Paroline, Restitution, and Transferred Scienter: Child Pornography Possessors and Restitution Based on a Commerce-Clause Derived, Aggregate Proximate Cause Theory

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PAROLINE, RESTITUTION, AND TRANSFERRED SCIENTER: CHILD PORNOGRAPHY
POSSESSORS AND RESTITUTION BASED ON A COMMERCE CLAUSE-DERIVED,
AGGREGATE PROXIMATE CAUSE THEORY

Adam Lamparello¹ & Charles E. MacLean²

Abstract

This Article responds to the Fifth Circuit’s decision in In re Amy Unknown, which is before the United States Supreme Court on granted writ of certiorari. This Article poses a more logical and legal construct, derived from Commerce Clause analysis, that although each individual possessor of child pornography appears to contribute almost imperceptibly to the original victim’s harm, instead, on an aggregate proximate cause theory, the original victim would not have been victimized at all had there been no aggregate market of willing possessors for the material. Victims of child pornography, under the federal statute, and via aggregate proximate cause, have a right to restitution as against the possessors.

INTRODUCTION

Should possessors and manufacturers of child pornography be treated identically for purposes of victim compensation? Various circuit courts of appeal say no. ³ The Fifth Circuit, in In re Amy Unknown,⁴ took a different approach and said yes. In an en banc opinion, the Fifth Circuit held that 18 U.S.C. § 2259(a-e), the federal statute providing mandatory restitution for victims of child exploitation and abuse, does not require a causal link between the possession of child pornography and the resulting harm. The Fifth Circuit’s holding now stands apart from all other circuits to have considered this question. These circuits have interpreted § 2259(f)⁵—which explicitly requires causation—to modify the language of sections (a-e), thus importing

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³ See, e.g., United States v. Benoit, 713 F.3d 1, 22-23 (10th Cir. 2013); United States v. Evers, 669 F.3d 645, 658-59 (6th Cir. 2012); Amy and Vicky v. United States, 698 F.3d 1151, 1152 (9th Cir. 2012); United States v. Burgess, 684 F.3d 445, 456-57 (4th Cir 2012); United States v. Aumais, 656 F.3d 147, 153-54 (2d Cir. 2011); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011); United States v. McDaniel, 631 F.3d 1204, 1208-09 (11th Cir. 2011); United States v. Laraneta, 700 F.3d 983, 991-92 (7th Cir. 2012).

⁴ In re Amy Unknown, 701 F.3d 749, 752 (5th Cir. 2012) (hereinafter “Paroline II”), cert. granted sub nom., Paroline v. United States, 133 S. Ct. 2886 (June 27, 2013).

⁵ Section (f), the “catchall” provision, provides as follows:
causation throughout all sections in the statute. The United States Supreme Court has granted certiorari, and will soon consider this question.

The authors believe that both interpretations are wrong. The answer lies somewhere in the middle, and can be found in the Court’s Commerce Clause jurisprudence. Specifically, based upon the theory of “aggregation” as enunciated in a long line of cases defining the scope of Congress’s commerce clause powers, the Court has held that individual (or intrastate) activity, while not sufficient in itself to affect interstate commerce, is nonetheless subject to regulation based on its cumulative effect. The same argument applies in the context of child pornography, where the victim’s harm is connected to and intertwined with the individual possession (and viewing) of sexually explicit images. In the aggregate, possession of child pornography contributes to the victim’s initial and continuing harm, and fuels an industry that exploits and abuses children. Thus, while the Fifth Circuit reached the right result, it used the wrong reasoning. The other circuit courts, however, unwisely require a relational nexus between the victim and the pornography possessor.

The aggregation theory, which establishes a limited nexus between possession and ultimate harm, strikes the right balance between a possessor’s liberty interests and the victim’s right to compensation for what it a unique—and continuing—harm. Each act of pornography possession contributes independently and continuously to the victim’s harm by fueling the

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6 See Wickard v. Filburn, 317 U.S. 111, 127 (1942); see also Gonzales v. Raich, 545 U.S. 1, 19 (2005) (“production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity”); United States v. Morales-de Jesus, 372 F.3d 6, 16 (1st Cir. 2004) (“[i]n addition to our own precedent applying Wickard’s principles to a child pornography statute in Robinson, the Supreme Court long ago recognized that child pornography is a commodity influenced by and subject to economic market forces”) (citing Osborne v. Ohio, 495 U.S. 103, 109–10 (1990) ( it is “surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand”)). In Morales-de-Jesus, the First Circuit held that Congress had the authority, under the Commerce Clause, to penalize the local production of pornography. While factually distinguishable, Morales-de-Jesus, supports the notion that individual possession has a direct impact upon production and thereby contributes to the victim’s harm. 372 F.3d at 16-17.
production of materials that exploit children.\textsuperscript{7} Put differently, since the harm suffered by victims of child pornography is \textit{sui generis}, traditional rules of “but for” and proximate causation should not apply. An aggregate harm approach is fair and constitutes sound public policy—the touchstone considerations in proximate cause analysis.\textsuperscript{8}

I. \textbf{THE FEDERAL CHILD PORNOGRAPHY RESTITUTION STATUTE REQUIRES CAUSATION}

The federal child pornography restitution statute\textsuperscript{9} provides that restitution for the full amount of the victim’s losses is mandatory in all child pornography convictions, including convictions for possessing child pornography. Of particular note, the statute incorporates causation into its terms: “the term “victim” means the individual harmed \textit{as a result of a}

\textsuperscript{7} See, e.g., Osborne, 495 U.S. at 109–10; see also United States v. Kearney, 672 F.3d 81, 97 (1st Cir. 2012) (“[p]roximate cause exists on the aggregate level … there is no reason to find it lacking on the individual level”).


\textsuperscript{9} 18 U.S.C. § 2259: Mandatory restitution.

(a) In general.--Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.--

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

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

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

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

(B) physical and occupational therapy or rehabilitation;

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

(D) lost income;

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

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

(4) Order mandatory.--

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

(B) A court may not decline to issue an order under this section because of--

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.--For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.
commission of a crime under this chapter.” But the statute does not further define causation; presumably leaving to courts the definition of that word to apply. That being said, there is no doubt that under the child pornography federal statutory scheme, the paramount quests are interdiction and elimination of child pornography, and full compensation for the victims; those twin quests can only be achieved through an aggregate proximate cause approach.

II. THE FIFTH CIRCUIT OPINION IN AMY UNKNOWN V. UNITED STATES, A/K/A PAROLINE II

The Fifth Circuit, in Paroline II, reached the right result but erred in its reasoning. In that case, petitioner Doyle Paroline, who pled guilty to possessing 150-300 images of the victim, argued that an award of restitution was not proper unless it could be shown that his possessory acts proximately caused Amy’s harm. The district court held that §2259 required a showing of proximate cause, and denied restitution. In its view, Amy had failed to demonstrate that Paroline’s possession (and viewing) of her images proximately caused the ensuing harm.

In Paroline II, which was consolidated with a similar appeal, the Fifth Circuit, en banc, reversed. The court focused on the language of 2259(b)(3)(a-e), which listed five categories for which restitution could be awarded. Section (f), the “catchall” provision, authorized restitution for “any other losses suffered by the victim as a proximate result of the offense.” Paroline argued that section (f)’s proximate cause language should be interpreted to modify and therefore import into sections (a-e) a proximate cause requirement.

11 Paroline II, 701 F.3d at 752-753. The Fifth Circuit confronted the same issue in United States v. Wright, 639 F.3d 670 (5th Cir. 2011), where it applied the holding in the In re Amy Unknown, (Paroline I), 636 F.3d 190 (5th Cir 2011), and held that restitution under 2259 did not require causation. In Paroline II, both Wright’s and Amy’s appeal (from a district court order denying restitution) were heard together en banc.
13 Id. at 793.
14 In In re Amy, the Fifth Circuit denied restitution because it was unclear whether §2259 required a showing of proximate cause. 591 F.3d 792 (5th Cir. 2009)
15 701 F.3d at 760.
16 Id.
The Fifth Circuit disagreed. Applying the “rule of the last antecedent” canon of statutory construction, the court held that causation was only required for losses under subsection (f).\textsuperscript{17} The court explained that “the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the “proximate result” language in § 2259(b)(3)(F).” Such an interpretation was based upon the statute’s plain language, and consistent with its “broad restitutionary purpose,”\textsuperscript{18} which directs the “defendant to pay the victim ... the full amount of the victim's losses.”\textsuperscript{19}

Ultimately, the Fifth Circuit reached the right results, but its reasoning leads to an unjust result.\textsuperscript{20} The Fifth Circuit majority decision in \textit{Paroline II}, in awarding restitution to the victim without any proximate cause requirement: (1) is at odds with other circuits that have interpreted § 2259(F); (2) threatens to disrupt the administration of unrelated federal statutes, which have applied the “series qualifier” to similar “catchall” provisions; and (3) may impermissibly expand the transferred intent doctrine. In short, the court applied the wrong canon of statutory construction. It should have held that causation was required under each subsection—and used a non-traditional formulation to hold that it was satisfied.

The First Circuit in \textit{United States v. Kearney},\textsuperscript{21} however, got it right. The court recognized that, for purposes of restitution under § 2259, causation should be predicated on aggregation.\textsuperscript{22} To hold otherwise would allow an entire class of individuals to escape liability for conduct that violates a child’s personhood \textit{and} perpetuates the widespread victimization of

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 765.
\item \textsuperscript{18} \textit{Id.} at 760.
\item \textsuperscript{19} \textit{Id.} (quoting §2259(b)(1)).
\item \textsuperscript{20} Importantly, “[a]n apportionment system that spreads the effect of the penal goals of deterrence, retribution, and rehabilitation among the many convicted consumers of child pornography, while leading ultimately to the goal of full compensation for \textit{caused injury}, fulfills the public purposes of restitution.” \textit{United States v. Gamble}, 709 F.3d 541, 552 (6th Cir. 2013) (emphasis added).
\item \textsuperscript{21} 672 F.3d 81 (1st Cir. 2012)
\item \textsuperscript{22} \textit{Id.} at 97.
\end{itemize}
children. This result contravenes the express intent underlying 18 U.S.C. § 2259, which requires full restitution for “any offense” under Title 18, including possession. This was the correct—and fair—result. Below is a detailed discussion of how—and why—the Supreme Court should adopt the aggregation theory.

III. **Possessors of Child Pornography – Individually and Collectively – Cause Harm to the Victim.**

Proximate cause must be considered within the context of Congress’s intent when enacting § 2259, which expressly addressed the harms caused by both the producers and the possessors of child pornography.

A. **Possessors of Child Pornography Individually and Collectively Contribute to the Victim’s Harm**

In *United States v. Hardy*, a federal district court noted,

Children are exploited, molested, and raped for the prurient pleasure of [defendant] and others who support suppliers of child pornography. These small victims may rank as ‘no one else’ in [defendant's] mind, but they do indeed exist ... Their injuries and the taking of their innocence are all too real. There is nothing ‘casual’ or theoretical about the scars they will bear from being abused for [defendant's] advantage … The simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. Consumers such as [defendant] who ‘merely’ or ‘passively’ receive or possess child pornography directly contribute to this continuing victimization. Having paid others to ‘act out’ for him, the victims are no less damaged for his having remained safely at home[.]

Obviously, the federal district court in *Hardy* saw that causation could easily be tracked to the user or “mere possessor” of the material. And the First Circuit’s approach properly

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24 Section 2259(a) provides that a district court “shall order restitution for any offense under this chapter.”
25 See *Kearney*, 672 F.3d at 97 (emphasis added) (“[t]he restitution statute was enacted against a body of Supreme Court case law explaining the type of harm caused by distribution and possession of child pornography...[t]hese cases make clear that injury to the child depicted in the child pornography … is a readily foreseeable result of distribution and possession”).
balances the severity of an individual’s conduct with the aggregate effects of possession.\textsuperscript{27}

Proximate cause exists on an “aggregate level,” even if “the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.”\textsuperscript{28}

In \textit{Kearney}, the defendant, who was convicted of transportation, possession, and distribution of child pornography, argued that “because so many have seen and distributed the pornography, his contribution cannot be said to have caused any harm absent specific linkage to [the victim’s] knowledge about him.”\textsuperscript{29} The First Circuit rejected this argument:

\begin{quote}
[It] is true that [the expert report] does not state that any single additional instance of possession or distribution by itself increases the harm to Vicky. But although such an explanation \textit{would be sufficient for a finding of causation}, it is not necessary for such a finding. Kearney's conduct \textit{contributed to a state of affairs} in which Vicky's emotional harm was worse than would have otherwise been the case. Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.\textsuperscript{30}
\end{quote}

Indeed, “causation exists … where ‘none of the alternative causes is sufficient by itself, but together they are sufficient’ to cause the harm.”\textsuperscript{31}

As such, the \textit{Kearney} Court held restitution under § 2259 was not precluded simply because the victim “would have suffered harm in the absence of [defendant’s] conduct.”\textsuperscript{32} The Court also rejected the notion that “the victim of child pornography could only show causation if she focused on a specific defendant’s viewing and redistribution of her images and then

\begin{footnotes}
\footnote{27} \textit{Kearney}, 672 F.3d at 98; \textit{see also} \textit{Holmes v. Sec. Investor Prot. Corp.}, 503 U.S. 258, 268 (1992).
\footnote{28} \textit{Kearney}, 672 F.3d at 98.
\footnote{29} Id.
\footnote{30} Id. (emphasis added). The \textit{Kearney} Court claimed that its analysis was not a departure from traditional proximate cause principles, in that it was foreseeable, by possessing child pornography, that the children depicted in the images would be harmed. The finding that causation existed on an “aggregate level” is less commonly invoked to justify a finding of “but for” proximate cause.
\footnote{31} Id. (quoting Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 reporters’ n. cmt. g. (2010)); \textit{and} § 36 cmt. a (“even an insufficient condition ... can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm...”); \textit{see also United States v. Veazie}, No. 2:11-cr-202-GZS, 2012 WL 1430540, at *3 n.4 (D. Me. Apr. 25, 2012) (“[p]roximate cause exists where the tortuous conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.”) (quoting \textit{Kearney}, 672 F.3d at 98).
\footnote{32} \textit{Kearney}, 672 F.3d at 99.
\end{footnotes}
attributed specific losses to the defendant’s actions.” As the majority recognized, “[t]he logic of this argument is that there would be no remedy for the harm suffered … as a result of redistribution and possession,” thus allowing each defendant “to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group.”

Finding causation in this context is not tantamount to strict liability; it reflects the notion that the intentional possession of child pornography is directly related to the resultant harm. The aggregate harm principle is also consonant with principles of fairness and sound public policy, which counsel against a mechanical application of the “but for” causation test.

Of course, there must be “some direct relation between the injury asserted and the injurious conduct,” and not just “harm flowing merely from the misfortunes visited upon a third person by the defendant's acts.” The causal connection, however, between even a single viewing of child pornography, and the resultant harm, is readily apparent. In the aggregate, possession and distribution bear far more than “some direct relation”; it is the *sin qua non* for the

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33 *Id.* (restitution was not precluded “because [defendant’s] contribution to the harm cannot be precisely ascertained with exactitude”).

34 *Id.; see also United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (the defendant’s conduct was a “substantial factor” in the victim’s harm, despite the fact that she suffered from pre-existing psychological problems prior to meeting the defendant).

35 *See United States v. Salsbury*, 727 F. Supp. 2d 789, 792 (D.N.D 2010) (“The recipient of child pornography obviously perpetuates the existence of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children”).

36 See e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting); United States v. Tallent, 872 F. Supp. 2d 679, 687 (E.D. Tenn. 2012) (“proximate cause essentially serves as a proxy for fairness…courts should limit liability on public policy grounds where holding the defendant liable would be unfair or unjust”); *see also Holmes*, 503 U.S. at 268 (“[h]ere we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility…[a]t bottom the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient’”) (quoting W. KEETON, ET AL., *PROSSER AND KEETON ON LAW OF TORTS* § 41, p. 264 (5th ed. 1984)).

37 *Holmes*, 503 U.S. at 268.

initial and continuing harm that each victim suffers. To argue otherwise “defies both fact and law.”

Aggregation is neither a novel nor unworkable concept. In the commerce clause context, aggregation has—for nearly three-quarters of a century—been the basis upon which this Court connected purely intrastate activities to its effects on interstate commerce. In Wickard, the Court held that a local farmer’s modest production of wheat, for purely intrastate purposes and self-consumption, nonetheless had an aggregate effect of interstate commerce.

While an effect is not by implication a cause, it undoubtedly “contribute[s] to a state of affairs in which [the victim’s] emotional harm was worse than would have otherwise been the case.” This is true, a fortiori, because the possession of child pornography contributes to a continuing harm, or “repetition of [the victim’s] abuse.”

B. TRADITIONAL PROXIMATE CAUSE ANALYSIS DOES NOT ACCOUNT FOR THE HARM CAUSED BY THE INDIVIDUAL POSSESSORS OF CHILD PORNOGRAPHY

Adhering to the traditional “but for” and foreseeability tests would involve the courts in an unworkable parsing of conduct that is often indivisible, and does not reflect the relationship between possession—by any individual—and the underlying harm.

39 Kearney, 672 F.3d at 94.
40 See Wickard, 317 U.S. at 127 (1942); Morales-de Jesus, 372 F.3d at 16.
41 317 U.S. at 127 (“[t]hat appellant's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial”).
42 Tallent, 872 F. Supp. 2d at 688 (quoting Kearney, 672 F.3d at 98) (brackets added).
43 Kearney, 672 F.3d at 94-95 (brackets added); see also Morales-de Jesus, 372 F.3d at 16. ("possessing child pornography fuels the demand side of the market," and contributes to the victim’s harm).
44 See Brief for Respondent United States of America, United States v. Paroline, No. 128561, 2013 WL 6235571, at *26 (such an approach would “erect an ‘impossible burden’ on the victims’ statutory right to restitution and frustrate the express purpose of § 2259” (quoting J.A. 296)).
45 Several circuit courts support a traditional application of proximate cause. The D.C. Circuit based its finding of a proximate cause requirement based upon “traditional principles of tort and criminal law, and on 2259(c)’s definition of ‘victim’ as an individual harmed ‘as a result of the defendant’s offense.” Evers, 669 F.3d at 658 (quoting Monzel, 641 F.3d at 535). As the D.C. Circuit held, “[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused.” Evers, 669 F.3d at 658 (quoting Monzel, 641 F.3d at 535-36). Without such requirement, “liability would attach to all sorts of injuries a defendant might indirectly cause,
Requiring a direct connection between possession and the victim’s actual losses, or notification to the victim of the specific defendant(s) who viewed such images, misperceives the harm that child pornography victims suffer. The harm does not lie in knowing who viewed the images, but in knowing that they were viewed at all. Knowing that these images exist and are available for public consumption causes the emotional and psychological damage that § 2259 is intended to address.

This fact dispels any notion that possession of child pornography is a victimless crime.

As the court in *Kearney* held:

The Supreme Court has repeatedly explained, for thirty years, that individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image. Such materials are “a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation” … Indeed, the Court has stated that “as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being.”

That is precisely why “aggregate level” causation is justified.

This is not to suggest that anyone convicted of possession will face “infinite liability, or be responsible for harms that occur prior to the crime’s commission.”

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46 See e.g., United States v. Kennedy, 643 F.3d 1251, 1263 (9th Cir. 2011) (suggesting that causation is satisfied where the victim knows the identity of those who have viewed her images).

47 See United States v. McGarity, 669 F.3d 1218, 1269-70 (11th Cir. 2012) (“for proximate cause to exist, there must be a causal connection between the actions of the end-user and the harm suffered by the victim”).

48 Hardy, 707 F. Supp. 2d at 605 (“[The original victim]'s appearance in images held by defendant make her an ‘individual harmed as a result of a commission of a crime’ under § 2259, and therefore a victim for purposes of ordering restitution under § 2259”) (emphasis added).


50 Kearney, 672 F.3d at 98.
otherwise be causally related to the victim’s harm, however, can become so when, together with the conduct of others, it contributes to “repetition of [the victim’s] abuse.”\textsuperscript{52} Possession causes harm, because the lifeblood of production \textit{is} individual consumption.

C. \textsc{The Fifth Circuit’s Decision in Paroline I Disregarded the “Series Modifier” and Leads to Unjust Results.}

1. \textsc{The Fifth Circuit’s Decision Has the Potential to Disrupt the Orderly Administration and Interpretation of Unrelated Federal Restitution Provisions.}

The Fifth Circuit erred when holding that Section 2259(A-E) did \textit{not} require proximate cause. The majority’s opinion relied on the rule of the last antecedent to hold that § 2259(b)(3) “limit[ed] the phrase ‘suffered by the victim as a proximate result of the offense’ in § 2259(b)(3)(F) to the miscellaneous ‘other losses’ contained in that subsection.”\textsuperscript{53}

In so doing, the Fifth Circuit disregarded the “series qualifier” canon, which would have incorporated the proximate cause requirement for all subsections (2259(b)(3)(A-E)).\textsuperscript{54} The Fifth Circuit’s interpretation is inconsistent with other circuits that have interpreted 2259(F), as well as \textit{unrelated} federal statutes.\textsuperscript{55} Accepting the Fifth Circuit’s rationale, therefore, has the potential to create disharmony in the administration of various federal criminal restitution statutes.

\textsuperscript{51} Brief for Respondent United States of America, Paroline, 2013 WL 6235571, at *28; see also \textit{United States v. Ageloff}, 809 F. Supp. 2d 89, 104 (E.D.N.Y. 2011) (restitution requires “reasonable estimates arrived at by a preponderance of the evidence”).

\textsuperscript{52} \textit{Kearney}, 672 F.3d at 94-95.

\textsuperscript{53} \textit{Paroline II}, 701 F.3d at 752 (brackets added); see also \textit{United States v. Benoit}, 713 F.3d 1, 20 (10th Cir. 2013) (the rule of last antecedent states that a limiting phrase “should ordinarily be read as modifying only the noun or phrase it immediately follows”) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

\textsuperscript{54} Analogous federal statutes support the conclusion that application of the “series qualifier” would have been consistent with Congress’s intent when enacting Section 2259. See, \textit{e.g.}, Victim and Witness Protection Act of 1982, Pub. L. 97-291, 1982 S. 2420, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1907-1910, and Mandatory Victim Restitution Act, Pub. L. No. 104-132, 110 Stat. 1214 (incorporating the criminal restitution statute [18 U.S.C. §§ 3663(a)(2), 3663A(a)(2), and 3771(e)], which define the term “victim” as “a person directly and proximately harmed” by conduct that justified an award of restitution).

\textsuperscript{55} See, \textit{e.g.}, \textit{United States v. Fast}, 709 F.3d 712, 721 (8th Cir. 2013). In \textit{Fast}, the Eighth Circuit considered whether § 2259(a-e), which, unlike § 2264(a-e), enumerated specific categories of losses, meant that subsection (a-e) did not require proximate cause. The Eighth Circuit answered this question in the negative, holding that “the variation among these restitution statutes” did not “mean that Congress eliminated the proximate cause requirement
2. The Fifth Circuit’s Decision Threatens to Impromissibly Transfer Scienter.

When enacting Section 2259, “Congress made no distinction between the various actors involved in the production, distribution, receipt and possession of child pornography, notwithstanding the strong possibility the culpability of these actors varies.” Importantly, given that the lesser included offense of possessing child pornography is inextricably linked with the harm resulting from its manufacture and distribution; it is just to subject both possessors and manufacturers to restitution.

In other contexts, however, such result would be unjust and contrary to law. For example, there are significant differences between, interstate domestic violence and interstate violation of a protective order. If the Fifth Circuit’s decision were followed in contexts other than child pornography, crimes of varying culpability would, in effect, be construed as causing the same harm and subject different defendants to the same restitution statute.

Such an interpretation would, de facto, transfer the scienter of a defendant who committed a more serious crime, to the defendant who committed a lesser—and often dissimilar—crime. Such approach violates the well-established limits on transferred intent.

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56 Tallent, 872 F. Supp. 2d at 682.
57 With respect to culpability, the differences between possession and production, are evidenced by the penalties imposed under federal law. Under 18 U.S.C. § 2251(a), defendants convicted of producing child pornography face a minimum sentence of fifteen year, and maximum of thirty. Pursuant to 18 U.S.C. § 2252(a)(4)(b), however, defendants convicted of possession only face a maximum term of only ten years.
59 Of course, courts have the discretion to apportion a restitution award based on the particular circumstances of a case. The fact remains, however, that individuals convicted of different crimes would potentially face the same restitution award. This goes against the basic notion in criminal law that criminal sanctions vary depending on the severity of the crimes.
60 United States v. Pulungan, 559 F.3d 326, 330-31 (7th Cir. 2009) (“[t]ransferring intent from one genus of offense to another has never been permitted.”).
The Fifth Circuit’s interpretation, therefore, threatens to undermine the administration of criminal restitution statutes, and collapse crimes of different severity into a single remedial category. If Congress wished to effectuate such a result, it would likely have been more explicit. Congress certainly would not have included the words “proximately caused” in subsection (F), when the courts have used the series qualify to apply it equally to all preceding sections.61

Ultimately, the approach adopted in Kearney reflects the unique harm that child pornography victims face, and recognizes that possession of child pornography contributes to an aggregate harm, thus making possession a direct and proximate cause of that harm.

CONCLUSION

Paroline represents a clash between victims’ rights and the protections that should be afforded to criminal defendants. Victims of child pornography suffer the type of harm that cannot be overstated, and it results from despicable acts of abuse and exploitation. Importantly, however, possessors of child pornography are arguably less culpable than manufacturers, and should be penalized differently. Ordinarily, this argument would have substantial merit—subjecting different categories of offenses to the same potential penalty could affront due process of law and raise Eighth Amendment proportionality concerns.

The child pornography context, however, is unique. The interdependent relationship between possessors and manufacturers of child pornography contributes to a life-altering, aggregate harm to young children, thereby justifying a restitutionary award that would otherwise be hard to apportion. The correct approach, however, is not to dispense with causation altogether, or to adopt the traditional rules of proximate causation. An aggregation approach

61 See e.g., United States v. Gamble, 709 F.3d 541 548 (6th Cir. 2013) (noting, in the context of Section 2259, that “Congress [is] presumed to have legislated against the backdrop of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction’ here ‘[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them”) (United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978)) (brackets in original).
properly balances the defendant’s due process guarantees with the victim’s interest in full restitution, thus achieving the goals that §2259 sought to achieve.