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Slow Acid Drips and Evidentiary Nightmares: Smoothing Out the Rough Justice of Child Pornography Restitution with a Presumed Damages Theory

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SLOW ACID DRIPS AND EVIDENTIARY NIGHTMARES:
SMOOTHING OUT THE ROUGH JUSTICE OF CHILD PORNOGRAPHY RESTITUTION
WITH A PRESUMED DAMAGES THEORY

MARY MARGARET GIANNINI*

ABSTRACT

Section 2259 of title 18 of the Federal Code directs that those convicted of
distribution or possession of child pornography shall pay restitution for the full
amount of the victim’s losses. Courts have struggled, however, with interpreting
and applying the statute’s proximate cause language, resulting in rough justice for
both victims and defendants. A majority of courts interpret section 2259 as
including a proximate cause requirement, but are inconsistent in their definition
and application of that standard. Victims are subjected to the “slow acid drip” of
the continued knowledge that their images are being circulated and viewed by
countless individuals, while they face the “evidentiary nightmare” of attempting
to proximately link the ongoing harm they suffer to a specific defendant’s
possession of their image. In the end, many victims are denied recovery.
Conversely, some defendants have been saddled with enormous restitution awards
that do not fairly represent the harm the defendant caused to the victim. In an
attempt to soften this rough justice, this article proposes that the crimes of
distribution and possession of child pornography be viewed as a criminal species
of privacy and defamation torts. Courts have long recognized that the dignitary
and reputational harms associated with privacy and defamation tort claims are
difficult, if not impossible, to quantify, but nonetheless require compensation. In
these narrow settings, courts and legislatures have turned to the doctrines of
general and presumed damages to afford victims relief. Congress should similarly
revise section 2259 to employ a variant of presumed damages in which defendants

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must pay victims a set statutory amount for distribution or possession of their images.

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INTRODUCTION

Crime is costly. Governments struggle with balancing the costs of law enforcement, maintaining functional court and prison systems, and rehabilitating offenders. Victims are faced with property loss, medical costs, lost wages, mental health expenditures and the long process of
rebuilding their lives. In an attempt to aid victims in their path toward recovery, Congress has passed any number of criminal restitution statutes. Included among these statutes is the Violent Crime Control and Enforcement Act (VCCEA) which provides restitution to victims of child exploitation,\(^1\) including victims of child pornography distribution and possession. However, as courts have sought to apply the statute, it is becoming increasingly clear that it is ill equipped to appropriately address the harms suffered by such victims.

Courts generally agree that the harms suffered by victims of child pornography distribution and possession are like a “slow acid drip,”\(^2\) in that victims are constantly reminded of their abuse by the fact that others are deriving perverse pleasure from viewing images of the same. However, it can be an “evidentiary nightmare”\(^3\) for a victim to disentangle harms she suffered from the original creation of the images from the harms arising from the subsequent distribution and possession of those images by countless strangers. This so called evidentiary nightmare is exacerbated by courts’ struggle with how to interpret section 2259 of the federal code, which allows child pornography victims to seek restitution. Most courts have ruled that the statute requires that any and all claimed victim losses must be proximately linked to the defendant’s acts. Conversely, a few courts have ruled that the statute’s proximate cause requirement is limited to a far narrower category of losses. Courts that read section 2259 as requiring proximate cause between all and any of a victim’s losses and a particular defendant’s possession, either decline to award restitution or render awards in a seemingly haphazard and inconsistent manner. Conversely, the one court that interpreted section 2259 more narrowly was willing to impose a multi-million dollar restitution award against a single defendant who merely possessed six images of a given victim. These differing interpretations of section 2259 have resulted in inconsistent and rough justice for both victims and defendants.

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\(^1\) 18 U.S.C. § 2259(a) (“the court shall order restitution for any offense under this chapter”).


\(^3\) See United States v. Solsbury, 727 F.Supp.2d 789, 795 (D.N.D. 2010) (calculating a victim’s losses can be “an evidentiary nightmare”).
In the midst of this rough justice, even those courts denying restitution have begun a steady refrain calling Congress to reexamine section 2259 and establish a better remedy for child pornography distribution and possession victims. This article joins in that chorus and suggests that Congress establish a set statutory award for such victims.

In advocating for a set statutory award, this article suggests that the crimes of child pornography distribution and possession should be viewed through the lens of privacy and defamation torts. Courts have long recognized that the harms that arise from privacy and defamation tort claims are hard if not impossible to quantify, but still should be compensated. In these narrow settings, courts and legislatures have turned to the doctrines of general and presumed damages to afford tort plaintiffs relief. A similar construct should be applied to the crimes of child pornography distribution and possession. Instead of requiring that victims’ losses be proved under a proximate cause standard, Congress should amend the statute and provide victims with an amount akin to presumed or liquidated damages. If a victim believes that the defendant caused losses beyond that amount, the victim can seek restitution under section 2259’s proximate cause standard.

This proposal helps address the inherent dignitary and reputational harms suffered by victims of child pornography distribution and possession and ensures a base line of recovery. Defendants are also protected from being subjected to restitution obligations which outmatch any reasonable estimation of the harm they have imposed on their victims. By viewing the crime of distribution and possession of child pornography possession as the criminal cousin to invasion of privacy or defamation, and allowing for a limited presumed damages remedy for victims, the rough justice that currently exists under section 2259 will be softened.

Part I of this article addresses the series of cases which have brought section 2259’s interpretive problems to the fore. Part II follows with an overview of the current disarray among the district and circuit courts regarding how to interpret section 2259. It concludes by proposing that instead of applying a proximate cause standard to victim losses which arise from the distribution and possession of pornographic images, Congress should impose a limited statutory penalty against defendants to be paid directly to victims. Parts III through V of this article justify the proposal by developing the theory that the harms associated with the distribution and possession of child pornography should be examined through the prism of privacy and defamation law. Part III details how the harms suffered by victims of child pornography
possession and distribution can be easily likened to the harms suffered by tort plaintiffs whose privacy has been invaded or who have been defamed. Part IV investigates how the general damages and presumed damages theories from privacy and defamation cases can be extended to victims of child pornography distribution and possession. Part V further supports the overall proposal by noting other instances in the law where the principle of presumed or liquidated damages has been afforded by Congress to individuals whose privacy has been invaded. This section also contends that such a remedy would not run afoul of the general goals of the criminal justice system. Part VI concludes by asserting that this statutory change will smooth out the rough justice that is currently being administered under section 2259.

I. THE AMY AND VICKY CASES

Two recent series of cases have highlighted problems inherent in section 2259 restitution determinations. Commonly named the “Amy” and “Vicky” cases, these controversies showcase the varied approaches courts have taken when addressing whether to award restitution to victims of child pornography possession, and if so, how much.

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4 In both sets of cases, the names “Amy” and “Vicky” are pseudonyms. See e.g., United States v. Aumais, 2010 WL 3033821 (N.D.N.Y. 2010) (noting use of pseudonym for Amy); United States v. Brunner, 2010 WL 148433 (W.D.N.C. Jan 12, 2010) (noting use of pseudonym for Vicky). In some cases, courts also refer to Amy as Misty. See e.g., Brunner, 2010 WL 148433. For the sake of consistency I will use the pseudonym Amy.

Amy and Vicky, now women in their mid-twentieths, were sexually abused by family members. Amy’s uncle sexually abused her between the ages of four and nine, and Vicky’s father sexually abused her between the ages of five and eleven. Among the many awful acts these men committed, Amy’s uncle forced her to engage in sex telephone calls and internet chats with other men and took her to a wooded area to meet pedophiles. Vicky’s father invited adults to join in sexually abusing Vicky in scripted sexual related scenarios. Both men preserved

much of this abuse in photographs and video recordings which are now widely circulated on the internet. The images of Amy, commonly referred to as the “Misty Series,” reportedly total over 35,000 images, and represent some of the most downloaded child pornographic images on the internet. The series is even considered a collector’s item among some pedophiles.\(^8\) Officials have identified at least 750 individuals who have possessed the “Misty Series,” but estimate there could be tens of thousands copies in circulation.\(^9\) The images of Vicky are also a regular subject of discussion on pedophile internet blogs and chat rooms\(^10\) and several people who have viewed Vicky’s images have attempted to contact her. Fortunately, Amy’s father and Vicky’s uncle were both prosecuted and sentenced to prison terms.\(^11\) Nonetheless, the images of Amy and Vicky are still circulated across the internet and are regularly downloaded and viewed.

Amy and Vicky’s lawyers have appeared in federal actions against defendants charged with possessing their images and have requested restitution pursuant to section 2259 of the federal code. At the time of writing this article, at least thirty-three different courts have rendered decisions in the Amy and Vicky cases resulting in published decisions in Westlaw and Lexis.\(^12\) Many more are likely pending. So long as images of Amy and Vicky – and others like them – are on the internet, these types of cases will continue to exist.

\(^8\) “Misty Series,” *supra* note 8; Child Pornography and an Issue of Restitution, *supra* note 8.


\(^10\) *Strayer,* 2010 WL 2560466 at *3.

\(^11\) Amy’s uncle received a 17-25 year state sentence and a 10-year federal consecutive sentence, which were meant to run consecutively. Unfortunately, due to administrative mistakes, the uncle’s sentences ran concurrently, and he could be released on parole sometime in 2011 after serving 12 years. *See* Victim of Child Porn, *supra* note 9. The uncle was also ordered to pay $6000 in restitution, $1125 of which was meant to go directly to Amy. *Id.*

\(^12\) *See supra* note 5 (collecting cases). In a January 2010 exhibit filed in the pending litigation *United States v. Mahoney,* the exhibit detailed over 177 different cases (many of which are unreported) in which Amy and Vicky had sought restitution. Case 2:10-cr-00075-RRE, Doc. 55-
Amy, now in her early twenties, has struggled with the impact of her uncle’s abuse. Upon learning of the abuse, Amy’s parents immediately put her into therapy, and she showed some initial signs of recovery. However, as she entered her teens, Amy regressed and struggled with alcohol. Her recovery was further exacerbated when she learned that the images were available on the internet.\textsuperscript{13} In an impact statement, Amy has commented that:

I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids, like my uncle did to me, then tell them what to do? Will they see me and think its ok for them to do the same thing? Will some sick person see my picture and then get the idea to do the same thing to another little girl? These thoughts make me sad and scared.\textsuperscript{14}

Amy has not been able to maintain enrollment in college, she is fragile, a single mother, and lives with her parents in rural Pennsylvania.\textsuperscript{15}

In the course of seeking restitution on her behalf, Amy’s attorney, James Marsh, had her write a victim’s impact statement, hired a psychologist to examine her, and had an economist calculate her financial losses from her uncle’s abuse and the continued trauma she suffers every time another individual views her images. Including such factors as counseling, diminished wages and lawyers fees, Marsh has calculated Amy’s losses somewhere between $3.3 to $3.6 million.\textsuperscript{16} Since 2009, Marsh has filed at least 350 cases seeking restitution on Amy’s behalf.\textsuperscript{17}

\begin{footnotes}
\footnotetext[13]{See e.g., In re Amy, 591 F.3d 792, 794 (5th Cir. 2009); United States v. Church, 701 F.Supp.2d 814, 816-17 (W.D. Va. 2010); United States v. Aumais, 2010 WL 3033821 at *1 (N.D.N.Y. 2010). See also Victim Impact Statement, supra note 6; Misty Series, supra note 6; Child Pornography and an Issue of Restitution, supra note 6; Victim of Child Porn, supra note 9.}
\footnotetext[14]{Victim Impact Statement supra note 6.}
\footnotetext[15]{Misty Series, supra note 6; Victim of child porn, supra note 6.}
\footnotetext[16]{Misty Series, supra note 6; Child Pornography and an Issue of Restitution, supra note 6.}
\footnotetext[17]{Child Pornography and an Issue of Restitution, supra note 6.}
\end{footnotes}
and as of June 2011 has been able to secure over $236,000 for Amy.\textsuperscript{18} Marsh claims he will continue his efforts until the entire $3 million amount is reached.\textsuperscript{19}

Vicky’s path toward recovery has been equally rocky. Like Amy, Vicky is now in her early twenties and suffers from chronic post traumatic stress disorder, eating disorders, chronic headaches and other problems.\textsuperscript{20} Vicky has commented that

\begin{quote}
I had no idea that the . . . child pornography series taken of me had been circulated at all until I was 17. My world came crashing down that day, and now, two years later, not much has changed. These past two years have only showed me the enormity of the circulation of these images and added to my grief and pain. This knowledge has given me paranoia. I wonder if people I know have seen these images. I wonder if the men I pass in the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control. They are trading my trauma around like treats at a party, but it is far from innocent. If feels like I am being raped by each and every one of them.\textsuperscript{21}
\end{quote}

Vicky’s attorney has been a fervent advocate in her behalf. However, like the Amy cases, Vicky’s financial recovery has been mixed. As of April 2009, Vicky’s lawyer has been able to secure $44,000 of her total claimed losses of $383,803.\textsuperscript{22}

The restitution awards courts have granted to Vicky and Amy have been far from consistent. A large percentage of courts have declined to award anything to either woman on the ground that neither has been able to show how the defendant’s possession of their images has specifically caused them harm.\textsuperscript{23} A smaller number of courts have awarded restitution, but have done so by estimating the amount of harm caused by the defendants and awarding restitution

\begin{footnotes}
\textsuperscript{20} United States v. Rowe, 2010 WL 3522257 at *3 (W.D.N.C. Sept. 7, 2010).
\textsuperscript{21} Id.
\textsuperscript{22} United States v. Thompson, 2011 WL 3438864 at *5 (W.D.N.C. Aug. 5, 2011).
\textsuperscript{23} See infra notes 83-91 and accompanying text.
\end{footnotes}
amounts ranging from $500 to $150,000. Finally, one court granted Amy nominal damages of $100, while another awarded Amy her full restitution request of over $3.6 million dollars.

The divergent results in the Amy and Vicky cases highlight the rough justice of section 2259. At one end of the spectrum, courts awarding no restitution or only nominal restitution leave unredeemed the harms victims suffer from the continued distribution and possession of their images. At the other end, courts imposing an award for victim’s entire losses against a single defendant smacks of unfairness. The awards landing somewhere in the middle, while appearing more fair and proportional, nonetheless often lack preciseness. A closer examination of section 2259 and criminal restitution sheds further light on how these legal constructs are limited in their ability to provide a remedy to victims of pornography distribution and possession.

II. ROUGH JUSTICE:
THE COURTS’ VARIED INTERPRETATIONS AND APPLICATIONS OF SECTION 2259
A. The Restitutionary Framework of Section 2259

Victim restitution has evolved over history. In the earliest legal systems, victim restitution tended to be an integral part of any dispute resolution process. However, as legal distinctions between tort and criminal actions developed, restitution was categorized as a civil remedy, serving as a means to prevent defendants from becoming unjustly enriched as a result of their unlawful acts. While the civil system focused on the relationship between the plaintiff and defendant, the criminal system focused on the relationship between the defendant and the state. It was generally accepted that in a criminal trial the state was the victim of the defendant’s actions, and any punishment imposed on the defendant served as means to redeem the harm caused to society by the defendant, rather than to redeem any direct harm suffered by the victim. The individual victim, and any interests he or she may have brought to the criminal proceeding, were generally overshadowed and diminished by the state’s overriding interest to bring the defendant to justice. If the victim desired to seek some form of remedy from the defendant, the victim could bring a tort action in civil court.

24 See infra notes 70-82 and accompanying text.
25 See infra notes 92-96 and accompanying text.
26 See infra notes 44-49 and accompanying text.
However, even within this traditional paradigm, federal law has not entirely alienated restitution from criminal proceedings. The Federal Probationary Act of 1925 (FPA) represented the first step in a long line of statutes which provided crime victims restitution.\textsuperscript{27} Under the Act, defendants could be required, as a condition of probation and at the discretion of the court, to pay restitution to victims.\textsuperscript{28} Later statutes decoupled restitution awards from a defendant’s probation status,\textsuperscript{29} broadened the types of crimes for which restitution could be ordered,\textsuperscript{30} and mandated restitution for a number of crimes.\textsuperscript{31} Included among these statutes was section 2259, which mandated restitution for sexual exploitation of children,\textsuperscript{32} selling or buying of children,\textsuperscript{33} and activities related to child pornography.\textsuperscript{34}

Under section 2259, victims like Amy and Vicky can seek restitution for any losses they suffer as a result of the ongoing distribution of their images on the internet. However, courts faced with restitution claims from Amy and Vicky, and others like them, have struggled with how to interpret section 2259’s language. The results have been jagged and roughly hewn.

Section 2259 directs that a “court shall order restitution for any offense” involving the sexual exploitation and other abuse of children.\textsuperscript{35} As relevant here, the defendants in the Amy and Vicky cases were charged under 18 U.S.C. § 2252 which criminalizes the distribution and possession of child pornography. Under section 2259, a defendant is “to pay the victim . . . the

\begin{itemize}
  \item March. 4, 1925, ch. 521, 42 stat. 1259, originally codified at 18 U.S.C. § 3651-3656.
  \item \textsc{Catharine M. Goodwin, et al., Federal Criminal Restitution} 21 (West 2010).
  \item 18 U.S.C. § 2251.
  \item \textit{Id.} at § 2251A.
  \item \textit{Id.} at §§ 2252, 2252A.
  \item 18 U.S.C. § 2259(a).
\end{itemize}
full amount of the victim’s losses as determined by the court.”

Victims are those “individual[s] harmed as a result of a commission of a crime” under the statute. Of particular importance, section 2259(b)(3) guides that

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) attorney’s fees, as well as other costs incurred, and
(F) any other losses suffered by the victim as a proximate cause of the offense.

Orders of restitution are “issued and enforced in accordance with section 3664” of the statute. Section 3664 directs that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the

36 Id. at § 2259(b)(1).
37 Id. at § 2559(c). This language is similar to language found in section 2248. That statute directs that mandatory restitution should be provided for victims of sexual abuse, as opposed to child victims of sexual exploitation and other abuse who are covered in section 2259. See 18 U.S.C. § 2248(c) (mandatory restitution for victims of sexual abuse) (“For the purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter . . .”).

Conversely, the Victim Witness Protection Act (VWPA) and Mandatory Victim Restitution Act (MVRA) guide that

For the purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves an element of a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.


38 Id. at § 2259(b)(3)(A)-(F) (emphasis added).
39 Id. at § 2259(b)(2).
amount of loss sustained by the victim as a result of the offense shall be on the attorney for the Government.”

While victims like Amy and Vicky have been able to establish that their total losses are significant, courts have struggled to distinguish between losses which were the result of the original abuse from the ongoing and more general losses victims suffer from the continued distribution and viewing of those images by others. Courts have wrestled with whether the proximate cause language appearing in section 2259(b)(3)(F) should only be applied to subsection (F), or should also be applied to all the losses listed in subsections (A)-(E). However, even among courts that agree that the statue’s proximate cause language should be applied broadly reach vastly different restitution determinations. These varied results would not be so unsettling if they emanated out of distinct and different cases. However, all of the cases relate to Amy or Vicky in which the government provided courts with essentially the same expert reports calculating Amy and Vicky’s losses. The divergent outcomes highlight the need to carefully review section 2259 and ask whether it is well suited to address the needs of pornography distribution and possession victims.

**B. Proximate cause?**

Courts disagree as to whether the proximate cause language in section 2259 should be applied to the entire statute, or only to those losses listed in the last subsection of section 2259(b)(3). Two courts have ruled that so long as an individual can show she satisfies section 2259’s definition of a victim, she need not make a proximate cause showing for losses appearing in subsections (A)-(E). For example, in *United States v. Staples*, the defendant pled guilty to possessing six images of Amy, for which she sought $3.6 million in restitution. This amount represented approximately $3.2 million for Amy’s lost future wages until she was 67, as

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40 Id. at § 3664(e).


42 See supra notes 70-96 and accompanying text.

43 See id. § 2259(c) (victim is one “harmed as a result of a commission” of a crime).

well as approximately $475,800 for future treatment and counseling costs until she reached the age of 81.\textsuperscript{45} The trial court ordered the defendant to pay the full amount.\textsuperscript{46} It did not matter that the expert’s assessment of Amy’s harms and losses were made before the defendant’s possession of Amy’s images and that at the time of the expert’s examination, Amy lacked any knowledge of the defendant’s possession.\textsuperscript{47}

The \textit{Staples} court read section 2259 broadly and literally, requiring only that a victim and general harm be identified. According to the court’s analysis, once both of these elements were satisfied, the full amount of restitution could be awarded.\textsuperscript{48} The only restitutionary limits the court was willing to consider was in its suggestion that it imposed restitution against the defendant in a joint and several manner.\textsuperscript{49} Mr. Staples would initially bear the entire amount of Amy’s loss, but he could, on his own initiative, recover against other defendants who might subsequently be held liable to Amy for her losses.

The \textit{Staples} decision represents a measure of rough justice. The court imposed on a single defendant the entire estimated costs of Amy’s lifetime harms, regardless of whether those harms were caused by the defendant himself, by Amy’s uncle, or those who may subsequently distribute and possess her images. Of course, Mr. Staples should be held accountable for the ongoing harm he caused Amy, but it stretches credulity to contend that his possession of six

\textsuperscript{45} \textit{Id.} at *3. \textit{See also supra} note 16 and accompanying text.

\textsuperscript{46} \textit{Id.} at *4. After full appellate briefing by the parties, the defendant waived his right to appeal and the case was closed. Docket, 09-14156, December 20, 2010.

\textsuperscript{47} \textit{Staples}, 2009 WL 2827204 at *2.

\textsuperscript{48} The Eleventh Circuit Court of Appeals, in which the \textit{Staples} court sits, has subsequently held that “section 2259 limits recoverable losses to those proximately caused by the defendant’s conduct.” \textit{United States v. McDaniel}, 2001 WL 255151 at *3 (11th Cir. Jan. 28, 2011).

\textsuperscript{49} \textit{Staples}, 2009 WL 2827204 at *4. The court stated:

\begin{quote}
Considering that a victim cannot receive more restitution payments than she is due and the fact that “Amy” has sought and will seek restitution in other cases involving possession and dissemination of images of her sexual abuse as a child, the court finds that the defendant should be held jointly and severally liable with other defendants ordered to pay restitution to Amy for possession, receiving, and/or disseminating child pornography.
\end{quote}

\textit{Id.}
images caused Amy’s entire losses of $3.6 million. Even Amy’s uncle, the original perpetrator of the abuse, was only required to pay $6000 in restitution, $1125 of which was awarded to Amy.\(^{50}\)

At least one circuit court has ruled in a similar manner as Staples. In In re Amy Unknown, the Fifth Circuit ruled that section 2259’s proximate cause language only applies to the final category of losses listed in the statute.\(^{51}\) The court reasoned,

[i]t makes sense that Congress would impose [a proximate cause] restriction on the catchall category of “other losses” that does not apply to the defined categories [of losses listed in the statute]. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open ended subsection F.\(^{52}\)

The court also examined section 2259’s victim definition language in comparison to other criminal restitution statutes. It noted that in contrast to the Victim Witness Protection Act (VWPA), which defines a victim as one “directly and proximately harmed as a result of the commission of an offense,” section 2259 defined a victim as “the individual harmed as a result of a commission of a crime.”\(^{53}\) The court extrapolated from these language differences that Congress, in passing section 2259, “abandoned the proximate causation language that would

\(^{50}\) See supra note 11.

\(^{51}\) In re: Amy Unknown, 2011 WL 988882 (5th Cir. May 22, 2011).

\(^{52}\) Id. The court of appeals squarely rejected the district court’s statutory interpretation argument that “when several words are followed by a clause which is applicable to as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” Id. (quoting Porto Rico Railway, Light & Power Co. v. Mor, 253 U.S. 345, 348 (1973)). The appellate court engaged in a careful examination of the statutory construction cases relied upon by the district court and concluded that the interpretive principles articulated in those cases were derived in response to statutes which were structured differently than section 2259, and therefore were inappropriate for interpreting the statute. Id. at *7-*8. But see infra note 58 and accompanying text.

\(^{53}\) In re: Amy Unknown, 2011 WL 988882 at *6 (citing 18 U.S.C. § 3663A(a)(2)).

\(^{54}\) Id. (citing 18 U.S.C. § 2259(c)).
have reached all categories of harm via the definition of a victim.” The court also suggested, like the *Staples* court, that defendants could seek contribution from other defendants charged with possessing Amy’s images to lessen the restitution burden placed on any one defendant.

Alternatively, a majority of courts have ruled that section 2229’s proximate cause language should be applied to all the losses listed in section 2259(b)(3). As an initial matter of standard statutory interpretation, these courts have reasoned that the proximate cause language which appears in the final clause of losses listed in section 2259 should be applied to all the previous listed types of losses for which restitution can be awarded. Moreover, these courts have expressed concern that to rule otherwise would result in restitution awards which exceed the scope of a defendant’s liability. Relying on the Supreme Court’s decision in *Hughey v. United States* which guided that criminal restitution awards should be limited to the “loss caused by the specific conduct that is the basis of [the defendant’s] conviction,” courts have reasoned that “a restitution order encompassing losses stemming from acts other than that to which the defendant pleaded [or was found] guilty would be invalid.”

* Id. But see infra notes 61-65 and accompanying text.

* Id. (citing 18 U.S.C. § 3664).


* See *Chow*, 2010 WL 5608794 at *3 (engaging in statutory interpretation); United States v. Church, 701 F.Supp.2d 814, 826 (same); United States v. Van Brackle, 2009 WL 492850 at *4 (same); *Berk*, 666 F.Supp.2d at 188 (same). *But see In re Amy Unknown*, 2011 WL 988882 at *6–*8 criticizing this approach. *See also supra* notes 53-56 and accompanying text.


* Van Brackle*, 2009 WL 4928050 at *3; *Berk*, 666 F.Supp.2d at 188.
Courts have also focused on section 2259’s definition of a victim as one “harmed as a result” of the defendant’s offense.\(^{61}\) Based on traditional criminal law and tort principles, courts have extrapolated that section 2259’s victim definition indicates that a defendant should only be liable for the harms he caused.\(^{62}\) These courts reason that just because Congress did not specifically use proximate cause language in defining who is a victim should not be viewed as an indication that Congress intended for defendant accountability to be evaluated under some standard less than proximate cause.\(^{63}\) Rather, “Congress is presumed to have legislated against the background of . . . traditional legal concepts which render proximate cause a critical factor.”\(^{64}\) If Congress had intended to limit the proximate cause requirement to only the last set of losses listed in section 2259, “it would have found a clearer way of doing so.”\(^{65}\)

Finally, courts have reasoned that a proximate cause standard is required because interpreting the statute otherwise could result in granting unconstitutional restitution awards to victims.\(^{66}\) Restitution awards that are not tied to a proximate cause requirement and therefore fail to limit a defendant’s liability to the harm he specifically caused to the victim could run afoul of the excessive fines clause in the Eighth Amendment.\(^{67}\) A restitution award which holds a defendant liable for a victim’s entire losses, rather than the losses proximately caused by the defendant, could be viewed as resulting in an excessive or grossly disproportionate punishment.\(^{68}\)

\(^{61}\) 18 U.S.C. § 2259(c) (emphasis added).


\(^{63}\) Id.

\(^{64}\) Id. (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978)) (internal quotation marks and alterations omitted).

\(^{65}\) Id. at *7.


\(^{67}\) The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amed. VIII.

Unfortunately, even among courts that have determined that section 2259’s proximate cause language should be applied to all the losses listed in the statute, the courts have defined and applied the statute’s proximate cause language differently resulting in inconsistent decisions.\textsuperscript{69} Some courts have declined to award any restitution, others have sought to estimate appropriate amounts, and at least one court restored to awarding nominal damages.

\textbf{C. Applying the Proximate Cause Standard}

\textbf{1. Estimating restitution}

Among courts that have determined section 2259 requires a showing of proximate cause for medical costs and lost wages, restitution awards to Amy and Vicky have ranged anywhere from $500 to $150,000.\textsuperscript{70} However, how these courts have calculated the restitution owed to Amy and Vicky often appears haphazard. Many of these courts have avoided defining proximate cause language.


\textsuperscript{70} Exhibit, \textit{United States v. Mahoney}, Case 2:10-cr-00075-RRE, Doc. 55-1 (filed 1/7/2011) (on file with author).
cause and instead have generally relied upon the principle that restitution awards need not be mathematically precise, but merely calculated to a level of “reasonable certainty.” 71 Rather than examining whether there is a causal connection between the defendant’s possession and the harm to the victim, many of these courts have attempted to fairly apportion to a defendant72 a victim’s claimed losses by using the baseline damages amount listed in the civil damages statute for child exploitation as a guide. 73 Hence, a given defendant may only be required to pay a portion of a


72 Section § 3664(h) of title 18 guides that

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


73 18 U.S.C. § 2255 sets a minimum amount of $150,000 in damages that a victim of child pornography and exploitation can seek in a civil action against a distributor, possessor or other violator of the statute. 18 U.S.C.§ 2255(a). In passing this statute, Congress acknowledged that it can sometimes be difficult for victims of child pornography and exploitation to prove “the exact amount of damage a particular possessor or distributor has caused.” Regna, 2009 WL 2579103 at *5. Therefore, Congress determined that an amount of $150,000 is a sufficient
victim’s total losses, that portion representing an approximation of how the defendant harmed the victim. These courts tend to reason that a victim need not know of a given defendant’s specific distribution or possession of her images. Instead, the victim’s general knowledge that the images are in circulation is enough to warrant a restitution award.\textsuperscript{74}

starting place to calculate an individual’s full damages as a result of being the victim of child pornography or exploitation. \textit{Id.}

Courts have referred to the civil damages amount listed in section 2255 as a point of departure in calculating restitution awards pursuant to sections 3664(h) and 2259. These courts have reasoned that “[b]ecause Congress has already determined that $150,000 is deemed the damage amount for any Section 2252 violation, the court finds that any restitution amount under $150,000 will generally be reasonable.” \textit{Scheidt}, 2010 WL 144837 at *5. Courts who have used section 2255 as a guide have implicitly acknowledged that the $150,000 amount represents the baseline amount for a victim’s total damages for a civil claim, and have subsequently worked backwards from this amount and awarded much smaller amounts to Vicky and Amy under the mandatory restitution terms of section 2259. These courts have noted the broad range of crimes included within the scope of the civil section 2255, and these courts have concluded that “a defendant who received/distributed child pornography [has] caused the victim less than $150,000 in harm.” \textit{Scheidt}, 2010 WL 144837 at *5. \textit{See e.g., Scheidt}, 2010 WL 144837 at *6 ($3000 each to Amy and Vicky); \textit{Renga}, 2009 WL 2579103 at *6 ($3000 to Vicky); \textit{Ferenci}, 2009 WL 2579102 at *6 (same); \textit{Zane}, 2009 WL 2567832 at *6 (same); \textit{Monk}, 2009 WL 2567831 at *6 (same).

Courts relying on section 3664(h) have determined that where, in the case of the crime of distribution or possession of child pornography, there could be any number of individuals who have, are, or might in the future, possess such images, restitution should be limited against the defendant present before the court in anticipation to other restitution awards rendered against other future offenders. \textit{See e.g., Brunner}, 2010 WL 148433 at *4; \textit{Scheidt}, 2010 WL 144837 at *5; \textit{Hicks}, 2009 WL 4110260 at *6; \textit{Renga}, 2009 WL 2579103 at *6; \textit{Ferenci}, 2009 WL 2579102 at *6; \textit{Zane}, 2009 WL 2567832 at *6; \textit{Monk}, 2009 WL 2567831 at *6.

\textsuperscript{74} United States v. McDaniel, 2011 WL 255151, at *4 (11\textsuperscript{th} Cir. Jan. 28, 2011); United States v. Thompson, 2011 WL 3438864 at *3 (W.D.N.C. Aug. 5, 2011); United States v. Ontiveros, 2011
Courts taking this approach have tended to award Amy and Vicky $3000.\textsuperscript{75} This amount acknowledges that victims continue to be harmed by strangers viewing their images, while also acknowledges that the harm caused by a single defendant is likely minimal in relation to the overall harm suffered by the victim from the initial abuse.\textsuperscript{76} By employing an apportion approach cabined by the civil damages statute, these courts acknowledge that the possession of child pornography results in victim losses, but that those losses are not likely not to represent the victim’s full losses, or the losses suffered by the victim as a result of the original perpetrator’s acts.

Other cases show courts making their best efforts to estimate, in the context of a proximate cause requirement, the extent to which a defendant caused a victim’s losses. For example, in \textit{United States v. Thompson},\textsuperscript{77} the court ordered a total of $3800 in restitution for Vicky, which represented just under one percent of her total claimed losses. The court explained that it reached this amount by dividing restitution “equally among all possessors of her images after first discounting half of the total restitution amount as attributable solely to Vicky’s abuser. The court finds that this adequately considers the relative fault of the Defendant, the initial abuser, and others convicted of possession or distribution of the Vicky series.”\textsuperscript{78} Nowhere,

\textsuperscript{75} See e.g., Scheidt, 2010 WL 144837 at *6 ($3000 each to Amy and Vicky); Renga, 2009 WL 2579103 at *6 ($3000 to Vicky); Ferenci, 2009 WL 2579102 at *6 (same); Zane, 2009 WL 2567832 at *6 (same); Monk, 2009 WL 2567831 at *6 (same).
\textsuperscript{76} See e.g., Ontiveros, 2011 WL 2447721 at *4 (attributing one-half of victim’s total losses to initial abuser and person who placed images on the internet, and the other half to the present and future pool of pornography consumers who have or will view victim’s images on the internet); Brunner, 2010 WL 148433 at *4 (court should first discount total amount of requested retribution by half to account for initial harm imposed by creator of images).
\textsuperscript{77} 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011).
\textsuperscript{78} Id. at *6.
however, did the court explain how it reached the $3800 amount, nor how to account for any future possessors of Vicky’s images.\(^79\)

These decisions are problematic because courts provide little to show how their final restitution awards are the result of a proximate cause analysis.\(^80\) Their reasoning is often short on how a chosen restitution award of $1500, $3000 or $6000\(^81\) is directly linked to the victim’s harm arising from the defendant’s crime of possession. Rather, it appears that these courts engage in a measure of guess work to arrive at what they think is a fair apportionment of the victims’ total losses against the individual defendant appearing before them.\(^82\)

2. **No restitution or only nominal restitution**

\(^79\) *See also Ontiveros, 2001 WL 2447721 at *5* (applying same reasoning and determining award of $4500 which represented one percent of Vicky’s total losses was a “reasonable approximation” of defendant’s harm); United States v Lindauer, 2011 WL 1225992 (W.D. Va. March 30, 2011) (award of $5448.75, representing five percent of Vicky’s total claimed losses, was reasonable); *Aumais*, 2010 WL 3033821 at *8-9* (awarding $48,483 to cover weekly counseling sessions for five years and then monthly sessions for another five years at an estimate rate of $150 per session).

\(^80\) *Scheidt*, 2010 WL 144827 at *5* (an award of $3000 represents two percent of the civil amount of damages permitted in section 2255); *Hicks*, 2009 WL 4110260 at *6* (following the restitution reasoning adopted by courts in the Eastern District of California and estimating that if other numbers of defendants are also required to pay $3000 in restitution, the victim will be fully compensated); *Renga*, 2009 WL 2579103 at *6* (apportioning among defendants is fair); *Ferenci*, 2009 WL 2579102 at *6* (same); *Zane*, 2009 WL 2567832 at *6* (same); *Monk*, 2009 WL 2567831 at *6* (same).

\(^81\) *See e.g., Brunner*, 2010 WL 148433 (awarding $1500 to Vicky and $6000 to Amy); *Renga*, 2002 WL 2579103 (awarding $3000 to Vicky).

A number of courts have criticized the apportion approach and have indicated that courts should avoid awarding restitution on the basis of mere speculation. These courts tend to deny restitution awards to Amy and Vicky. They nonetheless do so reluctantly, recognizing the inherent difficulties of trying to differentiate between the general and ongoing harm victims suffer when their images are distributed and viewed by third parties from the original harms they suffered from the creation of the images. These courts do not reject victims’ claims that they suffer harm from knowing that their images are continuously downloaded and exchanged on the internet, and express great sympathy and concern for the lifelong emotional burdens that victims must carry as a result of this knowledge. However, in case after case, courts have ruled

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85 See e.g., Kennedy, 2011 WL 2675198 at *11-12; Brannon, 2011 WL 251168 at *3; Covert, 2011 WL 134060 at *9; United States v. Church, 701 F.Supp.2d 814, 831 (W.D. Va. 2010); Chow, 2010 WL 5608794 at *4; Rowe, 2010 WL 3522257 at *5; Solsbury, 727 F.Supp.2d at 795; Woods, 689 F.Supp.2d at 1112.

86 Rowe, 2010 WL 3522257 at *5; Woods, 689 F.Supp.2d at 1112; Solsbury, 727 F.Supp.2d at 795; Berk, 666 F.Supp.2d at 192 n.9; Simon, 2009 WL 2424673 at *7.

87 Covert, 2011 WL 134060 at *9; Solsbury, 727 F.Supp.2d at 796; Church, 701 F.Supp.2d at 834-35; Woods, 689 F.Supp.2d at 1112; Rowe, 2010 WL 3522257 at *5; Chow, 2010 WL [23]
that restitution is inappropriate because the government can only show that victims suffer a
generalized harm stemming out of the ongoing distribution and possession of their images, rather
than a specific harm directly caused by defendants. Often, the government’s evidence is
devoid of any specific reference to the defendant or the harm the victim suffered as a result of
learning of that defendant’s possession of their images. Instead, the government’s evidence
tends to be based on medical reports for Amy and Vicky that often pre-date the specific
defendant’s possession charge. Without more direct evidence of how a defendant’s possession
of a victim’s images directly harmed the victim, courts have been unwilling to grant victims any
form of restitution. To do so would impose liability on the defendants beyond that for which
they were responsible, and would require the courts to engage in speculation and conjecture.

A single court, seemingly not wishing to appear as stingy or legally as constrained as
those courts who wholly denied any restitution, granted $100 in nominal damages to Amy. Closely tracking the analysis followed by courts that declined to grant any relief, the court in

5608794 at *7; Berk, 666 F.Supp.2d at 192; United States v. Van Brackle, 2009 WL 4928050 at

88 United States v. Faxon, 2010 WL 430760 at *15 (S.D.Fla. Feb.5, 2010); Solsbury, 727
F.Supp.2d at 796; Woods, 689 F.Supp.2d at 1112; Chow, 2010 WL 5608794 at *7; Rowe, 2010

89 Kennedy, 2011 WL 2675918 at *9; Faxon, 2010 WL 430760 at *12; Church, 701 F.Supp.2d at
832; Woods, 689 F.Supp.2d at 1112; Simon, 2009 WL 2424673 at *5; Berk, 666 F.Supp.2d at
191 n.8.

90 See Kennedy, 2011 WL 2675918 at *11; Covert, 2011 WL 134060 at *9; Chow, 2010 WL
5608794 at *7; Solsbury, 727 F.Supp.2d at 796-97; Strayer, 2010 WL 2560466 at *15; Church,
701 F.Supp.2d at 834-35; Woods, 689 F.Supp.2d at 1112; Faxon, 2010 WL 430760 at *16-17;
Berk, 666 F.Supp.2d at 190; Simon, 2009 WL 2424673 at *7; Van Brackle, 2009 WL 4928050 at
*4.

91 See e.g., Kennedy, 2011 WL 2675918 at *10; Chow, 2010 WL 5608794 at *7; Solsbury, 727
F.Supp.2d at 797; Strayer, 2010 WL 2560466 at *15.

92 See Church, 701 F.Supp.2d 814.
Church noted without question that Amy had suffered harm.\textsuperscript{93} The court echoed the common refrain that under the proximate cause requirement, explicit findings of fact were needed to connect the victim’s loss and harm to the defendant’s action.\textsuperscript{94} Finding none, the court determined it could not award Amy restitution.\textsuperscript{95} However, in an effort to acknowledge that Amy did suffer some form of general harm from the possession of her images, the court deemed a nominal damages award of $100 appropriate.\textsuperscript{96}

A few courts have also noted that there might be ways by which the government could present adequate proof to link a given defendant’s possession of an image with a victim’s harm. These courts have suggested that

\begin{quote}
if, after receiving notice of the Defendant’s offense, the victim had to attend any additional therapy sessions, had to miss days of work, or incurred any additional expenses as a result thereof, the court would have a basis for making specific factual findings supporting a calculation of losses proximately caused by the Defendant’s offense.\textsuperscript{97}
\end{quote}

However, courts have been hesitant to believe that the government could regularly satisfy this evidentiary standard as the general harms suffered by victims like Amy and Vicky are commingled with the specific harms from their initial abuse. At bottom, these courts contend that section 2259 is not well suited to address the general harms suffered by victims like Amy and Vicky,\textsuperscript{98} and have called upon Congress “to develop a scheme to ensure that defendants . . . are held liable for harms they cause through their participation in the market for child pornography.”\textsuperscript{99}

\begin{footnotes}
\footnote{\textit{Id.} at 823-24.}
\footnote{\textit{Id.} at 832.}
\footnote{\textit{Id} at 834.}
\footnote{\textit{Id}. at 834-35.}
\footnote{\textit{Id}. at 833. \textit{See also Kennedy}, 2011 WL 2675918 at *12 (citing Church \textit{supra}).}
\footnote{\textit{Id}. (“the structure established by section 2259 . . . is a poor fit for these types of offenses”); \textit{Solsbury}, 737 F.Supp.2d at 798 (“the current statutory framework designed to assist victims of child pornography is unworkable”).}
\footnote{\textit{Kennedy}, 2011 WL 2675918 at *12 (further suggesting statutory damages for a fixed amount per image or payments into a general fund for victims); \textit{Solsbury}, 727 F.Supp.2d at 797 n.1}
\end{footnotes}
3. **Introducing a Solution: Presumed Criminal Damages**

Congress should command that a defendant found guilty of the distribution or possession of child pornography shall pay all identified victims whose images the defendant possesses at least $200 for each image, but no more than $10,000. In the alternative, a victim may elect to receive restitution for her actual losses as defined in 18 U.S.C. § 2559(b)(3).

These numbers are initially a bit arbitrary, and one would hope that Congress, after careful determination and study, would pick amounts it rationally believes represent the general harms suffered by victims of pornography distribution and possession. The goal with both numbers, however, is to set a baseline of defendant liability for possessing or distributing an image, but cabin that liability so as to not impose upon a defendant an amount that would represent a windfall for the victim. If a victim genuinely believed the defendant caused her losses that exceed the upper amount set by Congress, she could seek restitution for those losses under section 2259.

In passing such legislative reform, however, Congress must be prepared to justify its departure from the proximate cause requirement otherwise required for determining defendant liability. The following sections of this article provide that justification.

III. **Slow Acid Drips:**

**Reframing Victim Harm Through a Privacy and Defamation Analogy**

A. **Linking Child Pornography Distribution and Possession with Privacy and Defamation**

The stumbling block inherent in section 2259 rests with the fact that that Congress has not given sufficient attention to the nature of the harm suffered by victims of child distribution and pornography possession.\(^\text{100}\) Courts have acknowledged that the harms suffered by victims

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\(^{100}\) Even within the legislative history for federal criminal restitution, Congress has intimated that highly complex issues related to the cause or amount of a victim’s loss [should] not be resolved under the provisions of mandatory restitution. . . . [L]osses in which the amount of the victim’s losses are speculative, or in which the victim’s loss is not clearly causally linked to the offense, should not be subject to mandatory restitution.
such as Amy and Vicky represent a slow acid drip\textsuperscript{101} but have been quick to conclude that the evidentiary nightmares which accompany proving such harms preclude victims from seeking restitution.\textsuperscript{102} However, if one were to view the harms that arise from the possession of child pornography as a species of invasion of privacy and defamation torts, crafting a criminal remedy for victims is possible.

The injuries suffered by victims of child pornography distribution and possession are closely aligned with the dignitary and reputational harms associated with invasion of privacy and defamation torts. Courts have long recognized that the dignitary and reputational harms associated with privacy and defamation based tort claims are difficult, if not impossible to quantify, but nonetheless require compensation. In these narrow settings, courts have legislatures have turned to the doctrines of general and presumed damages to afford victims relief. Therefore, instead of requiring that victims satisfy a proximate cause standard in seeking restitution, Congress could employ a variant of presumed damages to hold a defendant responsible for a victim’s harms. However, in contrast to how presumed damages are applied in civil tort settings, where juries are often granted broad discretion to determine the amount of the tort plaintiff’s recovery, Congress could establish a set statutory award for victims along the lines of a liquidated damages provision. So doing, the inherent dignitary and reputational harms suffered by the victims of child pornography possession are recognized and can be redeemed. At the same time, a set statutory amount would protect defendants from being subjected to excessive restitution obligations that far exceed any reasonable comprehension of the harm they may have caused.

\textsuperscript{102} See Solsbury, 727 F.Supp.2d at 795 (calculating a victim’s losses can be “an evidentiary nightmare”).
Courts have easily recognized that the creators of child pornography are primarily responsible for the waves of harm suffered by their victims.\textsuperscript{103} Courts also acknowledge that the end receiver’s possession perpetuates that original abuse\textsuperscript{104} and causes additional harms to the children depicted in the material. It is here where many courts have intimated that these harms are analogous to, if not directly related to, the civil torts of invasion of privacy and defamation.

The Supreme Court has noted that possessors of child pornography invade childrens’ right to privacy and their interest in avoiding the disclosure of personal matters.\textsuperscript{105} Victims of

\begin{itemize}
\item See e.g., United States v. Ontiveros, 2011 WL 2447721 at *4 (N.D. Ind. June 15, 2011) (recognizing that at least one-half of a victim’s harms should be attributed to original abuser);
\item United States v. Aumais, 2010 WL 3033821 at *3 (N.D.N.Y. Jan. 13, 2010) (restitution should be awarded in pornography production cases);
\item United States v. Brunner, 2010 WL 148433 at *4 (W.D. N.C. Jan 12, 2010) (court should first discount total amount of requested retribution by half to account for initial harm imposed by creator of images);
\item United States v. Church, 701 F. Supp.2d 814, 819 (E.D. Va. 2010) (“It is uncontroversial to order restitution when the Defendant is convicted of the actual physical abuse of a child or of producing images constituting child pornography.”);
\item Osborn v. Ohio, 495 U.S. 103, 109 (1990) (“The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”);
\item New York v. Ferber, 458 U.S. 747, 759 (1982) (“the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”);
\item United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998) (“Unfortunately, the ‘victimization of children does not end when the pornographer’s camera is put away. . . . The simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials.”);
\item United States v. Geoff, 501 F.3d 250, 259 (“Consumers . . . who ‘merely’ or ‘passively’ receive or possess child pornography directly contribute to [victims’] continuing victimization.”).
\item Ferber, 458 U.S. at 758 n.9 (“When such performances are recorded and distributed, the child’s privacy interests are . . . invaded.”). See also id. at n.10 (“distribution of the material violates the individual interest in avoiding the disclosure of personal matters.”).
\end{itemize}

[28]
child pornography possession must spend their lives living with the reality that their images are in constant circulation and being viewed by countless strangers.\footnote{106} Unless and until victims can be assured that all their images have been removed from circulation and destroyed, they suffer from the perpetual emotional and psychic harm that some of the most terribly intimate and abusive moments of their lives are subject to the peering eyes of others.\footnote{107} Victims further suffer from the fear of exposure and identification while laboring under the stress of attempting to keep the fact of their abuse secret, or at least, private.\footnote{108} Finally, victims’ reputational interests are undermined by the distribution and possession of child pornography.\footnote{109} As the Supreme Court noted in \textit{Ashcroft v. Free Speech Coalition}, “[I]ike a defamatory statement, each new publication

\begin{footnotesize}
\begin{enumerate}
\item Osborn, 495 U.S. at 109 ("The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come."); \textit{Ferber}, 458 U.S. at 759 n.10 ("A child who has posed for a camera must go through life knowing that the recording is circulating with the mass distribution system for child pornography.") (quoting Shouvlín, \textit{Preventing the Sexual Exploitation of Children: A Model Act}, 17 \textsc{Wake Forest L. Rev.} 535, 545 (1981)); United States v. Hoey, 508 F.3d 687, 693 (1st Cir. 2007) ("the child is harmed not only through the actual production of pornography, but also by the knowledge of its continued circulation").
\item Norris, 159 F.3d at 930 ("victims of child pornography are directly harmed by this despicable intrusion on the lives of the young and innocent."); United States v. Grober, 624 F.3d 592, 598 (3d Cir. 2010) ("voyeurs re-victimize the children in the images by looking at them").
\item Ferber, 458 U.S. at 759 n.10 ("It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." (citing Schoettle, \textit{Child Exploitation: A Study of Child Pornography}, 19 \textsc{J.Am.Acad.Child Psychiatry} 289, 296 (1990)); \textit{Sherman}, 268 F.3d at 547 ("Children also suffer profound emotional repercussions from a fear of exposure, and the tension of keeping the abuse secret.").
\item Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002); United States v. Hardy, 707 F.Supp.2d 597, 612 (W.D. Pa. 2010) ("the republication or transmittal of defamatory material is analogous to, and related to, the distribution of child pornography).
\end{enumerate}
\end{footnotesize}
of the [image causes] new injury to the child’s reputation and emotional well-being.”

Hence, with each new download, victims are subject to the slow acid drip of harm. Even more direct links can be drawn between the invasion of privacy and defamation torts and child pornography distribution and possession through an examination of the civil tort caselaw.

B. A Right to Privacy

The right to privacy has escaped precise definition. It has been variously described as “the right to be left alone,” “control over knowledge about one’s self,” and as an “individual’s right to control her public image, including the ability to choose what she reveals and what she keeps hidden.”

One court has stated that

The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall be public and which parts we shall hold close.

Finally, Professor A. Michael Frommkin describes the right as encompassing ideas of bodily and social autonomy, of self-determination, and . . . the ability to create zones of intimacy and inclusion that define and shape our relationships with one another. Control over personal information is a key aspect of . . . these ideas of privacy, and is alien to none of them.

The right to privacy was given its first modern articulation in Samuel D. Warren and Louis D. Brandeis’ seminal law review article The Right to Privacy. Troubled by what they perceived to be an increasingly overreaching press, they advocated that “the law must afford some remedy for the unauthorized circulation of portraits of private persons . . . .” The men

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112 Charles Fried, Privacy, 77 YALE L.J. 475, 483 (1968).
116 Warren & Brandies, supra note 111.
117 Id. at 195.
asserted that the common law should recognize the right to privacy as a tort, rather than a right grounded in property or contract law. 118 William L. Prosser developed Warren and Brandeis’s ideas in his equally influential article, *Privacy*. 119 In contrast to Warren and Brandeis’ suggestion that there exist a single tort protecting an individual’s right to privacy, Prosser asserted that the right actually represented “four different interests of the plaintiff, which are tied together by the common name, but otherwise almost have nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’” 120 He described the different torts as follows:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. 121

Each has been incorporated into the Restatement (Second) of Torts and has been adopted in one manner or another in most jurisdictions across the country.

Prosser’s constructs, however engrained in our modern legal lexicon, have not escaped criticism. Professor Edward J. Bloustein has argued that Prosser’s development of Warren and Brandeis’ privacy tort sidestepped the two men’s focus on “inviolative personality.” 122 Professor Bloustein contends the right to privacy should protect more than interests in reputation and freedom from mental distress. Rather, the concept of “inviolative personality” focuses on “the individual’s independence, dignity and integrity; it defines man’s essence as a unique and self-determining human being.” 123 Developing on this idea, Professor Bloustein suggested that the interest served in the privacy cases is in some sense a spiritual interest rather than an interest in property or reputation. . . . Unlike many other torts, the harm

118 *Id.* at 198-213.
120 *Id.* at 389 (citing Cooley, Torts 29 (ed ed. 1888)).
121 *Id.* at 389. Of these four formulations, the appropriation tort is the least connected to child pornography possession and therefore will not be addressed further.
123 Bloustein, *supra* note 122 at 971.
caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.\textsuperscript{124}

Other scholars have criticized Prosser’s four part formulation as fossilizing the torts’ ability to develop to new forms of privacy concerns, including the collection and misuse of personal data.\textsuperscript{125} Others have focused on courts’ rigid treatment of the concept of privacy, and their inability to see the fluid connections which may exist between the different types of privacy torts.\textsuperscript{126} In suggesting reforms to our modern understanding of privacy torts, Professors Neil M. Richards and Daniel J. Solove present several suggestions.\textsuperscript{127} In particular, they posit that “tort law should take into account the social contexts in which information is shared between individuals, and the expectations (reasonable or not) that the individuals have about the shared information.”\textsuperscript{128} They further suggest that tort law “must come to a more sophisticated conception of harm,”\textsuperscript{129} and that courts must overcome their suspicion of privacy harms because they often lack physical manifestation.

Delving into how the law should respond to the developing notions of privacy in our increasingly technologically connected society is the topic for another article.\textsuperscript{130} Suffice to say, the suggestion that Prosser’s four categories may have impeded rather than enhanced the law’s ability to address privacy rights is well taken. Moreover, it highlights that there may be situations in which one may intuitively reach a conclusion that a right to privacy has been violated, just as courts have done in regard to the possession of child pornography, while it may

\textsuperscript{124} Id. at 1002-03.
\textsuperscript{125} Neil M. Richards & Daniel J. Solove, Prosser’s Privacy: A Mixed Legacy, 98 CAL. L. REV. 1887, 1904 (2010); Luddington, supra note 113 at 159.
\textsuperscript{126} Richards & Solove, supra note 125 at 1917-1920.
\textsuperscript{127} Id. at 1921-23.
\textsuperscript{128} Id. at 1922.
\textsuperscript{129} Id.
\textsuperscript{130} See generally, id.; Patricia Sanchez Abril, A (MY)Space of One’s Own: On Privacy and Online Social Networks, 6 NW. J. TECH. & INTELL. PROP. 73 (2007); Ludington, supra note 113; Froomkin, supra note 115.
not always be easy to perfectly align the alleged harm with a specific privacy tort. Nonetheless, Prosser provides a valuable framework in which to consider the harms resulting from child pornography distribution and possession.

1. **Intrusion on Seclusion**

   The tort of intrusion on seclusion is generally described as:

   One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.\(^{131}\)

   The Restatement further indicates that the focus of this tort is the intentional interference with a plaintiff’s interest in solitude or seclusion.\(^{132}\) Prosser suggests that the primary interest protected by this tort is mental, in that it serves to protect an individual from the distress that arises when one’s seclusion or solitude is unreasonably interfered with by another.\(^{133}\) Others have suggested that the interest is far broader and serves to protect one from an affront to personal dignity.

   Eavesdropping and wiretapping, unwanted entry into another’s home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.\(^ {134}\)

   Primary examples of this tort include the peeping tom, the overzealous reporter or paparazzi, or one’s use of surveillance methods to observe or listen to another in situations in which one would expect privacy.\(^ {135}\)

   Easy comparisons can be drawn between the tort of intrusion on seclusion and the harms suffered by victims of child pornography possession. Analogous tort cases address situations such as a tanning salon owner’s surreptitious taking of pictures of a patron in varying stages of undress,\(^ {136}\) hidden viewing devices in a public restroom at a skating rink,\(^ {137}\) phone tapping,\(^ {138}\)

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\(^{132}\) *Id.* cmt a.

\(^{133}\) Prosser, *supra* note 119 at 392.

\(^{134}\) Bloustein, *supra* note 122 at 974.

\(^{135}\) Ludington, *supra* note 113 at 159-60 (listing examples).


and the inappropriate questioning by an employer of an employee’s sex life.\textsuperscript{139} In one case, a court noted that “[o]ne’s naked body is a very private part of one’s person and generally only known to others by choice. This is a type of privacy interest worth protection.”\textsuperscript{140} The hidden cameras, microphones and inappropriate questions pried into the plaintiffs’ lives in an unreasonable way and warranted a remedy.

The same should be said of those who view images of Amy or Vicky. Amy has commented that she is “frightened that someone may recognize her and expose her as being [the] child” in the Misty series.\textsuperscript{141} Amy’s doctor further noted that “Amy is clear that there has been a resurgence of the trauma with her ongoing realization that her images are being traded on the internet giving rise to feelings of fear of discovery. . . .”\textsuperscript{142} Similarly, Vicky has stated that

When I learn about one defendant having downloaded pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about it. I live in fear that any of them [] may try to find me and contact me and do something to me.\textsuperscript{143}

\textsuperscript{138} Rhodes v. Graham, 37 S.W.2d 46 (Ct. App. Ky. 1931).


\textsuperscript{140} Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).


\textsuperscript{143} United States v. Woods, 689 F.Supp.2d 1102, 1105 (N.D. Iowa 2010).
Child pornography possessors are voyeurs. They are “peeping toms” who peer into the windows of Amy and Vicky’s lives at some of their most horrible moments. In drawing a connection between the tort of intrusion on seclusion and the harm suffered by victims of child pornography possession, it is not at all surprising that courts have stated that pornography possession defendants have engaged in a “despicable intrusion on the lives of the young and innocent”\textsuperscript{144} and that these “voyeurs re-victimize the children in the images by looking at them.”\textsuperscript{145}

2. **Publicity Given to Private Facts**

Similar links can be drawn between child pornography possession and the tort of publicity given to private facts. This tort is described in the Restatement as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for the invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.\textsuperscript{146}

The First Restatement articulation of this tort also suggests that

The interest which one has to maintain his privacy and to live an individual life . . . is similar to the much more strongly protected interest to have one’s person free from unwanted intentional physical contacts with others. In some aspects it is similar to the interest in reputation, which is an action in defamation, since both interests have relation to the opinions of third persons.\textsuperscript{147}

Prosser built upon this idea, commenting that the interests protected here include reputation and the prevention of mental distress.\textsuperscript{148} As articulated in the Second Restatement

\begin{quote}
[\] every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself and reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters . . . and some of [a man’s] past
\end{quote}

\textsuperscript{144} United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1990).

\textsuperscript{145} United States v. Grober, 624 F.3d 592, 598 (3d Cir. 2010).

\textsuperscript{146} \textsc{Restatement (Second) of Torts} § 652D (1977). \textit{See also} \textsc{Restatement (First) of Torts} §867 (1939) ( “a person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”).

\textsuperscript{147} \textsc{Restatement (First) of Torts} § 867 (1939).

\textsuperscript{148} Prosser, \textit{supra} note 119 at 398.
history he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.\textsuperscript{149}

At bottom, the tort protects individuals from the disclosure of private, and potentially embarrassing, information.\textsuperscript{150} Other scholars have advocated for a broader view of the tort, asserting that the “damage is to an individual’s self-respect in being made a public spectacle. . . . The gravamen in the public disclosure cases is degrading a person by laying his life open to public view.”\textsuperscript{151}

Again, it is not difficult to connect many of the publicity of private fact cases with the crime of child pornography possession. Many of the tort cases address the unwarranted disclosure of photographs or other images of the plaintiffs,\textsuperscript{152} and a number directly involve the

\begin{itemize}
\item \textsuperscript{149} Restatement (Second) of Torts § 652D (1977).
\item \textsuperscript{150} Id. at 392.
\item \textsuperscript{151} Bloustein, supra note 122 at 981.
\item \textsuperscript{152} See e.g., Vassiliades v. Garfinckel’s, Brooks Brothers, 492 A.2d 580 (D.C. Ct. App. 1985) (use of plastic surgery patient’s “before and after” photographs without consent violated privacy rights); Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964) (publication of plaintiff whose skirt was blown up and exposed her underwear invaded privacy as there was nothing of legitimate public concern about the image); Banks v. King Features Syndicate, 30 F.Supp. 352 (S.D. New York 1939) (X-ray of plaintiff’s pelvis published without plaintiff’s consent violated privacy rights); Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930) (privately taken photograph of deformed and deceased child which was published without parent’s consent invaded privacy rights); Feeney v. John Van Doren Young, 191 A.D. 501 (New York App. Div. 1920) (film of caesarean section operation published without woman’s consent violated privacy); Douglas v. Stokes, 149 S.W. 849 (Ky. Ct. App. 1912) (privately taken photograph of deceased and conjoined twins which was subsequently published without parent’s consent invaded privacy rights). Many of these cases might have had different results if decided after the Supreme Court’s rulings in \textit{New York Times v. Sullivan}, 376 U.S. 254 (1964), \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974) and \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749 (1985). This string of Supreme Court cases severely limited the contexts in which a plaintiff
disclosure of photographs of a sexual or intimate nature. Two cases, in particular, highlight how the tort of public disclosure of private facts and child pornography possession are closely related.

In *Michaels v. Internet Entertainment Group*, the court addressed an invasion of privacy claim raised by the rock star Brent Michaels and his then girlfriend and actress, Pamela Anderson Lee. Michaels and Lee had recorded themselves engaged in sexual intercourse. Their recording came into the hands of the defendant, Internet Entertainment Group (IEG), which intended to broadcast and distribute the video. IEG argued that Lee’s status as a “sex symbol” coupled with the fact that a different sex tape of Lee and her former husband had been widely distributed, undermined Lee’s claim that a broadcast of the Lee/Michaels tape would violate her right to privacy. The court rejected IEG’s argument, stating “[s]exual relations are among the most personal and intimate acts. [This] Court is not prepared to conclude that the public exposure of one [prior] sexual encounter forever removes a person’s privacy interest in all subsequent and previous sexual encounters.” The court similarly rejected IEG’s arguments that Michaels, because he was a famous rock star, had relinquished his right to privacy over the “most intimate details” of his life. The court acknowledged that due to both Michaels’ and

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155 Id. at 828.

156 Id. at 828–29.

157 Id. at 829.

158 Id.
Lee’s celebrity status, the fact that they were romantically involved might not rise to the level of a protected privacy right. However, “the facts recorded on the [t]ape . . . [were] not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.”

Similarly, in Taylor v. Franko, the court addressed an invasion of privacy claim raised by a woman whose former boyfriend posted, without her consent, several nude photographs of her on adult websites. The ex-boyfriend also included the plaintiff’s contact information with the website postings. She subsequently received “calls, e-mails and instant messages from individuals who viewed the adult websites and were seeking sex.” The court had no problem determining that the defendant had violated the plaintiff’s right to privacy through the public disclosure of private facts.

As the Michaels and Taylor cases indicate, an individual’s sexual activities are deemed some of the “most intimate details” of life, and the disclosure of such information can give rise to a tort claim. In concert with the tort’s general requirement that publicity is given to a “matter concerning the private life of another,” these courts had little trouble determining that sexual information about an individual would fall into this category. Indeed, Prosser suggested as much.

159 Id.
161 Id. at *1.
162 Id.
163 Id. at *8. The case of G.J.D. et al v. Johnson, 713 A.2d 1127 (Pa. 1998), addressed a very similar situation. There, an ex-boyfriend distributed a variety of sexually explicit photographs of the plaintiff in public places where she, her family, friends, and children would see the pictures. Id. at 1128. The photographs were accompanied text which also suggested that the plaintiff was a prostitute. Id. There was no question that the defendant had invaded the plaintiff’s privacy rights.
when he stated that “the details of sexual relations . . . spread before the public gaze” should be protected.  

Such protections are all the more appropriate for victims like Vicky and Amy whose sexual activity was the product of abuse. Amy suffers from shame and self-blame which is exacerbated by her knowledge that her images are still being viewed and could be used to help groom other children into believing that such abuse is appropriate. She is also “frightened that someone may recognize her and expose her as being [the] child” in the Misty series. Amy’s doctor opined that she will need ongoing psychotherapy for the remainder of her life. In particular, the doctor suggested that Amy will need “weekly therapy sessions and possibly more depending upon whether or not Amy is confronted in the future with more trauma relating to these images on the internet.” The doctor noted that “the revictimization of Amy through the trading of her images on the Internet is the source of enduring trauma that will have lasting effects on her.”

Vicky also lives “in constant fear that she will be recognized by someone in the public as being the person depicted in [the] child pornographic videos and photographs.” Each time Vicky learns that another person has been found in possession of her images, she feels violated all over again. Her doctor noted that she has suffered significant, permanent psychological damage as a direct result of the knowledge that the images of her victimization, humiliation and exploitation have been downloaded and viewed by numerous individuals . . . [and that she] will

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166 Prosser, supra note 119 at 397 (1960).
168 Faxon, 2010 WL 430760 at *7; Berk, 666 F.Supp.2d at 191.
169 Faxon, 2010 WL 430760 at *7.
172 Faxon, 2010 WL 430760 at *4.
173 Berk, 666 F.Supp.2d at 192 n.9.
continue to suffer from the knowledge and believe that those images of her childhood abuse are at high probability to continue to be downloaded for prurient purposes.  

Individuals like Amy and Vicky are subjected to the lifetime knowledge that images of their sexual abuse are being circulated and viewed, and that they could be further exposed and identified as objects of abuse and degradation.  

The horrible facts of their abuse which should otherwise be treated as private and confidential, can never be so. 

3. False Light and Defamation

Finally, analogies can be drawn between the tort of false light and the allied claim of defamation and child pornography possession. As noted by Prosser, these two torts are extensions of one another and seek to protect an individual’s reputation and prevent mental distress. 

The tort of false light has been defined as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

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176 Id. at 759 n.10. See also United States v. Sherman, 268 F.3d 539, 547 (7th Cir. 2001); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1990).

177 Prosser, supra note 119 at 398.

178 Restatement (Second) of Torts § 652E (1977).
The tort seeks to protect “the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, other than he is.”

The allied tort of defamation is driven by goal to allow an individual to protect his good name and “reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decedent system of ordered liberty.” Accordingly, defamation is generally defined as:

A false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting to at least negligence on the part of the publisher; and either actionability on the statement irrespective of special harm or the existence of special harm caused by the publication.

A defamatory statement is one which “tends to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.” The Supreme Court has placed a number of constitutional limits on the scope of defamation actions and the type of recovery a plaintiff can seek in such actions. However, where the alleged defamatory statement imputes that the plaintiff has engaged in serious sexual misconduct, a plaintiff has more room to seek recovery.

Admittedly, drawing connections between the tort of false light and defamation to the harms associated with the possession of child pornography does flow with the same ease as the analogies between the torts of intrusion of seclusion and private facts made public. The analogy falls somewhat short because a possessor of child pornography is not necessarily involved in the republication or dissemination of falsehoods about the children depicted in the images.

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179 Id. at cmt. b.
183 See infra notes 245-254 and accompanying text.
184 RESTATEMENT (SECOND) OF TORTS § 574 (1977) (slanderous imputation of sexual misconduct). See also RESTATEMENT (SECOND) OF TORTS § 570 (1977) (listing several other categories of slander that permit a plaintiff a wider scope of recovery).
185 See e.g., McLeod, Note, supra note 69 at 1353-56 (noting, in part, that under the law of defamation, the publisher or distributor of the defamatory material is held liable, but not the final
Likewise, there is nothing inherently false about the images of victims such as Amy and Vicky. The images depict what actually happened to them. Finally, it is not entirely clear whether a photographic image or other pictorial recording would be deemed as either slander or libel, the two sub-sets of defamation.\(^{186}\) Nonetheless, there remain sufficient connections between the harms associated with child pornography possession and the torts of false light and defamation to warrant discussion.

The messages sent about children in pornography give rise to the defamatory and false light comparisons. The multiple messages include that the children depicted deserve the abuse and objectification; that perhaps they enjoy the abuse; or perhaps they are sexual beings with knowledge and skill beyond their tender years. Therefore, while the individuals and the acts

\[\text{viewer, so neither should possessors of child pornography be subject to restitution liability to child pornography victims). But see United States v. Geoff, 501 F.3d 250, 259 (“Consumers . . . who “merely” or “passively” receive or possess child pornography directly contribute to [victims’] continuing victimization.”).}\]

\(^{186}\) The tort of defamation was originally treated as two separate torts, slander and libel. Slander represented oral representations, while libel was comprised of all other forms of communication. Julie Sipe, “Old Stinking, Old Nasty, Old Itchy Toad”: Defamation Law, Warts and All (A Call for Reform), 41 IND. L. REV. 137, 145 (2008). As the law developed, different standards of proof and remedial action were imposed on slander and libel. However, scholars and courts have long recognized that the distinctions between the two are unwarranted. William Prosser stated

[o]f all the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel and slander . . . . Arising out of old and long forgotten jurisdictional conflicts, and frozen into its present form in the seventeenth century by the rising tide in favor of freedom of speech and the press, it remains a senseless thing, for which no court and no writer has a kind word for upwards a century and a half.

depicted in the images are true – the picture *is* of Amy being raped by her uncle – the message is entirely false. Moreover, because the pornographic images were created when both young women were children, the negative images and messages transmitted about them stymie ability to develop a reputation independent of that associated with their abuse. Viewed in this context, cases about false light and defamation serve as corollaries to the harms suffered by victims such as Amy and Vicky.

As noted earlier, the tort of false light serves to protect an individual from being made to appear in a manner other than she really is.\(^{187}\) Courts have found that plaintiffs’ right to privacy embodied in this tort were violated when images of the plaintiffs were published with accompanying text that misrepresented the inherent truth of the images.\(^{188}\) Therefore, while the facts in the images might be true, the message sent by the images and the context in which they were shared with others, gave rise to false light claims.

For example, in *Braun v. Flynt*,\(^{189}\) a woman sued a magazine whose dominant theme was female nudity and unchaste in women.\(^{190}\) The magazine often ran a “current events” series which generally addressed overt sexual matters or included a photograph or image of a sexual nature.\(^{191}\) Plaintiff was

employed by Aquamarina Springs amusement park . . . Part of [her] job including working in a novelty act with “Ralph, the Diving Pig.” In the act, [the

\(^{187}\) *RESTATEMENT (SECOND) TORTS* § 652E, cmt. b (177).

\(^{188}\) *See e.g.*, G.J.D. v. Johnson, 713 A.2d 1127 (Pa. 1998) (privacy violated where text accompanying sexually explicit photographs of a woman erroneously suggested she was a prostitute); Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951) (privacy violated where text accompanying image of child harmed by a car accident wrongfully implied that child was the cause of the accident); Gill v. Curtis Pub. Co., 239 P.2d 630 (Cal. 1952) (privacy violated where text accompanying image of long-standing and happily married couple suggested their relationship was shallow and solely based on sexual attraction).

\(^{189}\) 726 F.2d 245 (5th Cir. 1984).

\(^{190}\) *Id.* at 247.

\(^{191}\) *Id.*
plaintiff], treading water in a pool, would hold out a bottle of milk with a nipple on it. Ralph would dive into the pool and feed from the bottle.\textsuperscript{192}

Aquamaria Springs produced postcards of the plaintiff with Ralph which came into the possession of an editor at the defendant magazine. The image was included in the magazine’s “current events” section without the plaintiff’s consent, and appeared alongside a series of suggestive photographs and titillating articles.\textsuperscript{193} The plaintiff sued the magazine asserting that her inclusion in the magazine violated her privacy by placing her in a false light. The court rejected the magazine’s argument that because there was nothing untrue about the image, the magazine could not be liable to the plaintiff for an invasion of privacy. The court reasoned that “[c]ommon sense dictates that the context and manner in which a statement or picture appears determines to a large extent the effect which it will have on the person reading or seeing it.”\textsuperscript{194} Pictures of the plaintiff in the magazine suggested that she was a wanton and unchaste individual and therefore violated the plaintiff’s privacy.

Similarly, in \textit{Wood v. Hustler Magazine, Inc.},\textsuperscript{195} a woman brought a false light claim against the magazine for an image which was published without her consent. The woman and her husband had been camping in a state park. While walking alone in a wilderness area, they became hot, disrobed, and went swimming in a river. Later they took several photos of each other in the nude. . . . . They treated the photos as private material, not showing them to anyone else and keeping them out of view in a drawer in their bedroom.\textsuperscript{196}

A neighbor stole the photos and submitted an image of the wife to Hustler Magazine, falsely indicating that her fantasy was to be “tied down and screwed by two bikers.”\textsuperscript{197} The magazine published the image along with the false description of the plaintiff’s fantasy. After her image

\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.} at 248.
\textsuperscript{194} \textit{Id.} at 254.
\textsuperscript{195} 736 F.2d 1084 (5th Cir. 1984).
\textsuperscript{196} \textit{Id.} at 1085.
\textsuperscript{197} \textit{Id.} at 1085-86.
appeared in the magazine, the plaintiff received a series of obscene phone calls. The trial court easily found that Hustler had violated the plaintiff’s privacy. “Under the false light theory, Hustler’s publication falsely represented that [the plaintiff] consented to the submission and publication in a coarse and sex-centered magazine of a photograph depicting her in the nude. Moreover, the publication falsely attributed a lewd fantasy to [the plaintiff.]”

Cases addressing slanderous imputations of sexual misconduct also support a connection to the harms associated with child pornography possession. In a case similar to the

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198 Id. at 1086.

199 Id. at 1089. In Taylor v. Franko, 2011 WL 2118270 (D. Hawai‘i, May 2, 2011), the court declined to find that the plaintiff had successfully asserted the tort of false light. However, the facts of the case certainly suggest that there may have been ground for such a claim. The plaintiff’s former boyfriend posted nude photographs of her, without her consent, on several adult web-sites on the internet. Id. at *1. The web postings included contact information for the plaintiff. As a result, she received “numerous calls, e-mails, and instant messages from individuals who viewed the adult websites and were seeking sex.” Id. While the images of the plaintiff were not false, the context in which they were posted and her accompanying contact information, certainly broadcast the message that she was available and interested in sexual encounters with others.

200 RESTATEMENT (SECOND) OF TORTS § 574 (1977). This portion of the Restatement has been generally applied to any statement that imputes any form of unchastity to a woman, married or single, irrespective of whether the conduct charged constitutes a criminal offense. The rule applies to a statement charging a woman with specific acts of adultery, fornication or any other form of sexual intercourse with a man other than her husband, as well as to general charges of unchaste conduct.

201 Id. cmt b. See e.g., Baufield v. Safelite Glass Corp., 831 F.Supp. 713, 717 (D. Minn. 1993) (a statement is defamatory if it imputes serious sexual misconduct to the subject of the statement); Longbehn v. Schoenrock, 727 N.W.2d 153, 157-59 (Minn. Ct. App. 2007) (referring to individual as “Pat the Pedophile” was defamatory per se); Minyard Food Stores, Inc. v. Boodman, 50 S.W.2d 131, 140 (Tex. Ct. App. 2001) (statements that individual engaged in hugging, kissing and heavy “make-out” session were defamatory per se).
false light case of *Braun v. Flint*, a male model sued for defamation when his photograph appeared in a weekly newspaper which advertised for another, far more sexually explicit, weekly. The model had willingly posed in the photograph which was suggestive in nature. He did not consent, however, to the photograph’s use to advertise the other, more sexually provocative publication. Moreover, his picture also appeared alongside advertisements for “live sex videos, telephone sex talk, erotic devices and sexual literature.” The court determined that the context in which the picture appeared falsely suggested that the model was “sexually lustful and promiscuous, that he participated in and consented to associate with and appear in sexually suggestive advertising in a magazine filled with other sexual advertising and that he endorses the views and conduct described therein.” Therefore, the court concluded that the model’s claim of defamation per se could stand.

Likewise, in *Ward v. Klien*, the court determined that the use of a woman’s picture in a documentary about Gene Simmons, lead singer of the rock star Kiss, could rise to the level of defamation per se because the images suggested that she was an unchaste woman. The woman and Simmons had been in a three year “exclusive, monogamous romantic relationship” during the early years of Kiss’s existence. Soon thereafter, she met her husband with whom she had sustained a long and loving marriage of nearly 30 years. The documentary included an extended segment entitled “24 Hour Whore,” about Simmons’ sexual antics and exploits. During this segment, the plaintiff’s image was regularly displayed, along with pictures of

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202 726 F.2d 245 (5th Cir. 1984). *See also supra* notes 189-194 accompanying text.
204 *Id.* at 243.
205 *Id.* at 243.
206 *Id.* at 244.
207 *Id.* at 244-245.
209 *Id.* at 830-832.
210 *Id.* at 830.
211 *Id.*
212 *Id.*
Simmons in sexually suggestive poses with other women. The court concluded that “[t]he repeated use of plaintiff’s photographs during the documentary could lead a reasonable viewer to conclude that plaintiff was a woman who regularly made herself available to [the rock star] at his beck and call, for casual sexual encounters.”\textsuperscript{213} Because the documentary could cause a reasonable viewer to conclude that the plaintiff was an unchaste woman, the court concluded she had successfully alleged defamation per se.\textsuperscript{214}

Like the plaintiffs in the false light and defamation cases, victims like Vicky and Amy are depicted in a false light which is injurious to their reputations and subjects them to unwanted advances from individuals who have viewed their images. Vicky’s images are a regular discussion subject on pedophile internet blogs and chat rooms\textsuperscript{215} and several people who have viewed the images of Vicky have attempted to contact her. Vicky was even stalked by a man for five years who “harassed her with pointed sexual questions and requests to make pornography with her.”\textsuperscript{216} Likewise, one possessor of her images created a video called “Where is Vicky Now?” which included recent pictures of Vicky and her family accompanied with obscene subtitles.\textsuperscript{217} Vicky’s experience is not dissimilar from the plaintiffs in the \textit{Wood}\textsuperscript{218} and \textit{Taylor}\textsuperscript{219} cases. Like the women in those cases, who received unwanted contacts from individuals who had viewed their sexually explicit images and then propositioned the women for sex, so too has Vicky’s reputation been harmed. The pornographic images falsely depict her as one who would be willing to engage in further degrading activities.

\textsuperscript{213} \textit{Id.} at 831.

\textsuperscript{214} \textit{Id.} at 832.


\textsuperscript{216} United States v. Rowe, 2010 WL 3522257 at *3 (W.D.N.C. Sept. 7, 2010); \textit{Strayer}, 2010 WL 2560466 at *3.


\textsuperscript{218} 736 F.2d 1084 (5th Cir. 1984) (woman received obscene phone calls after her picture appeared in \textit{Hustler} magazine without her consent).

\textsuperscript{219} 2011 WL 2118270 (D. Hawai’i, May 2, 2011) (woman received phone calls, e-mail and instant messages requesting sex after her images were posted on adult porn website). \textit{See also supra} note 199.
Courts have correctly suggested that that the harms suffered by victims of child pornography possession are akin to the harms associated with privacy and defamation torts.\textsuperscript{220} However, true to the criticisms of both the privacy and defamation torts, in that they may not always bring within their scope all the harms that the law should properly address,\textsuperscript{221} the harms suffered by victims of child pornography possession do not fit perfectly within any one privacy category. These victims therefore find themselves in a bit of a legal Venn diagram, where the nature of their harms overlap in any number of the privacy and defamation categories, but do not fit perfectly into any one. Nonetheless, the privacy and defamation categories bring greater understanding to the harm suffered by these victims. Similarly, the remedies associated with these torts can provide the foundation by which to provide restitution to victims.

IV. **EVIDENTIARY NIGHTMARES:**

**SOFTENING THE EDGES BETWEEN CIVIL DAMAGES AND CRIMINAL RESTITUTION**

A major hurdle victims like Amy and Vicky have faced when attempting to seek restitution is that their harms tend to be general. The large sums they seek cover the entirety of their harms arising from their initial abuse and also from the ongoing harm they suffer from the knowledge that their images are being distributed and viewed among the child pornography community. Courts that have rejected Amy and Vicky’s requests for restitution have rationalized that the young women failed to specify the measure to which a specific defendant’s possession of their image contributed to their losses.\textsuperscript{222} However, if courts were to view victim’s harms through the lens of a privacy or defamation construct, a broader approach would be warranted.

\textsuperscript{220} See supra notes 105-110 and accompanying text.

\textsuperscript{221} See supra notes 122-130 and accompanying text.

In both privacy and defamation cases, courts have drawn distinctions between general and special damages. General damages are those which courts believe “generally flow from the kind of substantive wrong done by the defendant.”223 These damages can be broken down into two categories: presumed or proven, and in most cases, must be proven.224 Conversely, special damages are those that are particular to a given plaintiff and not expected to occur regularly to other plaintiffs in like circumstances.225 In order to recover special damages, a plaintiff must specifically plead and prove the damages at a level higher than that required by courts for general damages.226 Together, special damages and general proven damages are often referred to as actual damages, in that “they are awarded for actual, proven losses.”227 In contrast, there are a few narrow situations in which general damages are presumed. Here, courts “infer both the fact of harm and the extent of harm from the circumstances surrounding the defendant’s conduct.”228

Presumed damages have been extended to select defamation and privacy cases.229

A. Privacy and General Damages

When evaluating privacy and defamation claims, courts have noted that proving the harms associated with these torts can be difficult, but should not wholly bar recovery.230 Rather,

224 Id.
225 Id.
226 Id.
227 Id. at 69-70.
228 Id. at 70. See also Sprague v. Amer. Bar. Assoc., 276 F.Supp.2d 365, 368 (E.D. Pa. 2003) (providing a general discussion regarding presumed and actual damages in the context of defamation claims).
229 See infra notes 240-259 and accompanying text. See also, Love, supra note 223 at 70-71 (citing Robert C. Post, The Social Foundations of Privacy: Community and the Self in the Common Tort Law, 77 CAL. L. REV. 957, 946-66 (1989)).
230 See e.g., Jones v. U.S. Child Support Recovery, 961 F.Supp. 1518, 1522 (D. Utah 1997) ("The fact that damages resulting from an invasion of privacy cannot be measured by a
the law has recognized that privacy tort plaintiffs can seek both general and special damages. Special damages have been deemed to include “harm to earning capacity . . . [and] expenses for medical treatment.” The category of special damages would seem to fit within section 2259’s losses permitting a victim to seek restitution for “medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income, attorneys’ fees, as well as other costs incurred; and any other losses suffered by the victim as a proximate cause of the offense.” However, what is missing in section 2259 is an acknowledgment of the more general harms suffered by victims of pornography distribution and possession.

While special damages must be specifically alleged in the plaintiff’s complaint and proved to the jury, general damages allow for relief under a slightly lesser standard. Nor must a plaintiff seek special damages in order to seek general relief for an invasion of privacy claim. Both Warren and Brandies in their The Right to Privacy article, as well as Prosser, support this

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231 Restatement (Second) of Torts § 904, cmt. b (1979).
233 Jones, 961 F. Supp. at 1522 (“courts appear to uniformly recognize that there is no specific standard for measuring damages of personal injury claims and that the jury is particularly well-suited for this type of case-by-case determination); Sabrina, 540 N.W.2d at 157 (“Plaintiffs have collected substantial damages without asserting or proving special damages or physical or other debilitating injury.”); Rumbauskas v. Cantor, 692 A.2d 1359, (N.J. Ct. App. 1993) (“Intrusion upon seclusion, like defamation per se, is actionable in the absence of proof of resulting special harm.”); Birnbaum, 436 F. Supp. at 987 (“Valuation of intangibles is difficult, but not impossible. In ordinary tort suits, judges and juries commonly draw upon the evidence of their shared experience to assess the dollar worth of such imponderables as future pain and suffering.”).
idea. In *The Right to Privacy*, the authors indicated that “[e]ven in the absence of special damages, substantial compensation could be allowed” for an invasion of privacy.\textsuperscript{234} Likewise, Prosser acknowledged that

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there is general agreement that the plaintiff need not plead or prove special damages . . . . the difficulty of measuring the damages is no more reason for denying relief here than in a defamation action. Substantial damages may be awarded for the presumed mental distress inflicted, and other probable harm, without proof.\textsuperscript{235}
\end{quote}

The Restatement also guides that “general damages are compensatory damages for a harm so frequently resulting from the tort that it is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved.”\textsuperscript{236} It further indicates that

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in many cases in which there can be recovery for general damages, there need be no proof of the extent of the harm, since the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge from the existence of the injury as described.\textsuperscript{237}
\end{quote}

At least one court has gone so far as to hold that once an invasion of privacy is proved by the plaintiff, “the fact of damage is proved as a matter of law.”\textsuperscript{238} Other courts have determined that the extent of liability should be determined by the finder of fact.

\begin{quote}
Valuation of intangible is difficult, but not impossible. In ordinary tort suits, judges and juries commonly draw upon the evidence and their shared experience
\end{quote}

\begin{footnotes}
\item[235] Prosser, *supra* note 119 at 409.
\item[236] Restatement (Second) of Torts § 904 (1979).
\item[237] Id. cmt. a.
\item[238] Snakeberg v. The Hartford, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989). See also Nolley v. County of Erie, 802 F.Supp. 898, 901-904 (W.D. N.Y. 1992) (allowing for presumed damages in case where prisoner’s right to privacy was violated when officials exposed prisoner has having HIV). In *Nolley*, the court looked to the existence of presumed damages in the area of defamation to warrant extension of the same to the privacy claim before it. *Id.* at 902-04.
\end{footnotes}
to assess the dollar worth of such imponderables such as future pain and suffering.\textsuperscript{239}

Therefore, a victim of pornography distribution or possession could not only seek restitution for her specific losses, but also a remedy for the more general harms she suffered.

\textbf{B. Defamation and Presumed Damages}

Viewing a victim’s harm as analogous to the tort of defamation also provides ground to support a broader approach to victim restitution under section 2259. Similar to courts’ discussions regarding general and special damages in privacy, analogous connections exist with defamation.\textsuperscript{240} In the limited instances of libel and slander per se,\textsuperscript{241} a plaintiff is excused from proving actual harm and can seek presumed damages.\textsuperscript{242} The justification for permitting presumed damages is based on the premise that “in many cases the effect of defamatory statements is so subtle and indirect that it is impossible to directly trace the effects thereof in loss


\textsuperscript{240} The Restatement (First) of Torts articulated this idea as follows: “One who is liable for a libel or for a slander actionable per se is liable for the harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation.” \textit{Restatement (First) of Torts} § 621 (emphasis added). In light of constitutional restrictions the Supreme Court has placed on defamation actions, \textit{see infra} notes 245-254 and accompanying text, the Restatement (Second) takes a more cautious approach.

One who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed. Caveat: The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.

\textit{Restatement (Second) Torts} § 621 (1977).

\textsuperscript{241} See \textit{supra} note 186.

\textsuperscript{242} Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). See also Sipe, \textit{supra} note 186 at 152 (proving an overview different types of damages which can be sought in a defamation action).
to the person defamed.”

The Supreme Court has also noted that the injuries associated with defamation are “extremely difficult to prove.”

Nonetheless, in *Gertz v. Robert Welch, Inc.*, Supreme Court has recognized that the “common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.”

Concerned that the “largely uncontrolled discretion of juries to award damages where there is no loss” and to “punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact,” the Court has placed a variety of constitutional limitations on a plaintiff’s ability to seek relief for defamation.

At bottom, the Court has been concerned with how to balance between society’s “pervasive and strong interest in preventing and redressing attacks upon reputation,” and the First Amendment interest in protecting expression. Starting with *New York Times Company v. Sullivan* and ending with *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court expanded the protections afforded to the press in defamation cases, while narrowed the types of remedies for individuals seeking to protect their reputations. Where alleged defamatory statements address officials, public persons or matters of public concern, a plaintiff is required to

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243 Restatement (First) of Torts § 621, cmt. a.
246 Id. at 349.
247 Id.
show actual malice on the part of the alleged defamer. Conversely, where the challenged speech is of matters of purely private concern, First Amendment protections are far less relevant. The Court has ruled that “in light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [to protect individuals from defamatory statements] adequately supports awards of presumed . . . damages – even absent a showing of ‘actual malice.’”

The Supreme Court’s First Amendment limitations on defamation actions do not implicate the type of defamation and dignitary interests which arise in cases involving victims of child pornography possession. First, it is commonly understood that child pornography, even where it might not qualify under the constitutional definition of obscenity, is not protected by the First Amendment. A defendant has no inherent right to possess such materials. Second, the potential defamatory message associated with child pornography possession cases does not involve a public official, person, nor is related to a matter of public concern. Therefore a presumed damages remedy is not limited by the Sullivan or Gertz holdings.

It must be acknowledged, however, that concept of presumed damages has not escaped criticism. Echoing the Gertz Court’s concern that presumed damages allows one to obtain relief

253 Id. at 760.
without specifically showing how they have been harmed, courts and scholars have suggested that presumed damages should be eliminated. The primary criticism of the presumed damages doctrine focuses on the wide and unfettered discretion it gives to juries. Allied to this concern is that a presumed damages theory departs too dramatically from the principle that tort remedies should serve to compensate the plaintiff for his or her losses and harms, and therefore could result in inappropriately large awards to plaintiffs. The concerns surrounding presumed damages however, are not insurmountable and should not defeat my suggestion that Congress permit victims of child pornography possession to seek a form of statutory presumed damages from the defendant.

V. SMOOTHING OUT THE ROUGH: A PRESUMED DAMAGES REMEDY FOR VICTIMS

The argument that a privacy harm could be redeemed by some form of statutory presumed or liquidated damages is already established within federal law. Congress has passed a number of civil statutes which seek to protect the public from privacy invasions. Many of these statutes permit plaintiffs to seek statutory or liquidated damages rather than having to specifically prove their losses and seek actual damages. Just as the presumed damages

258 See e.g., Sprague v. American Bar Ass’n, 276 F.Supp.2d 365, 374 (E.D. Pa. 2003); Anderson, supra note 257 at 749-50; Note, Measure of Damages in Constitutional Torts, 100 HARV. L. REV. 267, 276 (1986); Sipe, supra note 186 at 157.
259 Anderson, supra note 257 at 749-50; Lewis et al, supra note 186 at 857.
261 18 U.S.C. § 2724(b)(1) (permitting actual damages “but not less than liquidated damages in the amount of $2500”); 18 U.S.C. § 2710 (c)(2) (permitting actual damages “but not less than
doctrine is applied to defamation claims, and general damages to common law privacy torts, these statues implicitly recognize that there are privacy harms which can be difficult to prove, but nonetheless warrant a remedy.  

liquidated damages in the amount of $2,500”); 18 U.S.C. § 2520(c) (creating graduated scheme where victims of privacy invasion could seek actual damages, or statutory damages within a monetary range).  See also 15 U.S.C. § 1681n(a) (permitting plaintiffs suing under the Fair Credit Reporting Act to seek actual damages or damages within a set monetary range); 5 U.S.C. § 504(a) (permitting copyright infringement plaintiffs to seek actual damages or statutory damages).  But see 5 U.S.C. § 552a(g)(4) (defendant shall be liable for “actual damages . . . , but in no case shall a person entitled to recovery receive less than the sum of $1,000”); 18 U.S.C. § 2707(c) (defendant shall be liable for “actual damages . . . , but in no case shall a person be entitled to recover less than the sum of $1000”).  The Supreme Court has interpreted the Federal Privacy Act, 5 U.S.C. § 552a(g), as merely setting a statutory minimum for the actual damages which must be proved by a plaintiff.  See Doe v. Chao, 540 U.S. 614 (2004).  In contrast, lower courts who have interpreted the Stored Communications Act, 18 U.S.C. § 2707, have reached mixed results.  Some have interpreted the statute’s language following the Supreme Court’s reasoning in Chao.  See VanAlstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199 (4th Cir. 2009).  Others have distinguished the statute’s purpose and legislative history from the Federal Privacy Act to conclude that the statute creates a liquidated statutory damages clause.  See Pure Power Boot Camp, Inc. v. Warrior Fitness Bootcamp, LLC, 759 F.Supp.2d 417 (S.D. N.Y. 2010).  

262  See e.g., Pilcher v. Unite, 542 F.3d 380, 398-99 (3d Cir. 2008) (noting that common law of privacy did not require tort victims to prove actual damages and that Driver’s Privacy Protection Act’s statutory damage clause effectuated the same); Dunn v. Blue Ridge Telephone Co., 868 F.2d 1578, 1582 (11th Cir. 1989) vacated by 888 F.2d 731 (11th Cir. 1989) (where plaintiff does not seek actual damages for violations of Wiretap Act, plaintiff can recover liquidated damages); English v. Parker, 2011 WL 1842890 at *3 (M.D. Fla. May 16, 2011) (under Driver’s Privacy Protection Act, plaintiff need not prove that he suffered actual damages to be entitled to an award of liquidated damages); Lewton v. Divingnzzo, 2011 WL 962292 at *12 (D. Neb. Feb. 18, 2011) (liquidated damages clause in the Wiretap Act serve to compensate a plaintiff for the defendant’s misdeeds under the Act); Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759
For example, in *Kehoe v. Fidelity Federal Bank & Trust*,\(^{263}\) a Driver’s Privacy Protection Act case,\(^{264}\) the Eleventh Circuit stated “damages for a violation of an individual’s privacy are a quintessential example of damages that are uncertain and possibly unmeasurable.”\(^{265}\) Acknowledging that actual damages serve to compensate a plaintiff for his real loss and injury,\(^{266}\) the *Kehoe* court noted that liquidated damages represented an alternative form of relief.\(^{267}\) The court stated “liquidated damages serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable.”\(^{268}\) The *Kehoe* court concluded

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\(^{263}\) 421 F.3d 1209 (11th Cir. 2005) (interpreting terms of the Driver’s Privacy Protection Act).

\(^{264}\) 18 U.S.C. § 2724 (“The Court may award (1) actual damages, but not less than liquidated damages in the amount of $2,500”).

\(^{265}\) *Id.* at 1213.

\(^{266}\) *Id.*

\(^{267}\) *Id.*

\(^{268}\) *Id.* (citing Rex Trailer Co. v. United States, 350 U.S. 148, 153 (1956)).
that the liquidated damages provision in the Driver’s Privacy Protection Act permitted a plaintiff to obtain monetary relief from a defendant without proof of actual damages.\textsuperscript{269}

The federal privacy statutes which contain statutory liquidated damages provisions recognize the often difficult to prove harms which can arise in privacy settings, but nonetheless permit relief by setting a baseline of recovery for plaintiffs. At the same time, the statutes cabin the damages victims can seek without proof of actual harm and therefore protect defendants from unjustly large judgments.\textsuperscript{270} Therefore, these statutes temper concerns regarding unfettered jury discretion and windfalls to plaintiffs which might be raised in a standard presumed damages setting.\textsuperscript{271}

The invasion of privacy harms suffered by civil plaintiffs seeking relief under the various federal privacy statutes are serious. However, they hardly rise to the level of harms suffered by victims of child pornography distribution and possession. Hence, it would not be an unreasonable leap for Congress to craft a liquidated restitution award for victims like Amy and Vicky. Congressionally set statutory liquidated damages exist to specifically address the uncertainty and difficulty involved in proving actual damages. A liquidated damage provision is especially useful when real but intangible damages arise from violations. Because of the difficulties in assessing actual damages, a liquidated damages provision removes uncertainty by fixing a reasonable monetary sum. In other words, plaintiffs only need to prove that a breach or violation occurred, and proof of actual damages is unnecessary to recover liquidated damages.\textsuperscript{272}

Such a remedy would allow victims to recover from the often difficult to prove harms which accompany the invasion of their privacy and the falsehoods that are transmitted about them in the pornographic images. But, like a civil plaintiff who may believe her losses exceed the set statutory amount, the victim can seek further relief by proving her specific harms were proximately caused by the defendant.\textsuperscript{273}

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\textsuperscript{269} 421 F.3d at 1213.
\textsuperscript{270} See supra notes 44-50 and accompanying text.
\textsuperscript{271} See supra notes 257-259 and accompanying text.
\textsuperscript{273} 18 U.S.C. § 2259.
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Importing the civil tort construct of presumed or liquidated damages into a criminal law setting is a legitimate extension of the law. Scholars have long recognized that tort and criminal actions are closely aligned in that both address human behavior that departs from accepted and established community norms.274 Throughout criminal law, one can see an overlap between criminal and tort principles. The very debate which underlies the Vicky and Amy cases is whether the tort concept of proximate cause should be applied to every category listed in section 2259.275 Likewise, other portions of the federal restitution statutes include tort concepts. For example, section 3664(h) appears to give courts the opportunity to hold defendants joint and severally liable for the harms they have committed, or conversely, apportion the harm between different defendants.276

Moreover, the very nature of criminal restitution represents a blending of tort and criminal remedies. As noted earlier, for a good part of our nation’s history, victim restitution was relegated to tort actions. However, the federal criminal restitution statutes were passed, in part, to better integrate victims into the criminal justice system and ensure that they were

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compensated by those who commit crimes against them.\footnote{277} In this regard, criminal restitution represents a civil penalty that was integrated into the criminal process for the benefit of the victim.\footnote{278} Concurrently, scholars and courts have noted that criminal restitution also furthers the


\footnote{278} \textit{See e.g.}, United States v. Aguirre-Gonzalez, 597 F.3d 46, 52 (1st Cir. 2010) (noting “general shift in the restitution statutes towards a more compensatory regime”); United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (“Congress required judges to include this remedy in a criminal judgment to avoid the need for the victims of crime to file separate civil suits . . . .”); United States v. Innarelli, 524 F.3d 286, 293 (1st Cir. 2008) (purpose of restitution is to “make the victim whole again by restoring it to the value of losses it suffered as a result of the defendant’s crime”); United States v. Edwards, 162 F.3d 87, 91 (3d Cir. 1998) (MVRA was passed to make it easier for victims to seek otherwise civil relief against their offenders); United States v. Newman, 144 F.3d 531, 538 (7th Cir. 1998) (“Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoing’s actions.”); United States v. Dean, 949 F.Supp. 782, 785 (D. Or. 1996) (restitution serves, in part, the “important non-punitive goal of providing some relief to the victims”); United States v. Woods, 689 F.Supp.2d 1102, (N.D. Iowa 2010) (“restitution ‘is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.’” (citing United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005)).
At bottom, criminal restitution represents a hybrid remedy serving both civil compensatory and criminal punishment goals.\textsuperscript{280}

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\item \textsuperscript{279}See \textit{e.g.}, United States v. Satterfield, 743 F.2d 827, 837 (11th Cir. 1984) (restitution helps further the rehabilitative goals of sentencing); United States v. Holland, 380 F.Supp.2d 1264, 1278 (N.D. Ala. 2005) (restitution “is a criminal penalty meant to have a strong deterrent and rehabilitative effect.”); Chase, \textit{supra} note 277 at 478 (acknowledging how the MVRA serves penalogical goals); Brian Klienhaus, \textit{Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and the MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine and the Sixth Amendment}, 73 \textit{FORDHAM L. REV.} 2711, 2725 (2005) (noting penalogical goals of MVRA); Victim Restitution Act of 1995, S. REP. 104-179, \textit{reprinted in U.S.C.C.A.N.} 924 at *12 (restitution is “necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.”).
\item \textsuperscript{280}Kelly v. Robinson, 479 U.S. 36, 52 (1986) (restitution benefits the victim but is primarily punishment to the defendant); United States v. Serawop, 505 F.3d 1112, 1117 (10th Cir. 2007) (noting dual goals of criminal restitution); United States v. Leahy, 438 F.3d 328, 333 (3d Cir. 2006) (“restitution combines features of both criminal and civil penalties, as it is, on the one hand, a restoration to the victim by defendant of ill-gotten gains, while it is, at the same time, an aspect of a criminal sentence”); United States v. Johnson, 378 F.3d 230, 245 (2d Cir. 2004) (purpose of restitution includes compensation to victims and punishment of offenders); United States v. Reano, 298 F.3d 1208, 1211-12 (10th Cir. 2002) (restitution serves to provide victims what they are due, but also “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim”); United States v. Fountain, 768 F.2d 790, 800 (7th Cir. 1985) (criminal restitution serves as an example of how criminal and tort law intersect); United States v. Hardy, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010) (restitution serves to make victim whole, but also to further punitive and rehabilitative purposes); Chase, \textit{supra} note 277 at 478; Deborah M. Mostaghel, \textit{Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks}, 40 \textit{BRANDEIS L.J.} 83, 88-90 (2001); Linda Trang, \textit{Note, The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim}, 35 \textit{LOY. L.A.L. REV.} 1319, 1338-39 (2002).
\end{itemize}
When the blended creature of criminal restitution is asked to provide a remedy for the victims of child pornography possession, it too faces a blended animal. The harms associated with child pornography possession can be likened to the harms associated with privacy and defamation based torts, and therefore warrant an alternative approach to calculating harm. Importing some form of statutory or liquidated damages standard into the criminal environment is accordance with the already hybrid nature of criminal restitution.

Finally, adding a statutory or liquidated damages provision to the federal restitution statutes would not undermine the core goals of criminal punishment. It is commonly understood that a primary aspect of criminal punishment seeks to ensure that a defendant receives the punishment he deserves, but no more and no less. However, in concert with this retributivist ideal, scholars and courts acknowledge that our criminal justice system blends utilitarian as well as restorative principles in the process of punishing defendants. Community safety, defendant rehabilitation, and victim restoration all make up elements of the calculus of criminal punishment. Therefore, establishing some form of baseline statutory remedy for victims of child pornography possession would not be entirely out of place in the already blended field of criminal punishment.

VI. CONCLUSION

The Amy and Vicky cases have not only highlighted the inherent and on-going horrors of child pornography, but also the inherent difficulties of attempting to calculate victim losses under section 2259’s proximate cause standard. Courts have not only disagreed as to how to interpret the statute’s proximate cause language, but also how to apply it in a consistent manner. The

Civil cases addressing statutory or liquidated damages provisions have also noted how the penalties serve both compensatory and punitive purposes. For example, under the Copyright Act, plaintiffs may seek relief either in the form of statutory or actual damages. 17 U.S.C. § 504(c)(2). When discussing the statutory damages provision, courts have noted that it serves two purposes. The first is to compensate victims for harms they have suffered as a result of copyright infringement. The second is to punish and deter the defendants and others from further unlawful conduct. See e.g., Peer Int’l Corp. v. Pausa Records, Inc., 909 F.3d 1332, 1336-37 (9th Cir. 1990); Jackson v. Sturkie, 255 F.Supp.2d 1096, 1101 (N.D. Cal. 2003); Broadcast Music, Inc. v. R. Bar of Manhattan, Inc., 919 F.Supp. 646, 659-660 (S.D. N.Y. 1996).
result has been rough and uneven justice for both victims and defendants. However, the problem can be solved by recognizing that the ongoing harms suffered by victims of child pornography distribution and possession are grounded in the torts of invasion of privacy and defamation, harms from which courts and legislatures have long recognized can be difficult to prove. Therefore, just as the concepts of general and presumed damages have been employed to afford privacy and defamation plaintiffs relief, the same should be imported into the criminal restitution framework to provide relief to victims of child pornography and possession. Congress should amend the restitution statute to provide a set statutory award to victims. Doing so may go a great distance to ease victims’ evidentiary nightmares and bring about slightly smoother justice.