization." Id.

\textsuperscript{40} See POLINY, supra note 33, at 236–38, 237 n.158 (citing Josephine Gittler, Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems, 11 PEPP. L. REV. 117, 136–39 (1984)); see also Brian Kleinhaus, Note, Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment, 73 FORDHAM L. REV. 2711, 2717–19 (2005) (discussing the bifurcated history of restitution in both criminal and civil approaches). "Restitution has been described as . . . a 'rehabilitative tool,' a 'punitive measure' and an 'equity tool.'" Id. at 2711 (quoting BARBARA E. SMITH ET AL., IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION: EXECUTIVE SUMMARY: A STUDY OF THE ABA CRIMINAL JUSTICE SECTION VICTIM WITNESS PROJECT 1 (1989)).


\textsuperscript{42} POLINY, supra note 33, at 237. Echoing this argument, the Aristotelian theory of corrective justice provides that "[d]oing injustice and suffering injustice forges a link—a synallagma—between the parties and nobody else." FRANCESCO GIGLIO, THE FOUNDATIONS OF RESTITUTION FOR WRONGS 150–51 (2007). Because the wrongdoer achieves a gain while the
the offense and the defendant’s moral responsibility,” the retributive aspect of restitution strives to rectify this imbalance by requiring an offender to compensate the victim in an amount tailored to fit the crime.43

B. Statutory Underpinnings: The Development of Mandatory Restitution for Crimes of Child Sexual Exploitation

In response to developing concerns about victims’ rights, President Ronald Reagan established the Task Force on Victims of Crime in 1982.44 This task force recommended that Congress “require restitution in all cases, unless the court provides specific reasons for failing to require it.”45 Heeding this guidance, Congress enacted the Victim and Witness Protection Act (VWPA), which permits restitution in criminal sentencing.46 Reporting on the VWPA, the Senate emphasized its view on the purpose of restitution, stating “whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.”47 Over the following decade, judges used their discretion to order restitution when they found it necessary.48

In 1994, Congress converted restitution from a discretionary award into a mandatory requirement for victims of sex crimes, child exploitation, and related crimes.49 Enacted as a component of the Violence Against Women Act of 1994,50 § 2259 mandates that “the court shall order restitution for any offense under [Chapter 110],”51 which criminalizes the sexual exploitation and other abuses of children.52 Some of the acts criminalized in Chapter 110 include the engagement of sexual conduct,53 the sex trafficking of children,54 victim suffers an “excess of pain,” the “just is a mean between loss and gain.” Id. Although some losses cannot be calculated in economic terms, money may nonetheless be used to equalize the gain and loss “as far as possible.” Id. at 151.

43. Note, supra note 41, at 939.
44. See PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, supra note 35, at ii.
45. Id. at 18.
53. Id. § 2251.
the creation of sexually explicit images, and the reception and possession of child pornography.

Section 2259 instructs that the defendant shall "pay the victim . . . the full amount of the victim's losses as determined by the court." These losses may include expenses sustained from "medical services relating to physical, psychiatric, or psychological care," and "any other losses suffered by the victim as a proximate result of the offense." The government bears the burden of establishing the victim's losses by a preponderance of the evidence.

Congress further broadened the scope of mandatory restitution by enacting the Mandatory Victims Restitution Act of 1996 (MVRA). The MVRA requires restitution for certain crimes that cause a victim bodily injury or

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54. *Id.*
55. *Id.*

Various pieces of legislation identify the harms caused by the possession of child pornography. For example, in the Adam Walsh Child Protection and Safety Act of 2006, Congress concluded that:

A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.


57. 18 U.S.C. § 2259(b)(1).
58. *Id.* § 2259(b)(3)(A).
59. *Id.* § 2259(b)(3)(F). Section 2259(b)(2) instructs the court to look to § 3664 for procedural requirements for imposing and enforcing restitution. *Id.* §§ 2259(b)(2), 3364. Victims may submit an affidavit representing their amount of losses subject to restitution. *Id.* § 3664(d)(2)(A)(vi). After the court determines the amount of the restitution to be awarded, both parties and the victim have the opportunity to object. *See id.* § 3664(e). Section 3664 also states that "[i]f the court finds that more than [one] defendant has contributed to the loss . . . the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the[ir] level of contribution." *Id.* § 3664(b).

60. *Id.* § 3664(e). In evaluating whether to order restitution, a court may not consider the defendant's economic circumstances or the victim's receipt of compensation from another source. *Id.* § 2259(b)(4)(B).

monetary loss. Congress intended for the legislation to secure payment of restitution and to ensure that the offender “pays the debt owed to the victim as well as to society.” Most recently, Congress enacted the Crime Victims’ Rights Act (CVRA) in 2004 to further “reiterate[e] the right to restitution created by the MVRA.

C. The Judicial Arena: Conflicting District Court Decisions

Federal district courts across the country are engaged in a good-faith endeavor to apply § 2259 to the crime of possession of child pornography, but have applied different rationales, resulting in conflicting holdings. Despite generating divergent outcomes, these cases generally share the same factual circumstances and typically involve the discovery of images or videos of child pornography on a defendant’s hard drive. After the defendant pleads guilty, the court considers any restitution claims, employing a two-pronged analysis.

62. See id.; see also 18 U.S.C. §§ 3663(a)(1), (c)(1); Dickman, supra note 48, at 1688.
66. See Courts Weigh Criminal Restitution for Victims in Child Porn Cases, FOXNEWS.COM (Feb. 8, 2010), http://www.foxnews.com/us/2010/02/08/courts-weigh-criminal-restitution-victims-child-porn-cases/ (quoting Amy’s attorney, James Marsh, who stated that courts are “really grappling with this in good faith”); see also United States v. Faxon, 689 F. Supp. 2d 1344, 1356 (S.D. Fla. 2010) (recognizing that the application of the mandatory restitution provision of § 2259, as applied to possession of child pornography from the Internet, is a relatively new area).
68. See, e.g., United States v. Aumais, No. 08-cr-711, 2010 WL 3033821, at *1 (N.D.N.Y. Jan. 13, 2010) (explaining that the defendant pleaded guilty to one count of possessing child pornography and one count of transportation in foreign commerce after being apprehended by border patrol officials with DVDs, laptops, a video recorder, and a camera that contained over two thousand images and over one hundred videos of child pornography); United States v. Paroline, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009) (stating that the defendant pleaded guilty to one count of possessing child pornography after admitting he knowingly possessed between one hundred fifty to three hundred images of sexually exploited minors on his computer), mandamus denied sub nom., In re Amy, 591 F.3d 792 (5th Cir. 2009), rev’d on reh’g sub nom., In re Amy Unknown, 636 F.3d 190 (5th Cir. 2011).
69. Cf. United States v. Buchanan, No. 09-cr-0095, at 1 (D. Minn. Jan. 4, 2010) (order for government to file memorandum) (discussing § 2259’s mandatory restitution provisions upon a defendant’s conviction). The government typically requests restitution for the victim after the defendant has been convicted. See, e.g., id. at 2 (noting that the court had handled several other cases where victims sought restitution). However, in United States v. Buchanan, when both the prosecutor and defense attorneys stipulated that there would not be a request for restitution, the judge ordered the government to explain why the victim was not entitled to restitution. Id. at 2–3. The court emphasized that the defendant was convicted of possessing child pornography, which is an offense included in Chapter 110. Id. at 1. The judge stated:
First, the court must determine whether the claimant qualifies as a victim within the meaning of § 2259. A “victim” is defined as an “individual harmed as a result of a commission of a crime under [Chapter 110 of Title 18].” The Supreme Court has established that the circulation of child pornography is “intrinsically related to [a child’s] sexual abuse.” As a result, each time someone views a photograph or a video depicting the victim’s sexual abuse, the claimant’s original abuse is perpetuated and the harm is intensified. Circuit courts have further indicated that consumers who “merely’ or ‘passively’ receive[] or possess[] child pornography [still] directly contribute to the continuing victimization.” Consumers perpetuate the abuse, invade the victim’s privacy, and give original abusers an incentive to document their conduct and digitally distribute it for financial gain. Therefore, courts have unequivocally answered this first inquiry in the affirmative.

Section 2259 quite explicitly provides that an order of restitution is mandatory for such offenses . . . [and] given the clear Congressional mandate that those convicted of child-pornography offenses pay restitution to their victims, the Court will no longer accept silence from the government when an identified victim of a child-pornography offense seeks restitution.

Id. at 1–2. The court thereafter ordered Buchanan to pay $1000 to Amy. See James Walsh, Possessor of Child Porn to Pay $1,000 in Restitution, STAR TRIBUNE, Apr. 5, 2010, at B1.

70. See, e.g., United States v. Brunner, No. 5:08-cr-16, 2010 WL 148433, at *1–3 (W.D.N.C. Jan. 12, 2010) (quoting 18 U.S.C. § 2259(c) (2006)) (clarifying that courts must first determine whether the depicted child qualifies as a “victim” of the defendant’s possession within § 2259 and, secondly, whether proximate causation is required), aff’d, 393 F. App’x 76 (4th Cir. 2010).

71. Id. at *1.

72. 18 U.S.C. § 2259(c). This definition is broad compared to other provisions, including the VWPA and the MVRA, which define a “victim” as a “person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2) (2006).


74. Id. (stating that “the harm to the child is exacerbated by the[] circulation of the pornography”); see also Osborne v. Ohio, 495 U.S. 103, 111 (1990) (“The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”).

75. United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (emphasis added); see also United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007) (stating that “[t]here is nothing ‘casual’ or theoretical about the scars [the victims] will bear from being abused for [a consumer’s] advantage”).

76. Osborne, 495 U.S. at 110–11; Goff, 501 F.3d at 260; Norris, 159 F.3d at 930; see also Ferber, 458 U.S. at 759–60 (arguing that to curtail the child pornography market effectively, enforcement should target the consumers of these markets).

77. See, e.g., Norris, 159 F.3d at 930 (stating that the “effects stemming directly from a consumer’s receipt of child pornography amply justify” that the child depicted in the pornography is a victim); United States v. Brunner, No. 5:08-cr-16, 2010 WL 148433, at *2 (W.D.N.C.) (“[B]y both legislative intent and judicial construction, the law is clear that the children depicted in child
Second, the court must determine whether the defendant’s conduct satisfies § 2259’s proximate cause requirement. District courts diverge on this point of the analysis. The following two subsections explore these conflicting decisions, which highlight the necessity for national uniformity and fairness.

1. The Declining Courts: A Victim’s Generalized Harm Is Not Proximately Caused by an Offender’s Individual Possession

Some district courts have concluded that a defendant’s individual act of possession does not proximately cause a victim’s harm and, therefore, have refused to award restitution (these courts are hereinafter referred to as “declining courts”). Although no court disputes that the conglomeration of creators, possessors, and distributors of child pornography all contribute to a victim’s continued suffering, declining courts struggle with the notion of individualized responsibility for generalized harm.

Recognizing that an inconceivable number of possessors contribute to a victim’s suffering, declining courts conclude that proximate cause can only be pornography are victims not only of the makers of the pornography but also of its possessors.”), aff’d, 393 F. App’x 76 (4th Cir. 2010). See Brunner, 2010 WL 148433, at *2. The threshold question is whether the statute contains a proximate cause requirement at all. See, e.g., United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009). In answering this initial inquiry, circuits are split. United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011) (recognizing the circuit split about whether the proximate cause requirement in the catch-all category applies to all of the categories listed in the statute). The Fifth Circuit stands alone in its conclusion that § 2259 does not contain the element of proximate causation. See In re Amy Unknown, 636 F.3d 190, 198–201 (5th Cir. 2011) (identifying the weaknesses in the district court’s usage of statutory-interpretation cases and concluding that the proximate cause language is limited to § 2259(b)(1)(F), as opposed to all of the categories listed in §§ 2259(b)(1)(A)–(E), based on the differentiation between varying statutory definitions of “victim”). Most circuits, however, conclude that § 2259 does contain a proximate cause requirement. See, e.g., Monzel, 641 F.3d at 535 (concluding that § 2259 contains a proximate cause requisite based on “the traditional principles of tort and criminal law and § 2259(c)’s definition of ‘victim’ as an individual harmed ‘as a result’ of the defendant’s offense”); United States v. McDaniel, 631 F.2d 1204, 1208–09 (11th Cir. 2011) (finding the language of § 2259 to be “plain” and that because of the language of the statute, proximate cause must be established). The statutory interpretation and other relevant arguments for this threshold inquiry are beyond the scope of this Comment, and this Comment is based upon the conclusion that § 2259 includes a proximate cause requirement.

See infra Part I.C.1–2.


81. See, e.g., United States v. Solsbury, 727 F. Supp. 2d 789, 795 (D.N.D. Aug. 4, 2010) (declaring that “[t]here is no question that everyone associated with the evils of child pornography . . . contribute[s] to the victim’s never-ending harm”); United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (commenting that “no doubt” exists that everyone involved with child pornography contributes to the ongoing harm), mandamus denied sub nom., In re Amy, 591 F.3d 792 (5th Cir. 2009), rev’d on reh’g sub nom., In re Amy Unknown, 636 F.3d 190 (5th Cir. 2011).

established if the court is able to identify the harm caused by the particular defendant on trial. 83 For instance, in United States v. Van Brackle, the court emphasized that it must be able to ascertain with reasonable certainty “what proportion of the total harm was proximately caused by this defendant and this offense.” 84 To make this determination, a court must make the distinction between the harm resulting from the defendant’s conduct and the harm resulting from both the original abuse and the widespread circulation of the images. 85 Without this differentiation, an award of restitution would hold the defendant liable for “all losses resulting from all acts by all abusers.” 86 In Van Brackle, the government was unable to separate the different harms, so the court concluded that § 2259’s proximate cause requirement was not satisfied. 87 Similarly, in United States v. Covert, the court probed the facts in an effort to determine the specific amount of losses caused by the defendant’s possession. 88 Though recognizing the difficulty in establishing proximate cause in these cases, the court concluded that the government simply did not put forth enough evidence to demonstrate that the defendant caused a “specific loss” to the victim. 89

83. See, e.g., id. at *5.
84. Id. at *4. Van Brackle pleaded guilty to one count of receiving child pornography in violation of § 2252(a)(2)(A). Id. at *1. Vicky and Amy sought restitution in this case because their images were found in his collection. Id.
85. Id. at *4; see also United States v. Rowe, No. 1:09-cr-80, 2010 WL 3522257, at *5 (W.D.N.C. Sept. 7, 2010). The court in United States v. Rowe expressed that it could not “ignore the fact that a significant portion of the psychological harm . . . was inflicted by [Vicky’s] father,” which “is distinct from the psychological harm inflicted by the untold numbers of individuals (including the Defendant) who subsequently received and possessed images of [the] abuse.” Id. at *4. In presenting Vicky’s total losses, the court concluded that the government failed to make this distinction. Id. at *5. Thus, the court was unable to “estimate the amount of Vicky’s losses that can be attributed to the Defendant with any ‘reasonable certainty.’” Id. (quoting United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007)).
87. Id.
88. United States v. Covert, Crim. No. 09-332, 2011 WL 134060, at *6 (W.D. Pa. Jan. 14 2011) ("[T]he court must examine the evidence to determine if this Defendant’s conduct in this case was a substantial factor in Amy’s damages."); see also United States v. Solsbury, 727 F. Supp. 2d 789, 795 (D.N.D. 2010) (noting that the government did not make an effort to “show the portion of [the] losses specifically caused by [the defendant’s] possession of five pornographic videos”). In reviewing the decision in United States v. Aumais, the court was unable to determine how the Aumais court’s analysis differentiated from the finding that Amy was a victim under the statute. Covert, 2011 WL 134060, at *8.
89. Id. at *9; see also United States v. Church, 701 F. Supp. 2d 814, 832 (W.D. Va. 2010) (quoting United States v. Tencer, 107 F.3d 1120, 1135 (5th Cir. 1997) (explaining that the court must find “explicit findings of fact” supporting its calculation” for it to be upheld on review, and the evidence introduced in this case does not allow the court to “reasonably calculate the measure of harm done to the victim proximately caused by the Defendant’s conduct” (quoting United States v. Blake, 81 F.3d 498, 505 (4th Cir. 1996)); United States v. Simons, No. CR-08-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (explaining that there must be an
Declining courts refuse to conclude that defendants, as individuals, cause the victims’ specified harm beyond their pre-existing suffering. For example, the court in United States v. Berk focused on this premise and concluded that Amy and Vicky sustained their injuries before the defendant even possessed their images. Examining the evidence, the court expressly noted that upon learning of the defendant’s possession, neither victim pursued counseling nor did they experience a decline in their attendance at work. In light of these facts, the court believed that “[t]heir ‘prior state of well-being’ had already been inalterably damaged both by the initial abuse and by the idea that other individuals were viewing their images on a continuing basis.” Thus, the general idea of circulation, rather than Berk’s individual possession, caused the victims’ harm.

In United States v. Faxon, the court could not find how the defendant’s personal possession caused any of the victims’ alleged harm. The court emphasized that the victims were unaware of the defendant’s identity, his criminal acts, the facts of the case, and even the occurrence of related hearings on the matter. The court believed that this lack of knowledge about the particular defendant indicated that the victims’ suffering would have existed regardless of the defendant’s individual possession.

“identification of a specific injury to the victim that was caused by the specific conduct of the defendant”.

90. See, e.g., United States v. Berk, 666 F. Supp. 2d 182, 192–93 (D. Me. 2009) (indicating that the victim had already suffered the losses shown at the trial before the defendant viewed the images).

91. Id. at 192. Berk pleaded guilty to the possession of fifty thousand still images and fifty videos of child pornography in violation of § 2252A(5)(B). Id. at 185. Of these materials, six thousand images and ten videos belong to one hundred four identified series. Id. Because images of Amy and Vicky were found in Berk’s collection, they were victims in this case. Id. at 185–86.

92. Id. at 191–92.


95. United States v. Faxon, 689 F. Supp. 2d 1344, 1360 (S.D. Fla. 2010). Pursuant to a search warrant, a forensic analysis of the defendant’s computer revealed downloaded images and videos of child pornography from peer-to-peer file sharing software. Id. at 1348–49. The images include those from the Vicky series and the Misty series. Id. at 1349. The defendant pleaded guilty to the transportation of sexually exploitive materials of children on the Internet in violation of § 2252(a)(1), and possession of child pornography in violation of § 2252(a)(4)(B). Id. at 1347. The court stated that the evidence “clearly indicates that [the victim’s] continued psychological trauma would occur regardless of whether or not this Defendant committed the criminal acts in this case.” Id. at 1358; see also United States v. Simon, No. CR-08-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (noting that the evidence exhibited harm caused by the conduct of others, but not by the defendant).

96. Faxon, 689 F. Supp. 2d at 1357.

97. Id. at 1358.
Even if causation could be established, declining courts stress the impossibility of calculating an award of restitution.98 One court argued that quantifying the victim’s losses would be an “evidentiary nightmare.”99 To these courts, the countless numbers of possessors make it impossible to discern with reasonable certainty the losses caused by a particular defendant convicted of possession.100 This lack of specific evidence would cause an “award of restitution [to] be an arbitrary calculation based on speculation and guess work, at best.”101

2. The Awarding Courts: Individual Possession Proximately Causes the Victim’s Harm

Some courts conclude that the defendant’s individual act of possession proximately causes the victim’s harm102 and, therefore, award restitution to the victims (these courts are hereinafter referred to as “awarding courts”).103

a. The Finding of Proximate Causation

Awarding courts ground their analysis of proximate causation in their recognition of § 2259’s mandatory restitution requirement.104 One court described the provision as “explicit and unwaivable.”105 However, each awarding court has also acknowledged that the statutory language suggesting a causal requirement limits the provision.106 In United States v. Aumais, the court proclaimed that “circumscribed only by the limits of causation, Congress intended in § 2259 to mandate full compensation to victims from defendants

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99. Id. at 795.
100. See, e.g., id. (“There are hundreds of thousands of individuals who have contributed in some way to the victim’s losses by viewing these disturbing images over the past decade. . . . There is nothing in [the] evidence before the court, which permits it to be able to discern, with any reasonable certainty, [the] losses . . . caused by [the defendant].”); Faxon, 689 F. Supp. 2d at 1360–61.
101. Solsbury, 727 F. Supp. 2d at 796 (commenting that there must be “some semblance of reason, common sense, and fairness rather than speculation”); see also United States v. Rowe, No. 1:09-cr-80, 2010 WL 3522257, at *5 (W.D.N.C. Sept. 7, 2010) (indicating that the court could attempt to quantify the harm caused by the original abuse and the harm caused by the defendant’s conduct, but “the result would simply be an arbitrary and speculative figure”).
102. See infra Part I.C.2.a.
103. See infra Part I.C.2.b.
105. Id.; see also United States v. Buchanan, No. 09-05-0095, at 2 (D. Minn. Jan. 4, 2010) (order for government to file memorandum) (demanding that the government explain why no restitution was requested in light of the “clear Congressional mandate”).
for all harm caused by a defendant’s criminal conduct.\textsuperscript{107} The Ninth Circuit sustained this statutory interpretation by requiring the district court to order restitution whenever it convicts a defendant of a Chapter 110 crime.\textsuperscript{108}

Some awarding courts analyze the proximate causation issue by determining whether the defendant’s conduct was a substantial factor in causing the victim’s harm.\textsuperscript{109} In United States v. Aumais, the court indicated that to be considered substantial, the defendant’s conduct must be “important or significant”; however, this determination can be complicated because of the incalculable number of possessors.\textsuperscript{110} Despite this complexity, the court explained that substantiality “concerns the extent of that harm and not the comparative responsibility.”\textsuperscript{111} The harm caused by a defendant’s possession “is not obviated or diminished by the fact that others also possessed the images.”\textsuperscript{112} Rather, the court concluded that the harm caused by one defendant’s possession exists regardless of whether others also possess the material and whether the victim had actual knowledge of the defendant’s possession.\textsuperscript{113}

Instead of employing a test, some awarding courts infer proximate causation from the defendant’s participation in the market.\textsuperscript{114} In United States v. Brunner, the court found that the defendant “participated in an ongoing cycle of abuse and thereby contributed to the victims’ mental and emotional


\textsuperscript{108} United States v. Baxter, 394 F. App’x 377, 378 (9th Cir. 2010). The Ninth Circuit also proposes that § 2259 is “phrased in generous terms” to allow for an appropriate recompense in light of the enduring nature of the victim’s harm. United States v. Laney, 189 F.3d 954, 966 (9th Cir. 1999).

\textsuperscript{109} Hardy, 707 F. Supp. 2d at 613–14 (“[T]he real issue is not whether Defendant has caused Amy harm . . . but whether his doing so is a substantial factor in her overall harm.”). In contrast to cases that solely involve possession of child pornography, Hardy involved the receipt, possession, and circulation of such images. Id. at 599; see also United States v. Crandon, 173 F.3d 122, 125–26 (3d Cir. 1999) (holding that the district court did not err in concluding that the defendant’s conduct, receiving child pornography, was a “substantial factor in causing the ultimate loss”); Aumais, 2010 WL 3033821, at *5 (noting that proximate cause only requires that the defendant’s conduct be a substantial factor in the victim’s harm; this requirement does not mean that it needs to be the greatest or sole cause of the harm).

\textsuperscript{110} Aumais, 2010 WL 3033821, at *5.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at *6.

\textsuperscript{113} Id.

Likewise, in United States v. Hicks, the court concluded that the defendant's act of seeking images depicting the victim's abuse served as a “sufficiently proximate tie to her ongoing injuries.” Notwithstanding the approach used, all awarding courts conclude that each individual possession of child pornography is a proximate cause of the victim's harm.

b. Calculating an Award of Restitution

Upon a finding of proximate causation, awarding courts must calculate the now-mandatory monetary award under § 2259. This endeavor is admittedly difficult. Although united in finding proximate cause, awarding courts compute restitution in a variety of ways.

Two district courts in Florida granted restitution awards of over $3 million dollars. In United States v. Staples, the United States District Court for the Southern District of Florida awarded $3,680,153, the full amount of restitution requested, and held the defendant jointly and severally liable with future defendants. The court explained that because § 2259 applies to the crime of possession and uses the word “shall,” language that is explicit, not precatory, the defendant must pay restitution to Amy, the victim of his crime.

Most awarding courts have not granted full requests, but instead have granted reduced awards by focusing on the defendant's conduct, establishing a

115. Brunner, 2010 WL 148433, at *2. The defendant possessed over 1000 images of child pornography, which included at least one image each of Amy and Vicky. Id. at *1. The defendant pleaded guilty to two counts of possession of child pornography in violation of both § 2252 and § 2256. Id.

116. Hicks, 2009 WL 4110260, at *4. Among other materials, the defendant possessed two images and two videos depicting Vicky on his computer. Id. at *1. The defendant pleaded guilty under § 2252A(b)(1) for the attempted receipt of child pornography. Id.

117. See Aumais, 2010 WL 3033821, at *6 (“Each possessor of Amy’s images constitutes an individual who has caused [her] harm . . . .”); Brunner, 2010 WL 148433, at *2 (“Defendant’s conduct [receiving and possessing pornography of Vicky and Amy] was a proximate cause of both Vicky’s and [Amy]’s injury.”).


119. See Hicks, 2009 WL 4110260, at *3 (noting that ascertaining the specific harm caused by the defendant’s conduct is “highly interrelated with the issue of defining ‘victim,’” thus making the determination of a specific restitution amount an “admittedly . . . difficult task under § 2259”).


123. Id. at *2–3.
set award, or using apportionment. In Aumais, the district court aimed to distinguish the harm caused by the defendant’s conduct from the harm that resulted from the original abuse. The court assessed the government’s request for $3,367,173 in restitution to Amy and found that this figure reflected both the harm caused by her uncle and that caused by consumers. Regarding this as improper conflation, the court focused only on the harm resulting from the defendant’s personal conduct. Although the evidence did not indicate a causal link between her unemployment and the defendant’s possession, the evidence established that Amy would need future counseling sessions as a result of the defendant’s possession. However, in calculating a restitution award of $48,483, the court limited the frequency of counseling sessions and the time frame for which it held the defendant financially liable. Considering that the language of § 2259 instructs the defendant to pay “the full amount of the victim’s losses as determined by the court,” the court declined to award an apportioned amount and entered the full sum against the defendant.

Some district courts avoid calculation issues altogether by setting a standard amount. For example, the United States District Court for the Eastern District of California requires each defendant convicted of possessing child pornography to pay the victim $3000 in restitution. To reach this amount,

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124. See United States v. Aumais, No. 08-cr-711, 2010 WL 3033821, at *7–9 (N.D.N.Y. Jan. 13, 2010) (calculating an award of $48,483 to Amy because the defendant was “responsible for exacerbating a pre-existing condition”); Brunner, 2010 WL 148433, at *4 (awarding $1500 for Vicky and $6000 for Amy, both significantly less than the requested amounts, because the defendant only possessed the images without having any contact with the victims); Monk, 2009 WL 2567831, at *5–6 (awarding $3000 each to Vicky and Amy by apportioning liability).
126. Id. To reach the full amount requested, the government attributed $2,855,173 to lost wages and $512,681 to the expense of future counseling. Id.
127. Id. at *7–8.
128. Id. (noting that the court would have to make “major assumptions to connect the harm resulting from possession . . . to [Amy’s] inability to maintain employment”).
129. Id. at *8.
130. Id. at *8–9. The court recognized that any determination of expenses for counseling would involve an inevitable fusion of the original and exacerbated harm. Id. at *8. The court refused to calculate lifelong counseling expenses because it would require “substantial speculation” about Amy’s future. Id. Instead, the court found it reasonable to provide Amy restitution for five years of weekly counseling and an additional five years of monthly counseling. Id.
the court looked to § 2255, which establishes civil remedies for a victim’s personal injury.\textsuperscript{134} Under this provision, victims are “deemed to have sustained damages of no less than $150,000 in value.”\textsuperscript{135} However, because § 2255 incorporates crimes ranging from sexual engagement to sex trafficking, the court inferred that Congress did not intend to award such a significant amount for the comparably lesser crime of possession.\textsuperscript{136} Therefore, the court concluded that $3000, although only two percent of the $150,000 statutory minimum, was suitable in each case; a lower amount would not properly compensate the victim for his or her losses, but a higher amount would present issues involving the defendant’s due process rights.\textsuperscript{137}

Other courts strive to determine a proper restitution amount for the victim by apportioning liability.\textsuperscript{138} In United States v. Hicks, the court used apportionment to evaluate the appropriateness of the award for Vicky and found $3000 to be sufficient.\textsuperscript{139} Due to the large volume of Vicky’s images accessible on the Internet, the court believed that at least fifty individuals would be convicted for the possession of Vicky’s images.\textsuperscript{140} The court reasoned that if Vicky received $3000 in restitution from at least fifty individuals, the aggregate sum would total her original request and fully compensate her for her harm.\textsuperscript{141}

Similarly, in United States v. Brunner, the court concluded that “apportioning a discrete amount of the victims’ losses to Defendant is in the interests of justice.”\textsuperscript{142} Although finding Vicky and Amy’s full amount of lost earnings and counseling expenses to be legitimate, the court concluded that the

\begin{footnotesize}
\begin{enumerate}
\item[134.] Monk, 2009 WL 2567831, at *4-5 (E.D. Cal. Aug. 18, 2009).
\item[135.] 18 U.S.C. § 2255(a). The court referred to the calculation as a “legal quandary” due to the difficulty in quantifying the losses. Id. at *4.
\item[136.] Id. However, the court also acknowledged that $3000 is “somewhat less than the actual harm this particular defendant caused each victim.” Id.
\item[137.] See id.
\item[138.] See, e.g., United States v. Brunner, No. 5:08-CR-16, 2010 WL 148433, at *4 (W.D.N.C. Jan. 12, 2010) (determining that, in cases of child pornography possession, apportioning the defendant’s share of the restitution is appropriate because more than one defendant contributed to the victim’s loss), aff’d, 393 F. App’x 76 (4th Cir. 2010); United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009) (discussing the practicalities of apportioning restitution).
\item[139.] Hicks, 2009 WL 4110260, at *6.
\item[140.] See id.
\item[141.] Id.
\item[142.] Brunner, 2010 WL 148433, at *4 (reasoning that the defendant’s relatively minor contribution to the victims’ injuries made it proper to apportion the restitution award).
\end{enumerate}
\end{footnotesize}
defendant’s personal level of contribution only amounted to $1500 for Vicky and $6000 for Amy. The court explained that those amounts represented a "roughly equal fraction" of the individual victims’ projected therapy costs and lost income in relation to the defendant’s personal contribution to the victims’ injuries. Additionally, the court emphasized that the crime in this case was "mere possession" of child pornography; the defendant had never been in actual contact with the victims. Thus, the court opined that the restitution amounts awarded by other courts “overvalued” the amount each defendant owed because those courts “failed to recognize that the most substantial cause of [their] loss was the initial abuse.”

The Ninth Circuit upheld a similar decision and, after finding both causation and appropriate restitution, awarded Vicky $3000. The circuit court concluded that the government had satisfied its burden of establishing proximate causation on foreseeability grounds. The court upheld the restitution award because it found that the amount would cover the cost of one and one-half years of therapy, which “seem[ed] to be more than fair and reasonable.”

II. THE JUDICIAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN POSSESSION, CAUSATION, AND RESTITUTION

The possession of child pornography undoubtedly harms the depicted victim. However, the possessor’s role in contributing to the victim’s harm muddles § 2259’s clear mandate of restitution. Awarding courts approach this dilemma from a theoretical perspective by focusing on the individual possessor’s role. This Part demonstrates why this rationale prevails and

143. Id. at *3-4 (determining that the government had proven Vicky and Amy’s losses by a preponderance of the evidence).
144. Id. at *4.
145. Id. (explaining the rationale behind the court’s relatively low restitution determinations).
146. Id.
147. United States v. Baxter, 394 F. App’x 377, 378 (9th Cir. 2010).
148. Id. at 379.
149. Id.
150. See, e.g., United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (“There is no doubt that everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute to [the victim’s] ongoing harm.”), mandamus denied sub nom., In re Amy, 591 F.3d 792 (5th Cir. 2009), rev’d on reh’g sub nom., In re Amy Unknown, 636 F.3d 190 (5th Cir. 2011).
152. See infra Part II.A.
153. See infra Part II.A-B.
then addresses the workable and unworkable aspects of awarding courts' techniques for calculating victim restitution.

A. The Theoretical Lens: The Individual's Role

Awarding courts view the crime of possessing child pornography through the theoretical lens of consumerism, analyzing such conduct in the larger context of the child pornography market.\(^{154}\) These courts emphasize the uncontroverted determination that the dissemination of child pornography harms the depicted victim.\(^{155}\) Additionally, awarding courts believe that the transmission of these images over the Internet perpetuates the victims' abuse, invades their privacy, and provides an economic incentive for the further creation of child pornography.\(^{156}\) Under this perspective, the child's victimization "flows just as directly" from a defendant's knowing possession as it does from the production and dissemination of pornographic materials.\(^{157}\)

Awarding courts state that the individuals comprising the online child-pornography market fuel this harmful circulation.\(^{158}\) The individual possessor of the materials participates as a consumer of the market's "product" and, as a result, is an active participant in a system that perpetuates the injurious digital circulation.\(^{159}\) Each individual possession re-victimizes the

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155. See, e.g., Ferber, 458 U.S. at 757 (declaring that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child").

156. See, e.g., United States v. Norris, 159 F.3d 926, 929-30 (5th Cir. 1998) (outlining the various harms cased by the consumer, or "end recipient," of internet child pornography).

157. Id. at 930.

158. See, e.g., United States v. Hardy, 707 F. Supp. 2d 597, 613–14 (W.D. Pa. 2010) (concluding that although the circulation of images might occur regardless of the defendant's possession, his individual participation in such circulation proximately caused the victim's harm). The demand for images results partly from the "process of desensitization" where possessors desire a greater degree of explicit photography to maintain the thrill incited by the material. SHARON W. COOPER ET AL., MEDICAL, LEGAL & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 199 (Karen C. Maurer et al. eds., 2005). Furthermore, the ability of a possessor to exchange and share images with another offender provides "validation" for his collection efforts. See LANNING, supra note 7, at 30.

159. See, e.g., Norris, 159 F.3d at 929-30; see also United States v. Aumais, No. 08-cr-711, 2010 WL 3033821, at *5 (N.D.N.Y. Jan. 13, 2010) (finding that as long as the defendant's possession of the images "caused substantial harm to [the victim], proximate cause [could be found] even if the conduct of others similar to that of [the defendant] caused equal or greater harm").
victim and contributes to his or her harm. Under this rationale, awarding courts conclude that each individual possessor’s participation in the market is a proximate cause of the victim’s harm.

Awarding courts reject arguments opposing a finding of proximate cause by offering responses based on this market ideology. One such opposing argument points to the incalculable number of persons who have possessed or will possess the same images that the defendant obtained. Because each possessor personally contributes to the victim’s harm, awarding courts counter this assertion by arguing that such harm cannot be “obviated or diminished by the fact that others also possessed the images.” Another argument against proximate causation is the victim’s lack of actual knowledge of the details involved in each defendant’s case. However, awarding courts emphasize that the victim’s awareness, or lack thereof, does not alter the existence of the harm caused.

In contrast to the market ideology employed by awarding courts, declining courts view a defendant’s crime of possession through an individualistic lens. Instead of equating consumerism with proximate causation, declining courts strive to determine the precise portion of the victim’s harm caused by a particular defendant’s possession. As a result, declining courts and awarding courts arrive at contradictory conclusions when presented with similar facts.

Declining courts regard the inconceivable number of possessors as a significant obstacle to a determination of proximate causation. Because a

160. See Aumais, 2010 WL 303382, at *6 (noting that victims whose abuse is recorded “can never regard their victimization as terminated” because each future possessor will harm the victim).

161. See supra Part I.C.2.a (discussing the finding by some courts that mere participation in the internet child pornography market suffices to find proximate cause, while other courts require a “substantial” contribution to the victim’s harm).


163. See supra note 100 and accompanying text.


165. See supra text accompanying notes 95–97.

166. See, e.g., Aumais, 2010 WL 3033821, at *6 (stating that although the victim had no direct awareness of that defendant, his possession of the victim’s images caused her harm because the victim knew of the exploitation of her images by a group of consumers, one of whom happened to be the defendant). Furthermore, Amy and Vicky’s victim-impact statements illuminate their consciousness of individual possessors. See supra notes 14–15 and accompanying text.

167. See, e.g., United States v. Simon, No. CR-08-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (explaining that the court must be able to ascertain a specific harm caused by the defendant’s individual act).


169. Compare supra Part I.C.1, with Part I.C.2 (discussing the disparate findings of awarding and declining courts despite nearly identical facts).

170. See supra note 100 and accompanying text.
victim's harm is a product of indistinguishable accumulation, declining courts conclude that a victim's general trauma concerning the circulation of his or her images would exist regardless of whether an individual defendant downloaded the materials.\footnote{171} To bolster this point, declining courts emphasize the victim's ignorance of the particular defendant in the case\footnote{172} and that the victims do not pursue additional support upon learning of that particular defendant's possession.\footnote{173} Because the victims did not know of the individual defendant or his criminal acts, declining courts assert that their harm would continue regardless of the defendant's conduct.\footnote{174}

As applied to proximate causation, declining courts' individualized approach is flawed in several ways. The most significant flaw is the courts' failure to fully comply with § 2259, which mandates that district courts order restitution for offenses under Chapter 110, including the crime of possession of child pornography.\footnote{175} Despite universal recognition that the crime of possession causes harm to the depicted child,\footnote{176} declining courts do not hold guilty defendants financially accountable for their individual possessions.\footnote{177} If all courts adopted this individualized approach, the crime of possession would be effectively exempt from the statute's mandate.\footnote{178} Defendants in these cases

\footnote{171. See, e.g., United States v. Faxon, 689 F. Supp. 2d 1344, 1358 (S.D. Fla. 2010); United States v. Berk, 666 F. Supp. 2d 182, 192 (D. Me. 2009) ("Before this Defendant viewed their images, the Victims had suffered all of the losses established by the evidence . . . . Their 'prior state of well-being' had already been inalterably damaged both by the initial abuse and by the idea that other individuals were viewing their images on a continuing basis." (quoting S. REP. No. 104-179, at 13 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 926).)

\footnote{172. See supra text accompanying notes 96–97.}

\footnote{173. See supra notes 92–93 and accompanying text.}

\footnote{174. See supra text accompanying notes 93–97.}

\footnote{175. See 18 U.S.C. § 2259(a) (2006).}

\footnote{176. See supra notes 73–77 and accompanying text.}

\footnote{177. See supra text accompanying note 90.}

\footnote{178. See In re Amy, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting) ("Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation. Under the district court's analysis, the intent and purposes of § 2259 would be impermissibility nullified . . . ."); see also William L. Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413, 433–34 (1937) (describing, in the context of tort law, the concurrent causation of a single, indivisible result). In tort law, the concept of concurrent causation of an individual result lends fair support for the proposition of awarding courts:

In such cases [in which two or more individuals contribute to an indivisible result] it is clear that each defendant is in fact responsible for the single result, which cannot be apportioned; it is also clear that neither [of the concurrent actors] can be absolved from liability upon the ground that the injury would have happened without him, or there will be no recovery at all. Each defendant must be liable if his act was a material and substantial factor in producing the result, even though he was not essential to it. Prosser, supra, at 434. This theory mirrors the awarding courts' conclusion that because possessors are a substantial cause of a victim's harm, they should be liable, to some degree, for a victim's continuing injuries. For a further discussion of tort law concepts analogized to the crime
would then be protected from restitution claims, and victims would be left without the remedy that Congress intended to provide for them.\textsuperscript{179}

Furthermore, by refusing to award restitution, declining courts improperly consider whether a defendant \textit{should} be required to pay restitution—a decision that has already been pre-determined by the legislature.\textsuperscript{180} In \textit{United States v. Paroline}, for example, the court asserted that "[a] victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant’s specific conduct."\textsuperscript{181} The plain language of § 2259 requires the "full amount" of losses to be awarded in restitution and says nothing about a comparative analysis of individualized losses caused by the defendant versus general losses to the victim.\textsuperscript{182}

The awarding courts’ approach best reconciles congressional intent with the reality that an individual consumer of Internet child pornography contributes to the victim’s harm.\textsuperscript{183} Amy and Vicky give weight to this rationale in their victim-impact statements by expressing that the simple knowledge that an individual is or will be viewing images of their abuse causes anxiety.\textsuperscript{184} Although awarding courts admittedly struggle with an appropriate calculation of restitution, declining courts strive \textit{not} to find proximate causation because such a finding would require them to quantify a generalized harm on an individualized basis.\textsuperscript{185} Although this daunting task is a concern of merit, it is

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\footnote{179. \textit{Cf} Hardy, 707 F. Supp. 2d at 614–15; see also United States v. Hicks, No. 1:09-cr-150, 2009 WL 810260, at *4 (E.D. Va. Nov. 24, 2009) ("[T]he Court declines to refuse § 2259’s mandate—as several other districts have recently done—by selectively reading § 2259 to obfuscate its apparent intent 'to pay full restitution to the identifiable victims of their crimes.'" (quoting United States v. Croxford, 324 F. Supp. 2d 1230, 1249 (D. Utah 2004))).}

\footnote{180. See, e.g., United States v. Paroline, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009) (finding that § 2259 requires restitution once proximate cause has been found between the defendant’s actions and the victim’s harm), \textit{mandamus denied sub nom., In re Amy}, 591 F.3d 792 (5th Cir. 2009), rev’d \textit{on reh’g sub nom., In re Amy Unknown}, 636 F.3d 190 (5th Cir. 2011).

\footnote{181. \textit{Id.}}

\footnote{182. 18 U.S.C. § 2259(b)(1) (2006); see also United States v. Aumais, No. 08-cr-711, 2010 WL 3033821, at *5 (N.D.N.Y. Jan. 13, 2010) ("[I]f the harm caused by [the defendant’s] possession of [the victim’s] images caused substantial harm to [the victim], proximate cause has been demonstrated even if the conduct of others similar to that of [the defendant] caused equal or greater harm.").

\footnote{183. See, e.g., Aumais, 2010 WL 3033821, at *4–5 (noting Congress’s intent to fully compensate victims of defendants who proximately cause their harm).

\footnote{184. See \textit{supra} note 14–15 and accompanying text.

\footnote{185. See \textit{In re Amy}, 591 F.3d at 796–97 (Dennis, J., dissenting); see also Schwartz, \textit{supra} note 8, at A19 (quoting the assistant attorney general for the criminal division of the Department of Justice, who "urge[s] judges not to let ‘practical and administrative challenges’ to the restitution issue ‘drive a policy position that directly or indirectly suggests that possession of child pornography is a victimless crime”).}}
misplaced in a discussion of proximate causation rather than in the calculation of restitution.  

B. The Calculation of Restitution: The Lost Sight of the Individual

Under § 2259, the court must order the defendant to "pay the victim . . . the full amount of the victim's losses as determined by the court."187 Procedurally, "[i]f the court finds that more than [one] defendant has contributed to the loss . . . the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the[ir] level of contribution."188

In executing these provisions, awarding courts engage in various methods of restitution calculation.189 The most controversial and infrequent approach is to award the full restitution request; under this approach, courts have held defendants jointly and severally liable for an award of over $3 million.190 This system has several shortcomings. First, each district only has control over the defendants within its jurisdiction.191 Therefore, courts cannot apportion liability to defendants outside their jurisdiction,192 which forces the defendant to seek contribution from defendants convicted in other jurisdictions to avoid paying more than his fair share or pay the entire request himself.193 Even if cross-jurisdictional enforcement were possible, this mechanism would still falter because the "crime of child pornography is a collaborative victimization that is on-going," which makes it "impossible to make a proportionate division of the restitution amount among an unknown number of unidentified future

186.  Cf. United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at *4 (E.D. Va. Nov. 24, 2009) ("That such a showing [of harm] is difficult . . . does not relieve this Court of its duty to comply with the statutory command of § 2259.").
188. Id. § 3664(h).
192. See id. (noting that "in the context of multiple defendants across jurisdictions a court cannot . . . apportion restitution" because it would be impossible to determine each defendant's share).
193. See id.; 18 AM. JUR. 2D Contribution § 10 (2004) (noting that where a party has paid more than his share for a common burden, an action for contribution from other parties is appropriate).
Furthermore, the purpose of restitution is to equalize the harm caused, as to “make the victim whole while the Sentencing Guidelines serve a punitive purpose.” Thus, the imposition of the full award embodies the concern of declining courts that the defendants will be held responsible for “all losses resulting from all acts by all abusers.”

Second, courts that grant a fixed award may possibly undervalue an individual’s contribution to the victim’s harm by failing to give proper regard to the underlying facts of the individual defendant’s case. For example, a defendant who possesses a complete series of child pornography could be ordered to pay restitution in the same amount as an individual who possessed only one, less explicit image. Although a victim may ultimately recover restitution from multiple possessors to cover her full losses, due process requires that each defendant receive an individual consideration when determining the proper restitution amount.

Despite this possible pitfall, the consideration of § 2255(a) and the usage of a small percentage of the potential statutory amount is a notable tactical approach to calculating the restitution award.

One district court concluded that “the interests of justice” require the apportionment of a “discrete amount of the victims’ losses” to the defendant, especially because the crime at issue involved “mere possession” rather than

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196. United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009). From a practical standpoint, it may be useful for courts to consider the defendant’s assets when victims seek large restitution awards. Otherwise, a defendant may be forced to declare bankruptcy because the statute instructs the court not to consider the defendant’s economic circumstances. See 18 U.S.C. § 2259 (b)(4)(B)(1) (2006) (requiring the court to issue an order of restitution notwithstanding the economic circumstances of the defendant). As a result, the victim would be unable to fully collect her award.
197. See, e.g., Renga, 2009 WL 2579103, at *5–6 (finding a restitution amount of $3000 as appropriate for the victim, which was determined by calculating a percentage of the amount suggested by the statute that the court believed would compensate the victim for her harm without threatening the defendant’s due process rights); United States v. Zane, No. 1:08-cr-0369, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009) (granting both victims $3000 based on the same reasoning as Renga). These opinions do not discuss the underlying facts of each individual defendant, but simply suggest that the defendants possessed images depicting the victim or victims now requesting restitution. See, e.g., Renga, 2009 WL 2579103, at *1; Zane, 2009 WL 2567832, at *1.
198. 18 U.S.C. §§ 2252A, 2259(a)(b)(1) (stating that a defendant found guilty of any offense under Chapter 110 is liable for the full amount of the victim’s harm without regard to egregiousness).
199. See Brief of the NVCLI, supra note 191, at 15–16; see also supra Part I.A (discussing the equalizing function of restitution).
200. See supra notes 132–38 and accompanying text.
The apportionment approach has resulted in restitution amounts ranging from $1500 to $6000. Another district court determined what it believed to be an appropriate restitution amount by calculating the cost of counseling that could be fairly attributed to the defendant’s possession. The court relied on this method of calculation by focusing on § 2259’s instruction that the “full amount” of the losses should be awarded. However, such an award seems to exaggerate the harm caused by a particular defendant’s possession.

Although aspects of these techniques may be useful in some respects, there is a complete lack of uniformity among courts. Courts need a technique that considers the individual defendant as separate from both the original abuse and acts of all other possessors, and that evaluates the fact-specific aspects of each particular defendant’s case.

III. RECONCILIATION: BALANCING THE VICTIM’S RIGHT TO RESTITUTION WITH THE DEFENDANT’S RIGHT TO A REFLECTIVE AWARD

Restitution is meant to accelerate rehabilitation, facilitate retribution, and further deter the creation, distribution, and possession of child pornography. American jurisprudence and legislation recognize the harms that victims endure not only at the hands of their abusers, but also by the multitudes of possessors. Section 2259 epitomizes this consciousness. In light of the general purpose of restitution and the harmful effects that victims experience, the awarding courts’ consumerism analyses, which establish the finding of proximate causation for every individual possessor based on participation in the child-pornography market, is the most legally effective approach to both determining perpetual crime and compensating the traumatized victims. However, when calculating the proper restitution amount, the declining courts’

204. Id. at *9 (citing 18 U.S.C. § 2259(b)(1) (2006)).
205. See Brunner, 2010 WL 1484433, at *4 (concluding that some courts have overvalued awards by failing to keep the victim’s physical abuse, for which the defendant was not directly responsible, in mind).
206. See supra Part I.A.
207. See, e.g., United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009), mandamus denied sub nom., In re Amy, 591 F.3d 792 (5th Cir. 2009), rev’d on rehe’g sub nom., In re Amy Unknown, 636 F.3d 190 (5th Cir. 2011); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (declaring that a graphic depiction constitutes a “repetition of their abuse”).
208. See 18 U.S.C. § 2259; supra notes 107-08 and accompanying text.
209. See supra notes 154-66 and accompanying text.
individualistic approach must prevail. Because retribution requires an offender to pay for the injustices inflicted upon the victim, courts must strive to measure the offenses caused by a singular possessor.\footnote{210}

Section 2259 instructs that the defendant must “pay the victim . . . the full amount of the victim’s losses as determined by the court,”\footnote{211} with such losses being those proximately caused by the defendant’s illegal conduct.\footnote{212} To determine the “full” amount of harm to a victim proximately caused by the actions of a defendant, courts should engage in a fact-based inquiry, such as evaluating the number of material items possessed, the nature of the images, and the method of downloading the materials.\footnote{213} Possession of even one image of a child that exhibits partial nudity (as opposed to graphic conduct) constitutes a specific invasion of privacy that revictimizes the depicted child with each viewing.\footnote{214} Therefore, an analysis must be structured to evaluate how the defendant’s conduct aggravates this base harm to the victim, as opposed to allowing the defendant’s harm to be subsumed into the general harm caused by the availability of the victim’s images on the Internet.

In embarking on this fact-based inquiry, courts should begin by determining the quantity of materials depicting the victim that the defendant possesses.\footnote{215}

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210. See Brief of the NCVLI, supra note 191, at 16 (noting that although an individualized inquiry “may not be the most efficient way to proceed, a defendant’s due process rights arguably dictate this result”).

211. 18 U.S.C. § 2259(b)(1) (emphasis added).

212. See id. § 2259(b)(3); In re Amy, 591 F. 3d at 794–95 (upholding a district court decision finding a proximate causation requirement within § 2259); United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007) (stating a willingness to uphold an award of restitution under § 2259 as long as proximate cause could be established and the victim’s harm could be estimated).

213. See United States v. Solsbury, 727 F. Supp. 2d 789, 795–96 (D.N.D. 2010) (conducting a fact-specific analysis of proximate cause). The Solsbury court focused on whether the defendant distributed or produced the images, contributed to blogs or chat rooms, or attempted to contact the victim. Id. at 796. The court also noted that there was no evidence showing that the defendant actually viewed the downloaded materials and that the victim’s psychological reports did not specifically discuss the defendant. Id. Although this court laudably introduced a fact-specific method of evaluating proximate causation, several of its factors are irrelevant. First, the charged offense is knowing possession, which renders his lack of production, distribution, and contact with the victim immaterial, as those are separate criminal offenses. Furthermore, evidence that the defendant actually viewed the images is unnecessary to prove knowing possession. Obtaining images from a peer-to-peer network requires an active search of terms and intentional download of the materials. See U.S. Gov’t Accountability Office, supra note 2, at 9–10. Thus, under these circumstances, possession may be considered a “knowing” action. Although establishing an analytical framework is a progressive step toward accurately determining an individual defendant’s culpability, the factors used must be relevant.


A complete pornographic series or a multiplicity of images augments the possessor’s gratification. The offender views the victim’s exposure to a greater extent, which intensifies the victim’s harm by further invading her privacy and thereby revictimizing her.

The court should also review the degree of explicitness displayed in the materials. Because viewing child pornography is comparable to observing the initial abuse as it happens, the content of an image is a relevant consideration, as it determines what the offender was viewing. Though the victim is harmed by possession regardless of the explicitness of the content, an offender’s enjoyment of highly abusive and graphic images should weigh more heavily in measuring the harm caused by the defendant.

Finally, courts should consider the means by which the defendant acquired the materials. Compared to storing images in isolation on a harddrive, factor in evaluating attempted possession claims). But see Jelani Jefferson Exum, Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses, 16 RICH. J.L. & TECH. 8, 41 (2010). Noting that federal sentencing guidelines provide for harsher punishments based on the quantity of child pornography possessed, Exum argues that it is “unclear how having 150 to 300 images stored on an offender’s computer necessarily makes that an offender more deviant than an offender who has 10 to 150 images stored on his computer.” Id. at 40. Exum emphasizes the relative ease of obtaining large quantities of illegal images by “push[ing] a few buttons on a computer,” as contrasted to ordering materials by mail. Id. at 41. Exum’s arguments may be relevant when considering an individual’s deviancy for the purposes of sentencing or may be powerful rationales for revising the federal guidelines to reflect the modern role of technology in the commission of crimes; however, when evaluating the harm inflicted upon a depicted child, the number of possessed images should be a factor. Given that possession of a singular image harms the child, the possession of an entire “series” depicting the victim certainly compounds the initial harm. See supra note 214 and accompanying text.

216. See TAYLOR & QUAYLE, supra note 3, at 161 (indicating that the complete series has a greater "potential for increasing the capacity to create sexual arousal").

217. See supra note 214 and accompanying text.

218. See TAYLOR & QUAYLE, supra note 3, at 31–37 (describing the COPINE scale—a grading system consisting of ten levels, ranging from “indicative” to “sadistic/bestiality,” which is used to determine the severity of an image of child pornography). The degree of severity is determined by the context and “the way in which [the photographs] are organised, or stored, or the principal themes illustrated.” Id. at 33.

219. See Johnson, supra note 8, at 10A.


221. Exum, supra note 215, at 41 (noting that stricter sentences may be applicable to offenders who procure child pornography using "non-computer" means). Such stricter sentences may also be applicable to those who contribute to the proliferation of child pornography via
downloading images from a peer-to-peer network, which makes these images available to other users, passively fosters the circulation of such images by virtue of possession.222

Although these considerations will aid courts in determining the degree to which the defendant’s conduct aggravated a victim’s harm, they do not necessarily aid courts in translating the aggravated harm into a fixed monetary quantity. Without guiding pecuniary metrics, even courts that have awarded restitution have been unable to agree on the proper method of calculating the amount of harm proximately caused by each defendant, thus producing widely divergent results.223 Legislation would effectively resolve this “calculation quandary.”

For example, Congress could choose to establish a minimum and maximum percentage of the total amount of the victim’s losses to be available as restitution.225 The presiding judge would have discretion in determining whether to impose the minimum or maximum award or an intermediate

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222. See U.S. Gov’t Accountability Office, supra note 2, at 15. Although these interactive networks enable effortless access to child pornography in essentially the same manner as websites, their most dangerous feature in this context is making child pornography increasingly accessible. See id. at 15–19 (explaining how peer-to-peer networks allow users to easily communicate with each other to transmit and receive requested information). Thus, peer-to-peer networks amplify spread of child pornography files. See id. at 9–10. But see United States v. Schaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (holding that an individual “distributes” child pornography by allowing other users to download the materials that were accessible to others on a peer-to-peer network). The Tenth Circuit analogized downloading images from a peer-to-peer network to getting gas from a self-serve gas station, noting that the owners of the gas station may not be present when gas is pumped, but they nonetheless make their product accessible. Id.

223. See supra Part I.C.2 (noting that restitution awards have ranged from $1500 to over $3 million).

224. See Solsbury, 727 F. Supp. 2d at 796 (asserting that the problem of determining appropriate guidelines for imposing restitution in possession cases is “one best left for Congress to resolve”). The court calls for an “appropriate restitution remedy” for the “conflicting and inconsistent awards and decisions [that] have evolved.” Id. at 797.

225. Cf. id. at 796 n.1 (proposing that Congress should define minimum and maximum awards based on the severity of the offense). In a separate series of cases, the Eastern District of California employed a “percentage approach,” which calculated the appropriate award as $3000, two percent of the statutory $150,000 minimum provided for in § 2255. See supra text accompanying notes 132–37. Although the court did not fully explain its rationale for choosing to use a percentage of the total possible award, the amount of $3000 seems to serve the comprehensive goal of apportioning only a discrete amount of the losses to the defendant. See supra text accompanying notes 132–37. Rather than taking a percentage of the civil damages minimum, this Comment proposes that calculations should be derived from a congressionally determined minimum and maximum percentage of the victim’s requested damages.
amount derived from a fact-based inquiry.\footnote{Yet, the unique, enduring nature of child pornography and the inconceivable amalgamation of possessors make an accurate evaluation of harm caused by a particular defendant almost impossible. See supra text accompanying note 194. In light of the unworkable “restitution provision” of \$ 2259, one court suggested that Congress consider the establishment of a compensation fund for victims or a fine schedule. See Salsbury, 727 F. Supp. 2d at 790 n.1. Other nations, such as Australia, have established general compensation funds. See Directory of International Crime Victim Compensation Programs 2004–2005, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, http://www.ojp.usdoj.gov/ovc/publications/infores/intdir2005/australia .html (last visited Aug. 6, 2011). Alternatively, Congress could simply define the permissible range of monetary damages. Though not in the context of criminal restitution, Congress has previously established a collectable monetary sum for other offenses with harms that are difficult to quantify. See 18 U.S.C. \$ 2520(a)–(c) (2006) (setting forth offense-based levels of civil damages for those whose “wire, oral, or electronic communication is intercepted, disclosed or intentionally used”).} This system would ensure consistency while allowing the restitution award to fluctuate within established boundaries, depending on the severity of the defendant’s conduct and the ensuing aggravation of the victim’s harm. Thus, the proposed analytical structure would rehabilitate the victim by ordering the offender to offset the harm caused by the defendant’s personal conduct in accordance with the underlying purposes of criminal restitution.\footnote{See supra text accompanying note 41 (stating that rehabilitation, retribution, and deterrence are the primary purposes of restitution).}

IV. CONCLUSION

The Internet has transformed the market of child pornography, necessitating that the law evolve to address this transformation with respect to the Internet’s virtual intricacies. The judiciary must apply \$ 2259 in accordance with the prevailing theory that each possessor of child pornography participates in the market and thereby substantially contributes to the victim’s harm. The legislature must also address this novel legal issue. Once courts make a finding of proximate causation, they encounter the seemingly impossible task of first quantifying a continuing harm and then apportioning that harm amongst an uncertain, fluctuating number of possessors with varying degrees of liability. Although a fact-specific analysis may aid courts in determining the appropriate portion of the victim’s harm allocable to an individual defendant, there ultimately must be legislatively established monetary limits to curb the currently unbridled judicial discretion.

The harm that victims of the possession of child pornography suffer is perpetual. Although money may never make the victim whole, restitution may make the healing process economically feasible. Each victim deserves the legislatively designated award of restitution from each possessor, and each possessor deserves to pay only the amount that reflects the severity of his or her crime. The proximate causation requirement and the fused calculative approach of a factual inquiry and legislative limits will hopefully strike this
balance by addressing the alarming lack of uniformity and fairness in these cases.