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## When does Restitution become Retribution?

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# WHEN DOES RESTITUTION BECOME RETRIBUTION?

MELANIE REID\* & CURTIS L. COLLIER\*\*

## *I. Introduction*

During a civil trial, a defendant is typically focused on one thing: “How much money will this trial cost me if I lose?” The focus is quite different for a criminal defendant: “How much time will I serve in prison if I am found guilty?” Defense teams in both criminal and civil proceedings have similar objectives, i.e., minimize any damages imposed against their clients. However, in the scheme of things, financial loss is usually preferable to prison or loss of liberty. For that reason, most people lose sight of the fact that oftentimes a criminal defendant may face not only serious jail time but also debilitating financial losses in the form of restitution to identified victims. Restitution should be awarded to victims to compensate them for their losses, but excess restitution is tantamount to unfair retribution. Excess restitution has become particularly troubling in child pornography cases when one victim’s image is illegally possessed or distributed by multiple convicted criminal defendants. The result of duplicative restitution is often unjust enrichment of victims, who are sometimes compensated millions of dollars for one illicit image. This raises serious questions regarding when and how justice is served through the restitution process during criminal proceedings.

At the end of a federal criminal trial, if the defendant is convicted, the court sentences the defendant to a term of imprisonment, imposes a standard term of supervised release, and issues a \$100 assessment/criminal monetary fine per each count of conviction to be paid to the court.<sup>1</sup> Yet, there is an unfamiliar issue that increasingly arises at sentencing that touches upon the same concerns as those facing a civil defendant: *restitution*.

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\* Assistant Professor of Law, Lincoln Memorial University-Duncan School of Law. I would like to thank Robert Reid, Pat Laflin, Professor Bruce Beverly, and Associate Dean April Meldrum for their thoughts and criticism on this Article, and Heather Shubert for her research assistance. I would also like to thank Judge Collier in bringing this issue to the forefront and inspiring me to delve further into this specific area of criminal law.

\*\* Chief United States District Court Judge for the Eastern District of Tennessee. I would like to thank my law clerk Adam Sanders for his thoughts and comments on this issue and his invaluable research assistance.

1. FED. R. CRIM. P. 32.

Criminal restitution, like civil liability, threatens a criminal defendant with substantial financial loss. Despite the possibility of a large and at times unfair restitution award, criminal defense attorneys and prosecutors rarely devote adequate time to consideration of a third party's request for restitution. This is partially because, despite a growing body of statutory and case law addressing restitution,<sup>2</sup> criminal defense attorneys and prosecutors are not as familiar with restitution determinations as are their civil counterparts. Additionally, criminal defense attorneys and prosecutors focus on what they perceive to be more immediate concerns such as guilt and innocence and the length of sentence. Criminal prosecutors and defense attorneys are usually unfamiliar with restitution determinations which apply more to civil remedies. Restitution may be mentioned at the conclusion of a criminal trial, but this issue is secondary to incarceration deliberations. Restitution is thus never at the forefront of criminal proceedings.

What is restitution's place in the criminal proceeding? English courts first developed restitution centuries ago as a contractual remedy to prevent unjust enrichment of one party over another.<sup>3</sup> The United States brought the concept of restitution to the court system and expanded its use to contracts, torts, and criminal law.<sup>4</sup> In criminal law, restitution is an affirmative performance by the defendant that benefits the individual victim affected by the crime.<sup>5</sup> Restitution has many definitions. The one most applicable to its use in a criminal proceeding is:

Return or restoration of some specific thing to its rightful owner or status . . . [c]ompensation for loss; esp[ecially], full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."<sup>6</sup>

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2. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5(a), 18 U.S.C. § 3663 (2006); Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204 (codified as amended at 18 U.S.C. §3663A (2006)).

3. JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 314, 888 (2009).

4. *Id.* at 853-54.

5. *United States v. Wyzynski*, 581 F. Supp. 1550 (E.D. Pa. 1984); FRANK W. MILLER, ROBERT O. DAWSON, GEORGE E. DIX & RAYMOND R. PARNAS, CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS 1222 (Foundation Press, 5th ed. 2000).

6. BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

In criminal proceedings, the sentence is meant to punish, deter, incapacitate, and hopefully in some cases, rehabilitate the guilty.<sup>7</sup> Restitution, however, introduces another important consideration to the case. It is the only element of the sentence that focuses solely on the victim and, as the definition states, is meant to restore the victim to his or her original state before the crime occurred. As an example, imagine a defendant who has been convicted of robbing a bank. The punitive aspects of his sentence may include a term of imprisonment, supervised release, and a fine. In order to make the victim of the crime whole, however, the court may order the defendant to reimburse the bank for the whole amount of money he originally stole. But if the purpose of restitution is to make the victim of a crime “whole,” then it is not meant as additional punishment to the defendant, but rather something skin to punitive damages in the civil tort law context.<sup>8</sup>

A judge must decide the restitution amount to be awarded to the victim in a criminal case. To accomplish this, a judge must consider whether the restitution should focus on the *gains* the defendant has received from the crime or focus on the victim’s *losses* as a result of the crime.<sup>9</sup> The criminal court system can learn from the civil court system’s time-tested approach to damages, compensation, and restitution. The civil system employs the use of nominal, compensatory, and punitive damages, general and specific damages, non-pecuniary and pecuniary losses, and concepts such as joint and several liability and equitable remedies to return victims to their state of being “whole.”<sup>10</sup>

Not every request for restitution is as simple as repaying the bank or returning the stolen car to the original owner. Some crimes lend themselves to a more complicated restitution decision from the judge, as this article will show. The VWPA required that restitution be ordered as a separate component of every sentence if requested.<sup>11</sup> The MVRA amended the codified statutes involving restitution, specifically 18 U.S.C §§ 3663 and 3664, adding that victims must be “directly and proximately” harmed by the offense and that each victim is entitled to the “full amount of each victim’s

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7: 18 U.S.C. § 3553(a)(2) (2006).

8: DAN B. DOBBS, *THE LAW OF TORTS* 1063 (2000).

9: In other words, should the victim receive the value of whatever was conferred to the defendant as a result of the crime or should the victim’s compensation come from the loss the victim has suffered as a result of the defendant’s unlawful act?

10: FED. R. CIV. P. 32. Civil damages are typically determined by a jury whereas criminal restitution awards are determined by the judge.

11: 18 U.S.C. §§ 3663-3664.

losses.”<sup>12</sup> However, it was the Violence Against Women Act (VAWA), passed in 1994, that guaranteed restitution for certain title 18 offenses, such as violence against women, sexual abuse, sexual exploitation of children, domestic violence and telemarketing fraud.<sup>13</sup> This article specifically explores federal court orders of restitution entered against defendants convicted of possessing child pornography—intended to help make victims of sexual abuse and exploitation whole.<sup>14</sup>

Fifteen years after the passage of the VAWA, victims of child pornography began to request restitution from those convicted of possessing, receiving, or distributing child pornography in violation of 18 U.S.C. §§ 2252 and 2252A.<sup>15</sup> Congress made restitution for victims of child exploitation offenses, in particular possession of child pornography, mandatory under 18 U.S.C. § 2259.<sup>16</sup> An order of restitution under § 2259 “shall direct the defendant to pay the victim . . . the full amount of the victim’s losses as determined by the court . . . .”<sup>17</sup> This statute confronted judges with a multitude of issues: who are the “victims,” how can they be restored to their original state prior to the offense, and should they be compensated for their loss or should the focus be on the defendant’s gain by having unlawful images in his possession?

Since 2009, few victims have requested restitution under 18 U.S.C. § 2259 – most restitution requests have come from two victims, known only as “Amy” and “Vicky.”<sup>18</sup> “Amy” and “Vicky” have requested

12. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132 (codified as amended at 18 U.S.C. § 3663A (2006)).

13. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 18 U.S.C. § 3663 (2006).

14. See also Robert William Jacques, Note, *Amy and Vicky’s Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167 (2011); Michael A. Kaplan, Note, *Mandatory Restitution: Ensuring That Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531 (2011); Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327 (2011); Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333 (2011).

15. In most of the cases discussed below, the defendant is charged with knowingly possessing material that contained images of child pornography which had been transported in interstate commerce by means of computer in violation of 18 U.S.C. § 2252A(a)(5)(B) or § 2252(a)(4)(B). There is a mandatory minimum sentence of five years for distribution or receipt of such materials and a maximum of twenty years under these statutes. 18 U.S.C. § 2252A(b).

16. *Id.* § 2259.

17. *Id.*

18. “Amy” is also referred to as the child in the “Misty” child pornography series. “A ‘series’ is a collection of child pornography images depicting the same victim or victims; they are traded online among those who deal in child pornography.” *United States v. Hardy*,

\$3,367,854.00 and \$151,002.91, respectively, in multiple cases.<sup>19</sup> “Amy” has requested restitution in 684 cases of possession, receipt, or distribution of child pornography, and in a survey of 116 of those cases from multiple judicial districts, she has been awarded a total of \$11,939,821.00.<sup>20</sup> “Vicky’s” images are, unfortunately, associated with as many as 9200 cases around the country.<sup>21</sup> In a survey of 153 cases in which “Vicky” has sought restitution, “Vicky” has been awarded a total of \$2,739,145.50.<sup>22</sup> The paperwork from the victim’s attorney is the same in each case, simply replicated for the new defendant, forwarded to the prosecutor, the federal district court, and defendant’s attorney, regardless of the jurisdiction in which the case is being adjudicated. Some courts request additional information while others are satisfied with the dollar amount requested without further information. The decisions by the federal district court judges are not the same however. In some cases, the court has awarded the entire amount requested by the victim.<sup>23</sup> In other cases, the courts have declined to order any type of restitution, typically because the court found no quantifiable loss that was proximately caused by the defendant’s offense of conviction.<sup>24</sup> Still other courts have decided that the victim should

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707 F. Supp. 2d 597, 600 n.3 (W.D. Pa. 2010). “Amy” and “Vicky” have been used in court documents to protect their privacy.

19. Because of the nature of child pornography, images of a particular child will occur in many cases. The names “Amy” and “Vicky” appear in a large number of child pornography cases. *See, e.g.*, *United States v. Monzel*, 641 F.3d 528, 530 (D.C. Cir. 2011) (using “Amy”); *United States v. Patton*, No. 09-43 PAM/JSM, 2010 WL 1006521 (D. Minn. Mar. 16, 2010) (using “Vicky”); *United States v. Berk*, 666 F. Supp. 2d 182, 185 (D. Me. 2009) (using “Amy” and “Vicky”).

20. *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), *petition for cert. filed*, 2011 WL 2877874, at \*24 (U.S. July 15, 2011) (No. 11-85); *see also* spreadsheet surveying 116 of “Amy’s” cases in which she requested restitution. These restitution amounts reflect the amount awarded and not the actual amount received by the victim.

21. *United States v. Brannon*, No. 4:09-CR-38-RLV-WEJ, 2011 WL 2912862, at \*9 (N.D. Ga. May 26, 2011).

22. *See* spreadsheet surveying 153 of “Vicky’s” cases in which she requested restitution. These restitution amounts reflect the amount awarded and not the actual amount received by the victim.

23. *See, e.g.*, *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010) (awarding \$3000, the entire amount the government had requested); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*4 (S.D. Fla. Sept. 2, 2009) (awarding “Amy” \$3,680,153); *United States v. Freeman*, No. 08-cr-00022-002, 2009 U.S. Dist. LEXIS 113942 (N.D. Fla. filed Aug. 5, 2009) (awarding to “Amy” \$3,263,758).

24. *United States v. Covert*, Criminal No. 09-332, 2011 WL 134060 at \*9 (W.D. Pa. Jan. 19, 2011); *United States v. Rhodes*, No. CR-10-14-M-DWM, 2011 WL 108951, at \*3 (D. Mont. Jan. 12, 2011); *United States v. Rowe*, No. 1:09CR80, 2010 WL 3522257, at \*6 (W.D. N.C. Sept. 7, 2010); *United States v. Chow*, 760 F. Supp. 2d 335, 345 (S.D.N.Y. 2010); *United States v. Faxon*, 689 F. Supp. 2d 1344, 1361 (S.D. Fla. 2010); *United States v.*

receive a percentage of the total loss and have typically awarded between \$3,000 and \$5,000 as the amount of harm caused by the possessor of the child pornography.<sup>25</sup> There have also been a few cases in which the government and the defendant have stipulated to a restitution amount, taking the decision out of the hands of the judge.<sup>26</sup>

The wide variety of judicial decisions make clear that judges are confused as to the method of calculation of restitution owed to victims of child pornography. Title 18 U.S.C. § 2259, as written, is broken and must be fixed. Such action is required to provide clarity to sentencing judges, prosecutors, and defense attorneys, and to compensate the victim effectively while instilling a sense of fairness and justice in the issuance of an order to the defendant to pay the restitution.

This article proceeds in four parts. Part II examines the 18 U.S.C. § 2259 restitution statute in detail in relation to the child pornography possession statute, 18 U.S.C. § 2252(a)(5)(B). This part describes the issues facing defense attorneys and prosecutors alike as they tackle § 2259 restitution issues at the sentencing phase. The gray areas of 18 U.S.C. § 2259 are numerous: what constitutes a “victim” in a child pornography

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Solsbury, 727 F. Supp. 2d 789, 796-97 (D. N.D. 2010); *Patton*, 2010 WL 1006521 at \*2; *United States v. Woods*, 689 F. Supp. 2d 1102, 1113 (N.D. Iowa 2010); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at \*5 (N.D. Ga. Dec. 17, 2009); *United States v. Paroline*, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009); *United States v. Simon*, No. CR-08-0907 DLJ, 2009 WL 2424673, at \*7 (N.D. Cal. Aug. 7, 2009); *United States v. Johnson*, CR 08-218-01-KI (D. Or. May 19, 2009); *Berk*, 666 F. Supp. 2d at 188.

25. *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States v. Ontiveros*, No. 2:08-CR-81-JVB, 2011 WL 2447721 (N.D. Ind. June 15, 2011) (awarding 1% of losses or \$4,500 in restitution); *United States v. Lindauer*, No. 3:10-cr-00023, 2011 WL 1225992, at \*4 (W.D. Va. Mar. 30, 2011) (awarding 5% of total losses or \$5,448 in restitution); *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at \*6 (E.D. Cal. Dec. 13, 2010) (awarding \$3,000); *United States v. Brunner*, No. 08-CR-16, 2010 WL 148433, at \*5 (W.D. N.C. Jan. 12, 2010) (awarding \$6000 to “Amy” and \$1500 to “Vicky”); *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at \*5-6 (E.D. Va. Nov. 24, 2009) (awarding \$3000); *United States v. Elhert*, No. 3:09-CR-05203, judgment at 7-11 (W.D. Wash. Oct. 13, 2009) (awarding \$1000 and \$5000 to victims respectively for the number of images in defendant’s possession); *United States v. Brown*, No. 2:08-cr-1453-RGK-1, U.S. Dist. LEXIS 113942 at \*1 (C.D. Cal. filed Oct. 5, 2009) (awarding \$5000); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at \*6-7 (E.D. Cal. filed Aug. 19, 2009) (awarding \$3000); *United States v. Monk*, No. 08-cr-0365 AWI, 2009 WL 2567831, at \*6-7 (E.D. Ca. filed Aug. 18, 2009) (awarding \$3000); *United States v. Zane*, No. 08-cr-00369 AWI, 2009 WL 2567832, at \*6-7 (E.D. Ca. filed Aug. 18, 2009) (awarding \$3000).

26. *United States v. Lubiewski*, No. 09-cr-447 (E.D. Mo. filed Feb. 18, 2010) (“Vicky”); *United States v. Traynor*, No. 09-CR-00273 (D. N.J. Oct. 7, 2009); *United States v. Granato*, No. 2:08-cr-198 (D. Nev. filed Aug. 28, 2009); *United States v. Hesketh*, 08-cr-165 (Conn. filed Feb. 23, 2009) (“Amy”).

case, whether the damages must be closely linked or the “proximate result” of the defendant’s possession of the images, whether joint and several liability should exist in this area, what must the victim do to support the damage amount requested, and what are the due process concerns in relation to imposing such a restitution order. As each issue is addressed, a separate sub-section discusses possible solutions to issues faced by prosecutors and defense attorneys when arguing for or against § 2259 claims and possible suggestions on how judges could more uniformly handle these problems.

Part III proposes that Congress amend 18 U.S.C. § 2259 to provide guidance and consistency throughout the judicial system. A system that determines the full amount owed to victims in the first instance, sets forth percentage guidelines by apportioning the defendant’s fault in relation to other co-defendants, orders restitution based upon apportioned liability, and permits victims to seek contribution from other co-defendants would allow the court to fashion a just apportionment of damages to each possessor faced with a restitution request. The conclusory sub-sections in Part II, the proposals delineated in Part III, and Part IV’s conclusion have been written solely by Melanie Reid to serve as suggestions and guidelines to be used by practitioners, federal judges, or members of Congress.<sup>27</sup>

## *II. The Issues Facing Mandatory Restitution Under 18 U.S.C. § 2259*

Initially, determining the basics of criminal restitution in federal criminal cases seems rather straightforward. In fact, in a summary training outline on restitution, Assistant General Counsel for the United States Courts, Catherine M. Goodwin, spells out the five steps in determining specific restitution amounts: (1) “identify the offense of conviction in order to determine whether restitution is mandatory,” (2) “identify the victims of the offense,” (3) “identify the victims’ harms caused by the offense,” (4) “determine which harms (and/or costs) are statutorily compensable under restitution,” and (5) “determine if the plea agreement broadens restitution.”<sup>28</sup>

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27. Judge Collier collaborated on Part II of this article in an attempt to educate and acquaint practitioners and judges with the pitfalls and peculiarities of this issue. Any advocacy or suggestions on policy issues are the opinions solely of co-author, Melanie Reid, as Judge Collier takes no position on any suggested proposals addressed below.

28. CATHERINE M. GOODEN, U.S. SENTENCING COMM’N, RESTITUTION IN FEDERAL CRIMINAL CASES, SUMMARY TRAINING OUTLINE 4 (2001), available at [www.ussc.gov/Education\\_and\\_Training/Guidelines\\_Educational\\_Materials/trainnew.pdf](http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/trainnew.pdf).



These five steps are easy to follow when awarding restitution in traditional cases. For example, victims of a financial loss are easily identified whether the victim is a burglarized bank or an investor who fell for a Ponzi scheme. There may be litigation about the size of the loss or whether the offender should pay interest on the loss, but conceptually there is no real dispute about whether a tangible financial loss occurred. The offender appreciates why he must restore the victim's tangible financial loss. In the substantial majority of cases, there is a direct link between the offender and the victim. With mail, wire, and internet fraud cases, the offender and victim might not have ever physically met, but there is still a direct link between the offender and victim.

In contrast, only steps one and five appear to be relatively easy to interpret in the child pornography context. It is clear that restitution is mandatory pursuant to 18 U.S.C. § 2259 which provides that "the order of restitution under this section *shall* direct defendant to pay the victim" and that both the government and defendant can stipulate to a restitution amount in a plea agreement.<sup>29</sup> Restitution in child pornography cases differs from traditional restitution payments, however, in several respects. First, it is difficult to identify who is a "victim" of the offense. Second, monetizing victims' harms can be challenging because of the inherently personal nature of the harm. Third, it is unclear which harms are statutorily compensable as to the particular defendant.

Child pornography cases thus depart from the traditional understanding of restitution in a variety of ways. When the possessor of child pornography enters a guilty plea, it is unlikely he realizes and appreciates that his offense is such that he must financially restore someone. One of the benefits of restitution in traditional cases is that the act of making the victim "whole" brings home to the offender the harmfulness of his/her actions, and this restorative act has deterrent value in and of itself. This deterrent value is completely missing in child pornography cases. In fact, the opposite effect may be present because offenders will think the order of restitution is unjust due to the extremely large restitution award granted the victim which could lead to non-acceptance of the fairness of the sentence.<sup>30</sup>

Another distinction, of course, is there will rarely be a direct link between the victim and the offender (as will be discussed in Part II.B). The possessor and the victim have almost certainly never met. Moreover, the

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29. The statutes governing the sexual exploitation of children are found under 18 U.S.C. §§ 2251-2258 (2006). The mandatory restitution requirement for these offenses is found at 18 U.S.C. § 2259.

30. See *infra* notes 18-26 and accompanying text.

victim and possessor may be separated by great distances with the defendant being in the United States and the victim in Eastern Europe or elsewhere. There is also a separation of time. The victim's photograph may have been taken many years ago and just recently accessed and possessed by the defendant. The last distinction is that the types of losses listed in § 2259 are not the types of injuries or damages recognized in typical restitution cases. Bernard Madoff's Ponzi scheme doubtless led to victims experiencing psychiatric or psychological injury when they learned their life savings were gone and they were destitute. However, the consequential damages found in child pornography possession cases are generally not part of typical restitution litigation or awards in federal court.<sup>31</sup>

From this complex perspective, everyone involved in a child pornography possession case must look at restitution with a completely new and different mindset. The defense attorney must put out of his or her mind much of what they knew or thought they knew about restitution in federal sentencing.

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31. Most restitution cases require the defendant to restore any gains he or she made in the process of committing the crime. DOBBS, *supra* note 8, at 1047. Child pornography restitution cases are rather unique because they focus on the victim's losses rather than any gains made by the defendant. Focusing on the victim's losses would lead one to believe the term "damages" would also apply. However, the terms "losses" and "damages" are not synonymous. Damages, which "refers to the monetary award for legally recognized harm," is "distinct from restitution." *Id.* "Loss" is defined as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way." BLACK'S LAW DICTIONARY 1029 (9th ed. 2009). "Damages" is defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Id.* at 445. In tort law, damages can include non-pecuniary losses for physical pain and suffering, mental or emotional distress, fright and shock, anxiety about the future, loss of peace of mind, happiness, mental health, humiliation, embarrassment, or loss of dignity, loss of the ability to enjoy a normal life, inconvenience, etc. Title 18, § 2259 of the U.S. Code muddies up the water by referring to "losses" incurred by the victim and includes items that are covered under civil damages such as medical services, lost income, attorney's fees, and any other general losses which are all usually covered in civil damages. However, it is imperative to remember restitution (a victim's recovery of losses) was not necessarily meant to cover everything one is entitled to under civil damages (such as pain and suffering, mental or emotional distress, etc.). For example, if an end-user sports bar pirated cable channels from Direct TV, Direct TV would ask for restitution in the amount of profit lost those months the end-user watched the pirated channels. *See generally Anti-Fraud Enforcement Actions: The Truth*, [http://hackhu.com/news\\_archive.php](http://hackhu.com/news_archive.php). Direct TV would not include pain and suffering as part of their losses. Even if the "victim" was an actual person rather than an inanimate entity such as Direct TV, emotional damages would not be considered "losses" under the general restitution statutes. Those emotional damages would only be covered in a civil suit and not considered during a criminal restitution hearing.

Further, unlike typical restitution cases where restoring the victim is the purported intent, the unstated goal in child pornography cases is punitive, not restorative. Much of what would be considered as a mitigating factor against restitution in other cases is not present in child pornography cases. Foremost, it is irrelevant whether the offender has the ability to pay restitution because restitution awards are lifetime obligations. This means in some child pornography cases the defendant will be saddled with a very large restitution order that the offender will most likely never be able to pay and no one will ever be able to collect.<sup>32</sup> It is therefore helpful in this context to think of restitution more in the nature of a criminal fine.

As a group, child pornography offenders are distinctive. Statistically, the offender is a middle-aged white male, who, in possessing child pornography, is committing his first offense.<sup>33</sup> He has a solid work history, and likely has at least a college education.<sup>34</sup> Prior to his conviction, he has been able to earn a decent salary, but after a criminal conviction and lengthy prison sentence, his future earning capacity post-prison is dismal.<sup>35</sup>

It would behoove accused offenders in child pornography cases and their defense attorneys to realize that the underlying intent of restitution in these cases is not to make some victim whole but rather to punish the offender further. With this realization, the offender has a better chance of mounting a rigorous defense against unjust restitution. Indeed, child pornography cases are the fastest growing type of case in federal prosecutions.<sup>36</sup> While these cases make up only about 2.3% of federal sentencing orders, this growth is larger than any other type of federal crime.<sup>37</sup> More and more

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32. This too explains why proximate cause is somewhat irrelevant and why each offender must pay the “full amount of the victim’s losses.” 18 U.S.C. § 2259(b)(3); see discussion *supra* Part II.

33. U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm); JANIS WOLAK ET AL., NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL ONLINE JUVENILE VICTIMIZATION STUDY 1-3 (2005), available at [http://www.missingkids.com/en\\_US/publications/NC144.pdf](http://www.missingkids.com/en_US/publications/NC144.pdf).

34. WOLAK ET AL., *supra* note 33, at 2-3.

35. *Id.* at 3.

36. *Id.*

37. See U.S. SENTENCING COMM’N, U.S. OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY fig. A (2010), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureA.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureA.pdf); *Fact Sheet: Project Safe Childhood*, U.S. DEP’T OF JUSTICE, <http://www.projectsafefchildhood.gov/docs/factsheet.pdf> (last visited June 16, 2012). The issues surrounding section 2259 of the child pornography restitution statute have been raised in many federal courts recently. See *United States v. Wright*, 639 F.3d 679,

practitioners will be facing these issues and be prepared to grapple with them in the courtroom setting. The following sections A-E identify specific issues facing practitioners in these types of cases.

*A. Who Is Considered a “Victim” When the Offender “Merely” Possesses Child Pornography?*

*1. The “Victim” Issue Identified*

In order to request and receive restitution, a victim must suffer harm from the offender’s conduct. Some defendants in child pornography cases argue that the harm occurred when the image was created, and not when viewed by the possessor, thereby negating the premise that the child is a “victim” in the specific case of possession only.<sup>38</sup> Those who feel they are the “victim” and request restitution typically do so because they feel each time the photograph or video is viewed, more harm is added to the initial injury of being sexually abused.<sup>39</sup> The child in the images may feel shame, humiliation and fear that individuals, such as the defendant/possessor, are watching these images, victimizing the child each time they are viewed. The child is aware that his/her images were viewed because federal prosecutors are required to notify potential victims that someone found to be in possession of said images is being prosecuted.<sup>40</sup>

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682 (5th Cir. 2011); U.S. SENTENCING COMM’N, [2010] SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 13 (15th ed. 2011).

38. See *United States v. Woods*, 689 F. Supp. 2d 1102, 1105-06 (N.D. Iowa 2010); *United States v. Patton*, No. 09-43 PAM/JSM, 2010 WL 1006521 at \*1 (D. Minn. Mar. 16, 2010); *United States v. Church*, 701 F. Supp. 2d 814, 819 (W.D. Va. 2010); *United States v. Chow*, 760 F. Supp. 2d 335, 338-39 (S.D.N.Y. 2010); *United States v. Brunner*, No. 08-CR-16, 2010 WL 148433, at \*5 (W.D. N.C. Jan. 12, 2010); *United States v. Van Brackle*, No. 2:08-CR-042-WCO 2009 WL 492805,0 at \*2-4 (N.D. Ga. Dec. 7, 2009); *United States v. Staples*, No. 09-14017 CR, 2009 WL 2827204, at \*3 (S.D. Fla. Sept. 2, 2009); *United States v. Paroline*, 672 F. Supp. 2d 781, 785 (E.D. Tex. 2009); *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at \*5-6 (E.D. Va. Nov. 24, 2009); *United States v. Berk*, 666 F. Supp. 2d 182, 185-86 (D. Me. 2009).

39. See *infra* note 67 (summarizing a typical victim statement).

40. Images found on a defendant’s computer as a result of a search warrant are typically submitted to the National Center for Missing and Exploited Children (NCMEC) which maintains a collection of images of child pornography made using known, real children under the age of eighteen. See *Child Victim Identification Program (CVIP)*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=2444](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444) (last visited June 20, 2012). NCMEC then identifies from their database any known children under the age of eighteen and forwards this to the government. *Id.* Federal prosecutors must provide victims of crime with notice of certain developments in their case. 18 U.S.C. § 3771(a)(2) (2006). In child pornography cases, only the victim who has requested notification of a found image will be notified via the Victim Notification System (VNS). *Attorney General Guidelines for Victim and Witness*

The various restitution statutes differ in defining “victim.” The general Mandatory Victims Restitution Act, which is codified in 18 U.S.C. § 3663A(a)(2) and § 3663(a)(2), states that “the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”<sup>41</sup> The VAWA restitution statute, 18 U.S.C. § 2259(c), states that “‘victim’ means the individual harmed as a result of a commission of a crime under this chapter.” The requirement that the individual must be “harmed as a result of the commission” of a crime under § 2259 is a lesser standard than the “directly and proximately harmed” requirement of 18 U.S.C. §§ 3663 and 3663A, which address general criminal restitution. It is logical to suggest that § 2259’s requirement of “harm” rather than “direct and proximate harm” lends itself to a broader range of “victims” than any other federal restitution statute.<sup>42</sup>

Defendants’ threshold argument that children found in photographic images are not “victims” in child pornography possession cases has not fared well. Most courts, even those that eventually deny restitution, have found that the children in the images are “victims” harmed as a result of the possession/viewing, and that these children should be allowed to allege any losses suffered as a result of the crime.<sup>43</sup> Many courts cite *New York v. Ferber* for support:

Sexual molestation by adults is often involved in the production of child sexual performances. When such performances are recorded and distributed, the child’s privacy interests are also invaded . . . . [P]ornography poses an even greater threat to the

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*Assistance*, OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, \_\_\_\_ (2005), [http://www.justice.gov/olp/pdf/ag\\_guidelines.pdf](http://www.justice.gov/olp/pdf/ag_guidelines.pdf). The VNS is a computerized system that provides notice both via regular mail and email. *Id.* Victims may then submit impact statements and request for restitution. *Id.* A victim is not required to request or participate in any phase of a restitution order. 18 U.S.C. § 3664(g)(1). Sixty days before sentencing, the government attorney, “after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.” *Id.* § 3664(d)(1).

41. 18 U.S.C. § 3663.

42. Title 18 U.S.C. § 3771(e) also states, “For the purposes of this chapter, the term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense.” *Id.* § 3771(e). In another context, the Supreme Court has discussed the need to pay close attention to any meaningful variation among similar statutes. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (giving weight to different phrases used by Congress).

43. *Chow*, 760 F. Supp. 2d at 338-39; *Church*, 701 F. Supp. 2d at 820; *Patton*, 2010 WL 1006521, at \*2; *Van Brackle*, 2009 WL 4928050, at \*3; *Paroline*, 672 F. Supp. 2d at 789; *Berk*, 666 F. Supp. 2d at 188 n.5.

child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.<sup>44</sup>

The Fifth Circuit has also addressed the concern as to whether a child found in images possessed by the defendant was a "victim" under 18 U.S.C. § 2259 and entitled to restitution.<sup>45</sup> The court has explained that the possessors provide an economic incentive for the creation of the images, thereby keeping the child's images in circulation: "The consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization therefore the recipient may be considered to be invading the privacy of the children depicted, directly

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44. 458 U.S. 747, 758 n.9 and 759 n.10 (internal citations omitted); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002) ("[T]he continued circulation itself would harm the child who had participated. . . . each new publication of the speech would cause new injury to the child's reputation and emotional well-being."). The Senate seemed to quote *New York v. Ferber*, 535 U.S. 234 (2002), when discussing an amendment to legislation on offenses of sexual exploitation:

Because the child's actions are reduced to recordings, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system of child pornography . . . . It is the fear of exposure and the tension of keeping the act secret that seems to have the most profound emotional repercussions.

S. REP. NO. 104-358, at 14 (1996) (quoting *Bill to Amend Certain Provisions of Law Relating to Child Pornography and for Other Purposes: Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (statement of Sen. Biden, Member, S. Comm. on the Judiciary)); *see also* *United States v. Santa-Cruz*, 127 F.3d 894, 897 (9th Cir. 2009) (holding that possession of child pornography causes continuing injury); *United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) ("The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters.") (citation omitted); *United States v. Tillmon*, 195 F.3d 640, 643 (11th Cir. 1999) (stating that "the legislative history of 18 U.S.C. § 2252 made clear that the primary objective of the provision was to lessen the harm suffered by children"); *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) ("children depicted in the child pornography distributed and possessed by a defendant who are the primary victims . . . ."); *United States v. Boos*, 127 F.3d 1207, 1211 (9th Cir. 1997) ("[T]he legislative history, when viewed in its entirety, confirms the conclusion that the primary 'victims' that Congress sought to protect by enacting 18 U.S.C. § 2252, were in fact, the children involved in the production of pornography.").

45. *United States v. Norris*, 159 F.3d 926 (5th Cir. 1998).

victimizing these children.”<sup>46</sup> Congress has also stated that a child found in pornographic images is a “victim” because each possession/viewing is a repetition of the sexual abuse.<sup>47</sup>

## 2. Conclusions

Based upon current judicial interpretation and congressional intent, a defendant will likely fail in his argument that the child depicted in the pornography the defendant possessed or viewed is: (1) not a victim within the meaning of § 2259 or (2) not harmed by defendant’s conduct. The victim will have the right to be heard at the defendant’s sentencing and/or restitution hearing if his or her images were found on the defendant’s computer or in his possession.<sup>48</sup> Congress has placed great emphasis on the victim’s rights after passing a series of victim witness protection and restitution acts: 1982 (VWPA), 1984 (Sentencing Reform Act), 1994 (VAWA), 1996 (MVRA), and most recently the Justice for All Act of 2004, so that no judge, defendant, or prosecutor could deny a victim’s day in court.<sup>49</sup>

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46. *Id.* at 930.

47. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(A), (2)(D), 120 Stat. 587, 623-24. Congress stated that the illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the psychological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole. . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of victims and a repetition of their abuse.

*Id.*

48. 18 U.S.C. § 3664.

49. Title 18 U.S.C. § 3771, the Justice for All Act of 2004, also known as the Crime Victims’ Rights Act (CVRA), amends the federal criminal code to grant crime victims specified rights, including:

(1) the right to be reasonably protected from the accused; (2) the right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime, or of any release or escape of the accused; (3) the right not to be excluded from any such public proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard testimony at that proceeding; (4) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) the reasonable right to confer with the attorney for the Government in the case; (6) *the right to full and timely restitution as provided by the law*; (7) the right to proceedings free from unreasonable delay; (8) the right to be treated with fairness and with respect for the victim’s dignity and privacy.

*B. Is the Defendant's Act of Possession a "Proximate" Cause of the Victim's Harm?*

*1. The "Proximate" Cause Issue Identified*

Next, the courts must then decide whether the defendant was a proximate cause of the harm alleged by the victim. Causation is a tricky concept in any law school torts class. And it is the most difficult argument the victim must make when requesting restitution under § 2259. Was the possessor of child pornography a proximate cause of a victim's harm? If the answer is yes, then the courts must decide if the possessor was a cause or responsible party for all or only partial harm to the victim. While an alleged "victim" may have little difficulty in proving some generalized harm based solely on child pornography images of that individual being discovered on some offender's computer, it is another matter entirely to request and recover the "full amount of the victim's losses" from the particular possessor. The "full amount of the victim's losses" under § 2259 includes:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorney's fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a *proximate result of the offense*.<sup>50</sup>

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*Legislative Histories*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/jmd/ls/legislative\\_histories/legislative-histories.html](http://www.justice.gov/jmd/ls/legislative_histories/legislative-histories.html) (last visited July 28, 2011) (emphasis added). Section 3771(c)(1) provides that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded the rights described in [CVRA]." 18 U.S.C. § 3771(c)(1). "The crime victim or the crime victim's lawful representative . . . may assert the rights described in [the CVRA]" *Id.* § 3771(d)(1). Under the Mandatory Victim Restitution Act (MVRA), the Financial Litigation Unit of the United States Attorney's Office collects the restitution for a period of twenty years from the time of sentencing plus any incarceration time. 18 U.S.C. § 3663.

50. 18 U.S.C. § 2259(b)(3)(A)-(F) (emphasis added). [ Interestingly, Congress did not include embarrassment, humiliation, anxiety, loss of reputation, or loss of earning capacity



Judges must decide to award restitution based on the harm the victim suffered as a result of either the defendant's *possession* or if the defendant is responsible for the "full amount" of losses suffered as a result of the *initial injury* and *additional victimizations* each time the image was traded, distributed, possessed and viewed. Defendants argue that there is a proximate cause requirement between the victim's losses and the particular defendant's conduct.<sup>51</sup> Defendants further argue that they should only be responsible for the additional harm of the image(s) being viewed and possessed by that particular defendant, which is the only injury that was foreseeable as a consequence of his conduct.<sup>52</sup>

More specifically, as applied to § 2259, it is unclear whether the term "proximate result" that is found in section (f) refers only to "any other losses suffered by the victim" or whether there is a proximate result requirement to all the losses, including those stated in sections (a) through (e). This appears to be the crux of most judges' disagreement in determining the specific restitution amount. In *In re Amy*, the Fifth Circuit concluded that the proximate cause requirement is only applicable to "any

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in the specified losses. These, in theory, are included in the "any other losses" category which requires proximate cause.

51. Under tort law, proximate cause is concerned with policy considerations limiting the scope of liability and the idea of remoteness and fairness in holding a defendant accountable only for foreseeable consequences of his/her actions. DOBBS, *supra* note 8, at 450. If the driver of a truck begins to type a text message on his cell phone and fails to see the traffic light has turned red and hits an oncoming car due to his carelessness, the truck driver is liable as a proximate cause of the other driver's/victim's injuries. However, should we hold the truck driver's mother liable for the accidents as well? But for the truck driver being born, this accident would never have occurred in the first place, thereby satisfying the actual causation requirement. Yet, the mother will undoubtedly not be held liable because of the proximate cause requirement -- giving birth to a son who becomes a truck driver later in life is not an act in which a future injury/car accident caused by her son would be reasonably foreseeable. The same policy arguments as to proximate cause apply here; yet, in this scenario the possessor is not an innocent third-party like the mother. The possessor of the child pornography would be similar to a rescue worker who caused additional injury to the victim after the accident occurred. The producer of the child pornography, similar to the truck driver, created the initial injury to the victim. See BLACK'S LAW DICTIONARY, *supra* note 8, at 250 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41, at 264 (5th ed. 1984)) ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.").

52. *United States v. Strayer*, No. 8:08CR482, 2010 WL 2560466, at \*10, \*15 (D. Neb. June 24, 2010); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802, at \*2-6 (N.D. Iowa Oct. 9, 2007); *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999).

other losses” in section (F) of 2259(b)(3): “As a general proposition, it makes sense that Congress would impose an additional proximate cause restriction on the catchall category of ‘other losses’ that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E. On the other hand, Congress could not anticipate what victims would propose under the open-ended ‘any other losses’ subsection F.”<sup>53</sup> Under the Fifth Circuit’s interpretation, the victim would be entitled to recover all costs associated with sections (A) through (E) without alleging the particular defendant directly or proximately caused the harm, but rather by alleging generalized harm (as discussed in Part II section A in relation to the term “victim”). However, in the undefined “any other losses” catchall category in section (f), the victim need allege how exactly the particular defendant caused the “other” harm. Therefore, the inclusion of the phrase “proximate result” in the last of the enumerated sections on types of losses means that such a requirement is not needed for the other types of losses.<sup>54</sup> The Seventh Circuit appears to have agreed in *United States v. Danser*, when it stated: “in enacting section 2259, it is clear that Congress intended to provide victims of sexual abuse with expansive relief for the full amount of . . . [their] losses suffered as a result of abuse. Congress chose unambiguously to use unqualified language in prescribing full restitution for victims.”<sup>55</sup>

On the other hand, the Ninth Circuit in *United States v. Laney*, held that § 2259 incorporates a requirement of proximate causation on all categories of claims—that there must be a causal connection between the offense of conviction and the victim’s harm.<sup>56</sup> Other courts have agreed, determining

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53. 636 F.3d 190, 198-99 (5th Cir. 2011). The Fifth Circuit also used the grammar found in the statute to support its argument: “Here the statute does not present the types of recoverable costs in a series, separated by commas. Instead, it begins a sentence (‘full amount of the victim’s losses’ includes any costs incurred by the victim for—’) and then lists six different endings for that sentence.” *Id.* at 199. The significance of the “double-dash” before the list of losses is that it separates each loss section from the other, and the semicolons in between each loss section separates each section even further. *Id.*

54. The Fifth Circuit rejected the proposition that *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345 (1920), controls when analyzing the grammatical structure of § 2259(b)(3). *In re Amy*, 636 F.3d 190, 199-200 (5th Cir. 2011). The Supreme Court stated in *Porto Rico* that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” 253 U.S. at 348.

55. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001).

56. 189 F.3d 954 (9th Cir. 1999); *see also United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011).

that the offense of conviction must be a “substantial factor” in the victim’s losses,<sup>57</sup> and that any loss suffered by a victim must be “a proximate result of the offenses of conviction.”<sup>58</sup> In *United States v. McDaniel*, the Eleventh Circuit also determined that when using general principles of statutory construction, a general proximate cause requirement should be read backwards from (F) through the preceding sections (A)-(E).<sup>59</sup>

The District of Columbia Circuit, in *United States v. Monzel*, has recently followed the Ninth, Third, and Eleventh Circuits’ lead in deciding proximate cause is required in all categories specified in § 2259(b)(3)(A)-(F) and not just in (F), basing its decision on “traditional principles of tort and criminal law.” “It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused . . . nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause.”<sup>60</sup>

To further its argument that proximate cause applies in all categories of § 2259(b)(3), the D.C. Circuit found that the definition of “victim” in § 2259(c) that a person must be harmed “as a result of” the defendant’s offense of possession “invokes the standard rule that a defendant is liable only for harms that he proximately caused. . . [t]hat the definition does not include an express requirement of proximate cause makes no difference.”<sup>61</sup> The Fifth Circuit counters by arguing that this definition of “victim” in § 2259(c) demands more of a general causation requirement than a proximate

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57. *Crandon*, 174 F.3d at 126.

58. *Raplinger*, 2007 WL 3285802, at \*2; *see also* *United States v. Pearson*, No. 1:04-Cr-340, 2009 WL 2383025, at \*5-6 (N.D.N.Y. July 30, 2009) (entering a restitution order of one-third the amount requested by the victim because only that amount was proximately caused by the offense of conviction).

59. 631 F.3d 1204, 1208-09 (11th Cir. 2011).

60. *United States v. Monzel*, 641 F.3d 528, 535-36 (D.C. Cir. 2011).

61. *Id.* at 536. The Court in *Hughey v. United States*, 495 U.S. 411, 413, 421 (1990), stated that the statute, 18 U.S.C. §§ 3579, 3580 (2006), authorized restitution “only for the loss caused by the specific conduct that is the basis of the offense of conviction.” In *Hughey*, the defendant pled guilty to the misuse of one credit card, and the district court ordered the defendant to pay restitution for only the “loss caused by the specific conduct that is the basis of the offense of conviction.” *Id.* at 413. Thus, under the VWPA, “the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally).” *United States v. Vaknin*, 112 F.3d 579, 590 (1st Cir. 1997). Under the MVRA, the First Circuit also ruled that there must be a clear causal link that “a particular loss would not have occurred but for the conduct underlying the offense of conviction” and that the link between the defendant’s conduct and the loss must not be “too attenuated.” *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002) (quoting *Vaknin*, 112 F.3d at 589-90).

cause requirement.<sup>62</sup> The Fifth Circuit points to other restitution statutes, such as 18 U.S.C. §§ 3663A(a)(2) and 3663(a)(2), which define “victim” in terms which would cause the reader to believe a specific proximate cause requirement is necessary, in that the definition specifically states that the “victim” be “a person directly and proximately harmed as a result of the commission of an offense.”<sup>63</sup>

District court judges differ as to whether a general proximate cause requirement applies to all categories or just to the catch-all category (F). As the district court judge in *United States v. Monk*, opined, “[t]he only monetary figure provided to the court is the total amount of the victim’s harm, not the harm Defendant Monk caused a particular victim.”<sup>64</sup> The judge found it difficult, if not impossible, to separate the amount of harm caused by the defendant/possessor from the amount caused by other possessors and in effect, required a proximate cause requirement in all categories.<sup>65</sup> Another judge in *United States v. Berk* determined that the losses alleged were generalized and caused by the idea of the victims’ images being viewed by the public at large rather than caused by the particular defendant having viewed their images.<sup>66</sup> Since the losses alleged were not specifically linked to the defendant’s conduct, nor was there any mention as to what the impact was on the victims upon learning of the defendant’s offense, the judge denied restitution.<sup>67</sup> On the other hand, in *United States v. Staples*, the judge easily found the victim was specifically harmed by the defendant’s possession of images depicting her sexual abuse as a child.<sup>68</sup>

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62. *In re Amy*, 636 F.3d 190, 198-99 (5th Cir. 2011).

63. *Id.* at 199 n.10 (quoting 18 U.S.C. § 3771(e)).

64. *United States v. Monk*, No. 1:08-CR-0365AWI, 2009 WL 2567831, at \*4 (E.D. Cal. Aug. 18, 2009).

65. *Id.*

66. 666 F. Supp. 2d 182, 191 (D. Me. 2009).

67. *Id.* at 192-93. One of the victims in *Berk* told Dr. Silberg: “Everyday I have to live in fear of these pictures being seen.” Psychological Evaluation by Dr. Joyanna Silberg at 4, *Berk*, 666 F. Supp. 2d 182 (No. 08-CR-212-P-S).

She fears the discovery of the pictures by her friends, but she also fears the unknown and unnamed people who continue to be looking at these pictures of her for their own perverse interests or to “groom” other children into these acts. She feels continually violated when she contemplates these possibilities. As Amy stated, “I don’t want to be there, but I have to be there and it’s never going away, and that’s a scary thought.”

*Id.*

68. No. 09-14017-CR, 2009 WL 2827204, at \*3 (S.D. Fla. Sept. 2, 2009).

## 2. Conclusions

Does the proximate cause requirement only pertain to “any other losses” in section F of § 2259(b)(3) as argued by the Fifth Circuit? Or is a finding of proximate cause applicable to medical costs, lost income, and attorney’s fees in sections A-E as it is to “any other losses”? “Amy” recently filed a petition in the United States Supreme Court for a writ of certiorari on this very issue.<sup>69</sup> This debate goes to the heart of what needs to be fixed in the § 2259 restitution statute. Thanks to legislative history and the Supreme Court’s decision in *Ferber*, victims can easily connect a generalized harm to each defendant’s conduct of possessing and viewing pornographic images depicting the victim. Child pornography creates “a permanent record of the children’s participation [in sexual activity,] and the harm to the child is exacerbated by their circulation.”<sup>70</sup> Thus, the generalized harm would include the invasion of the victim’s privacy, the creation of an economic motive to keep distributing the images, and the “new injury to the child’s reputation and emotional well-being,”<sup>71</sup> fear, and isolation as a result of the additional viewing by the particular defendant.<sup>72</sup>

A proximate cause requirement by all categories in § 2259(b)(3)(a)-(f) would demand that the defendant only be liable for foreseeable consequences and would require more than an allegation of generalized harm. According to Black’s Law Dictionary, proximate cause is either “[a] cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor” or “[a] cause that directly produces an event and without which the event would not have occurred.”<sup>73</sup> In tort law, the concept of proximate cause is concerned with policy issues limiting a

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69. Petition for a Writ of Certiorari, *Amy v. Monzel*, No. 11-85, 2011 WL 2877874 (2011); see also *Staples*, 2009 WL 2827204, petition for cert. filed, (filed Mar. 11, 2011) (No. 10-1132).

70. S. REP. NO. 104-358, at 18 (1996) (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)). The Senate Judiciary Committee stated that “[c]hild pornography permanently records the victim’s abuse [and] can cause continuing harm to the depicted individual for years to come. . . .” *Id.* at 8.

71. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

72. *Id.* at 249 (2002) (“[A]s a permanent record of a child’s abuse, the continued circulation [of child pornography] itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.”); see *United States v. Knox*, 32 F.3d 733, 750 (3rd Cir. 1994) (finding that child pornography is an “affront to the dignity and privacy of the child and an exploitation of the child’s vulnerability”).

73. BLACK’S LAW DICTIONARY 250 (9th ed. 2009).

defendant's liability to risks the defendant directly or foreseeably created.<sup>74</sup> Courts have placed both a proximate cause requirement on negligence claims and an actual causation requirement (in which the plaintiff must prove that the defendant was the cause-in-fact of the harm suffered by the plaintiff).<sup>75</sup>

In cases where the harm to the plaintiff is extremely widespread involving multiple parties that contributed to the ultimate resulting injury or where the magnitude of the injury is grossly out of proportion to the defendant's negligent conduct, the element of proximate cause is critical to the judge's analysis.<sup>76</sup> Liability of the defendant must begin and end in some logical form. A proximate cause requirement provides the judges with a safety net so that just as in civil negligence cases, a criminal judge can limit the defendant's responsibility for the harm caused to the victim to harms which are foreseeable. It is foreseeable that a possessor's demand for child pornography creates an economic incentive for the creation and distribution of more child pornography. It is also foreseeable that the defendant's viewing of the victim's images would invade the victim's privacy and exacerbate the victim's initial sexual abuse. The sexual abuse while filming or photographing the victim would not have occurred but for the possessor's demand for the images. Congress chose to write § 2259(b)(3) so that judges would take into consideration the *total* harm suffered by the victim in the form of medical services, therapy or rehabilitation, transportation, housing, child care expenses, lost income, and attorney's fees. There appears to be no limiting language, and therefore, arguably no proximate cause requirement.<sup>77</sup> The only explicit proximate

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74. DOBBS, *supra* note 55, at 448-50.

75. *Id.* at 447-48.

76. *United States v. Church*, 701 F. Supp. 2d 814, 830 (W.D. Va. 2010).

77. Title 18 U.S.C. § 2259(b)(3) appears to differ from the VWPA causation standard. The First Circuit stated in a VWPA case:

[W]e hold that a modified but for standard of causation is appropriate for restitution under the VWPA. This means, in effect, that the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally). The watchword is reasonableness. A sentencing court should undertake an individualized inquiry; what constitutes sufficient causation can only be determined case by case, in a fact-specific probe.

*United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997) (ordering restitution to the bank only for outstanding fraudulent loans and not other loans owed that were not procured by fraud), *abrogated on other grounds by United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010).

cause requirement is found in the final category of “any other losses.”<sup>78</sup> In this category, Congress attempts to place limits on the potentially unlimited circle of liability. If there are additional losses suffered by the victim, the victim must show that these losses are foreseeable consequences flowing from the defendant’s own conduct. The victim must show that she suffered an additional loss particular to the defendant’s conduct above and beyond what harm she had already experienced.

Determining that the defendant is responsible for the total harm, including the initial injury to the victim and limiting the proximate cause requirement to the “any other losses” category makes some sense. But for the possessor soliciting the child pornography, the initial injury would not have occurred in the first place, and the possessor’s demand feeds the supplier. The harm suffered by the victim is intertwined in the possessor’s desire to possess and view the images.<sup>79</sup> Moreover, it would be extremely difficult to identify the specific harm that a particular defendant caused by viewing the victim’s image rather than looking at the total harm that the victim has experienced as a result of the production, distribution, and possession of her images. But if the victim chooses to request additional restitution amounts for pain and suffering, humiliation, embarrassment, emotional distress, etc., the victim must specifically tie these losses to the possessor’s conduct. This places a limit on a victim’s losses and gives judges some discretion to decide what additional restitution amounts are warranted.

The key issue to be determined here is the apportionment of liability. Assume that the defendant, along with others, is liable for the total harm caused to the victim because the court determined the victim’s alleged losses were a foreseeable consequence of the defendant’s actions. Should the single defendant bear the total cost of the victim’s losses or merely a portion?<sup>80</sup>

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78.. 18 U.S.C. § 2259(b)(3)(F).

79. However, this argument leaves out the role the distributor or redistributor plays in the chain of responsibility. The distributor or redistributor is more active in meeting the supply of child pornography, and thus is a more culpable character in creating the demand.

80. If the defendant is held liable only for the harm he/she caused the victim (and therefore, the judge applied the proximate cause element to the total amount of harm alleged by the victim), then there is no need to address this question. The defendant is then merely held accountable for the injuries he specifically caused, and the argument in question C need not be addressed. The judge in *Berk* found that the possessor’s viewing of the images was not the proximate cause of a specific injury to the plaintiff. 666 F. Supp. 2d 182, 191-93 (D. Me. 2009). If the victim was not aware that the defendant had viewed the images, then the viewing could not result in harm to the victim which was later alleged as losses in consideration for restitution. *Id.* at 191 n.8.

*C. Should Apportionment Apply to the “Full Amount of the Victim’s Losses” Under §2259(B)(3) When Multiple Offenders Are Involved, or Should Each Offender Be Held Fully Liable?*

*1. The Joint Liability Issue Identified*

Multiple parties contributed to the resulting harm to the victim in these child pornography cases. Such persons include the producer of the images, the distributors or re-distributors of the images, and criminal defendant who possesses illicit images. In civil cases, once the defendant has been found to have actually and proximately caused harm to the plaintiff (as well as other co-defendants and/or non-parties to the lawsuit), the court must decide whether the harm done to the plaintiff is divisible or indivisible.<sup>81</sup> If the injury is divisible, then the defendant is liable only for his share of the plaintiff’s injury and the victim may recover from each wrongdoer the damages that said wrongdoer caused.<sup>82</sup> Conversely, if the injury is indivisible, then the jury does not apportion liability amongst the wrongdoers because the defendants cannot demonstrate what portion of the total damage he or she caused.<sup>83</sup> Defendants should always argue the injury to the victim is divisible so as to only be responsible for the harm they specifically caused, though it may prove to be difficult to separate the possessor’s injury to the victim from the actions of the initial producer, distributors, and other possessors. More than likely, judges will tend to find that the defendant is jointly and severally liable because the injury to the victim is indivisible.<sup>84</sup> The production, distribution, and possession of each image combine to form a single, indivisible result. Each defendant’s act (as the producer, the distributor, or possessor) is essential to the victim’s overall injury. Since there are successive injuries to the victim each time her image is viewed, it is impossible to determine which defendant caused which injury (unless a particular defendant can adequately prove the limit

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81. See JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 201-03 (Lexis Nexis, 4th ed. 2010).

82. *Id.*

83. *Piner v. Superior Court*, 962 P.2d 909, 916 (Ariz. 1999) (“[I]n an indivisible injury case, the factfinder is to compute the total damage sustained by the plaintiff and the percentage of fault of each tortfeasor. Multiplying the first figure by the second gives the maximum recoverable against each tortfeasor. This result conforms not only with the intent of the legislature and the text of the statute but also with common sense.”).

84. *In re Amy*, 636 F.3d 190, 201 (5th Cir. 2011). However, in *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), the court found joint and several liability did not apply because the court found that 18 U.S.C. § 3664(h) did not apply to single defendant prosecutions, citing *United States v. McGlown*, 380 F. App’x. 487, 490-91 (6th Cir. 2010) and *United States v. Channita*, 9 F. App’x. 274, 274-75 (4th Cir. 2001).



of his liability).<sup>85</sup> In addition, there may be future defendants as yet undetected (and thus not prosecuted) that have viewed or will view in the future the images of the victim forever stored in the internet. This type of scenario lends itself to joint and several liability. While the idea of holding the defendant accountable for the entire financial loss amount appears to be unfair to the possessor (in relation to the culpability of the producer or distributors), the idea behind joint and several liability is that between the innocent injured party and multiple responsible parties, the injured party should be made whole. And that means the responsible parties should have to resolve their relative shares among themselves by seeking contribution from each other.<sup>86</sup>

While § 2259 does not explicitly address this particular issue, § 2259(b)(2) does refer to 18 U.S.C. § 3664 as guidance in the issuance and enforcement of a restitution order under § 2259. 18 U.S.C. § 3664(h) states that

[i]f the court finds that more than one defendant has contributed to the loss of a victim, they may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.<sup>87</sup>

Under tort law, once the plaintiff's injury is determined to be indivisible, and the court has determined which defendants constituted a substantial factor in causing the indivisible injury to the plaintiff,<sup>88</sup> the defendants are held jointly liable, and the plaintiff can collect the full amount of damages from any one of or combination of the defendants.<sup>89</sup> The defendant who pays the plaintiff the full amount of damages may seek contribution from the other defendants at a later date.<sup>90</sup> Hopefully, during the civil trial, evidence is presented so that the jury may apportion fault among the

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85. The injury suffered by the victim is similar to Driver *B* hitting and causing injury to *X*'s car while *X* was on his way to the auto body shop to fix his car after Driver *A* had hit and caused injury to *X*'s car the day before. Unless Driver *B* can prove he should only be liable for the front headlight damage and not the damage done to the back fender caused by Driver *A*, Drivers *A* and *B* will be held jointly liable for *X*'s damages and are both responsible for 100% of the total damages. See *DIAMOND*, *supra* note 81, at 201-03.

86. *United States v. Hardy*, 707 F. Supp. 2d 597, 615 (W.D. Pa. 2010).

87. 18 U.S.C. § 3664(h) (2006).

88. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

89. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § A18 (2000).

90. *Id.*

defendants and so that the defendant who pays the plaintiff will be able to seek an equitable contribution from the remaining defendants based upon each defendant's amount of fault.

## *2. Conclusions*

The restitution process during any criminal proceeding should focus on making the victim whole to the greatest degree possible while also being fair to the defendant. The judge should first decide whether the defendant was a substantial factor in causing the indivisible injury to the victim. If so, the judge should determine the full amount of losses and apportion fault. The defendant should then have the right to seek contribution from other defendants (or alternatively, the victim is awarded only the defendant's apportioned damages and the victim must seek contribution from other defendants). In this respect, the innocent party is "made whole" by being awarded full restitution, but the actual burden of recovering the full restitution amount may be the responsibility of either the victim or the defendant. It is within the purview of the court to decide who should bear the burden of seeking contribution from other defendants who are later determined to be the producers, distributors, or possessors of the victim's images. It is important that either the victim or defendant has the ability to seek contribution from other defendants because, in practical terms, the defendant will be serving a very long prison term, and whatever assets he had will have been used in defending himself or taken by the government.<sup>91</sup>

Therefore, not only should the defendant be held jointly liable, but severally liable as well. The judge should apportion damages based on the defendant's specific share of liability. Child pornography producers may be more culpable or just as culpable as a possessor depending upon the view of the judge. Despite the fact that judges may disagree as to the exact apportionment of damages in relation to the defendant in their particular courtroom, the idea of apportionment would alleviate some of the unfairness inherent in holding the defendant responsible for the full amount of damages. The percentage apportioned to the defendant will serve a much greater purpose when the defendant attempts to collect the entire amount of damages from the other defendants (minus what his apportionment was deemed to be if permitted to seek contribution).<sup>92</sup> In a

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91. Part III argues that victims should be the party to seek contribution from past, present, and future co-defendants because it is unrealistic to imagine defendants in any numbers will be able to collect from other defendants.

92. Defendants in § 2259 restitution cases have argued that it would be virtually impossible to track loss determinations and restitution obligations in § 2259 cases in other

civil case, the jury apportions fault amongst all the defendants and non-parties whether they are before the court at that time or not. In this context, apportionment among all the defendants (and non-parties not yet prosecuted) in one criminal case in one jurisdiction is not possible considering multiple defendants in multiple jurisdictions contributed to the victim's indivisible injury. Some opponents of apportionment have made this argument.<sup>93</sup> However, it bears mentioning that apportionment in most jurisdictions only applies to the defendant's ability to collect from other co-defendants and does not affect the victim's collection of the full amount of damages from the defendant.<sup>94</sup> Therefore, the fact that not all the defendants will be apportioned their amount of liability in one criminal case should not be a reason to eliminate the requirement of apportionment altogether. Joint liability protects the victim; the apportionment of fault protects the defendant in a later contribution claim.<sup>95</sup>

*D. What Evidence Is Needed to Support a Restitution Claim for Damages?*

*1. Evidence Issue at Restitution Hearings*

In many of the § 2259 criminal restitution cases, courts have permitted victims to allege their losses in the form of affidavits sent to the court, prosecution, and defense. In some § 2259 cases, restitution is decided upon the affidavits submitted while in others a hearing is held in which the expert witnesses must testify as to their claims.<sup>96</sup>

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jurisdictions. If CEOS tracks these types of cases, this information could be sent to defendants regarding future cases related to the victim. The defendant would then only need to worry about receiving contribution from other defendants after the defendant has paid his/her full apportionment of fault.

93. "The viewing of child pornography is often a solitary event," and therefore, since most child pornography cases involve a single defendant in a single case, apportionment should not apply. Brief of National Crime Victim Law Institute (NCVI), The National Center for Victims of Crimes, and the Victim's Rights Law Center in Support of Restitution for Amy and Other Victims of Child Pornography at 18, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 6:08-CR-61). "It is impossible to make a proportionate division of the restitution amount among an unknown number of unidentified future defendants that have and will contribute to the victim's loss." *Id.* at 20. The NCVI believes that apportionment among the multiple defendants is authorized when the defendants are currently before the court for sentencing. *Id.* at 21.

94. Defendants have argued that fashioning an order of restitution is so complicated and time-consuming that it outweighs the need to provide restitution. 18 U.S.C. § 3663A(c)(3) (2006).

95. This applies if the defendant is required to seek contribution and not the victim. Part III argues the victim should seek contribution.

96. At a restitution hearing in *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*1-3 (S.D. Fla. Sept. 2, 2009), three witnesses testified on behalf of the victim:

These affidavits have generally included (1) a victim impact statement,<sup>97</sup> (2) a psychological evaluation in which the psychologist or psychiatrist explains that the victim suffers from various medical problems (including sleeping issues and post-traumatic stress disorder, experiences fear, anger, and shame as a result of her exploitation and engages in self-harming behavior which requires past, present, and future therapy) and (3) a report by an economist discussing the value of lost wages and benefits and the reduction of the value of the victim's life due to this exploitation.<sup>98</sup>

Some defendants have argued that § 2259(b)(3), which states that the "full amount of the victim's losses" includes any costs incurred by the victim," only applies to the victim's *past* and *present* losses and not *future* losses, such as the cost of future medical treatment and counseling. Defense counsel may have a point – the clear language of § 2259 uses the past tense in describing what losses are covered. Future losses could be inferred as not included under § 2259 since the statute does not discuss

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a detective in the case, who received an image of child pornography via the internet from the defendant, the victim's attorney, who outlined the basis for each amount requested, and a psychologist with a Ph.D in general child psychology, child sexual abuse, and traumatic stress in children, who testified that the dissemination and possession of these images depicting the sexual abuse caused additional harm to the victim and resulted in harm distinct from that suffered from her actual physical sexual abuse. The government also entered into evidence several exhibits to support the victim's loss calculations such as tables that broke down the present value of net wage and benefit loss and another table which analyzed the present value of future treatment and counseling costs to create a total of \$3,680,153 in damages. *Id.*

97. Victim impact statements describe victims' financial, physical, psychological, or emotional damages; harm to relationships; medical treatments or mental health services; the need for restitution; and, in some cases, victims' opinions of appropriate sentences. FED. R. CRIM. P. 32(d)(2)(B). They are used in court to ensure that victims' voices are heard during the criminal justice process. *SART Toolkit*, OFFICE OF JUSTICE PROGRAMS (Jul. 28, 2011), <http://ovc.ncjrs.gov/sartkit/develop/issues-vis.html>.

98. For example, in *United States v. Paroline*, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009), Amy submitted a victim impact statement, a psychological evaluation by a forensic psychologist, and an economic report. The paperwork also included attorney's fees and expert witness fees so that the total losses alleged was \$3,367,854. *Id.* A breakdown of this figure includes \$2,855,173 for lost wages and earning capacity, \$512,618 for future treatment and counseling costs, \$16,980 in expert fees, and an unknown amount for attorney's fees and other costs. *United States v. Berk*, 666 F. Supp. 2d 182, 191 n.7 (D. Me. 2009).

In *Berk*, Vicky submitted a forensic psychological evaluation completed by Dr. Randall Green, a victim impact statement as well as a statement by her mother and stepfather, and "a transcript of an internet chat that discusses 'Vicky' and her images." *Id.* Vicky alleged "\$128,005 for future counseling expenses, . . . \$19,497.91 for expenses, and . . . \$3,500 in attorney's fees for a total of \$151,002.91." *Id.*

typical future loss requirements such as fixing a loss period<sup>99</sup> or reducing future losses to present value.<sup>100</sup>

Yet most courts, by awarding amounts that include future losses, have apparently found that the words “costs incurred by the victim” does not limit the victim’s damages to past losses but rather, have found “incurred” to be an adjectival participle with no connotation of tense.<sup>101</sup> This would seem to be in line with congressional intent given that the victims will be young children, and many of the losses, such as lost wages, will not fully manifest until adulthood. If criminal restitution damage calculations were to mimic tort law damage calculations, the victim’s future need for medical care and associated costs as well as the victim’s future lost wages would almost always be recoverable as they are in civil suits (as long as sufficiently proved).

While hearsay is permissible during a sentencing hearing, the information presented to the court must contain a “sufficient indicia of reliability.”<sup>102</sup> However, hearsay presented at most sentencing hearings consists of information intended to persuade a judge to sentence a defendant to a lower or higher sentence depending upon which party is introducing the evidence. The stakes in restitution cases are as high or even higher than sentencing considerations because the judge has to make a total loss calculation similar to the one made by juries in civil courts. Those juries receive a wealth of information and testimony prior to making a final damage determination. Plaintiffs in civil suits are required to spend a

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99. In tort law, “[w]hen the plaintiff claims that she will suffer losses in the future, she must prove by a preponderance of the evidence that those losses will in fact be incurred in the future. She must also prove duration. If she will endure pain for the rest of her life, the trier must have some basis for estimating her life expectancy. If her injury is permanent and will never allow her to work, the trier must have some basis for estimating how long the plaintiff would have worked if she had not been injured. Such periods may be very long, easily thirty or forty years in some cases.” DOBBS, *supra* note 55, at 1056-57. In child pornography cases, rarely has a victim been asked to provide more than an affidavit from a statistician to prove life expectancy and work estimates had she/he not been injured and an affidavit from a psychiatrist or a psychologist to determine future medical and therapy needs.

100. In tort law, “[c]ourts have said that damages awarded for losses that will occur in the future should be reduced to present value.” *Id.* at 1057.

101. The damages award may encompass future losses if estimated with reasonable certainty. *United States v. Pearson*, No. 1:04-CR-340, 2009 WL 1886055 at \*2-3 (2d Cir. July 2, 2009); *United States v. Doe*, 488 F.3d 1154, 1161 (9th Cir. 2007); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *United States v. Julian*, 242 F.3d 1245, 1248 (10th Cir. 2001).

102. *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006); *United States v. Bryant*, 571 F.3d 147, 155 (1st Cir. 2009) (“Rules of evidence do not generally apply to sentencing proceedings.”).

significant portion of the trial proving specific damages, property damages, personal injury damages (including medical expenses, lost wages or diminished earning capacity, a reduction to “present value,” and pain and suffering), and punitive damages, by presenting evidence in the form of expert and witness testimony.<sup>103</sup> This testimony at trial is considered during jury deliberations when the jury assigns fault (if multiple defendants are involved) and awards the total amount of damages owed. The standards set by the criminal courts in proving damages during the restitution phase of sentencing should be changed to reflect the standards set by the courts in civil trials as they pertain to damage calculations. Defendants should have the right to confront the victim’s expert witnesses who have assigned these loss calculation figures at a restitution hearing.<sup>104</sup> Defendants should also

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103: While medical expenses may be easy to establish, lost wages and pain and suffering may prove to be much more difficult. In tort, a plaintiff can ask for past and future lost wages or diminished earning capacity. *DIAMOND ET AL.*, *supra* note 84, at 214. Past and future wages are relatively easy to prove. The plaintiff must show the lost wages or lost business earnings during the period impacted by the injury and in the future period the injury is anticipated to impact. *Id.* Diminished earning capacity “measures the victim’s lost potential to earn income because of the injury and is not dependent on proof that the victim had exploited, or would in the future exploit, that capacity.” *Id.* In essence, the plaintiff is compensated “for an injury which deprives him of his opportunity to use his time as he so chooses.” *Id.* The plaintiff must use the prevailing workplace compensation rates and prove his/her specific ability, skills, aptitude for a career path prior to the injury, educational attainment, and prior employment history (if it exists) in order to receive damages for diminished earning capacity. *Id.* If the plaintiff is awarded a lump sum, the damages must be reduced to their “present value” which must reflect “the interest the plaintiff can earn on the advance transfer of money for future losses in income.” *Id.* at 215. Since pain and suffering damages have no monetary equivalent like lost wages and income, proof of pain and suffering is “highly dependent on proof that the victim is or was during his life conscious of his injuries and the negative implications of those injuries.” *Id.* at 216.

104: In fact, one could argue it may be a violation of the United States Constitution’s Sixth Amendment right of Confrontation if they are not given the opportunity to cross examine these expert witnesses during a restitution hearing. *But see* *United States v. Young*, 981 F.2d 180, 187 (5th Cir. 1993) (“At sentencing, due process merely requires that information relied on in determining an appropriate sentence have ‘some minimal indicia of reliability.’” (quoting *United States v. Galvan*, 949 F.2d 777, 784 (5th Cir. 1991))). If restitution is considered a criminal penalty, questions regarding the Sixth Amendment right to a jury trial are raised. The Supreme Court held that the Sixth Amendment right to a jury trial and the Fifth Amendment right to due process require that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *United States v. Booker*, 543 U.S. 220, 244 (2005); *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Judges must determine that “restitution does not constitute a criminal sanction” or that the “restitution statutes fail to set the ‘statutory maximum’ necessary to trigger *Apprendi* concerns” in order to avoid any

be given the opportunity to provide their own experts, such as an economist, vocational expert, or psychiatrist, to dispute the total amount of damages suffered by the victim.<sup>105</sup> Arbitrary figures alleged for non-pecuniary losses, such as pain and suffering and other variations of mental distress, should be questioned just as they are in civil courts. Similar to bifurcation in criminal trials, in which the asset forfeiture phase is put forth after the jury finds the defendant guilty, so too should the restitution portion of the trial begin after the defendant's guilt is determined. Civil courts often bifurcate the trials, requiring the jury to determine whether the plaintiff has established causation before the plaintiff is able to present evidence on actual damages.

As the law currently stands, “[a]ny dispute as to the property amount or type of restitution shall be resolved by the court by the preponderance of the evidence standard.”<sup>106</sup> The government must bear the burden of proof with respect to loss amount, the defense must bear the burden of proof with respect to the ability to pay, and the court must assign the burdens with respect to other disputed matters as it deems appropriate.<sup>107</sup> Even though the defendant bears the burden with respect to his ability to pay, 18 U.S.C. § 3664(f)(1)(A) is clear that the court should order full restitution without regard to the financial circumstances of the defendant.<sup>108</sup> Initially, this

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Sixth Amendment right to jury trial violation. CHARLES DOYLE, CONG. RESEARCH. SERV. RL 34138, RESTITUTION IN FEDERAL CRIMINAL CASES 5-6 (2007).

105: Defendants may be able to argue an ineffective assistance of counsel claim under the Sixth Amendment if defense counsel is unable or unwilling to provide the defendant with the opportunity to have his own economist or psychiatrist/psychologist review the victim's loss calculations prior to being ordered to pay millions of dollars to the victim. A defendant's request for expert funds was denied without prejudice in *United States v. Paroline*, 672 F. Supp. 2d 781, 784 n.5 (E.D. Tex. 2009). Defense attorneys often receive the victim's claims shortly before the hearing and are ill-prepared to address restitution concerns. In a perfect world, the probation officer, who is required to prepare a report identifying each victim of the offense and the extent of their injuries, damages, or losses, receives information from the government no “later than 60 days prior to the date initially set for sentencing.” 18 U.S.C. 3664(d)(1) (2006). However, if the government is unable to consult with all identified victims during this sixty-day period and the victims submit their affidavits outside the sixty-day period, defense counsel likely will not have the time to investigate loss amounts and find their own expert witnesses in time for sentencing.

106: 18 U.S.C. § 3664(e).

107: *Id.* The government bears the burden of proving: (1) that a person or entity is a victim for purposes of restitution and (2) the amount of loss. *United States v. Wankine*, 543 F.3d 546, 555 (9th Cir. 2008).

108: *United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 133 (2d Cir. 2006) (internal citations omitted); *United States v. Sosebee*, 419 F.3d 451, 460 (6th Cir. 2005). The statute most likely requires the defendant to prove his or her ability to pay so that the court can consider the defendant's assets,

requirement would seem unfair to the defendant who may be unable to pay a victim millions of dollars—however, the focus of restitution is on making the victim “whole.”<sup>109</sup> If the defendant is ordered to pay the victim’s full amount of damages, it is in the defendant’s best interest to request that the judge assign fault so that the defendant may later seek contribution from other defendants (past, present, and future) in order to be fully compensated.

Title 18 U.S.C. § 3664(d)(5) also requires that the court not take into account the fact that a victim may have been compensated by insurance “or any other source. . . .”<sup>110</sup> In torts, this collateral source rule is somewhat controversial.<sup>111</sup> Placing a collateral source rule in the criminal restitution context is rather harsh—if the victim receives compensation from other possessors of her images or from other distributors or the actual producer of the images, the victim’s award against the defendant in the particular case should be trimmed by the amount of these collateral payments. Reduction of damages to the particular defendant will not create a “systematic underdeterrence” for possessors of child pornography, which is the underlying reason behind the collateral source rule.<sup>112</sup>

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anticipated future income, and other financial obligations in its calculation of the manner and schedule of restitution payment for each victim. 18 U.S.C. § 3664(f)(2). For example, in *Staples*, the court ordered that

[u]pon release from incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule. These payments do not preclude the government from using other assets or income of the defendant to satisfy his restitution obligation.

*United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*4 (S.D. Fla. Sept. 2, 2009). Compensation may be made in lump sum payments, partial payments, in-kind payments (such as replacements costs), or nominal periodic payments. 18 U.S.C. § 3664(f)(3)(A), (B).

109. *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 at \*4.

110. *See also* 18 U.S.C. § 3664(f)(1)(B). However, 18 U.S.C. § 3664(j)(2) states that [a]ny amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in – (A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State.

*Id.* § 3664(j)(2).

111. “Numerous reform statutes . . . reject the collateral source rule and allow the jury to consider such insurance payouts and deduct them from the defendant’s liability.” *See* DIAMOND ET AL., *supra* note 81, at 223. Some reform statutes, such as section 4545(c) of the New York Civil Practice Law and Rules, allow collateral source admissibility without indicating what role such evidence should play in the jury’s deliberations. N.Y. C.P.L.R. § 4545(c) (McKinney 2009).

112. RICHARD A. EPSTEIN, *TORTS* 450 (1999).



## *2. Conclusions*

Courts must ensure that these damage figures are fully supported by the record. Some of the practical difficulties include: whether the defendant should be permitted to take the deposition of the victim to see what she says about “losses;” whether the defendant should be permitted to require the victim to submit to an examination by experts of the defendant’s choosing; whether the defendant should be permitted to interview the victim, perhaps by telephone, regarding losses; whether the defendant should be permitted to learn the location and true identity of the victim; whether the defendant should be able to hire CPAs, financial experts, psychologists, psychiatrists, and vocational experts at the government’s expense in order to challenge the victim’s affidavit and present affirmative proof on behalf of the offender; and whether the defendant should be able to challenge the “reasonableness” of any of the listed losses in § 2259.

Courts should hold restitution hearings separately from the guilt or sentencing phase of the case. Defense attorneys would have enough time to counter the victim’s loss calculations (if they need time to review the victim’s calculations) and to rebut the victim’s evidence with expert witnesses of their own. Yet, a defendant’s need to rebut a victim’s assertions must be balanced with the need for judicial efficiency. A bifurcated sentencing hearing split into a sentencing and restitution phase cannot be far apart. Judges are under considerable time pressure to conclude these matters in one short hearing and are required to announce the restitution order from the bench at the end of the hearing and then later enter a Judgment and Commitment Order that includes the restitution order. If the defendant went to trial, judges should consider allowing juries to determine damages in the criminal restitution context (after the defendant is found guilty at trial), just as juries are held to be competent to determine damages in civil suits or asset forfeiture decisions in criminal trials. These options might answer many of the practical difficulties listed above, but would also devote a larger, more burdensome amount of time and expense on the government and the court system and subject the victim to greater scrutiny.

### *E. What Are the Due Process Concerns When Imposing a § 2259 Restitution Order?*

#### *1. Due Process Issues Identified*

Several defendants in § 2259 restitution cases have argued that the amount of restitution imposed violated the Eighth Amendment’s excessive

fines clause and also violated their due process rights as they had not been made aware that they may be subject to restitution at the time they pled guilty.<sup>113</sup>

The second argument is much easier to resolve than the first. The Supreme Court has stated that a defendant must be “aware of the consequences of his plea. . . .”<sup>114</sup> But a variance from the specified Rule 11 procedures constitutes harmless error if it does not affect the defendant’s substantial rights.<sup>115</sup> If the court’s failure to advise the defendant of the possibility of restitution at the time of the plea colloquy was deemed to affect the defendant’s “substantial rights,” and was not, in fact, a simple variance, the court can still cure any defect from the Rule 11 plea colloquy by informing the defendant of the court’s restitution authority and offering the defendant the opportunity to withdraw the plea and go to trial.<sup>116</sup>

As to the first argument set forth by the defendant, the Eighth Amendment prohibits the imposition of “excessive fines”<sup>117</sup> and “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”<sup>118</sup> The question becomes whether the fine is “grossly disproportional to the gravity of a defendant’s offense.”<sup>119</sup> Courts must evaluate the statutory maximum fine, the defendant’s level of culpability, and the actual harm caused by the defendant’s conduct in determining whether the fine bears some relationship to the offense.<sup>120</sup>

113: *United States v. Hardy*, 707 F. Supp. 2d 597, 616 (W.D. Pa. 2010); *United States v. Berk*, 666 F. Supp. 2d 182, 188 n.5 (D. Me. 2009); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050 at \*3 (N.D. Ga. Dec. 17, 2009); *United States v. Wilk*, No. 04-60216-CR, 2007 WL 2263942, at \*1 (S.D. Fla. Aug. 6, 2007) (arguing that the forfeiture of the defendant’s house, after finding it to have been used to commit or promote the possession of child pornography, was excessive and grossly disproportionate to the offense of child pornography possession).

114: *McCarthy v. United States*, 394 U.S. 459, 464 (1969).

115: *United States v. Rogers*, 984 F.2d 314, 318 (9th Cir. 1993) (remanding to district court to decide whether the interests of justice would be better served by resentencing without restitution or by offering the defendant the opportunity to withdraw his plea).

116: Under 18 U.S.C. §§ 2252 and 2252A, possession, distribution, and receipt of child pornography, the court is authorized to order restitution in an amount up to the statutory maximum fine of \$250,000 under 18 U.S.C.A. § 3571(b)(3) or the maximum guideline fine, which is \$250,000 at U.S.S.G. § 5E1.2(c)(3).

117: U.S. CONST. amend. VIII.

118: *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotes omitted).

119: *Id.* at 334, 337.

120: *Id.* at 338-40. As previously described, the statutory penalties for possession of an image of child pornography in violation of section 2252A(a)(5)(B) include imprisonment for not more than ten years for a first offense, a fine of \$250,000, or both, and not more than three years of supervised release. The advisory sentencing guidelines group counts of possession of child pornography and aggregate images to generate an offense level and

The Ninth Circuit in *United States v. Dubose*<sup>121</sup> found that restitution ordered pursuant to the MVRA, under 18 U.S.C. § 3664, did not violate the Eighth Amendment because it was “geared directly to the amount of the victim’s loss caused by the defendant’s illegal activity.”<sup>122</sup> Again, proximate cause rears its head in the Eighth Amendment context. While defendants may argue that the victim’s recoverable losses should be limited to those proximately caused by the offense of conviction (that is, limited to the mere possession of the victim’s images in the particular case at issue or else the award may face Eighth Amendment excessive fine concerns), the total injury to the victim is indivisible and, therefore, it is practically impossible to make an individualized inquiry into the amount of losses proximately caused by the defendant’s conduct. The best workable solution is for the judge to apportion fault (albeit somewhat arbitrarily)<sup>123</sup> so that the defendant (or victim) might later seek contribution from other defendants.<sup>124</sup>

## 2. Conclusions

A § 2259 restitution order issued to a possessor of child pornography, which takes into account the victim’s entire loss can become so large and overwhelming for the defendant that the damages awarded begin to look less like compensatory damages, which are meant as restitution for harm sustained by the victim,<sup>125</sup> and more like a criminal fine or punitive damages designed to punish and deter particularly egregious conduct.<sup>126</sup> Extremely large restitution amounts may make it difficult for possessors to later assimilate into society and have any chance at rehabilitation since they are now burdened with exorbitant restitution claims which may defy the

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sentencing range. See U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2(b)(7), 3D1.2(d) (2011). Restitution may be disproportionate when viewed in relation to the applicable statutory penalties and advisory sentencing guidelines’ range.

121. 146 F.3d 1141 (9th Cir. 1998).

122. *Id.* at 1144; see also *United States v. Lessner*, 498 F.3d 185, 205-06 (3d Cir. 2007); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003).

123. See *infra* Part III.

124. Although, under §§ 3663 and 3664, restitution, by definition, demands that it be exactly proportionate to the harm caused by the offense. See *United States v. Beydoun*, 469 F.3d 102, 107 (5th Cir. 2006); *United States v. Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006); *United States v. Gordon*, 393 F.3d 1044, 1060 (9th Cir. 2004); *United States v. Dawson*, 250 F.3d 1048, 1050 (7th Cir. 2001).

125. RESTATEMENT (SECOND) OF TORTS § 903.

126. *Id.* § 908. “Courts in most states award punitive damages against defendants who act with malice.” *DIAMOND ET AL.*, *supra* note 84, at 218. Have the possessors of child pornography acted with malice or at least shown a reckless disregard towards a victim’s rights to justify punitive damages?

defendant's ability to pay. And despite the fact that the United States abolished federal imprisonment for unpaid debts in 1833, debtor's prison could become a reality.<sup>127</sup> Restitution amounts cannot be discharged in bankruptcy.<sup>128</sup> Any criminal monetary penalties ordered at sentencing must be paid and enforced immediately unless otherwise ordered by the judge.<sup>129</sup> It is entirely possible that if the defendant does not fully pay restitution, the defendant may be held in contempt of court and sentenced to additional time for not complying with the court's order. The United States may also file liens on the defendant's properties, and have rights to all of the defendant's properties and assets.<sup>130</sup>

The goal of restitution should be to find a balance between the desire to make the victim "whole" and the desire to provide the defendant with a chance at rehabilitation in the future.<sup>131</sup> With the ability to seek contribution, a defendant may be able to recover some of his losses from

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127: Editorial, *Timeline: A Brief History of Bankruptcy*, N.Y. TIMES, Nov. 16, 2005, [http://select.nytimes.com/2005/11/16/opinion/15talking.timeline.html?\\_r=1](http://select.nytimes.com/2005/11/16/opinion/15talking.timeline.html?_r=1). Imprisoning individuals for unpaid debts was common during both ancient Greek and Roman rule and in the Middle Ages. *Id.* American Revolutionary war hero and father of Robert E. Lee, Henry "Lighthouse Harry" Lee III, was imprisoned for unpaid debts between 1808 and 1809. Henry "Light-Horse Harry" Lee, THE ROBINSON LIBR., <http://www.robinsonlibrary.com/america/unitedstates/1775/biography/lee-h.htm> (last updated Nov. 25, 2011). With the rise in borrowers who are behind in paying off their credit card bills, auto loans, mortgage payments, and other bills, arrest warrants are now being issued "if a borrower defies a court order to repay a debt or doesn't show up in court." Jessica Silver Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, WALL ST. J., Mar. 17, 2011, <http://online.wsj.com/article/SB10001424052748704396504576204553811636610.html>. "Retailers, credit-card issuers, landlords and debt collectors are the most frequent seekers of such orders, according to court filings and interviews with judges and lawyers." *Id.*

128: 11 U.S.C. § 523(a)(7) (2010); *United States v. Pepper*, 51 F.3d 469, 473-74 (5th Cir. 1995) (citing *Kelly v. Robinson*, 479 U.S. 36, 50 (1986)).

129: U.S. SENTENCING GUIDELINES MANUAL, *supra* note 120, § 3E1.1, cmt. n.1(c).

130: 18 U.S.C. § 3613(C) (2011).

131: In the civil context,

[t]he rules of tort law are intended to achieve some uneasy balance between justice and efficiency. . . . From the vantage of corrective justice, damage awards function as a form of redress. Set the damages too low and P is not made whole even if liability is established; set them too high and D is forced to pay for losses he did not cause. The central legal task is first to choose and then to apply a legal rule that avoids these twin perils. . . . Set that award too low and D will consume too many of P's resources for his own benefit. Set that award too high and D will spend too many resources to avoid harms to others. Making accurate damage calculations is critical under both negligence and strict liability regimes in order to make D's private costs align with the social costs of his actions.

EPSTEIN, *supra* note 114, at 435-36.

other possessors, distributors, and producers. However, this may become much more complicated as more and more victims begin to make their own restitution claims, and defendants have scarce funds to go after co-defendants.<sup>132</sup> Defendants will face not only a claim from one or two victims but possibly claims from multiple victims seeking hundreds of thousands or millions of dollars each. The task of seeking “contribution” by one possessor against another, by one defendant against another, may become overwhelming and seemingly unworkable.

### *III. Proposed Solution: Apportioning Fault in Child Pornography Possession Cases*

The various arguments facing judges regarding the matters discussed above are all issues which need to be identified and addressed when apportioning fault in child pornography possession cases. If the injury to the victim is indivisible, just as in tort law, the defendant is jointly and severally liable for the full amount of damages. Each defendant has contributed to the single result – the victim’s fear, shame, and humiliation in the face of sexual abuse and repeated victimization each time the image is viewed. Joint and several liability protects the victim from being undercompensated. However, in order to avoid unfair treatment of a defendant who is the mere possessor of child pornography images, a judge should take into consideration the totality of damages done to the victim along with the number of identified and unidentified offenders, and apportion fault based on a reasonable assumption of individual culpability.

Apportionment will prove to be difficult in these cases – usually one defendant convicted of child pornography possession out of hundreds is before that particular judge. How can a judge apportion fault when there are future defendants who have not yet viewed the victim’s images, or defendants who will never be identified or prosecuted? Thus, the fault

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132. According to the National Center for Missing and Exploited Children (NCMEC), the “volume of apparent child pornography images seized by law enforcement and sent to NCMEC for review continues to grow dramatically . . . [yet] the number of child victims who are identified remains relatively small.” Brief of NCMEC at 4-5, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex., 2009) (No. 6:08-CR-61). “Of these identified children, 89% are located in the United States and 11% are located outside the United States. *Id.* at 5. However, since the victims have only recently begun seeking restitution from possessors of child pornography and have begun to receive significantly high damage awards, it is reasonable to assume the amount of victims requesting restitution will rise. These high damage awards also encourage attorneys to seek out victims of child pornography in order to find deep-pocket defendants who may be able to pay the full amount of damages (including attorney’s fees).

percentages based on the number of prospective defenders will randomly change as future offenders are identified. In the context of illegal drug prosecutions, the fault percentages can be quantified and tallied quite easily. If an innocent child happens upon some toxic cocaine being sold by a street dealer in Minnesota, and the child ingests it, and is permanently harmed by it,<sup>133</sup> the fault could be apportioned amongst the manufacturer at the cocaine lab, the Colombian trafficker who purchased it and sold it in Mexico, the Mexican trafficker who purchased it and transported it to Denver, Colorado,<sup>134</sup> the distributor in Colorado who transported it to Minnesota, and the dealer who divided up the cocaine and sold it in small quantities on the street. If each individual's fault was determined based upon the profits they made in the selling of the illegal drugs (and for simplicity's sake, the profits were based on the purchase of one kilogram of cocaine), the percentages would be as follows: the manufacturer at the lab would be liable for 0.5%, the Colombian trafficker 2%, the Mexican trafficker 47.5%, the Denver distributor 25%, and the Minnesota street dealer 25%.<sup>135</sup> Therefore, if the child victim's total medical expenses, therapy, lost income, etc. totals one million dollars—each defendant is liable for the one million but may seek contribution from the other defendants not before the court. Not only do these percentages take into account the amount of profits each individual earned on the drug deal, but the amount of profit (and percentage) correlated to the amount of risk each individual assumed in transporting the illegal substance to its final destination. If the street dealer sells to ten end-users, he assumes great risk and receives a larger amount of profit because it is likely those ten individuals, if eventually caught by law enforcement with the drugs, may incriminate the dealer in Minnesota. The Mexican trafficker also assumes a greater risk of getting caught crossing the Mexico-United States border with cocaine than the Colombian trafficker

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133: To make this example as similar as possible to § 2259, the victim must be innocent. An end-user, drug addict, may be held partially liable for creating demand for the drug in the first place. This scenario could be just as effective if an innocent child in Minnesota was killed in a drug-related gun battle between two rival gangs.

134: Denver, Colorado is considered a known drug source city in the United States. See *Colorado Drug Threat Assessment*, NAT'L DRUG INTELLIGENCE CTR., <http://www.justice.gov/ndic/pubs4/4300/cocaine.htm> (last visited Jan. 26, 2011).

135: The percentages of fault are based upon illegal cocaine prices commonly known by Drug Enforcement Administration agents. See generally MATTHEW B. ROBINSON & RENEE G. SCHERLEN, *LIES, DAMNED LIES, AND DRUG WAR STATISTICS* 107 (2007). Generally, one kilogram of cocaine sells for \$1000 in Colombia, \$5000 in Mexico next to the U.S. border, \$20,000 in Denver, \$30,000 in Minnesota, and \$40,000 on the street in Minnesota if the street dealer sells ten packets of 100 grams each for \$4000 each. *Id.*

who needs only to send the cocaine to Mexico where there is little law enforcement presence compared to the United States.<sup>136</sup>

Profits associated with child pornography images are much more difficult to determine. It is common knowledge that several internet sites exist in which users barter and trade one image for another rather than pay for the images, thereby creating an even greater demand for new images to replenish the supply so that the users can keep trading. If fault is to be apportioned, it seems fair to suggest that producers are the most culpable and should shoulder at least 50% of the liability, with distributors and redistributors a close second at 25%, and possessors, the least culpable between 25% to 1% (depending upon the amount of images found in his possession).<sup>137</sup> Within the categories, those who possess thousands of images should also be apportioned more of the fault as opposed to those who possess only a few images.

Since the images can be reproduced indefinitely, the scenario is similar to lawsuits in which music producers under the Recording Industry Association of America (RIAA) sued companies such as LimeWire for copyright infringement. Websites encouraged users to share their music files on LimeWire, which took profits away from musicians, record labels, and producers associated with RIAA.<sup>138</sup> If the court apportioned fault, end users of the website would be responsible for a small percentage of the total amount of damages to RIAA whereas LimeWire, the storer and distributor of the songs, would be responsible for a greater amount of the damages. The task of apportioning fault for a victim's total loss for injuries suffered from child pornography among all offenders may be difficult and arbitrary. It may appear arbitrary to assign 50% of the fault to the producer, 25% to distributors, and 25-1% to each possessor, but at least a defendant would then have the ability to recover some of the losses paid to the victim if the judge issued a full restitution order against the only defendant charged and prosecuted in court.<sup>139</sup>

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136: See Randal C. Archibold, *Bit by Bit, a Mexican Police Force Is Eradicated*, N.Y. TIMES, Jan. 11, 2011, <http://www.nytimes.com/2011/01/12/world/americas/12mexico.html>.

137.: These apportionments are simply for the sake of argument and could easily be adjusted up or down in a given case.

138: Thomas Mennecke, *LimeWire Sued by the RIAA*, SLYCK, Aug. 4, 2006, [http://www.slyck.com/story1258\\_LimeWire\\_Sued\\_by\\_the\\_RIAA](http://www.slyck.com/story1258_LimeWire_Sued_by_the_RIAA).

139: The obvious difference between these examples and the possessory child pornography cases is the focus on profits lost compared to losses suffered by the victim. However, as previously discussed, personal losses suffered in most crimes (such as in a gang rape or kidnapping situation with multiple defendants) are easy to determine as most of the co-defendants are finite and identified. In the drug and copyright examples, the co-

Some courts have devised their own apportionment formulas by dividing defendants into categories, assigning a percentage of damages to each category,<sup>140</sup> and creating a formula for determining restitution amounts by utilizing the civil remedies section which Congress made available to victims of § 2252 violations.<sup>141</sup> Section 2255 states that a victim of sexual exploitation “shall be deemed to have sustained damages of no less than \$150,000 in value.”<sup>142</sup> Courts have set 2% of \$150,000 as the amount of harm caused by a possessor of child pornography, and have determined that \$3000 was found to be a reasonable apportionment of liability pursuant to 18 U.S.C. §§ 3664(h) and 2259.<sup>143</sup> Courts reason that Congress was aware

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defendants are much more difficult to identify and therefore, similar to these child pornography cases in that particular instance.

140. *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011); *United States v. Aguirre II*, No. 1:08-CR-434 AWI, 2010 WL 1328819, at \*5 (E.D. Cal. Apr. 2, 2010); *United States v. Scheidt*, No. 1:07-CR-00293 AWI, 2010 WL 144837, at \*5 (E.D. Cal. Jan. 11, 2010); *United States v. Berk*, 666 F. Supp. 2d 182 (E.D. Tex. 2009); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at \*5 (E.D. Cal. Aug. 19, 2009); *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at \*5-6 (E.D. Cal. Aug. 19, 2009); *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at \*4-5 (E.D. Cal. Aug. 18, 2009); *United States v. Monk*, No. 1:08-CR-0365 AWI, 2009 WL 2567831, at \*5 (E.D. Cal. Aug. 18, 2009). Defendants have been divided among those who produced and/or transmitted the images, those who possessed images, and those who possessed and transmitted images.

141. *See United States v. Lindauer*, No. 3:10-cr-00023, 2011 WL 1225992, at \*4 (W.D. Va. Mar. 30, 2011); *United States v. Stowers*, No. CR-10-74-JHP, 2011 WL 3022188, at \*4 n.15 (E.D. Okla. Jul. 22, 2011); *United States v. Brannon*, No. 2:09cr19, 2011 WL 251168, at \*3 (W.D. N.C. Jan. 26, 2011); *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at \*6 (E.D. Cal. Dec. 13, 2010); *Aguirre II*, 2010 WL 1328819 at \*4; *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at \*4 (W.D.N.C. Jan. 12, 2010); *Scheidt*, 2010 WL 144837 at \*5; *United States v. Baxter*, 394 F. App'x. 377, 379 (9th Cir. 2010); *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at \*6 n.10 (E.D. Va. Nov. 24, 2009); *Renga*, 2009 WL 2579103 at \*5; *Monk*, 2009 WL 2567831 at \*4-5; *Zane*, 2009 WL 2567832 at \*5. Title 18 U.S.C. § 2255 states that

[a]ny person who, while a minor, was a victim of a violation of section 2241(c), 2242 [sexual abuse], 2243 [sexual abuse], 2251, 2251A [selling children for purposes of sexually explicit conduct], 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.

18 U.S.C. § 2255 (2006).

142. 18 U.S.C. § 2255.

143. This amount is two percent of the \$150,000 amount reflected in Section 2255. Given the high amount of the deemed damages in Section 2255, the court finds an amount less than \$3000 inconsistent with Congress's findings on the harm to children victims of



that victims would have a difficult time proving the exact amount of damages a particular possessor or distributor caused, and therefore, Congress set forth \$150,000 as the minimum amount the victim suffered.<sup>144</sup> The civil remedy in § 2255 is separate from criminal restitution, yet “[c]rimes and torts frequently overlap. . . . The [Mandatory Victims Restitution] Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution.”<sup>145</sup> While the civil remedy statute may be of some use to judges in determining the victim’s damage, setting the damages at \$150,000 is much more arbitrary than determining the victim’s full amount of losses and apportioning the defendant’s fault and proportionate share of liability.

Lastly, if victims are allowed to file the same restitution claims in various federal jurisdictions throughout the United States, this creates the possibility of dual recovery. How is it possible or justifiable for a victim’s attorney to claim the same amount of attorney fees, medical expenses, lost incomes, in multiple jurisdictions for the same offense, the same type of possession case? In a civil proceeding, once a jury determines damages, the plaintiff may then recover from the defendants in the case. While those same defendants may not be the only individuals who caused the harm, it is well settled that the plaintiff may not sue for the identical damages in a separate case. The original defendants and non-parties not before the court but identified in the civil trial are responsible for the plaintiff’s damages and these defendants can seek contribution from those parties complicit in the offense. Thus, the plaintiff presents her evidence of damages to the court only once and can recover only once. Similarly, in the criminal restitution context, the victim/petitioner should only present her evidence of loss once, and in each subsequent case, the federal district court judge should give “full faith and credit”<sup>146</sup> to the restitution amount given to the

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child pornography. At the same time, the court finds \$3000 is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns. *Monk*, 2009 WL 2567831 at \*5.

144: *Id.*

145: *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999); *see also United States v. Duncan*, 870 F.2d 1532, 1539 (10th Cir. 1989) (finding no abuse of discretion in the district court’s deferral to judgment in the civil suit in determining the proper amount of restitution where the amount of compensatory damages sought in the civil suit, which covered the same acts of wrongdoing as stated in the criminal restitution order, was no greater than the amount alleged by the government in connection with the criminal offense).

146: U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

victim in the previous federal case. In this sense, the difficult task of determining damages has already been decided, and it is the current judge's sole task to determine how to apportion fault as it pertains to the particular defendant before him. This would prevent dual recovery by the victim and limit the wide array of restitution awards from decisions made by multiple federal district court judges in different federal jurisdictions.

Child pornography possession cases are unique. The victim must confront an unknown number of co-defendants, and most defendants lack the resources to seek contribution from other future co-defendants. The author proposes that: (1) the full amount of restitution owed to a particular victim should be determined when the victim first requests restitution, and the amount should be fixed after the first case is adjudicated; (2) the judge in future cases pertaining to the same victim should apportion fault and liability to the particular defendant appearing before his court based on the earlier total restitution amount as determined by the initial court; (3) the judge should issue a restitution order based upon the apportioned liability; (4) victims are then permitted to seek the rest of the restitution damages not fully recovered during the first criminal case during successive criminal trials, until the full amount of damages are satisfied; and (5) once that restitution award is satisfied, if the victim feels re-victimized by additional viewings that occurs after the original restitution was requested, the victim must petition the court and allege additional losses before seeking additional award amounts.

These recommendations appear to place a greater burden on the victim (plaintiff) to recover the full amount of restitution from individual defendants, whereas in a civil trial the defendant oftentimes is held liable for all losses and it is incumbent upon the defendant to seek recovery from other co-conspirators or offenders. However, in child pornography possession cases, it is the victim that receives information from prosecutors any time his/her image is viewed and there is a pending criminal prosecution. A victim is notified that a possessor of their child pornography image has been identified and charged with a criminal offense. The victim is in a better position to seek full restitution through future apportioned contributions by other as-yet-unidentified defenders in subsequent trials before other courts than is the defendant in this particular case because they know which image was distributed. Moreover, the defendant is not the typical civil defendant with a significant cushion to handle severe financial loss and ability to seek contribution from known co-defendants. These recommendations, which center on fault apportionment, would also preclude victims' attorneys from cherry picking wealthy

defendants in an effort to seek full restitution from defendants who are least culpable but have the deepest pockets. If a defendant of a child pornography possession case has no money, and yet the defendant is held liable for full restitution to a victim, it seems that both the defendant and the victim lose. The victim will receive little or no money from a defendant who faces years in prison and has only a depleted bank account as his sole asset; the defendant, in turn, will have a blighted future when released from incarceration with an unimaginable financial obligation. It is more fair and equitable for both parties to have full restitution determined by the court during the first criminal trial, and the defendant ordered to pay only his apportioned amount of the “total loss” suffered by the victim. The victim can then seek future contributions towards full restitution from other defendants as future offenders are identified and held accountable for their crimes.

#### *IV. Conclusion*

Congress has provided little insight into how the court should determine restitution under § 2259. Section 2259 ambiguously defines the term “full amount of the victim’s losses” and refers the reader to the MVRA’s § 3664’s sparse procedures to be used for the issuance and enforcement of the order of restitution; neither section provides guidance on how precisely to determine the amount subject to restitution. Section 2259 should be amended to provide more guidance to judges in how to determine restitution amounts and how to fairly apportion fault in the child pornography context.

These amendments should provide some flexibility and discretion for judges to deviate from said guidelines when creating restitution orders; but a suitable standard must be established. Restitution orders should, at times, be permissibly decreased based on due process rights under the Eighth Amendment; otherwise, restitution orders may appear to be additional forms of punishment rather than attempts to make the victim “whole.” The defendant should have the right to a restitution hearing and the right to question the evidence presented and cross-examine the expert witnesses at the hearing. The defendant’s ability or inability to pay should be taken into account when apportioning fault (as the court does in bank robbery cases). Lawyers involved in the restitution process should be educated on the relationship between restitution and tort law. While the defendant cannot negate the prima facie evidence of multiple child pornography images found on his/her computer, defense counsel can, at least, attempt to limit the defendant’s amount of financial exposure at sentencing if made aware

of restitution claims in advance. Defense attorneys should have the ability to question the financial damages proffered or claimed by the victim's lawyer. Restitution amounts should be subject to discovery prior to sentencing.

A defendant's liability should be apportioned at the restitution hearing, and the defendant should only be responsible to pay the victim his portion of liability. The victim is in the best position to seek contribution from other co-defendants and to include those who may be prosecuted in the future. If this does not occur, excessive restitution amounts will make it extremely difficult, if not impossible, for possessors to compensate the victim. The current law, as it stands, encourages attorneys to seek out victims in order to find deep-pocket defendants who are then forced to pay all the damages when their true liability is nominal. If victims are allowed to present their case for damages only once, with the understanding that the prevailing judge will determine the full restitution amount and the apportionment of liability for all defendants, then this binding decision would preclude plaintiffs and their attorneys from taking a second, third, and fourth bite of the apple in other federal jurisdictions.

As the Child Exploitation and Obscenity Section of the Department of Justice has stated,

Producing child abuse images has now become easy and inexpensive. The Internet allows images and digitized movies to be reproduced and disseminated to tens of thousands of individuals at the click of a button. . . . The technological ease, lack of expense, and anonymity in obtaining and distributing child pornography has resulted in an explosion in the availability, accessibility, and volume of child pornography.<sup>147</sup>

Congress may have gone a bit overboard in attempting to deter child pornography with the creation of the § 2259 restitution statute. A "reasonable determination"<sup>148</sup> of restitution must be made—one that keeps both the victim and the defendant in mind.

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147: *Child Pornography*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/ceos/childporn.html> (last visited Jan. 26, 2012).

148: *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir. 2008) (finding that the court must make a "reasonable determination" of restitution not merely a "rough approximation").