Continuous Contamination: How Traditional Criminal Restitution Principles and Section 2259 Undermine Cleaning Up the Toxic Waste of Child Pornography

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HOW TRADITIONAL CRIMINAL RESTITUTION PRINCIPLES
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TOXIC WASTE OF CHILD PORNOGRAPHY POSSESSION

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ABSTRACT

Section 2259 of Title 18 of the United States Code allows courts to award victims of child pornography possession monetary relief from those convicted of possessing images of the victim’s sexual abuse. The statute is grounded in traditional criminal restitution principles that guide that a defendant pay for a victim’s losses which are the result of the specific acts he committed. However, courts have increasingly struggled with applying this construct to the harms and losses suffered by child pornography possession victims. Courts’ restitution awards have been inconsistent, varied, and often non-existent, leading may courts to call upon Congress to revisit the statute and craft a more appropriate remedy for these victims. This article engages in an in depth diagnosis of why courts have become so frustrated with section 2259. It asserts that when Congress passed the statute, it did not fully consider the nature of the harm suffered by victims of child pornography possession. The harms suffered by these victims are ongoing and caused by an ever growing body of independently acting defendants, leaving the victims in a constant state of disaster response, rather than mere disaster recovery. The victims’ continued and compounding harms, coupled with the infinitely growing number of potential defendants who cause those harms, are mismatched for the more static nature of the criminal restitution framework which is better suited to address a completed harm by a finite and identifiable number of defendants.

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defendants. Through a thorough examination of the law undergirding criminal restitution, as well as examining a number of the key child pornography possession restitution cases in depth, this article brings into full light how these harms are not best addressed by section 2259. By clearly articulating the problems courts have with the statute, this article highlights the issues Congress must take into account as it seeks to craft a more appropriate remedy for victims. In particular, the article suggests that in somewhat similar fashion to how Congress has addressed multiple defendant liability for cleaning up environmentally contaminated properties, Congress treat child pornography possession akin to a strict liability crime for which a set legislative remedy is provided to victims.

TABLE OF CONTENTS

Introduction

I. The Amy and Vicky Cases

II. An Attempted Remedy for Child Pornography Possession Victims: The Restitution Framework of Section 2259
   A. Restitution Principles
   B. Sections 2259 and 3664(h)
   C. The Harm
      1. Ongoing Harms?
      2. Divisible Harms?

III. Ongoing (In)divisible (?) Harms
   A. Indivisible Harms and Joint and Several Liability: In re Amy Unknown
   B. Divisible Harms and Apportioning Liability
      1. United States v. Aumais and its Emanations
      2. United States v Kearney: Aggregate Proximate Cause and its Application

IV. Conclusion: Remediing the Continuous Contamination of Child Pornography Possession

INTRODUCTION

Section 2259 of the federal criminal code mandates that victims of child sexual exploitation and other abuses receive restitution from defendants. However, since 2009, the federal courts have struggled with interpreting and applying the statute for victims of child pornography possession. Courts have increasingly found themselves caught between wanting to

follow the statute’s mandatory command while remaining true to traditional criminal restitution principles. The growing consensus among the judiciary is that by its very terms, section 2259 is unable to deliver upon its promise of mandatory restitution to victims and that Congress must revisit the legislation.

Many commentators, myself included, raised similar arguments.\(^2\) In an earlier article, I suggested that Congress revise the restitution statute to provide victims with a form of set

\(^2\) See, e.g., Ashleigh B. Boe, Note Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims, 86 N.D. L. REV. 205 (2010) (proposing changes to the current wording of section 2259); Katherine M. Gilbin, Comment Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to those Victimized by Possessors of Child Pornography, 60 CATH. U. L. REV. 1109 (2011) (suggesting inclusion of aggravating factor considerations and monetary limits for restitution awards under section 2259); Steven Joffee, Avenging “Amy”: Compensating Victims of Child Pornography Through 18 U.S.C. § 2259, 10 WHITTIER J. CHILD & FAM. ADVOC. 201 (2011) (proposing section 2259 should be interpreted to allow for more restitution awards for victims); Catharine M. Goodwin, Jay E. Grenig, Nathan A. Fishbach, Federal Criminal Restitution § 7:28 (citing proposed changes suggested by several different courts);

statutory damages grounded in recognition of the compounding privacy violations victims suffer each time another individual downloads and views their images of their sexual abuse. What was implicit in that earlier article, and which is the focus of this piece, is that the harms and subsequent losses suffered by victims of child pornography possession do not fit easily into a traditional criminal restitution framework. Therefore, it is difficult, if not often impossible, for victims to receive relief under section 2259.

In this article I assert that the underlying problem with applying section 2259 to child pornography possession cases is that when Congress crafted this restitution statute, it did not fully consider the nature of the harm these victims suffer. Section 2259 is designed to best address victim harms that are finite and caused by an equally finite, identifiable set of defendants to whom specific and particular liability can be assigned. In this regard, the statute is grounded in traditional criminal restitution principles that guide that a defendant be held liable only for the harms which are the result of the specific acts he committed. Such a construct works well in a case where there is a single defendant who is entirely responsible for a victim’s harms, or in cases); Courtney Lollar, *Child Pornography and the Restitution Revolution*, CITE?? (2012) (advocating that Congress focus more on preventing underlying sexual abuse). *See also* Dennis F. DeBari, Note *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution is Sought*, 33 CARDOZO L. REV. 297 (2011) (reviewing and criticizing many courts’ award of restitution); Dina McLeod, Note *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327 (2011) (same).

cases of conspiracy where a group of defendants, in joint fashion, have imposed a calculable amount of harm upon a victim. In such settings, determining that a victim has been harmed as a result of a defendant’s, or defendants’ acts, and therefore that the offenders should pay the victim restitution, presents a relatively straight forward analysis. The same has not proven true for victims of child pornography possession.

Victims of child pornography possession suffer from an ongoing process of exploitation and invasion of privacy every time a new defendant possesses images of their sexual abuse. These victims are not unlike a piece of property upon which polluters are continuously dumping toxic waste which commingles with the waste left by past violators. Victims are left in a state of constant and ongoing disaster response, rather than mere disaster recovery. Their requests for restitution are for funds to support the ongoing clean-up costs they must bear so long as the images of their sexual abuse are in circulation. These continued and compounding harms, coupled with the infinitely growing number of potential defendants who are causing those harms, are mismatched for the more static nature of the criminal restitution framework. Courts working within the confines of section 2259 have had an exceedingly difficult time determining how a single defendant found guilty of possessing an image of a victim’s sexual abuse should be allocated restitutionary responsibility for the victim’s ongoing losses where countless other defendants also contribute to the victim’s harms.

Two separate legal controversies commonly referred to as the “Amy and Vicky” cases have highlighted the problems inherent with applying section 2259 to child pornography possession cases.4 In multiple separate prosecutions against a growing number of individual

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4 See infra Part I. 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
defendants, courts have wrestled with whether, and to what extent, those defendants should pay restitution to the victims. These courts, often based on nearly identical facts deriving out of Amy and Vicky’s experiences, and sometimes even articulating the same legal standards, have nonetheless reached divergent results, indicating the precariousness of section 2259 as a remedy for child pornography possession victims.

A close review of a number of these cases highlight that the courts are acutely aware of the ongoing and perpetual harms child pornography victims suffer, but nonetheless feel constrained to wedge those losses into the more static construct of the restitution framework laid out in section 2259. Despite acknowledging victims’ ongoing harms, courts have still tended to characterize their harms as finite. Likewise, when grappling with the reality that victims of child pornography possession are continually harmed by a disparate but every growing number of defendants, courts have vacillated between characterizing the victim harms as either divisible or indivisible. In cases were courts appear to define the victim’s harms and losses as divisible, many courts have concluded there lacks sufficient proof to differentiate a specific defendant’s particular causal connection to the victim’s harm from that of the original abuser and creator of the images, or from any other independent possessors of those images. Therefore, courts have denied many victims’ requests for restitution. Other courts have crafted ways to award

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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. The courts have also begun to address two additional series of cases which involve different victims. See, e.g., United States v. Breisacher, 2012 WL 2789065 (D. N.J. July 9, 2012) (addressing restitution claims for victims identified as Cindy and L.S.).

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restitution to victims, but by employing reasoning that significantly challenges the core restitution principle that a defendant should only pay restitution for the harm he specifically caused. Conversely, there have been a few courts which appear to view the total losses suffered by victims as a finite but indivisible set of harms. In these cases, the courts have asserted that a single defendant can be held jointly and severally liable for a victim’s total losses.

A survey of the case law makes clear that many courts believe section 2259 falls short in its goal to provide restitution to victims of child pornography possession. In the midst of these varied rulings, the courts have issued desperate pleas to Congress to reevaluate how to provide a financial remedy for these victims. The success of any new remedy, however, must be grounded in a clear understanding of the victims’ harms. It is my hope that this article will contribute to establishing that clarity.

Primarily, this article is diagnostic. Through a thorough examination of the law undergirding the Amy and Vicky line of cases, as well as examining a number of those cases in depth, I bring into full light how the harm suffered by child pornography possession victims is not best addressed by section 2259. Instead of defining the victims’ harms as a type of finite loss, the harms would be better described as ongoing and therefore require a compensatory structure outside that of the traditional restitution framework. In particular, I suggest that in somewhat similar fashion to how Congress has addressed defendant culpability for liability for cleaning up environmentally contaminated properties, Congress treat child pornography possession as something akin to a strict liability crime for which a set legislative remedy should be provided to victims.

Part I provides a brief overview of the facts underlying the Amy and Vicky line of cases. Part II moves into a discussion regarding the underlying principles that support the restitution
remedy, and how those principles are embodied in section 2259 and its associated statutes. This portion of the paper also provides an introduction to the problems courts are having in addressing the ongoing nature of child pornography possession victims’ harms which are caused by an ever growing group of independently acting defendants. To the extent that part II of this paper provides a sense of the forest regarding criminal restitution and the child pornography possession cases, part III climbs up into the trees. Part III will provide a detailed case study of a number of the key child pornography possession cases which highlight the layers of difficulties courts are having with attempting to apply section 2259 to restitution claims of child pornography possession victims. Part IV will then conclude by briefly questioning how Congress should respond to the problem of the poor fit between section 2259 and child pornography victims.

I. THE AMY AND VICKY CASES

The horrendous facts of the Amy and Vicky cases have been well documented elsewhere.\(^5\) In short, when they were children, Amy and Vicky, who are now in their mid-

twenties, were sexually abused by family members. The abusers documented their mistreatment in photographs and video recordings which are now widely circulated on the Internet. While both family members were prosecuted and sentenced to prison terms, the images of Amy and Vicky’s sexual abuse are still accessible on the Internet and are regularly downloaded and viewed by countless individuals.

Both women struggle with the ongoing knowledge that images of their abuse are available for viewing on the Internet. Amy has commented that

It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at picture of me as a little girl being abused by my uncle and is getting some sick enjoyment from it. It’s like I am being abused over and over and over again. . . . The truth is that I am being exploited and used every day and every night someone in the world by someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people? \(^7\)
Similarly, Vicky has commented that on top of recovering from the actual physical and sexual abuse she suffered, her “world came crashing down”\(^8\) when she learned that the pictures of her abuse were being circulated on the Internet. She stated:

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.\(^9\)

A psychological assessment of Vicky also noted that she has found the wake of her father’s abuse to pale in comparison to the proliferating implications of his heinous crimes against her being recorded for anyone so motivated and inclined to view for their own unknowable purposes. She has been appalled and confused by the discovery of the hundreds, if not thousands, of seemingly disturbed individuals.\(^10\)

Both young women have suffered from continuing injuries such as chronic post traumatic stress disorder, insomnia, eating disorders, chronic headaches, suicide ideation, substance abuse and depression.\(^11\) In an effort to recover from the ongoing effects of their exploitation, Amy and Vicky have sought restitution pursuant to section 2259.\(^12\)

\(^8\) United States v. Rowe, 2012 WL 3522257, 3 (W.D. N.C. September 7, 2010).

\(^9\) Id.

\(^10\) United States v. Kearney, 672 F.3d 81, 88 (1st Cir. 2012).

\(^11\) See e.g., United States v. Faxon, 689 F.Supp.2d 1344, 1349, 1352 (S.D. Fla. 2010).

\(^12\) See, e.g., In re Amy Unknown, 2012 WL 4477444, *2 (5th Cir. October 1, 2012); United States v. Burgess, 2012 WL 2821069, *8 (4th Cir. July 11, 2012); Kearney, 672 F.3d at 85; United States v. Aumais, 656 F.3d 147, 149-150 (2d Cir. 2011); United States v. Kennedy, 643 F.3d 1251, 1255 (9th Cir. 2011); United States v. Tallent, 2012 WL 2580275, *1 (E.D.
II. AN ATTEMPTED REMEDY FOR CHILD PORNOGRAHY POSSESSION VICTIMS:

THE RESTITUTION FRAMEWORK OF SECTION 2259

A. Restitution Principles

Victim restitution has been a part of the legal system from its genesis. Before the existence of formalized governments, societies had systems in place which required criminal actors to compensate victims or their families.13 This private compensatory structure shifted as


societies began to establish governments which assumed the responsibility of holding criminals liable for their acts. As a result, the state based criminal justice system focused on punishing the defendant for his breach of the public peace while the civil private system served to respond directly to any specific harms suffered by individual victims. Therefore, a victim’s right to compensation from her offender was integrated into civil legal system, while the defendant’s punishment was the state’s responsibility. The delineation, however, between the criminal was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense.).

\footnote{14} Goldscheid, supra note 13 at 177-78 (“crimes were viewed as committed against the state, not the victim . . .”); Lavenue, supra note 13 at 450-51 (“Crime became an offense against the common good . . .”); Note, Victim Restitution in the Criminal Process: A Procedural Analysis, supra note 13 at 935-36 (“the goal of civil law is to compensate private wrongs, whereas the aims of the criminal law are to redress public wrongs and to protect society by punishing those whose behavior is morally culpable.”); Frank, supra note 13 at 110 (“The use of restitution soon became nonexistent, forcing the victim who desired compensation to file for damages in a separate civil action.”).

\footnote{15} See, e.g., Note, Brian Kleinhaus, Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment, 73 FORDHAM L. REV. 2718 (2005) (“the idea of payments between individuals became associated with tort or civil law”); Lavenue, supra note 13 at 448-49 (noting predominant civil role of restitution within the law); Linda Trang, Note, The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim, 35 LOY. L.A. REV. 1319, 1333 (2002) (noting how restitution served as an alternative civil remedy to seek damages);
justice system’s goal to punish defendants, and the civil law system’s goal to compensate victims, did not completely eliminate victim interests from criminal proceedings. Congress and the states have passed any number of statutes allowing victims to seek restitution from their offenders as part of the criminal trial. Among these federal statutes is section 2259.16

Because of restitution’s ever shifting home within the law, courts do not fully agree as to whether restitution is best characterized as a civil remedy or a criminal penalty.17 Most however,

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17 See, e.g., Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986) (categorizing restitution as a criminal penalty); United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006) (same); United States v. Leahy, 438 F.3d 328, 333 (3d Cir. 2006) (same); United States v. Ross, 279 F.3d 600, 609 (8th Cir. 2002) (same); United States v. Bearden, 274 F.3d 1031, 1041 (6th Cir. 2001) (same); United States v. Tencer, 107 F.3d 1120, 1135 (5th Cir. 1997) (same); United States v. Hairston, 888 F.2d 1349, 1355 (11th Cir. 1989) (same); United States v. Fountain, 768 F.2d 790,
acknowledge the remedy serves multiple goals. Criminal restitution furthers the civil goal of compensating a victim for the losses she has suffered as a result of the defendant’s actions. Likewise, it furthers the criminal goal of punishing the defendant for his actions. Therefore, regardless of whether victim restitution is appropriately categorized as a civil remedy or a criminal penalty, both categorizations require that one ask how a defendant’s actions have specifically harmed the victim and caused that victim’s losses.

800 (7th Cir. 1985) (same). But see Kelly, 479 U.S. at 54 (Marshall, J., dissenting) (noting the civil and compensatory aspects of restitution); United States v. Serawop, 505 F.3d 1112, 1122-23 (10th Cir. 2007) (holding that restitution is not a punitive remedy); United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (noting that restitution should be characterized as a civil remedy).

18 See Kelly, 479 U.S. at 54 (Marshall, J., dissenting) (noting the civil and compensatory aspects of victim restitution); United States v. Aguirre-Gonzalez, 597 F.3d 46, 51 (1st Cir. 2010) (noting criminal restitution includes a focus on compensation for the victim); United States v. Chalupnik, 514 F.3d 748, 753 (8th Cir. 2008) (characterizing restitution as a civil remedy blended into the criminal justice system); United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005) (restitution is a civil remedy incorporated into criminal proceedings); United States v. Johnson, 378 F.3d 230, 245 (2d Cir. 2004) (restitution serves to both punish defendants and compensate victims); United States v. Perry, 360 F.3d 519, 524 (6th Cir. 2004) (noting criminal restitution statutes are increasingly focused on providing compensation to victims). See also Trang, supra note 15 at 1338-1339 (2002), Note, Victim Restitution in the Criminal Process: A Procedural Analysis, supra note 13 at 933.
If a court finds restitution punitive, then ordering restitution without a sufficient causal connection between the offender’s act and the victim’s harm is equivalent to punishing a defendant for harm he did not cause. Conversely, if restitution is viewed as compensatory in nature, then restitution ordered in the absence of proximate causation erroneously compensates the victim for harm not caused by the defendant.\textsuperscript{19}

Hence, in any restitution analysis it is important to draw an appropriate causal link between the defendant’s actions and the victim’s harms.

Establishing a specific causal link between a defendant’s actions and a victim’s harms for restitutionary purposes was emphasized by the Supreme Court in \textit{Hughey v. United States}.\textsuperscript{20} In \textit{Hughey}, the Court ruled that victim restitution awards had to be limited to the loss caused by the defendant’s specific conduct which was the basis of the offense of conviction.\textsuperscript{21} The Court reasoned that the ordinary meaning of the word “restitution” indicated that a victim was being restored to the position he or she occupied prior to the defendant’s acts. Therefore, a defendant could only be held accountable for the harms and losses caused by his underlying offense of conviction.\textsuperscript{22}

Most federal victim restitution statutes have embodied \textit{Hughey}’s edict by including specific causation language which defines victims as those who are “directly and proximately

\textsuperscript{19} DeBari, \textit{supra} note 2 at 308.

\textsuperscript{20} 495 U.S. 411 (1990).

\textsuperscript{21} \textit{Id.} at 412.

\textsuperscript{22} \textit{Id.} at 416.
harmed as a result of the commission” of the defendant’s offense. These statutes have sought to ensure that a defendant’s restitution liability will only extend to those harms which the victim suffered as a direct result of the defendant’s charged acts. The key exception is section 2259 which defines victims slightly differently. Under section 2259, victims are those who harmed “as a result” of the defendant’s actions. The distinction drawn in a majority of the restitution statutes where a victim is defined as one “directly and proximately harmed” by the defendant’s actions, and section 2259’s definition of a victim as “an individual harmed as a result” of the defendant’s actions, has contributed to much of the federal courts’ consternation as to how to interpret and define section 2259 in the context of child pornography possession cases. Section 2259’s lack of an explicit proximate cause standard to describe victims has led a few courts to suggest that a defendant could be liable for a victim’s total losses, even if he only partially contributed to those loses. These courts imply that under section 2259, a defendant could pay restitution for more than his offense of conviction. Conversely, a majority of courts have interpreted section 2259 to require a proximate cause showing between a victim’s asserted harms


and losses and a specific defendant’s acts,\textsuperscript{26} thereby hewing far more closely to the restitution principle that a defendant should only be liable for the harms caused by his underlying count of conviction.

A closer examination of section 2259 and its associated statutes further highlights how this restitution scheme crafted by Congress may not sufficiently serve child pornography possession victims.

\textbf{B. Sections 2259 and 3664(h)}

Congress passed section 2259 as part of the Violence Against Women Act\textsuperscript{27} which expressly made restitution mandatory for offenses including the sexual abuse and exploitation of children.\textsuperscript{28} The Victim Restitution Act of 1995\textsuperscript{29} also included statutory provisions, now found in section 3664 of the criminal code, that provide a consolidated procedure for the courts to follow the process of issuing restitution orders.\textsuperscript{30}

\textsuperscript{26} See, e.g., United States v. Burgess, 684 F.3d 455 (4th Cir. 2012); United States v. Aumais, 656 F.3d 147 (2d Cir. 2012); United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011); United States v. Laney, 189 F.3d 954 (9th Cir. 1999).


\textsuperscript{29} Pub. L. 104-132.

Section 2259 directs that a “court shall order restitution for any offense” involving the sexual exploitation and other abuse of children including the distribution and possession of child pornography. Section 2259 also guides that “the issuance of a restitution order under this section is mandatory,” and states that a defendant is “to pay the victim . . . the full amount of the victim’s losses as determined by the court.” As noted earlier, victims are defined as “the individual harmed as a result of the commission of a crime under this chapter.” A victim’s losses include any costs incurred by the victim 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,
- attorney’s fees, as well as other costs incurred, and

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34 Id. at § 2259(b)(1).

35 Id. at § 2259(c). See also supra notes 23 - 26 and accompanying text.
(F) any other losses suffered by the victim as a proximate cause of the offense.\textsuperscript{36}

Victims such as Amy and Vicky have sought restitution for losses that have included psychological care, educational and vocational counseling, lost income, and attorney’s fees.\textsuperscript{37}

Section 3664 details how courts should go about issuing restitution orders.\textsuperscript{38} Among its terms, section 3664 imposes upon the government the burden of demonstrating the amount of loss sustained by the victim as a result of the defendant’s convicted offense.\textsuperscript{39} Section 3664 also guides that

if 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 of restitution or may apportion liability among defendants to reflect the level of

\textsuperscript{36} 18 U.S.C. § 2259(b)(3)(A)-(F) (emphasis added). Over the past four years the district and circuit courts have been engaged in a dialogue as to how to best interpret and apply the proximate cause language which appears in the last clause of section 2259(b)(3). A majority of courts have determined that the proximate cause language applies to all the losses listed in subsections (A) – (F). See, e.g., United States v. Burgess, 684 F.3d 455 (4th Cir. 2012); United States v. Aumais, 656 F.3d 147 (2d Cir. 2012); United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011); United States v. Laney, 189 F.3d 954 (9th Cir. 1999). One circuit, however, has ruled otherwise. See In re: Amy Unknown, 2012 WL 4477444 (5th Cir. October 1, 2012).


\textsuperscript{38} 18 U.S.C. § 2259(b)(2) (“An order of restitution under this section shall be issued and enforced in accordance with section 3664 . . .”).

\textsuperscript{39} Id. at § 3664(e).
contribution to the victim’s loss and economic circumstances of each defendant.\textsuperscript{40} However, in arriving at a restitution amount, courts are not required to craft restitution awards with mathematical precision. Rather, courts may reach reasonable estimates as to how much the defendant should pay the victim for her losses.\textsuperscript{41}

Reviewing the statutory language of section 2259 and its allied provisions in isolation is a relatively straightforward exercise. Courts are mandated to order a defendant found in possession of child sex abuse images to pay restitution to the individual depicted in those images for the full amount of the victim’s losses.\textsuperscript{42} A victim’s losses can encompass a number of things,

\textsuperscript{40} Id. at § 3664(h). As noted infra notes 137, 201-204 and accompanying text, the courts do not agree as to whether section 3664(h) should be applied to the Amy and Vicky line of cases, and if so, in what manner.


including medical services related to psychological services, lost income, and attorneys’ fees or any other losses that were proximately caused by the defendant’s offense.\textsuperscript{43} The government has the burden to make the evidentiary argument on behalf of victims, and there is the suggestion that if more than one defendant contributed to a victim’s losses, a court could order the defendant to bear the entire amount of victim loss, or apportion liability among the several defendants. However, as courts have attempted to apply the statute’s terms to child pornography possession cases, any clarity that may have existed upon a first read of the statute becomes quickly muddied.

At bottom, a clash of purposes seems to exist in section 2259 when applied to victims of child pornography possession. When writing section 2259, it appears that Congress did not fully consider how to provide restitution to individuals who are suffering ongoing harms perpetrated by a perpetually growing number of independently acting defendants. Section 2259’s terms make clear that Congress intended that perpetrators of child sexual exploitation, including those who possess child pornography, pay restitution to victims. However, by including a proximate cause standard within the statute, and thereby requiring some sort of divisible analysis of how the defendant’s acts are specifically linked to the victim’s harms and losses, Congress also appears to have written a statute which severely limits awarding restitution to victims. As a result, most courts have been unable to determine how to proximately link a defendant’s possession of sex abuse images with a victim’s losses, and therefore have felt bound to decline to award any relief to victims, or to severely limit that relief. The growing consensus among the courts is that the statute is incapable of addressing the victims’ ongoing harms caused by independent defendants.

\textbf{C. The Harm}

\textsuperscript{43} 18 U.S.C. § 2259 (b)(3)(A)-(F).
1. Ongoing harms?

The Supreme Court has suggested that the harms suffered by victims of child pornography possession are on-going in nature.\(^{44}\) Addressing the broader question of whether the government can criminalize the possession of child pornography, the Supreme Court discussed the underlying harms suffered by victims of child pornography possession. The Court reasoned that even in the context of a possession offense where there is not direct contact between the defendant and victim, children depicted in images of pornography are nonetheless victims.\(^{45}\) First, the distribution of the child abuse images exacerbates the victims’ original abuse.\(^{46}\) For victims like Amy and Vicky, the circulation of their sex abuse images in the child pornography market represents an ongoing harm because the images can haunt them throughout their lives.\(^{47}\) The “child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution for child pornography.”\(^{48}\) Second, the


\(^{45}\) See generally GOODWIN, ET AL, FEDERAL CRIMINAL RESTITUTION, supra note 2 at § 7.27.

\(^{46}\) Ferber, 458 U.S. at 795.

\(^{47}\) Id. at 759 n. 10.

\(^{48}\) Id. (quoting Shouvin, Preventing the Sexual Exploitation of Children: A Model Act, 17 WAKE FOREST L. REV. 535, 535 (1981)). See also Ashcroft, 535 U.S. at 249.
existence and distribution of the sex abuse images violates the victim’s privacy.\textsuperscript{49} Finally, the consumer or possessor of child pornography “provides an economic motive for [the pornography’s continued] creation and distribution,”\textsuperscript{50} therefore perpetuating the ongoing cycle of exploitation.\textsuperscript{51} Hence, the harm suffered by victims of child pornography possession should be considered as an ongoing harm, representing not only the victims’ original abuse, but the exacerbation of that abuse by the compounding effect of untold numbers of strangers continuing to possess and view images of the victims’ sexual abuse.

Despite the Supreme Court’s suggestion that the harms of child pornography victims are ongoing in nature, courts have struggled fitting such harms within section 2259’s framework. Courts addressing restitution claims of victims like Amy and Vicky acknowledge, with little hesitation, that the harms and losses suffered by these victims are ongoing. For example in \textit{United States v. Flast},\textsuperscript{52} the court explicitly described victim Vicky’s harms as continued and ongoing.

\begin{quote}
“Vicky’s” torment at the hands of [the defendant] and others like him is somewhat like enduring torture by a thousand tiny cuts. It matters not to the victim that she cannot see who is inflicting each little wound. It also does not matter to the victim that each cut is exquisitely small. The victim knows she is being cut apart bit by bit. Reasonably, she fears that she will succumb unless the minute slicing stops. Having inflicted one of those tiny cuts and directly caused
\end{quote}

\textsuperscript{49} \textit{Ferber}, 458 U.S. at 759 n. 10; \textit{Ashcroft}, 535 U.S. at 249. \textit{See also} Giannini, \textit{supra} note 3.

\textsuperscript{50} GOODWIN, \textit{ET AL}, \textit{FEDERAL CRIMINAL RESTITUTION}, \textit{supra} note 2 at § 7.27.

\textit{See also} \textit{Ferber}, 458 U.S. at 759-60.

\textsuperscript{51} \textit{Ferber}, 458 U.S. at 759-60; \textit{Osborn}, 495 U.S. at 109; \textit{Ashcroft}, 535 U.S. at 249.

the resulting fear, [the defendant] must now pay for the terror he condemned “Vicky” to suffer.\textsuperscript{53}

The \textit{Fast} court could not have done a better job at describing the ongoing harms of child pornography possession victims. With each new and successive download of the images of their sexual abuse, these victims are subjected to ongoing fear and violations. All the while, victims are left responsible for cleaning up the toxic waste dumped upon them by the exploitive possessors of their sex abuse images.

However, as courts have attempted to evaluate victims’ ongoing harms and losses within section 2259’s restitutionary framework, it has become clear that the statute is not well suited to provide relief for these types of ongoing harms. For example, in \textit{United States v. Berk},\textsuperscript{54} the court did not question for a moment that victims of child pornography possession suffer on-going harm.\textsuperscript{55} However, when questioning what type of relief could be provided to the victims, the


\textsuperscript{54} 666 F.Supp.2d 182 (D. Me. 2009).

court noted that “[t]he difficulty lies in determining what portion of the [v]ictims’ loss, if any, was proximately caused by the specific acts of this particular [d]efendant.” Therefore, despite the courts’ general acknowledgment of the ongoing nature of the harms and losses that victims of child pornography possession suffer, courts have noted that they must, as predicated by section 2259, treat victims’ harms and losses in a more finite and proportional manner. Along with courts’ inability to fit victims’ ongoing harms into section 2259, they have not necessarily fared any better in determining how to hold single defendants liable for a victim’s total losses.

2. Divisible harms?

While litigants and the courts describe the victim’s harms as ongoing, their restitution arguments are framed around fixed and set amounts of losses. For example, in the Amy line of cases, Amy has consistently requested $3.3 to $3.6 million in restitution. These asserted losses represent a calculation of the costs Amy will have to bear for the rest of her life as a result of her suffering from the ongoing knowledge that countless individuals are trading and possessing images of her sexual abuse. Hence, even though Amy’s harms are ongoing, her legal team has sought to calculate the costs of those harms for her entire life and seek restitution for the same. A problem with this approach, however, is that with an ever increasing body of defendants causing Amy harm, the liability each individual defendant may bear for the collective harm


imposed on Amy could eventually reach zero. In essence, as courts seek to allocate losses among defendants, the denominator remains the same (i.e., the total asserted losses), while the numerator (i.e., the number of liable defendants) is ever growing. The more defendants who are liable for Amy’s losses, when those losses are set at a fixed amount, the less and less future defendants will have to pay in restitution.

Conversely, in the Vicky line of cases, Vicky’s asserted total losses have increased as her many cases have progressed through the courts. This increase likely represents the reality that with each new defendant’s download or distribution of Vicky’s sexual abuse images, Vicky’s harms and associated losses have increased due to the ongoing trauma she suffers. Nor are

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57 This is why a handful of courts have reasoned that defendants be held jointly and severally liable for the collective harms they have caused to child pornography possession victims. See infra Part III.A.

increases unwarranted by the law. Section 3664(d) allows for amending restitution orders where a victim discovers additional losses.\textsuperscript{59} However, in similar fashion to the Amy line of cases, this approach also presents problems with calculating a defendant’s restitution. With Vicky’s cases, not only is the denominator of victims’ losses ever growing, but the numerator of liable defendants is also perpetually growing. In such a fluid context, it would be difficult to determine how a specific defendant could be individually or jointly liable for a victim’s losses.

However, the child pornography possession cases do not present the only time Congress and the courts have grappled with how to assess liability for multiple but independently acting individuals who cause harm. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\textsuperscript{60} provides a framework for thinking about allocating liability among multiple independent offenders. In fact, a few of the Amy and Vicky courts have drawn the distinct analogy between how the law allocates liability among the harms created by polluters, and the harms suffered by victims of child pornography possession.\textsuperscript{61} Just


\textsuperscript{60} 42 U.S.C. § 9607.

as section 2259 attempts to lay out a statutory framework to hold criminals responsible for the “clean up” costs otherwise borne by victims, CERCLA created a scheme to promote cleaning up and restoring contaminated sites where the harm to those properties was caused by the acts of independent multiple defendants.

One cannot draw a perfect analogy between CERCLA and the child pornography possession restitution statutes. First, CERCLA is a civil statute addressing liability for environmental waste and cleanup, while section 2259 addresses criminal liability for defendants convicted of child sex exploitation. Second, under CERCLA, defendants bear the evidentiary burden to avoid the imposition of cleanup costs for environmentally damaged property, while under section 2259, the government bears the evidentiary burden of establishing the victim’s losses and requisite causal links under the statute. Third, in contrast to the CERCLA statute, which imposes strict liability for the costs of cleaning up contaminated sites, criminal courts evaluating the Amy and Vicky line of cases have shied away any suggestion that section 2259 is a strict liability statute. Finally, in the CERCLA cases, the polluting activity is generally over. There are no more entities dumping on the site and there is a presumption that the number and identities of the liable parties can be ascertained with relative ease. Conversely, for victims like Amy and Vicky, their harm continues with every new defendant’s download of their images off the Internet. Despite these distinctions, both statutes have been used to address how to compensate for harms that have been caused by multiple actors. Therefore, aspects of

CERCLA’s structure and courts’ interpretation of the same may be instructive for the child pornography possession cases.

CERCLA sets up a scheme to encourage individuals to clean up and restore hazardous waste sites.\(^{63}\) The statute also imposes strict liability on several categories of parties for the costs associated with cleaning up the sites.\(^{64}\) Generally, any party that in any way was connected to the property and may have contributed to the accumulation of hazardous waste on that site, is strictly liable for the costs of cleaning up the property. If another party assumes the clean-up costs for the property, that party may bring an action for reimbursement from those deemed strictly liable under the statute.\(^{65}\)

Because of CERCLA’s strict liability structure, an entity seeking reimbursement for replacement costs from strictly liable parties does not have to show how the liable party


\(^{65}\) Chem-Dyne Corp., 572 F.Supp. at 805; Hercules, 246 F.3d 706; Matter of Bell Petroleum Servs., Inc., 3 F.3d. at 894.
contributed to the damage at the hazardous waste site. In essence, CERCLA removed any calculation of proximate cause from an analysis of who would be required to pay for cleanup costs. However, as courts have interpreted and applied CERCLA, they have looked to the Restatement (Second) of Torts Section 433A to guide whether a defendant should be held jointly and severally liable for clean-up costs, or whether those costs should be apportioned among the body of defendants who caused harm to the property. The CERCLA courts have determined that where the underlying harms are defined as divisible, apportioning costs is appropriate. Where the harms are indivisible, joint and several liability is applied. The section 2259 child pornography possession cases echo some of the same distinctions made in the CERCLA cases between divisible and indivisible harms.

66 Alcan Aluminum Corp., 990 F.2d at 721; Hercules, Inc., 247 F.3d at 716. See also Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936, 935 (8th Cir. 1995).

67 Restatement (Second) of Torts § 433A (1965).


69 Burlington Northern and Santa Fe Ry. Co., 556 U.S. at 613; Redwing Carriers, Inc., 94 F.3d at 1513; Alcan Aluminum Corp., 990 F.2d at 721-22; O’Neil, 883 F.2d at 178-79; Monsanto Co., 858 F.2d at 171-72.
The Restatement guides that the type of harm suffered by a plaintiff will dictate whether damages for that harm should be apportioned among two or more defendants or whether a court should impose joint and several liability.\textsuperscript{70} Generally, courts may apportion damages among several defendants where a defendant can show that the plaintiff’s harm was a distinct, successive or a divisible harm. Conversely, if the plaintiff’s harm is best characterized as indivisible, then a defendant can be held jointly and severally liable for the plaintiff’s damages.\textsuperscript{71}

Distinct harms are those that represent separate injuries and therefore allow for apportionment.\textsuperscript{72} For example, where two defendants “independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg” the Restatement would

\textsuperscript{70} \textit{Restatement (Second) of Torts} § 433A (1965). In particular, the Restatement guides that

(1) Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

\textsuperscript{71} \textit{Burlington Northern and Santa Fe Ry. Co.}, 556 U.S. at 613; \textit{Redwing Carriers, Inc.}, 94 F.3d at 1513; \textit{Alcan Aluminum Corp.}, 990 F.2d at 721-22; \textit{O’Neil}, 883 F.2d at 178-79; \textit{Monsanto Co.}, 858 F.2d at 171-72.

\textsuperscript{72} \textit{Hercules, Inc.}, 247 F.3d at 717; \textit{Restatement (Second) of Torts} § 433A cmt. b. (1965).
characterize the harms as distinct.\textsuperscript{73} While certain aspects of the plaintiff’s damages, such as lost wages or pain and suffering, could be difficult to apportion, “it is still possible, as a logical, reasonable, and practical matter . . . to make a rough estimate which will fairly apportion such subsidiary elements of damages” between different defendants.\textsuperscript{74} Comparing the Amy and Vicky line of cases against the types of harms described in the Restatement, it does not appear that the courts have sought to characterize victim harms as distinct. Rather there appears to be the implicit recognition that the harm of possession is more akin to an on-going invasion of the victim’s privacy and exploitation of their underlying abuse.\textsuperscript{75}

Harms which are characterized as successive under the Restatement also allow for apportioning damages among defendants. A successive injury is one in which the harm inflicted by the defendant “may be conveniently severable in point of time.”\textsuperscript{76} As described by the Restatement, “if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time,

\textsuperscript{73} Matter of Bell Petroleum Servs., Inc., 3 F.3d at 895; Restatement (Second) of Torts § 433A cmt. b. (1965).

\textsuperscript{74} Restatement (Second) of Torts § 433A cmt. b. (1965). See also Matter of Bell Petroleum Servs., Inc., 3 F.3d at 895.

\textsuperscript{75} See supra notes 41 - 51 and accompanying text; Giannini, supra note 3.

\textsuperscript{76} Restatement (Second) of Torts § 433A cmt. c. (1965).
and that neither has any responsibility for the harm caused by the other.” Therefore, apportioning liability among these different defendants would be appropriate. 

There is certainly room for argument that courts could treat child pornography possession victim harms as successive, although the courts do not tend to be taking this route. One could analogize the circumstances of victims such as Amy and Vicky to the successive harms construct in that the initial abuse, subsequent distribution of images of that abuse, and each individual defendant’s act of possession of those images, are separate and successive events. However, the courts have sidestepped this characterization favoring instead a divisible construct.

Liability for divisible harms can be apportioned among different defendants. This type of harm is probably the most difficult to conceptualize, but represents situations in which the harm, “while not so clearly marked out as severable into distinct parts, [is] still capable of division upon a reasonable and rational basis.” The Restatement provides two different examples. First, it suggests that where the cattle of two or more owners trespass upon the plaintiff’s land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by

77 Id. See also Matter of Bell Petroleum Servs., Inc., 3 F.3d at 895.


79 RESTATEMENT (SECOND) OF TORTS § 433A, cmt. c.

80 Matter of Bell Petroleum Servs., Inc., 3 F.3d at 895.

each, and the reasonable assumption that the respective harm done is proportionate to that number.\textsuperscript{82}

Second, the Restatement suggests that apportionment of damages may be appropriate where the pollution of a stream . . . from different sources, has interfered with the plaintiff’s use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff’s use of the water may be treated as divisible in terms of degree, and may apportioned among the owners of the factors, on the basis of evidence of the respective quantities of pollution discharged into the stream.\textsuperscript{83}

One could view the harms suffered by victims of child pornography possession in a similar manner. Like the land trampled by multiple cattle owned by different owners, or the stream which is polluted by a variety of sources, victims of child pornography possession suffer harms as a result of multiple independent acting individuals who possess images of the victim’s sexual abuse. While the victim’s harms may be aggregate in nature, a court might still theoretically be able to determine the extent to which a single possessor contributed to the victims’ overall harms.

A majority of the child pornography possession courts appear to have characterized the victims’ harms as divisible.\textsuperscript{84} These courts also tend to be those which require that the government prove that the defendant proximately caused the all victim’s losses.\textsuperscript{85} If meeting a proximate cause standard represents the courts’ compliance with \textit{Hughey}’s edict that a defendant can only be held liable in restitution for the losses which were “caused by the specific conduct

\begin{itemize}
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} \textit{See infra} Part. III.B.
  \item \textsuperscript{85} \textit{See supra} note 36.
\end{itemize}
that [was] the basis of the offense of conviction, then it is not a far leap of logic to require that the harms and losses suffered by victims be separated out per defendant. Child pornography possession victims have asserted total loss amounts representing lifetime therapy costs and lost wages arising out of their original abuse and subsequent ongoing exploitation by those viewing those images. While the defendant has certainly contributed to the victims’ total losses, it is difficult to argue the defendant caused all those losses. Therefore, the types of harms suffered by victims such as Amy and Vicky could be characterized as divisible harms.

Under a divisible approach, courts’ restitution awards to victims have been sporadic, inconsistent and sometimes nonexistent. Some courts have ruled that it is impossible to delineate how an individual and specific possessor of a child sex abuse image has caused a victim’s total losses, or even a portion of those losses, and therefore have declined to award any restitution. Other courts, often invoking the general proposition that restitution awards can be determined with a measure of flexibility, have crafted creative ways to provide victims some restitution.

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86 United States v. Hughey, 495 U.S. 411, 413 (1900). See also supra notes 20 - 22 and accompanying text.

87 See infra notes 192 and 224.

but not the entirety of their claimed losses, \(^{89}\) consequently departing from section 2259’s otherwise mandatory language that victims receive the full amount of their losses. \(^{90}\)

Conversely, a few courts have been willing to characterize child pornography possession harms as indivisible in nature, generally by contending that section 2259’s proximate cause


language does not apply to the types of losses asserted by victims such as Amy and Vicky.  

These courts focus on the fact that the harms suffered by these victims are caused by countless defendants downloading images of their abuse off the Internet. It is the victims’ ongoing knowledge that countless unknown strangers are viewing images of their abuse which represents the harm for which the victims seek restitution.

When discussing indivisible harms, the Restatement guides

Where two or more causes combine to produce . . . a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.


92 See, e.g., Kearney, 2012 WL 639168 at *5-6 (while requiring that government must make proximate cause showing, nonetheless describes harms as ongoing); United States v. Haynes, 2012 WL 3242206, *2 (E.D. Tenn. Aug. 7, 2012) (while requiring that government must make proximate cause showing, describes victim harm as knowing strangers are downloading sex abuse images of victim); United States v. Lindquist, 2011 WL 7446325, *6 (N.D. N.Y. Dec. 14, 2011) (holding to a proximate cause standard, but noting that victim’s harms and losses stem from continued knowledge that individuals were exchanging and viewing images of her sexual abuse); United States v. Thompson, 2011 WL 3438864, *3 (W.D.N.C. Aug. 5, 2011) (proximate causation requirement can be satisfied by victim’s generalized knowledge that images were being proliferated on internet).

93 RESTATEMENT (SECOND) OF TORTS, § 443A, cmt. i.
As an example, the Restatement proffers

A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C’s barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.94

One can conceive of the child pornography possession cases in a somewhat similar manner, although the analogy is admittedly somewhat strained. Victims such as Amy and Vicky have had toxic waste dumped upon them by their initial abusers and by those who have distributed the images of their abuse on the internet. Each subsequent possessor ignites that toxic waste which causes constant injuries to the young women. In such settings, joint liability, rather than apportioning damages, could be appropriate. Applying a joint and several liability construct often makes sense where a party, along with others, has imposed an indivisible injury on another.95 Similarly, under this construct, section 3664(h)’s language indicating a defendant may be held jointly liable for a victim’s losses is apropos.96

94 Id., illustration 14.


While the indivisible construct may present a bit of a stretch when contemplating the Amy and Vicky line of cases, courts who have adopted the construct have picked up on an inherent problem when applying section 2259 to child pornography possession. The statute mandates restitution to victims for their total losses, but at the same time undercuts this promise by seemingly requiring a specific causal connection between the defendant’s acts and the victim’s losses. Courts that have tended to the indivisible description for victims’ harms seem to be focusing on the “total losses” command of section 2259, while downplaying the need for a direct proximate cause link between the defendant’s acts and the victims’ harms. So doing, these courts have honed in on the remedial and victim focused goals of the restitution statute. Under this approach, victims are honored, but defendants may be unduly burdened.

The courts adopting an indivisible harm approach represent the minority in the ongoing discussion regarding how to appropriately compensate victims under section 2259. However, even among the majority of courts who view victim harms as divisible, there still lacks consensus as to how to properly apply section 2259. This lack of agreement highlights all the more how the statute is a poor fit for child pornography possession crimes. The following part of this paper details that lack of consensus in more detail.

**III. ONGOING (IN)DIVISIBLE (?) HARMS**

What follows is a series of case studies which highlight the interpretive and application struggles courts have encountered when trying to faithfully follow Congress’s statutory commands in section 2259 and 3664(h). The resulting judicial dialogue between the trial and appellate courts provide a valuable window into the court system’s disquiet regarding how to apply section 2259 to child pornography possession cases. Throughout these different opinions, judges have engaged in an open debate with one another, as well as lodging a full-on critique of Congress, regarding whether and how the criminal restitution statutes are meant to apply to child
pornography possession cases. Without putting too fine a point on it, the case law is a bit of an angry mess and difficult to discuss in any perfectly organized pattern.

In providing an overview of these cases, the goal of the following exegesis is not to try to establish clarity among confusion. Rather, the goal is to highlight what lies at the core of the confusion. The courts, despite their implicit acknowledgments that the harm suffered by these victims is on-going and caused by an infinitely growing number of defendants, feel compelled to shoehorn the victim’s harms into a structure designed to address harms that have ceased and were imposed by a distinct and manageable set of defendants. As stated by the courts themselves, Congress has written a statute that is incompatible with the injuries and losses suffered by victims of child pornography possession. CITES

A. Indivisible harms and joint and several liability: In re Amy Unknown

At least one court of appeals has taken a broad view of how to provide restitution to victims such as Amy and Vicky. In In re Amy Unknown III,97 the en banc Fifth Circuit Court of Appeals departed from the rest of the circuits to hold that section 2259 does not impose a proximate cause requirement on the types of restitution claims raised by victims of child pornography possession.98 Connected to this holding, the court also ruled that imposing joint and several liability on a defendant was well within the bounds of the restitution statute.99 The In

97 In re: Amy Unknown, 2012 WL 4477444 (5th Cir. October 1, 2012).

98 Id. at *1.

re Amy’s case journey to the en banc court’s decision is instructive, as the progression of cases from the district court’s decision to the final en banc ruling provide a cogent example of the courts’ overall consternation as to how to properly apply Congress’ language from section 2259 to the scenarios presented by the Amy and Vicky types of cases.

The first decision in the In re Amy cases was decided by the Eastern District Court of Texas. That court ruled that in order for Amy to receive restitution, the government had to prove that Amy’s losses were proximately caused by the defendant’s possession of two images of the young woman.\(^{100}\) The court did not reject the underlying proposition that Amy suffered harm by the defendant’s possession of her images and that his possession perpetuated her underlying sexual abuse, represented an ongoing invasion of her privacy, and further contributed to the child pornography market.\(^{101}\) However, the court was not convinced the government had properly shown how the defendant’s acts were a proximate cause of Amy’s harms. The court stated that the mere existence of harm to Amy

> does little to show how much of her harm, or what amount of her losses, was proximately caused by [the defendant’s] offense. A victim is not necessarily entitled to restitution for all her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant’s specific conduct.\(^ {102}\)

By imposing a proximate cause standard which required that the government show how the defendant’s possession of Amy’s images specifically caused her losses, the court intimated that it viewed Amy’s harms and subsequent losses as divisible. Amy may have suffered a single total loss as a result of her exploitation on the Internet through the distribution of the images of her


\(^{101}\) Id. at 786.

\(^{102}\) Id. at 791.
abuse. Nonetheless, in order for the court to determine how much restitution the defendant was obliged to pay, Amy’s losses had to be specifically attributed to each defendant who in the past, currently, or in the future, harmed her.

Amy brought a mandamus action challenging the district court’s decision.\(^{103}\) Her request for relief was denied by the Court of Appeals in *In re Amy I*.\(^{104}\) There, the appellate court ruled that the district court’s decision was not erroneous.\(^{105}\) However, in *In re Amy II*,\(^{106}\) a different panel of the Fifth Circuit reviewed the *In re Amy I* court’s denial of the mandamus order as well as Amy’s direct appeal of the district court’s ruling denying restitution.\(^{107}\) The *In re Amy II* court reversed the district court and the prior panel’s decisions to hold that the statute did not require a showing of proximate cause, thereby opening the door for a restitution award to Amy upon remand of the case to the trial court. The court noted that while the statute “holds a criminal responsible for the full amount of the victim’s losses, it instructs the court to enforce the

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\(^{103}\) Under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), victims may petition for a writ of mandamus to the appellate courts in response to the denial of any rights by the federal trial courts which the victims believe are granted to them by virtue of the CVRA. In concert with section 2259, the CVRA also requires that victims be provided restitution as required by law. 18 U.S.C. § 3771(a)(6).

\(^{104}\) *In re Amy Unknown*, 591 F.3d 792 (5th Cir. 2011) (*In re Amy I*).

\(^{105}\) *Id.* at 794-95.

\(^{106}\) 636 F.3d 190 (5th Cir. 2001) (*In re Amy II*).

\(^{107}\) *Id.* at 193-194.
restitution award . . . by all . . . available means, [including] joint and several liability.” 108 So doing, the court explicitly referenced CERCLA. 109 Noting CERCLA’s use of joint and several liability for environmental claims, the In re Amy II court stated that “holding wrongdoers joint and severally liable is no innovation. . . . Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetuated the harm rather than its innocent recipient.” 110 By reading section 2259 as not requiring a showing of proximate cause, and by indicating that joint and several liability could be imposed on defendants, the In re Amy II decision suggested that the types of harms suffered and subsequent losses incurred by child pornography victims are, like in pollution cases, of such a nature that they should be viewed as indivisible harms.

However, in remanding the case back to the district court for further proceedings, the In re Amy II court undermined its own reference to a joint and several liability remedial scheme by stating that the district court was “best qualified to determine Amy’s total harm and the fraction due to [the defendant’s] crime.” 111 Therefore, on one hand, the court appeared to initially suggest that the harms suffered by victims of child pornography possession could be categorized as indivisible nature. However, by stating that any final restitution amount should represent the “fraction due to [the defendant’s] crime,” the court also seemed to suggest that the defendant’s liability was divisible and thereby might require some measure of a proximate cause analysis.

108 Id. at 201

109 Id. (citing 42 U.S.C. § 9607(a)).

110 Id.

111 Id. at 201 (emphasis added).
On *en banc* review, a divided court affirmed the *In re Amy II*’s court’s overall reasoning.\(^{112}\) The majority ruled that section 2259’s proximate cause language did not apply to Amy’s asserted losses. So long as Amy could show she was a victim under the statute, the district court was required to grant restitution in the full amount of her losses.\(^{113}\) The court asserted that the problem animating many courts struggling with how to interpret and apply section 2259 to child pornography possession crimes was how to “allocate responsibility for a victim’s harm to any single defendant.”\(^{114}\) Getting to the heart of the problem in all the child pornography possession cases, the court rightly noted that “it is quite possible that no other crime is like the crime of distribution, receipt and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country.”\(^{115}\) So doing, the court explicitly recognized that a victim’s losses represented the cumulative effect of multiple independent actors, and reasoned that section 3664(h)’s joint and several liability provision was aptly designed to be applied to these types of crimes.\(^{116}\)

By invoking section 3664(h)’s joint and several provision, the *en banc* court suggested that it viewed Amy’s losses as indivisible.\(^{117}\) Amy’s asserted harms comprised financial losses of up to $3.4 million for psychological care and lost wages borne for the rest of her life as a

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\(^{112}\) *In re Amy Unknown III*, 2012 W.L. 4466444 (5th Cir. October 1, 2012).

\(^{113}\) *Id.* at *20.

\(^{114}\) *Id.* at *16.

\(^{115}\) *Id.* at n.14.

\(^{116}\) *Id.* at *17.

\(^{117}\) *Id.* at *16.
result of having images of her sexual abuse being distributed and possessed by strangers.\footnote{118} Under a joint and several analysis, the court reasoned that a single defendant could be held liable for these total losses. However, the court also suggested that it viewed Amy’s losses as finite. It noted that if Amy was ever able to recover the full amount of her losses, then defendants convicted of possessing her images subsequent to her full financial recovery might be relieved of restitution liability.\footnote{119} Taking the In re Amy III’s court’s reasoning to its ultimate conclusion, a whole swath of defendants could escape any restitution liability if they were simply lucky enough to be prosecuted and convicted after a victim had otherwise recovered her full losses from other defendants. The financial likelihood of this happening is likely slim. Nonetheless, it strains credulity to think a defendant should be excused of his restitution obligation solely because he was prosecuted later than other defendants.

In implying that Amy’s losses were best described as indivisible, the In re Amy Unknown III court rejected any argument that the apportion language appearing in section 3664(h) should be applied in Amy’s case. The court reasoned that to do so would run counter to section 2259’s command that courts award victims the full amount of their losses,\footnote{120} and would overlook that the injuries suffered by such victims do “not produce a loss capable of division.”\footnote{121} Therefore, the majority in In re Amy III clearly viewed the harms and associated losses as indivisible in nature.

\begin{footnotes}
\item[118] Id. at *2.
\item[119] Id. at 17.
\item[120] Id. at *16 n.15.
\item[121] Id.
\end{footnotes}
Judge W. Eugene Davis, dissenting in part to the majority’s opinion, presented a somewhat bifurcated approach to categorizing victim harms in child pornography possession cases.\(^{122}\) He asserted that section 2259 does require a showing of proximate cause for the types of harms asserted by victims such as Amy and Vicky, and further proffered that proximate cause standard should be defined in “collective causation” terms.\(^{123}\) Under this approach, “[p]roximate cause exists where the tortious conduct of multiple actors has combined to bring about the harm even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.”\(^{124}\) By defining proximate cause in an aggregate or collective manner, the judge appeared to be trying to move closer to acknowledging the collective nature of the harms suffered by child pornography possession victims, and that perhaps those harms were more akin to indivisible than divisible harms. Nonetheless, the dissenting judge asserted that pursuant to the apportion language appearing in section 3664(h), Amy’s losses should be allocated among the multiple offenders in possession of the images of Amy’s sexual abuse.\(^{125}\) Despite Judge Davis’ sense that Amy’s harm was caused collectively, and therefore would be more akin to an indivisible harm, his reliance on the apportion language in section 3664(h)

\(^{122}\) *Id.* at *22*-28 (Davis, J., dissenting). *See also supra* notes X-X (re Wright discussion).

\(^{123}\) *Id.* at *25*. The dissenting judge based his proximate cause standard on the First Circuit Court of Appeals’ decision in *United States v. Kearney*, 2012 WL 639168 (1st Cir. Feb. 29, 2012). *See also infra* Part III.B.2.

\(^{124}\) *In re Amy Unknown*, 2012 WL 4466444 at *25* (citing *Kearney*, 672 F.3d at 98).

\(^{125}\) *Id.* at *25*-26.
suggests he was holding to the standard restitution principle that a defendant should only be held accountable for the harms and losses caused by his underlying offense of conviction.\textsuperscript{126}

The Fifth Circuit stands alone among the circuits in how it applies sections 2259 and 3664(h) to child pornography possession victims. By interpreting the statute as not requiring a proximate cause showing for Amy’s harms, and endorsing a joint and several liability structure, the circuit is treating the harms as indivisible. However, even among its ranks, the court could not unanimously agree that a strict liability indivisible structure best accorded with section 2259’s terms.

\textbf{B. Divisible harms and apportioning liability}

In contrast to the \textit{In re Amy} line of cases, the overwhelming trend among the circuit courts suggests that, in accordance with their reading of section 2259’s proximate cause requirement, courts must view the harms suffered by victims such as Amy and Vicky as divisible. Therefore, in order to warrant awarding restitution to the victim, the government must show how an individual defendant specifically caused or contributed to the victim’s total harm. In many cases, the courts have determined the government was not able to make this proximate cause showing and therefore have declined to award restitution. Nonetheless, in similar fashion to the \textit{In re Amy} case law progression, courts who view the harms suffered by victims such as Amy and Vicky as single but divisible can sometimes be just as confused in how to apply section 2259.

\textit{1. United States v. Aumais and its emanations}

\textsuperscript{126}See United States v. Hughey, 495 U.S. 411 (1990). See also supra notes 20 - 22 and accompanying text.
A series of cases emanating out of the Second Court of Appeals highlights how courts have struggled with how to interpret and apply section 2259. In United States v. Aumais (Aumais I), the district court awarded restitution to Amy for up to ten years’ worth of counseling. The trial court ruled that section 2259 required a showing of proximate cause in order for a victim to receive restitution and suggested it viewed Amy’s total losses as divisible. The court stated “separate and apart from the harm resulting from the uncle’s conduct, the conduct of consumers of Amy’s images constitute an independent component of harm which exacerbates the trauma initiated by the uncle and generates a need for continuing therapy.” The court’s language suggested that Amy’s harms were divisible.


128 Id. at *2.

However, in determining that the government had met its burden in proving that the
defendant’s possession of Amy’s images was a proximate cause of her on-going counseling
costs, the court seemed to shift gears and describe Amy’s losses as indivisible in nature. The
court stated that “[t]he harm from the uncle’s abuse and the harm from possession of the images
of the abuse by others are closely related for purposes of counseling and cannot be separated to
allocate costs between them as it appears Amy will require counseling for both.”130 Amy’s harm
was her knowledge that she was being exploited in an ongoing manner by a group of consumers,
one of which was the otherwise anonymous defendant in the case.131 Focusing on section 2259’s
language commanding that a defendant be required to pay the full amount of a victim’s losses,
and relying on circuit precedent which had previously rejected any type of proportionality
analysis via section 3664(h) when applying section 2259, the court required that the defendant be
permit the court to estimate with reasonable certainty what portion of the claimants’ harm was
proximately caused by defendant’s act of receiving child pornography, as opposed to the initial
abuse or unknown other acts of receipt and distribution that occurred before and independent of
(“While it is without question that Vicky’s father harmed her, his culpability does not insulate
[defendant] from shouldering the responsibility for his own separate injurious conduct.”); United
States v. Berk, 666 F.Supp.2d 182, 190-91 (D. Me. 2009) (“While a significant portion of the
harm that the Victims have suffered was solely caused by the original abuse, some of the
Victims’ harm clearly arises out of the widespread availability of their images and the possession
of their images by individuals such as the Defendant.”).

130 Aumais, 2010 WL 3033821 at *8.

131 Id. at *6.
fully responsible for Amy’s counseling costs for a ten year period.\textsuperscript{132} Therefore, the district court seemed to switch between treating Amy’s harm as divisible and indivisible. The Second Circuit Court of Appeals reversed the district court’s decision.

In \textit{United States v. Aumais (Aumais II)},\textsuperscript{133} the appellate court appeared to view the harms and losses suffered by Amy as divisible. Picking up on the seeming inconsistencies of the lower court’s reasoning, the \textit{Aumais II} court acknowledged the inherent conflict between 2259’s command that a court \textit{shall} order restitution for a victim’s total losses that are proximately caused by the defendant,\textsuperscript{134} and the statute’s cross reference to section 3664(h)’s joint liability language.\textsuperscript{135} The court noted that

\begin{quote}
[i]f Amy’s future counseling costs are \textit{partly} caused by her uncle’s abuse, then [the defendant] cannot be responsible for all those losses – a problem under the wording of \$ 2259, which mandates that [the defendant] make restitution for the full amount of Amy’s losses caused as a result of [the defendant’s] possession.\textsuperscript{136}
\end{quote}

\textsuperscript{132} \textit{Id.} at *9.

\textsuperscript{133} \textit{United States v. Aumais}, 656 F.3d 147 (2d Cir. 2011) (\textit{Aumais II}).

\textsuperscript{134} \textit{Aumais II}, 656 F.3d at 155-156 (2011). \textit{See also} 18 U.S.C. \$ 2259(b)(1).

\textsuperscript{135} 18 U.S.C. \$ 3664(h) (“[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 of restitution or may apportion liability among defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.”).

\textsuperscript{136} \textit{Aumais II}, 656 F.3d at 155 (emphasis added).
Because the government was unable to draw a distinct link between the defendant’s possession of Amy’s images and her total asserted counseling costs, the court was unwilling to impose restitution on the defendant. The appellate court also questioned whether section 3664(h) should ever be invoked in the child pornography possession cases. The court interpreted section 3664(h) as only being appropriate in cases where a “single district judge is dealing with multiple defendants in a single case (or indictment); [and therefore] the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country.”¹³⁷ This concern was bolstered by the court’s recognition that the imposition of a joint and several award against the defendant in the case before it could not only result in providing more to Amy than her actual losses, but also give rise to substantial administrative difficulties in overseeing restitution awards issued by different courts across the country.¹³⁸ At the time of the Aumais II decision, Amy had sought restitution in over 250 cases, and her estimated recovery thus far was cited to be $170,000.¹³⁹ The court expressed concern that by virtue of the other restitution awards, Amy “may already have been fully compensated by others for the loss found


¹³⁸ Aumais II, 656 F.3d at 156.

¹³⁹ Id.
in this case." Therefore imposing a joint and several award against the defendant could result in double recovery for her.

The court further noted that the collection of any restitution award would need to be carefully monitored to ensure that total payments by all defendants did not exceed what Amy has been awarded . . . . The need for such monitoring would pose significant practical difficulties. As an initial matter, it is not entirely clear what government body, if any, is responsible for tracking payments that may involve defendants in numerous jurisdictions across the country. In addition, determining what amount Amy has received would entail collecting data about hundreds of cases, ascertaining what money has actually been paid, and determining what losses that money was intended to cover.

The last sentence of the quotation further highlights how the Aumais II court views the harms suffered by child pornography victims as divisible. A victim may have a total amount of losses, but those losses may have been created by a variety of different defendants to a variety of different degrees. Because the court viewed Amy’s harms as divisible, and because the court was unconvinced the government had shown how the defendant had specifically contributed to those harms, it denied Amy restitution.

In contrast to its ruling in Aumais, in United States v. Hagerman the Second Circuit affirmed a district court’s ruling awarding restitution to victim Vicky. The court nonetheless

140 Id.

141 Id.

142 The court in United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011), engaged in similar reasoning regarding section 3664(h). Id. at 539.


144 Id. at *7.
severely criticized the district court for how it calculated the award. The district court, in seeming contradiction to the *Aumais II* court’s reasoning that section 3664(h) was not appropriate in child pornography possession cases, determined that imposing joint and several liability upon child pornography possession defendants pursuant to section 3664(h) was entirely appropriate\(^{145}\) and imposed the victim’s full restitution requests on the defendant.

In *Hagerman* district court used language to suggest that it considered Vicky’s harms to be continuous, on-going, and far more akin to indivisible harms than divisible harms.\(^{146}\) The court suggested that Vicky’s harms and associated losses were related to her re-victimization by all the individuals downloading the abusive images of her off of the Internet.\(^{147}\) Therefore, the court appeared to reject the notion that the harms in these types of cases were best described as divisible.

The court’s rejection of a divisible approach to victim restitution was further highlighted by the court’s willingness to impose joint and several liability upon the defendants pursuant to section 3664(h).\(^{148}\) The district court flatly rejected the suggestion made by the *Aumais II* court.

\(^{145}\) The trial court characterized the *Aumais II* court’s discussion regarding section 3664(h) and joint and several liability as a mere “observation,” *United States v. Hagerman*, 2011 WL 6096505, *17* (N.D. N.Y. Nov. 30, 2011), rather than a holding to which the district court was bound.

\(^{146}\) *Id.* at *5* (“Vicky has sustained, and continues to sustain significant psychological damage . . .”), *13* (Vicky suffers from the constant reminders that every day strangers are downloading the images of her abuse on the Internet).

\(^{147}\) *Id.* at *13.

\(^{148}\) *Id.* at *16-19.
that the joint and several liability provision laid out in section 3664(h) was not meant to be employed in child pornography possession cases.\textsuperscript{149} In particular, the district court asserted that to not apply section 3664(h) to these types of cases would “undermine, if not contradict, the legislative intention of providing restitution as a remedy under 19 U.S.C. § 2259 – to \textit{fully} restore victims to their prior state of wellbeing.”\textsuperscript{150} The court went on to explain:

\begin{quote}
As a practical matter, each year that passes, the pool of individuals found to have downloaded [Vicky and Amy’s] images on the Internet will likely increase. Concomitantly, each new individual’s relative share of losses proximately caused by him will likely decrease. What is worse, a certain percentage of those individuals will likely continue to be “judgment proof,” lacking sufficient assets to pay restitution to [the victims]. As a result, [the victims] will likely never be able to recover all of [their losses], unless district court judges find defendants jointly and severally liable . . . .\textsuperscript{151}
\end{quote}

By imposing joint and several liability on the defendants, the district court signaled that it viewed the harms suffered by Vicky and Amy to be the result of the continuous and ongoing exploitation they suffered from individuals downloading images of their abuse off of the Internet, rather than single and isolated incidents.

\textsuperscript{149} \textit{Id.} at *17.

\textsuperscript{150} \textit{Id.} (emphasis in original).

\textsuperscript{151} \textit{Id.}. Curiously, two other district courts, in ruling that section 3664(h) should not be used at all in these types of cases, asserted a very similar argument for why any type of apportion analysis under section 3664(h) would not square with standard restitution principles. \textit{See} Untied States v. Veazie, 2012 WL 1430540, *1 (D. Me. April 25, 2012); United States v. Tallent, 2012 WL 2580275, *12 (E.D. Tenn. June 22, 2012). \textit{See also infra} notes 200-204 and accompanying text.
On appeal, the Second Circuit rejected the district court’s use of joint and several liability.\textsuperscript{152} The appellate court nonetheless proceeded to engage in a form of apportion analysis to determine the defendant’s liability, but without any explicit reference to section 3664(h)’s apportion language. The court noted that Vicky’s total asserted losses in the case were approximately $1.2 million, nearly $250 thousand of which had already been collected from 146 defendants.\textsuperscript{153} The court noted that because the defendant was one of the 146 contributors to Vicky’s losses, he should be responsible for $1/146^{th}$ of her total losses (or .68\%),\textsuperscript{154} rather than for a percentage of her remaining unpaid losses.\textsuperscript{155}

The appellate court’s calculations appeared to take some heed of the district court’s concern that any type of apportion calculation might undermine full recovery for victims. By holding the defendant proportionally responsible for Vicky’s total losses, rather than the balance of her yet to be recovered losses, the appellate court appeared to be attempting to ensure that the defendant, as one of the 146 individuals who had been prosecuted for causing Vicky’s losses, would bear equal responsibility for the harm he caused with other defendants. What the court of appeals missed however, was the district court’s suggestion that the courts’ were trying to function within a construct that presumed that a victim’s losses were total and complete, as well as the fact that the number of individuals who caused those losses were also finite. To the contrary, neither appears to be true in the child pornography possession cases. As long as sex abuse images of children are distributed on the Internet, the harms suffered by victims such as

\textsuperscript{152} 2012 WL 6621311 at *4 (2d Cir. December 20, 2012).
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
Amy and Vicky will continue to grow, as well the numbers of those individuals who caused those harms. Therefore, the numbers in any divisible analysis are always going to be increasing, making it difficult for courts and litigants to try to properly calculate restitution under sections 2259 and 3664(h).


In *United States v. Kearney*, the First Circuit articulated a new and broad definition of proximate cause going a great distance to affirm the collective nature of child pornography possession victims’ harms, and making it easier for them to satisfy the standard. However, how subsequent courts have applied the standard has not been consistent, adding to the confusion surrounding the Amy and Vicky line of cases.

In *Kearney*, the court began by initially ruling that section 2259’s proximate cause standard requires that a “plaintiff show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant’s conduct.” The court surmised that it would be reasonably foreseeable to a defendant that a result of his possession of child pornography would be that the child depicted therein would require mental health treatment. The court also referenced that section 2259 requires restitution to be paid for “any” offense committed under chapter 10 of the federal criminal code, thereby bringing within its scope, not just the direct exploitation and sexual abuse of children, but also exploitation that may arise

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158 *Id.* at *14.
through a defendant’s distribution, receipt and possession of child pornography. The court reasoned that in light of Congress’s clear intent to subject all types of child exploitation to scrutiny under the restitution statute, it should avoid “any construction of a proximate cause requirement that would functionally preclude any award of restitution . . . for possession and distribution offenses.” Therefore, it believed that a “reasonably foreseeable” proximate cause standard would fulfill Congress’s goals.

However, the court did not stop there in defining proximate cause. The defendant had argued that because there had been so many other defendants who had access, or would in the future have access to the images of victim Vicky’s sexual abuse, it would be impossible to establish the required proximate cause link between the defendant’s acts and Vicky’s harms. Rejecting this proposition, the Kearney court added a new layer onto its articulation of a proximate cause standard. The court stated that the defendant’s conduct contributed to a state of affairs in which Vicky’s emotional harm was worse than would have otherwise been the case. Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort . . . It is clear that, taken as a whole, the views and distributors of child pornography depicting Vicky caused the losses she

159 Id.

160 Id.
has suffered . . . Proximate cause therefore exists on the aggregate level and there is no reason to find it lacking on the individual level.\(^{161}\)

Therefore, the court created an aggregate proximate cause standard. The court was unwilling to adopt a more stringent or narrow proximate cause standard because it were to do so, it would be acting in a manner contrary to Congress’s goal to provide mandatory restitution to victims of child pornography possession and distribution.\(^{162}\) By speaking of proximate cause in an aggregate manner, the court moved closer to the notion that Vicky’s losses might be characterized as indivisible.

Nonetheless, when it came to awarding restitution to Vicky, the court opted to calculate an apportioned award. Citing to the commonly accepted proposition that restitution awards may be based on a degree of approximation so long as they reasonably determine an appropriate amount,\(^{163}\) the court reasoned that a restitution award of $3,800 would be appropriate. Vicky had asserted total losses just over $226 thousand and had already received partial restitution in thirty-three other cases. The court averaged the awards Vicky had already received in earlier cases, after first discarding the highest and lowest awards. It then evaluated this sum against Vicky’s

\(^{161}\) *Id.* at *15. The court went on to cite to sections from the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* for the proposition that “even where none of the alternative causes is sufficient by itself, but together they are sufficient” to cause the harm. *Id.* at *15 (*Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, § 27, reporters cmt. g (2010)).

\(^{162}\) *Id.*

\(^{163}\) *Id.* at *17 (citing United States v. Innarelli, 524 F.3d 286, 294 (1st Cir. 2008) and United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007)). *See also supra* note 41.
claimed total losses. The $3800 amount represented about 1.5% of her total claimed losses, which the court deemed “proportionate and reasonable.” Therefore, despite the court’s aggregate proximate cause standard which suggested that it viewed Vicky’s harms as collective and potentially indivisible, the court’s final restitution calculations treated the defendant’s possession of Vicky’s images as a something that could be divided out of her total losses.

A number of courts have adopted the Kearney court’s aggregate proximate cause standard, but they have not all followed the court’s reasoning in terms of how to calculate restitution for victims. For example, in United States v. Olivieri, the New Jersey District Court was asked to address restitution claims asserted by the government on behalf of three victims, including Amy and Vicky. The court began by describing the victims’ harms as comprising two separate sets of unlawful acts – the original abuse plus the subsequent exploitation arising out of the distribution and possession of the sex abuse images – thereby intimating the that harms were divisible. For example, when discussing Vicky’s harms, the court noted that she was suffering from Post-Traumatic Stress Disorder which was caused by both the underlying abuse as well as by Vicky’s “knowledge about the downloading by multiple parties of images of her abuses and degradations.”

However, the court followed the Kearney court’s articulation of an aggregate proximate cause standard in rejecting the defendant’s argument his downloading of the victims’ images were too minor to have substantially contributed to the victims’ harms. The court stated

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164 2012 WL 639168 at *17.


166 A third victim, L.S. was also involved in the case. Id. at *1.

167 Id. at *4.
[a]n act can proximately cause harm even is such harm would have occurred in the absence of that particular act, such as where there are two independent acts that are sufficient to cause the harm. Even where an individual act is insufficient to cause the harm, it can be a proximate cause of the damage if it combines with other similar acts to produce the loss.\textsuperscript{168}

The court also referred to the pollution cases, noting that “courts have allowed the plaintiff to recover from each defendant to contributed to the pollution that caused the injury, even though none of the defendants’ individual contributions was either necessary or sufficient by itself for the occurrence of the injury.”\textsuperscript{169} Finally, the court agreed with the \textit{Kearney} decision that it would be inappropriate to hold that a victim of child pornography could only succeed in a restitution request where the victim could show how a specific defendant’s viewing of her images caused her specific losses.\textsuperscript{170} Doing so would allow a defendant to escape financial liability for the collective harm he caused to the victim.

In similar fashion to the \textit{Kearney} court, the court in \textit{Olivieri} determined that calculating an apportioned restitution amount for the victims’ losses was appropriate. So doing, the court rejected any argument that it should impose joint and several liability on the defendant, noting that the defendant was only one of many who caused the losses suffered by the victims in this case, and that it was likely that many more defendants, some of whom had not yet been charged or prosecuted, would also contribute to the victim’s losses. Therefore, it “would be difficult to

\textsuperscript{168} \textit{Id.} at *6. In making this statement, the court specifically relied on the reasoning which appeared in the \textit{Kearney} decision. \textit{Id.} at *6-7.

\textsuperscript{169} \textit{Id.} citing (George F. Wright, \textit{Causation in Tort Law}, 73 CAL. L. REV. 1735, 1792 (1985)).

\textsuperscript{170} \textit{Id.} at *7.
coordinate joint liability” among the past, present and future defendants. More pointedly, the court stated it would be “unfair to impose joint and several liability on [the defendant] for the total amount of losses stemming from both the initial abuse and all the acts of possession and distribution that contributed to the victim’s losses.” Therefore, like the court in Kearney, the Olivieri court determined that an apportioned restitution award was appropriate.

The Olivieri court’s method of calculating restitution, however, differed from the Kearney court’s method. Working from the position that the victims’ harms represented a combination of the original abuse plus the subsequent possession of those images by third parties, the Olivieri court reasoned that the original abuser was fifty percent responsible for the victims’ losses. The court proceeded to reason that the remaining fifty percent of losses should be apportioned among the remaining individuals who had been prosecuted thus far for possessing images of the victims. At least fifty defendants had already been prosecuted for possessing the images of the victims, and the court suggested that this number was likely to increase. The court further noted that the victims had already recovered some of their asserted losses from other defendants. In an effort to ensure that the victims did not recover more than their total losses, and that the defendants were not required to pay for more than their proximate share of the harms they had imposed on the victims, the court divided the remaining fifty percent of claimed losses by seventy-five to reach a restitution award for each victim.

171 Id. at *10. The court also questioned, as have other courts, whether section 3664(h)’s joint and several provision is even appropriately applied in cases with separate defendants in separate cases. Id. See supra notes 137-140 and accompanying text.

172 2012 WL 118763 at *10.

173 Id. at *11.
The Olivieri and Kearney courts’ restitution calculations certainly fit within the general edict that courts are not required to craft restitution awards with mathematical precision.\(^{174}\) However, they both miss the problem highlighted by the district court in the Hagerman litigation.\(^{175}\) An apportion analysis for child pornography possession cases that is based solely on the current number of prosecuted defendants misses that there will be more defendants who will add to the victim’s ongoing harms. The Olivieri court did attempt to somewhat remedy this problem by projecting that up to 75 defendants could be prosecuted for possession of child sex abuse images. However, how will courts address the seventy-sixth defendant?

In United States v. Burgess, the Fourth Circuit Court of Appeals also endorsed the Kearney court’s aggregate proximate cause approach.\(^{176}\) From the outset of its opinion, the court appeared to believe that victim Vicky’s harms were better categorized as some variant of divisible harm rather than as indivisible. In this regard, the court rejected Vicky’s argument that the restitution statute only required a showing of general causation, and that therefore, under section 3664(h), joint and several liability could be imposed on the defendant.\(^{177}\) Signaling that it viewed the types of harms suffered by victims of child pornography possession as divisible, the court noted that “[i]n situations such as Vicky’s, individuals viewing her video recordings inflict injuries at different times and in different locations. Therefore, those individuals cannot have

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\(^{174}\) See supra note 41.


See supra notes 143-155 and accompanying text.


\(^{177}\) Id. at *10-11.
proximately caused the same injury.”\textsuperscript{178} Joint and several liability, reasoned the court, can only be applied when there is an indivisible injury.

Nonetheless, recognizing that the ongoing harms suffered by victims of child pornography possession are caused by multiple defendants, the court adopted the \textit{Kearney} court’s aggregate proximate cause standard as “best effectuat[ing] the express intent of the restitution statute”\textsuperscript{179} to ensure that victims receive compensation from offenders found in possession of the images of their sexual abuse.

In remanding the action back to the district court to determine whether the defendant was a proximate cause of Vicky’s harms, the \textit{Burgess} court opined that the far more difficult question was to what extent the government could attribute the defendant’s actions to the victim’s losses. It acknowledged that calculating the defendant’s restitutionary liability would be difficult, and joined the chorus of courts calling to Congress to “reevaluate the restitution statute in light of the challenges presented by the calculations of loss to victims in the Internet age.”\textsuperscript{180}

A dissenting judge in the \textit{Burgess} opinion challenged the suggestion made by his colleagues that Vicky’s harms could so easily be deemed divisible.\textsuperscript{181} The dissenting judge asserted his belief that Vicky’s psychological harms caused by the specific defendant before the court were likely indivisible from the psychological injuries proximately caused by other offenders. The judge stated:

\textsuperscript{178}\textit{Id.} at *11.

\textsuperscript{179}\textit{Id.}

\textsuperscript{180}\textit{Id.}

\textsuperscript{181}\textit{Id.} at *13 (Gregory, J., dissenting).
I do not believe that a fact finder could meaningfully say precisely \( x \) amount of Vicky’s psychological injuries were caused by [the defendant’s] watching the video, that \( y \) amount was caused by Defendant #2’s watching the video and so on.\(^{182}\)

Furthermore, to apportion a victim’s losses among several offenders was “at odds with § 2259’s plain language . . . that the district court shall ‘direct that the defendant pay the victim . . . the full amount of the victim’s losses.’”\(^{183}\) Therefore, the dissenting judge reasoned that the defendant should be obliged to pay all the losses he proximately caused, rather than some portion of loss attributed to him.\(^{184}\) In this context, the dissenting judge also challenged the majority’s immediate rejection of use of the joint and several liability standard. He noted that generally, joint tortfeasors are held jointly and severally liable for indivisible damages.\(^{185}\) If, as the dissenting judge reasoned, Vicky’s injuries were indivisible, then the defendant should be held jointly and severally liable for those harms.\(^{186}\)

Other courts, while adapting Kearney’s aggregate proximate cause approach, have echoed the concerns stated in both the majority and dissent in the Burgess opinion that even a more flexible proximate cause standard cannot ensure that section 2259’s mandate for victim restitution will be fulfilled. In both *United States v. Veazie*\(^{187}\) and *United States v. Tallent*,\(^{188}\)

\(^{182}\) *Id.*

\(^{183}\) *Id.* at *12 (quoting 18 U.S.C. § 2259(b)(1) (emphasis in original)).

\(^{184}\) *Id.*

\(^{185}\) *Id.*

\(^{186}\) *Id.*

two separate federal trial courts adopted Kearney’s aggregate proximate cause standard. However, in contrast to the Kearney, Olivieri, and Burgess decisions, the Veazie and Tallent courts ruled that restitution could not be awarded.

Both courts suggested that in light of Congress’s clear intent that restitution be mandatory for a victim’s full losses, the Kearney court’s aggregate proximate cause standard would be the best way to effectuate “Congress’s goal of ensuring that victims receive full compensation for the losses they have incurred . . . .”\(^{189}\) However, even after finding that the defendants before both courts were individuals who, in the aggregate, proximately caused the victims’ harms, the courts nonetheless determined that awarding restitution for victims of child pornography possession was impossible under the terms of section 2259.\(^{190}\) At bottom, the statute’s inclusion of a proximate cause standard, no matter how broadly or flexibly defined, still required that the courts determine the specific amount of restitution a defendant is required to pay based on the


\(^{189}\) Veazie, 2012 WL 1430540 at *3; Tallent, 2012 WL 2580275 at *10 (an aggregate proximate cause standard “seeks to reconcile the Congressional intent of compensating child pornography victims and the government’s requirement to establish proximate cause for all losses described in § 2259(b)(3).”).

\(^{190}\) Veazie, 2012 WL 1430540 at *4; Tallent, 2012 WL 2580275 at *10.
particular losses he caused to the victim.\textsuperscript{191} In the context of the child pornography possession cases, the Veazie and Tallent courts found this task impossible.\textsuperscript{192}

\begin{flushright}
\textsuperscript{191} Veazie, 2012 WL 1430540 at *5; Tallent, 2012 WL 2580275 at *10.
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\textsuperscript{192} See also United States v. Kennedy, 643 F.3d 1251, 1265 (9th Cir. 2011) (declining to award restitution because it “is likely to be a rare case where the government can directly link one defendant’s viewing of an image to a particular cost incurred by the victim”); United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) (victim impact and psychological evaluation were made prior to defendant’s possession of images, therefore proximate cause could not be established); United States v. Covert, 2011 WL 134060, *9 (W.D. Pa. Jan. 14, 2011) (evidence did not indicate how victim suffered additional harm upon learning of defendant’s possession of her images); United States v. Chow, 760 F.Supp.2d 335, 344 (S.D. N.Y. 2010) (government failed to present evidence as to how defendant’s specific acts caused victim’s losses); United States v. Rowe, 2010 WL 3522257, *5 (W.D. N.C. Sept. 7, 2010) (same); United States v. Patton, 2010 WL 1006521, *2 (D. Minn. March 16, 2010) (evidence of losses addressed harms from creation, distribution and possession of sex abuse images, but did not specifically identify defendant’s contribution to victim’s losses); United States v. Solibury, 727 F.Supp.2d 789, 795-796 (D. N.D. 2010) (“The Court is unable to determine, with any reasonable certainty, what losses are attributable to the egregious acts of sexual abuse committed by Vicky’s father, what losses are attributable to the countless others who have received, distributed, or possessed the images, or what losses were calculated by this particular defendant’s conduct . . . .”); United States v. Strayer, 2010 WL 2560466, *15 (D. Neb. June 24, 2010) (“The government has not quantified, however, any increased or incremental damage to Vicky that would reflect Strayer’s contribution to her injuries and losses.”); United States v. Woods, 689 F.Supp.2d 1102, (N.D. [66])
Neither court questioned that the victims suffered long-lasting and deep psychological harms from the ongoing knowledge that the images of their sexual abuse were in constant circulation and had been viewed by the defendants. Similarly, neither court had trouble agreeing that the defendants were among the many actors responsible for the harm and resulting economic losses suffered by the victims.\textsuperscript{193} However, the courts remained unconvinced that the government had proved how each defendant specifically caused the victims harm.\textsuperscript{194} Invoking bedrock restitution principles,\textsuperscript{195} both courts articulated the common understanding that under any restitution scheme, “a defendant can only be held liable for the harm he proximately caused.”\textsuperscript{196} Even under an aggregate proximate cause standard, both courts viewed the victim’s harms as arising out of a conglomeration of factors: the original abuse, the distribution of the

\textsuperscript{193} Veazie, 2012 WL 1430540 at *3; Tallent, 2012 WL 2580275 at *10.

\textsuperscript{194} Veazie, 2012 WL 1430540 at *4; Tallent, 2012 WL 2580275 at *11.

\textsuperscript{195} Veazie, 2012 WL 1430540 at *5; Tallent, 2012 WL 2580275 at *11.

\textsuperscript{196} Veazie, 2012 WL 1430540 at *5; Tallent, 2012 WL 2580275 at *11.
child sex abuse images, and the ultimate possession of those images by the defendants.\footnote{Veazie, 2012 WL 1430540 at *5; Tallent, 2012 WL 2580275 at *11.} In order to properly order restitution, the government was required to show how each defendant was specifically responsible for all or even part of the victims’ claimed losses. Both courts found the government failed to meet this standard.\footnote{Veazie, 2012 WL 1430540 at *7; Tallent, 2012 WL 2580275 at *12.}

Neither court, however, overwhelming chastised the government for not satisfying its burden. Rather, the courts asserted that the problem rested with the inherent irreconcilable nature of section 2259. As stated by the Tallent court:

> Indeed, the Court cannot imagine how the government could meet its burden to provide specific evidence delineating that quantum of damages proximately caused by [the defendant], or any other defendant convicted of a possession or receipt offense. The statute promises more than it can deliver. It makes a court’s imposition of restitution mandatory, but it then demands that the government prove what is in essence unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim.\footnote{Tallent, 2012 WL 2580275 at *12.}

The courts also rejected any suggestion that applying any aspect of section 3664(h) was appropriate in these types of cases.\footnote{See also United States v. Aumais, 656 F.3d 147, 155-156 (2d Cir. 2011) (rejecting use of section 3664(h) in pornography possession cases); United States v. Monzel, 641 F.3d 528, 538-40 (D.C. Cir. 2011) (same); United States v. Simon, 2009 WL 2424673, *6 (N.D. Cal. Aug. 7, 2009) (same).} Bound up with the courts’ concerns that the statute’s proximate cause standard requires that a defendant be held liable only for the harms his actions specifically caused, the courts asserted that the imposition of joint and several liability upon a
defendant would be misplaced. Among a variety of other reasons, the Veazie court noted that doctrine was only appropriate where a defendant caused all of the victim’s injuries.

Where the defendant does not proximately cause all the victims’ injuries, it would be unfair to impose joint and several liability on the defendant for the total amount of losses attributable to both the initial abuse and all of the acts of possession and distribution that contributed to the victim’s losses.

Nor was either court willing to take up section 3664(h)’s apportionment language to allow for an award of restitution to the victims. In both cases, the government proffered

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201 Veazie, 2012 WL 1430540 at *4, n7. In declining to apply section 3664(h)’s joint and several liability option, the court articulated several arguments for why the doctrine was inappropriate. The court questioned whether the doctrine could be applied to different defendants in separate cases. It also noted the difficulty in administering a joint and several liability scheme among countless defendants being prosecuted in different federal district courts across the United States. The court also suggested that precedent did not support the application of section 3664(h) to section 2259 restitution cases. Finally, and as noted above, the court commented that the doctrine of joint and several liability should not be used “to cure a failure of proof on the causal relation between a defendant’s conduct and the victim’s losses.” Id. (quoting United States v. Kennedy, 2011 WL 2675918, at *11 (9th Cir. July 11, 2011)).

202 Veazie, 2012 WL 1430540 at *4, n.7.

203 Other courts have declined to apportion a defendant’s restitution liability on the ground that to do so would run afoul of section 2259’s command that a defendant pay a victim the full amount of her losses. To divide a restitution award among several defendants would undermine this statutory command. See, e.g., United States v. Crandon, 173 F.3d. 122,126 (3d Cir. 1999); United States v. Lindquist, 2011 WL 7446325, *12-15 (N.D. N.Y. Dec. 14, 2011);
different formulas by which to calculate how to apportion restitution liability among defendants found in possession of the child sexual abuse images. In *Veazie*, the government suggested that the defendant pay $2400 in restitution. The government reached this amount by noting that thus far, twelve other defendants had already been prosecuted for possessing images of the victim in that case, Cindy. Restitution awards in those cases ranged between $1000 and $5000, the average being $2400. Therefore, the government reasoned that $2400 would also be appropriate in the *Veazie* case.204

In *Tallent*, a case involving the victim Vicky, the court noted that Vicky was claiming losses in an amount over just $1.3 million, but had already received over $500 thousand in restitution awards, leaving her at a net amount of losses just over $800 thousand.205 The government suggested that the defendant should pay Vicky just under $4000 in restitution. This amount represented Vicky’s “net outstanding economic losses . . . divided by the number of defendants convicted of possessing [her] image, which the government contend[ed] (without citation) [was] at present approximately 200.”206 In both cases, the courts rejected the government’s “average the award” approach to determining a defendant’s restitution liability.

204 *Veazie*, 2012 WL 1430540 at *2.


206 Id. The government’s number of 200 defendants is much higher than the number of defendants cited to have been prosecuted for possession of Vicky’s images in *United States v. Olivieri*, 2012 WL 1118763 (D. N.J. April 3, 20120), a decided two and a half months prior to
Stemming back to the courts’ concerns that a restitution award must be tied to a specific defendant’s liability, both courts noted that the government’s proffered “average” approaches ignored the important requirement that a restitution award had to be linked with a defendant’s individual culpability.207 The courts also echoed the concerns raised by the district court in Hagerman.208 With and ever growing and potentially infinite number of defendants charged with possessing child pornography images, in time, a defendant’s average restitution award would be reduced to nearly nothing.209

the Tallent decision. In Olivieri, the court stated that fifty defendants had thus far been prosecuted for possession of Vicky’s images. See supra notes X-X.

207 Veazie, 2012 WL 1430540 at *6 (“The government is essentially asking the Court to pick a number representing Cindy’s loss without any regard for the amount of loss caused by the Defendant in this case.”). See also Tallent, 2012 WL 2580275 at *12 (the government’s “formula takes no account of the culpability of a given defendant.”). The courts’ arguments are similar to those raised by the district courts in United States v. Hagerman, 827 F.Supp.2d 102 (S.D. N.Y. 2011) and United States v. Lindquist, 874 F.Supp.2d 364 (N.D.N.Y. 2011), who nonetheless ruled that section 2664(h)’s joint liability standard should be imposed on defendants.

208 2011 WL 6096505, at *14 (N.D.N.Y. Nov. 30, 2011). See also supra notes 165–174 and accompanying text.

209 Veazie, 2012 WL 1430540 at *5 (“if each successive restitution award is based on the average of past restitution awards, the next award will be slightly lower than the preceding award. Eventually, with enough defendants and enough restitution awards, the average restitution award will be just one penny.”). See also Tallent, 2012 WL 2580275 at *12 (“the formula of dividing the total restitutionary amount by the number of defendants possessing
The *Kearney* court’s aggregate proximate cause standard represents one of the more recent and generous attempts by the judiciary to make section 2259 fit with the ongoing and collective nature of child pornography possession victims’ harms. The aggregate proximate cause standard acknowledges that the nature of child pornography possession victims’ harms pose a challenge to the more static nature of the traditional criminal restitution framework, and seeks to create as structure by which victims can be assured relief. However, as the case law exhibits, that assurance is by no means guaranteed.

As the foregoing has demonstrated, the harms suffered by child pornography possession victims challenge the traditional restitution framework in two ways. First, the victims’ harms are ongoing. Whether one figuratively describes a victim’s harms as a “slow acid drip,”\(^{210}\) or “enduring torture by a thousand tiny cuts,”\(^{211}\) one cannot ignore that with each new defendant charged with possessing the sex abuse images of victims such as Amy and Vicky, the young women are subjected to the constant reminder of their original abuse as well as a perpetual invasion of their privacy. Second, these ongoing harms are caused by an ever growing body of independently acting defendants. For example, in two different cases regarding Vicky, decided months from one another, the number of reported defendants prosecuted for possessing Vicky’s sex abuse images had jumped from fifty to two hundred.\(^{212}\) The ongoing nature of victims’ harms as caused by multiple defendants makes the crime of child pornography possession a bit images of a given victim will gradually reduce the amount of restitution to be paid until a defendant is required to pay almost nothing.”).


\(^{212}\) *See supra* note 206.
of a square peg that does not fit with ease into the round hole of restitution. The courts are increasingly highlighting this poor fit and have explicitly asked Congress to address the problem. However, any remedy Congress decides to craft cannot ignore the challenges child pornography possession harms pose to the traditional restitution framework.

IV. CONCLUSION: REMEDYING THE CONTINUOUS CONTAMINATION OF CHILD PORNOGRAPHY POSSESSION

\[213\] See, e.g., United States v. Burgess, 2012 WL 2821069, *12 (July 11, 2012) (asking “Congress reevaluate the structure of the restitution statute in light of the challenges presented by the calculations of loss to victims in the internet age.”); United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) (section 2259 is a poor fit for child pornography possession cases and Congress should reconsider how to provide remedy to victims); United States v. Tallent, 2012 WL 2580275, *12-13 (E.D. Tenn. June 22, 2012) (Congress could not have anticipated that it wrote a statute that promises more than it can deliver); United States v. Chow, 2010 WL 5608794, *7 (S.D.N.Y Nov. 22, 2010) (Congress should further address issue to ensure that victims are appropriately compensated); United States v. Solibury, 727 F.Supp.2d 789, 796 (D. N.D. 2010) (“Unfortunately, the current statutory framework designed to assist victims of child pornography is unworkable in the criminal arena” and Congress needs to resolve the problem); United States v. Paroline, 672 F.Supp.2d 781 (E.D. Tex. 2009) (“While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely unworkable in the context of criminal restitution.”) overruled on other grounds In re Amy Unknown, 2012 WL 4477444 (5th Cir. Oct. 1, 2012).
In this section I do not intend here to try to craft the perfect solution for addressing the harms suffered by child pornography victims. Rather, my hope is to outline the different approaches Congress could take in revisiting the statute take and briefly evaluate each.

First, Congress could clarify for the courts what type of proximate cause standard it intended to include in section 2259.\textsuperscript{214} So doing, Congress could take one of two routes. First, it could affirm the approach taken by the Fifth Circuit court of appeals in the In re Amy Unknown line of cases where that court has interpreted section 2252A as not requiring a precise showing of proximate cause between a defendant’s possession and a victim’s harms.\textsuperscript{215} This approach also supports holding defendants jointly and severally liable for a victim’s entire losses.\textsuperscript{216} Such an approach has its benefits, as it supports Congress’s broad remedial goal of ensuring that victims are compensated for their injuries and that those who have harmed them are held accountable. However, as noted throughout this paper, such an approach departs from a core restitution principle that a defendant should only be held liable for the harms he caused.\textsuperscript{217}

\textsuperscript{214} See supra note 36.

\textsuperscript{215} See In re Amy Unknown, 2012 WL 4477444 (5th Cir. October. 1, 2012). See also Boe, supra note 2; Joffee supra note 2; Kaplan, supra note 2.


\textsuperscript{217} See United States v. Hughey, 495 U.S. 411 (1990). See also supra notes 20 - 22 and accompanying text.
Conversely, Congress could clarify that the proximate cause language which appears in section 2259 requires a direct link be established between the defendant’s possession and a victim’s harms. To the extent a defendant may have contributed to a victim’s total harms, the defendant’s restitution liability should be apportioned pursuant to section 3664(h).\textsuperscript{218} Under this construct, Congress would be sending the message that the harms suffered by victims are divisible. Such an approach would also remain far more faithful to the criminal restitution framework. However, this approach fares no better in ensuring that courts make restitution awards to victims in a consistent manner. Neither victims nor defendants can be assured as to how a court will evaluate whether a defendant must pay restitution. Some courts have reluctantly denied any restitution because the government has been unable to show how a specific defendant’s possession of a victim’s sexual abuse image has caused the victim harm.\textsuperscript{219}


\textsuperscript{219} See, e.g., United States v. Kennedy, 2011 WL 2675918 (9th Cir. July 11, 2011); United States v. Aumais, 656 F.3d 147 (2d Cir. 2011); United States v. Aguirre, 2011 WL 3629236 (9th Cir. 2011); United States v. Tallent, 2012 WL 2580275 (E.D. Tenn. June 22,
Others have crafted any number of creative, but potentially suspect means of providing victims some form of remedy.\(^{220}\) With either set of results, the courts are unable to fulfill Congress’s

\(^{220}\) See, e.g., Brannon, 2012 WL 1758998 at *2 (reaching restitution amount by creating an average of all other restitution amounts already received by victim); United States v. Kearney, 2012 WL 639168, *17 (1st Cir. Feb. 29, 2012) (reaching restitution amount by averaging awards victim had received in other cases after discarding the highest and lowest awards); United States v. Christy, 2012 WL 3255107, *48 (D. N.M. Aug. 2, 2012) (awarding $500 in restitution based on parties’ stipulation); Breisacher, 2012 WL 2789065 at *4 (setting restitution amount for victims at $10,000 deeming the award “reasonable” without explanation of how amount fits with extent of harm defendant caused to victim); United States v. Olivieri, 2012 WL 1118762, *12 (D. N.J. April. 3, 2012) (attributing fifty percent of victim’s claimed losses to original abuser, and then dividing the remaining losses by seventy-five to account for presently known and potentially future defendants); United States v. Klein, 2011 WL 5389358, *9 (S.D. Ohio Nov. 8, 2011) (awarding $5000 in the form of nominal damages); United States v. Mather, 2010 WL 5173029, *5 (E.D. Cal. Dec. 13, 2010) (estimating $3000 to be a reasonable restitution award);
proffered goals under the statute. Victims are often denied their promise of mandatory restitution, while defendants are sometimes required to pay a restitution amount that while reasonable, may not genuinely represent the harm he caused to the victim. Therefore, even if Congress were to clarify section 2259’s proximate cause language as well as whether section 3664(h) could be applied to child pornography possession cases, problems would still exist. Rather, Congress must craft a remedy for victims outside the context of the standard criminal restitution framework.

In a separate article, I suggested that Congress categorize the harms suffered by victims of child pornography possession as a type of invasion of privacy, and provide victims with a form of set statutory damages. Others have suggested that Congress create a victim compensation fund for victims into which defendants will contribute set amounts, and to which victims may apply for funds to cover such costs as counseling and lost wages. Under these


18 U.S.C. § 2259(a) (“a court shall order restitution . . .”) (emphasis added).

See supra notes 20-22 and accompanying text. See also supra note 41.

See Giannini, supra note 3.

See, e.g., Kennedy, 643 F.3d at 1266 (suggesting that Congress either set a fix statutory damage for victims, or create a general fund for victims); Solsbury, 727 F.Supp.2d at 797 n.1 (same); United States v. Paroline, 672 F.Supp.2d 781, 793 n.12 (E.D. Tex. 2009) (same) overruled on other grounds In re Amy Unknown, 2012 WL 4477444 (5th Cir. Oct. 1, 2012). See also, Tyler Morris, Note, Perverted Justice: Why Courts are Ruling Against Restitution in Child

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approaches, there is a suggestion that to some measure, Congress and the Courts should treat a defendant’s possession of child pornography as a type of strict liability crime, at least in the context of determining what type of remedy a defendant should provide a victim. At least two of courts addressing restitution claims for Amy have impliedly taken such an approach. In both *United States v. Klein*, and *United States v. Church*, the district courts awarded what they characterized as “nominal damages” of $5000 and $100 to Amy. Both courts acknowledged the difficulty the government had in specifically showing how the defendants in these cases had

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I am not suggesting that in and of itself, the crime of child pornography possession, should be converted to a strict liability offense. Section 2252 of the criminal code makes clear that an affirmative defense for the crime exists where an individual possesses less than three images and “promptly and in good faith, without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy” of the child sex abuse images, “took reasonable steps to destroy each” image or “reported the matter to a law enforcement agency and afforded that agency access to each” image. 18 U.S.C. § 2252.


228 Klein, 2011 WL 5389358 at *9; Church, 701 F.Supp at 834-35.
specifically contributed to Amy’s harms.\textsuperscript{229} However, neither was comfortable with entirely ignoring the reality that the defendants, by possessing images of Amy’s sexual abuse, had contributed to her ongoing harms. Because the defendants in both cases entered guilty pleas to possessing the child sex abuse images,\textsuperscript{230} the Klein and Church courts reasoned that a nominal award was appropriate to recognize that Amy had been harmed by the defendants, even if the proof was lacking as to how those defendants had specifically contributed to her losses. While neither court explicitly said as much, each treated the defendants as if they were strictly liable, to a limited measure, for Amy’s harms. The defendants’ very possession of the images of Amy’s sexual abuse had caused her harm. The modified awards of $100 and $5000 acknowledged that harm in the absence of any required showing of proof on behalf of the government. While neither court was able to provide restitutionary relief to Amy by virtue of section 2259, the courts recognized that the defendants’ possession of her images did cause her harm and therefore warranted some measure of financial relief.

A tempered strict liability approach to compensating victims of child pornography possession, whether through a set of Congressionally established statutory damages, or through mandated defendant contributions to a victims’ compensation fund, would be the best way to address the ongoing and collectively caused nature of the harms suffered by victims such as Amy and Vicky. In similar fashion to CERCLA, which establishes that anyone who has had contact with a contaminated property is strictly liable for the clean-up costs for the property,\textsuperscript{231} Congress

\textsuperscript{229} Klein, 2011 WL 5389358 at *9; Church, 701 F.Supp at 834-35.

\textsuperscript{230} Klein, 2011 WL 5389358 at *9; Church, 701 F.Supp at 817.

\textsuperscript{231} 42 U.S.C. § 9607. \textit{See also supra} Part II.C.2.
could mandate that anyone found in possession of child pornography will be deemed strictly liable for a set amount of damages.\textsuperscript{232} Such an approach would recognize that the harms suffered by child pornography possession victims are better served outside the traditional restitution framework, and would eliminate the difficult and often impossible process of determining the extent to which a defendant has proximately caused a victim’s losses.

Of course, a strict liability damages approach is not perfect. First, Congress would have to engage in the policy determination to set a fair amount to impose on defendants for each possessed image, and any amount Congress chose could be subject to an Eighth Amendment challenge.\textsuperscript{233} Second, awards to victims would be piecemeal in nature. Instead of a victim being able to seek her total losses from a single defendant, victims could very well be subjected to a new type of a “slow acid drip.”\textsuperscript{234} Not only might the presumably smaller recovery amounts make it harder for victims to proceed in a systematic and even path toward recovery, but the constant trickling of small awards might create even more harm to victims as they were reminded all the more of their ongoing harms.

\textsuperscript{232} But see supra note 225.


However, the detriments of such a system are no worse than the current state of affairs. Moreover, a tempered strict liability approach brings many benefits that are currently lacking under section 2259. First, Congress would be more assured that it could provide an actual remedy to victims, while also ensuring that defendants are not burdened with exorbitant or inconsistently calculated restitution awards. Victims would know that they would get some measure of relief and the government would not be saddled with the often difficult task of proving that a defendant’s possession proximately caused the victims’ losses. Defendants would know that they would be required to pay something to the victims, and therefore might be deterred from possessing child sex abuse images. Furthermore, one would hope that the deterrent effect would then undercut the proliferation of the child pornography market.235 Finally, if a victim had reached a place in her recovery where she was able to healthfully separate herself from the reality that the images of her sexual abuse were always going to be in circulation and no longer wished to be regularly reminded of this fact in the form of regular damage awards or disbursements from a victim’s fund, she could always waive her right to those moneys and direct them for the benefit of other victims.

All told, the current system is not working. It is designed to address harms that have ended, and which were created by a discrete and identifiable set of defendants. The same cannot be said for the victims of child pornography possession. In crafting a better remedy for child pornography possession victims, Congress should depart from the framework laid out in section 2259, and opt for structure that is better poised to recognize the ongoing harms suffered by these victims at the hands of an ever growing body of defendants. A Congressionally set award,

235 See supra notes 44–51 and accompanying text (regarding Ferber discussion).
absent any specific causation requirement, represents the soundest way to respond to the ongoing harms of child pornography possession victims.