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Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims

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AMY AND VICKY'S CAUSE: PERILS OF THE FEDERAL RESTITUTION FRAMEWORK FOR CHILD PORNOGRAPHY VICTIMS

TABLE OF CONTENTS

I.	INTRODUCTION	1169
II.	CHILD PORNOGRAPHY, THE RISE OF VICTIM-FOCUSED RESTITUTION, AND DISTRICT COURT DISCORD	1174
A.	CHILD PORNOGRAPHY'S EFFECTS ON VICTIMS AND SOCIETY.....	1174
1.	<i>The Internet: Increasing Dissemination, Low Prosecution Rates</i>	1174
2.	<i>Recorded Form, Lasting Harm</i>	1175
B.	THE PURPOSE OF RESTITUTION: CHANGING ATTITUDES AND LEGISLATIVE RESPONSES.....	1176
1.	<i>Primary Goal: Compensation?</i>	1176
2.	<i>Federal Restitution Legislation</i>	1178
C.	PROXIMATE CAUSATION AND THE DISTRICT COURT DIVIDE.....	1180
1.	<i>The Majority: Proximate Causation in § 2259</i>	1180
2.	<i>The Split: Causal Harm in Non-Production Offenses</i>	1184
D.	A SUMMARY OF THE STATUS QUO	1187
III.	A PROPOSAL FOR CHILD PORNOGRAPHY RESTITUTION REFORM	1188
A.	THE CURRENT FRAMEWORK: CLEAR MESSAGE, INADEQUATE GUIDANCE	1188

B.	HOW A FINE AND CONGRESSIONAL GUIDANCE COULD ALLEVIATE OTHER ISSUES OF THE CURRENT RESTITUTION FRAMEWORK.....	1190
1.	<i>A Congressional Formula</i>	1191
2.	<i>The Problem of Notice</i>	1193
3.	<i>The Problems of Offender Apprehension and Victim Identification</i>	1194
4.	<i>The Problems of High Order Amounts and Low Victim Satisfaction</i>	1195
C.	IMPLICATIONS FOR THE VICTIMS' RIGHTS MOVEMENT	1197
IV.	CONCLUSION.....	1197

I. INTRODUCTION

It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I'm being abused over and over again.¹

I wonder if the people I know have seen these images. I wonder if the men I pass at the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control . . . It feels like I am being raped by each and every one of them.²

In recent years, two women have caused ripples in district courts across the country on a highly sensitive and contentious issue: the availability of restitution for victims of child pornography. While easily reproduced and disseminated images are likely to exist for years after their initial production, the effects of child pornography remain with its victims for a lifetime, causing great emotional, physical, and financial costs.³ Although court-ordered restitution helps alleviate victim costs, it has been historically applied narrowly to those who produce child pornography.⁴ The effort of two brave victims to expand

¹ United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009) (quoting a victim of child pornography, "Amy," about knowing that images of her sexual abuse continue to circulate on the Internet).

² United States v. Hicks, No. 1:09-CR-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009) (alteration in original) (quoting a victim of child pornography, "Vicky," about knowing that images of her sexual abuse continue to circulate on the Internet).

³ See *New York v. Ferber*, 458 U.S. 747, 758 (1981) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

⁴ See, e.g., *United States v. Hardy*, 707 F. Supp. 2d 597, 598–99 (W.D. Pa. 2010) (articulating that it is an issue of first impression for the court whether a victim can gain restitution from a defendant "not involved with the victim's original abuse or the creation of the images"); *United States v. Berk*, 666 F. Supp. 2d 182, 184 (D. Me. 2009) (noting that whether possessors of child pornography should pay restitution is an issue of first impression).

restitution's availability has been marked with mixed success, and a stark divide has emerged among courts over the issue.⁵

The first woman, "Amy,"⁶ is currently in her early twenties.⁷ Her uncle began to sexually abuse her when she was four years old.⁸ This abuse was catastrophic to her emotional health, and she is unable to function normally as an adult because of her guilt, humiliation, and panic.⁹ Although therapy somewhat improved her condition, her psychological well-being again deteriorated after she discovered that images of her abuse had been disseminated on the Internet.¹⁰ She lives in fear that she is recognized in public and feels perpetually victimized by the knowledge that people continue to view images of her abuse.¹¹ "She reports difficulty functioning on a day to day basis, plagued by flashbacks, nightmares, and an inability to focus," and, as a result, "cannot drive, has dropped out of school, lives with her parents, and has at times resorted to substance abuse to cope."¹² She is more resistant to treatment than she was prior to discovering the dissemination of her images and requires more intensive counseling.¹³ Due to the trauma, Amy has sought \$3,367,854 in restitution for lost wages, counseling expenses, and attorney's fees from defendants convicted

⁵ *United States v. Woods*, 689 F. Supp. 2d 1102, 1110 (N.D. Iowa 2010).

⁶ Courts have used the pseudonyms "Vicky" and "Amy" (and sometimes "Misty") to protect the privacy of the women. *E.g.*, *United States v. Brunner*, No. 5:08CR16, 2010 WL 148433, at *1 n.1 (W.D.N.C. Jan. 12, 2010); *Van Brackle*, 2009 WL 4928050, at *1 n.1.

⁷ *Hardy*, 707 F. Supp. 2d at 600.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Physicians identify two categories of trauma that result from being victimized by child pornography: "Type I' which stem[s] from the direct abuse . . . and 'Type II' abuse which stems from the 'knowledge of the dissemination and proliferation of the images of [the victim] at her times of greatest humiliation and degradation.'" *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *5 (E.D. Va. Nov. 24, 2009) (citation omitted). Type II trauma is arguably more harmful because the victim's knowledge "continuously works like corrosive acid on the psyche of the individual." *Id.* (citation omitted) (internal quotation mark omitted).

¹² *Hardy*, 707 F. Supp. 2d at 600.

¹³ *See United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *2 (S.D. Fla. Sept. 2, 2009) (describing the intense resurgence of symptoms in Amy following her knowledge of the proliferation of her images); *see also United States v. Brunner*, No. 5:08CR16, 2010 WL 148433, at *3 n.4 (W.D.N.C. Jan. 12, 2010) ("[Amy] is expected to require residential therapy at a trauma recovery facility . . .").

of possessing her images.¹⁴ Amy has filed over 250 restitution requests.¹⁵

The second woman, "Vicky," was abused by her father when she was around ten years old.¹⁶ The abuse was initially kept secret, but Vicky eventually disclosed the abuse to her mother in 2005.¹⁷ Her father was arrested later that year.¹⁸ Although her father's incarceration seemed to eliminate any reason to fear further abuse, Vicky discovered signs of pornographic material on her father's computer the next year.¹⁹ Not only was the sexual abuse photographed and videotaped, the "series"²⁰ was extensively shared on the Internet.²¹ In turn, she continues to suffer from "night terrors, a marked drop in academic performance at school, alcohol abuse, depression, chronic insomnia, and continuing dissociation with even those closest to her."²² Due to the trauma, Vicky has sought \$151,002.91 in restitution for future counseling expenses, miscellaneous expenses, and attorney's fees.²³

¹⁴ *E.g.*, *United States v. Aumais*, No. 08-CR-711 (GLS), 2010 WL 3033821, at *2 (N.D.N.Y. Jan. 13, 2010); *United States v. Paroline*, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009). The National Center for Missing and Exploited Children (NCMEC) can identify Amy when it reviews reported child pornography because of the wide proliferation of her images. *See Paroline*, 672 F. Supp. 2d at 783 ("The [NCMEC] identified Amy as at least one of the minors depicted in the pornographic images.").

¹⁵ *See Paroline*, 672 F. Supp. 2d at 783 n.4 (stating that Amy had filed "approximately 250 restitution requests" as of December 7, 2009, against different defendants across the country).

¹⁶ *Hicks*, 2009 WL 4110260, at *1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See id.* (discussing the disclosure of abuse, apprehension of Vicky's father, and subsequent investigation that disclosed pornographic images of Vicky).

²⁰ "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*, 707 F. Supp. 2d 597, 600 n.3 (W.D. Pa. 2010).

²¹ *Hicks*, 2009 WL 4110260, at *1.

²² *Id.* at *2.

²³ *United States v. Berk*, 666 F. Supp. 2d 182, 185 (D. Me. 2009). Vicky's requested amount for restitution is significantly lower than Amy's amount because Vicky's economic loss analysis assumes less therapy will be required over time while Amy's analysis assumes that one therapy session per week will be necessary for the remainder of her life. *United States v. Brunner*, No. 5:08CR16, 2010 WL 148433, at *3 n.4 (W.D.N.C. Jan. 12, 2010). Also, Vicky's "specific personal characteristics make her unusually well-off for a survivor of child sexual abuse." *Id.* She will likely not require "inpatient treatment of the type usually required by childhood victims of sexual abuse" because "she eschews the view of being a victim, [and] is very much committed to being a survivor." *Id.* (citation omitted).

As previously stated, Amy and Vicky have sought restitution from any offender convicted²⁴ of possessing their images, regardless of how much the defendant was involved in disseminating child pornography or in their abuse.²⁵ The divide among courts as to whether these women should be entitled to restitution has turned on interpreting the mandatory federal restitution statute, 18 U.S.C. § 2259.²⁶ The standard inquiry for courts is divided into two prongs: (1) whether § 2259 requires proximate causation be shown between a defendant's offense and the victim's harm and (2) whether proximate causation is actually shown.²⁷ While almost every court requires proximate causation,²⁸ a sharp divide exists regarding the second prong. Some courts find the harm from a specific offender is too attenuated in non-

²⁴ A court must determine whether to order restitution at (or shortly after) sentencing. See Beth Bates Holliday, Annotation, *Who Is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. FED. 2d 283, 294 (2008) ("The district court must make a restitution determination within 90 days of sentencing and a restitution order made outside this period may be invalid."); Fern L. Kletter, Annotation, *Mandatory Victims Restitution Act—Constitutional Issues*, 20 A.L.R. FED. 2d 239, 239 (2007) ("The [MVRA] . . . requires the sentencing court to order a defendant to make restitution . . .").

²⁵ See, e.g., *United States v. Baxter*, 394 F. App'x 377, 378 (9th Cir. 2010) (affirming the district court's order of restitution for an offender convicted of *receiving* child pornography under 18 U.S.C. § 2252A(a)(2)); *United States v. Rowe*, No. 1:09CR80, 2010 WL 3522257, at *1, *5 (W.D.N.C. Sept. 7, 2010) (denying an order of restitution for an offender convicted for one count of *possessing* child pornography under 18 U.S.C. § 2252(a)(4)(B)); *United States v. Aumais*, No. 08-CR-711, 2010 WL 3033821 (GLS), at *1 (N.D.N.Y. Jan. 13, 2010) (ordering \$48,483 in restitution to be paid by an offender convicted of transporting in foreign commerce and possessing child pornography under 18 U.S.C. §§ 2252A(a)(1), (5)(B), and 2256(8)(A)).

²⁶ See, e.g., *Berk*, 666 F. Supp. 2d at 184 (noting the authority to request restitution under 18 U.S.C. § 2259); *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *1 (E.D. Cal. Aug. 19, 2009) ("At issue is whether the court must award restitution and the amount of restitution the court should award to the victim under 18 U.S.C. § 2259.").

²⁷ E.g., *Hicks*, 2009 WL 4110260, at *3–4; *Berk*, 666 F. Supp. 2d at 186, 189.

²⁸ See, e.g., *United States v. Hardy*, 707 F. Supp. 2d 597, 610 (W.D. Pa. 2010) ("18 U.S.C. § 2259 does require that a victim's losses be proximately caused by the criminal acts of the defendant for restitution to be awarded."); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) ("[Section] 2259 requires the government to show . . . that the defendant's offense proximately caused a specific loss on the claimants' part."). But see *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *2–4 (S.D. Fla. Sept. 2, 2009) (focusing on the mandatory language of § 2259 and ignoring proximate causation in holding that Amy was harmed and is entitled to restitution).

production offenses while other courts conform to Congress's intent to compensate victims.²⁹

This Note suggests that, in light of the discord among courts over the issue of restitution for victims of non-production child pornography offenses, there is a need for congressional action. While Congress could merely make it explicit that such victims are entitled to restitution, the legislature should instead take the opportunity in amending § 2259 to consider other problems in the federal restitution framework. Part II of this Note discusses the following: the harm child pornography causes to its victims and society; the rise of the victims' rights movement; Congress's response to changing attitudes toward the purpose of restitution; and the divide among district courts in recent years on the issue of ordering non-production child pornography offenders—those who “only” possess, receive, or distribute child pornography—to pay restitution. Part III suggests that Congress should change the federal restitution framework so that judges must impose a mandatory fine for victim compensation funds, and discusses how this system would alleviate some problems that inhibit victim recovery and compensation. These problems include the psychological harm to victims in having to learn of their offenders; low prosecution rates; the difficulty in identifying victims; and high award amounts that are difficult to recover and thus cause low award satisfaction. In effect, this Note proposes that federal restitution for non-production child pornography offenses should become a mandatory fine without regard to any causal harm between a specific victim and offender.

²⁹ Compare *Van Brackle*, 2009 WL 4928050, at *5 (“The restitution request seeks to recover from defendant all losses resulting from all acts by all abusers, without regard to proximate causation.”), with *Renga*, 2009 WL 2579103, at *6 (awarding \$3,000 in restitution because anything less would be “inconsistent with Congress's finding on the harm to children victims of child pornography”).

II. CHILD PORNOGRAPHY, THE RISE OF VICTIM-FOCUSED RESTITUTION, AND DISTRICT COURT DISCORD

A. CHILD PORNOGRAPHY'S EFFECTS ON VICTIMS AND SOCIETY

1. *The Internet: Increasing Dissemination, Low Prosecution Rates.* Child pornography is “any visual depiction . . . where . . . the production . . . involves the use of a minor engaging in sexually explicit conduct”³⁰ Under federal law, it is illegal to knowingly produce, distribute, receive, or possess child pornography.³¹ Although legislators and law enforcement have been attentive to the crime for decades,³² the underground world of child pornography has expanded and gone through significant structural changes since the rapid growth of the Internet in the 1990s.³³

As the amount of child pornography increased, so have the number of prosecutions for its possession.³⁴ From 1994 to 2006, child pornography accounted for 82% of the growth in sexual exploitation crimes referred to federal prosecutors (2,539 out of 3,661 sexual exploitation crimes).³⁵ Although legislation,³⁶ programs,³⁷ and task forces³⁸ have increased law enforcement

³⁰ See 18 U.S.C. § 2256(8) (2006) (defining child pornography).

³¹ See *id.* § 2252A (stating offenses and punishments related to child pornography).

³² See, e.g., Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (toughening penalties and changing the statutory language of federal child pornography laws).

³³ See Mark Motivans & Tracey Kyckelhahn, U.S. Dep't of Justice, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, U.S. DEPT OF JUSTICE, 2 (Dec. 2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf> (discussing responses to the problem posed by “the dramatic increase in Internet availability [that has] provided a relatively anonymous forum for instantaneous exchange of pornographic images that more easily circumvent[] authorities”).

³⁴ *Id.* at 1.

³⁵ *Id.*

³⁶ See, e.g., Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (establishing a national registration program for sex offenders).

³⁷ See, e.g., *Google Joins Industry-Wide Movement to Combat Child Pornography*, NAT'L CENTER FOR MISSING & EXPLOITED CHILD. (Aug. 23, 2006), http://missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageID=2629 (publicizing the efforts of the Technology Coalition—including Google, Yahoo!, Microsoft, AOL, and others—to “enhance knowledge sharing among industry participants, improve law enforcement tools, and research perpetrators’ technologies in order to enhance industry efforts” against child pornography).

coordination and enhanced penalties for child exploitation,³⁹ prosecution rates are infamously low.⁴⁰

2. *Recorded Form, Lasting Harm.* There is little doubt that child pornography significantly harms its victims both initially and into adulthood. Child victims of sexual exploitation “are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.”⁴¹ Some authorities have even argued that pornography is a greater threat to children than sexual abuse itself because the recorded abuse can haunt victims long after the misdeed occurs.⁴² Indeed, these young victims often must live the rest of their lives with emotional harm from the fear of exposure to others who support child exploitation as consumers of this black market.⁴³ As the Supreme Court has explained, “[l]ike a defamatory statement, each new publication of the [contraband images causes] new injury to the child’s reputation and emotional well-being.”⁴⁴ Ultimately, the costs imposed on victims of child pornography are borne by all of society because “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”⁴⁵ This

³⁸ See, e.g., *Internet Crimes Against Children Task Force Program*, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/programs/progsu mmmary.asp?pi=3> (last visited Mar. 20, 2011) (providing an overview of the Internet Crimes Against Children (ICAC) program, which assists local law enforcement investigations of child pornography).

³⁹ Motivans & Kyckelhahn, *supra* note 33, at 2.

⁴⁰ See YAMAN AKDENIZ, *INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES* 131 (2008) (“[Fifty-three] per cent [sic] of total referrals result in prosecution, with an [eighty-seven] per cent [sic] conviction rate during the period 1995–2003.”); Motivans & Kyckelhahn, *supra* note 33, at 3 (stating that “[t]hirty-nine percent of all sex exploitation matters were declined for prosecution by U.S. attorneys in 2006,” which is a higher percentage than cases concerning drugs, weapons, and violence not related to child exploitation).

⁴¹ *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982).

⁴² See *id.* at 759 n.10 (citing various authorities that describe the long-term harm experienced by victims of child pornography).

⁴³ *Id.*

⁴⁴ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002).

⁴⁵ See *Ferber*, 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

growth is inhibited by the physiological, emotional, and mental harm caused by child pornography.⁴⁶

B. THE PURPOSE OF RESTITUTION: CHANGING ATTITUDES AND LEGISLATIVE RESPONSES

1. *Primary Goal: Compensation?* Restitution has served historically as an “offender-based remedy . . . imposed primarily to promote the responsibility and rehabilitation of offenders, not to compensate victims.”⁴⁷ Several reasons exist for why victim compensation has been an ancillary goal of restitution. Due to the limited economic resources and low conviction rates of offenders,⁴⁸ it would be hard to justify restitution’s existence purely for the benefit of the victim; enforcement of such orders is often haphazard and unsuccessful.⁴⁹ Instead, courts have traditionally relied on rehabilitation as the primary purpose behind restitution.⁵⁰ The Supreme Court reiterated this point stating:

The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the

⁴⁶ See *id.* (stating the rationale for legislative responses to child pornography).

⁴⁷ Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victim Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1701 (2009); see also Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2766 (2005) (“Restitution serves the traditional aims of punishment—retribution, deterrence, and rehabilitation—as well as the minimum goal of symbolic victim compensation, with the single act of having the offender make payments directly to the victim.”).

⁴⁸ See *supra* note 40 and accompanying text.

⁴⁹ See Dickman, *supra* note 47, at 1702 (explaining that the reason “most restitution programs have historically considered victim compensation an ‘ancillary goal’ is that restitution is not a practical means of victim compensation”).

⁵⁰ *Id.*

decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. . . . "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."⁵¹

Since the 1970s, however, there has been a movement to have victims more involved in the prosecution of their offenders.⁵² The victims' rights movement gained momentum due to the public perception that the criminal justice system coddled criminals and was not in tune with victims' needs.⁵³ A key catalyst for the wave of victim-focused reforms to criminal statutes was the publication of a report by President Ronald Reagan's Task Force on Victims of Crime in 1982, which observed that "pleas for justice [by victims] have gone unheeded" and recommended government-run sources of funding for victims.⁵⁴ Many rationales exist for why victims should be more involved in the criminal justice process. For example, letting victims participate seems the least that can

⁵¹ Kelly v. Robinson, 479 U.S. 36, 52 (1986) (citation omitted). The Court also reasoned that:

[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

Id. at 49 n.10.

⁵² See Dickman, *supra* note 47, at 1687 (describing the rise of the victims' rights movement and the federal response).

⁵³ See Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R. 5th 343, 362-93 (2001) (portraying the public dissatisfaction with the treatment of criminals and lack of victim involvement).

⁵⁴ *President's Task Force on Victims of Crime, Final Report*, U.S. DEPT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, at ii, 37 (Dec. 1982), http://ojp.usdoj.gov/ovc/publications/pre_sdtstskforcrprt/front.pdf; Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, CRIM. JUST., Spring 2009, at 4, 5-6.

be done to help correct a wrong.⁵⁵ Also, prosecutions will benefit because “the victim will presumably be the most zealous advocate for a successful prosecution.”⁵⁶ Finally, victim involvement will sensitize law enforcement and judicial personnel while “convey[ing] to the victim a message of administrative concern.”⁵⁷

One goal of the victims’ rights movement was to transform restitution from serving primarily rehabilitative purposes into a means to compensate victims for the losses sustained from an offender’s crime.⁵⁸ Now, some modern sentencing codes espouse restorative-justice principles.⁵⁹ Advocates argued that restitution may be the most important means for victims to recoup their personal and financial losses.⁶⁰ Accordingly, Congress responded with legislation that increased the authority of federal courts to order restitution—even mandating restitution for certain offenses.⁶¹

2. *Federal Restitution Legislation.* There has been significant federal legislation in response to changing attitudes toward restitution’s primary purpose. Congress passed the Victim and Witness Protection Act (VWPA) in 1982.⁶² The VWPA permitted federal courts, “for the first time, to order payment of restitution

⁵⁵ Zitter, *supra* note 53, at 363.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Dickman, *supra* note 47, at 1687; Zitter, *supra* note 53, at 370.

⁵⁹ See MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1, 2007) (stating principles of construction). In fact, Congress and state legislatures have passed thousands of statutes that affirm victims’ rights, “and 33 states have passed constitutional amendments protecting the rights of victims in the criminal and juvenile justice systems.” Boland & Butler, *supra* note 54, at 5.

⁶⁰ See Holliday, *supra* note 24, at 283 (“Congress enacted the Mandatory Victims Restitution Act (MVRA) . . . to reflect a fundamental shift in the purpose of restitution . . . to an attempt to provide those who suffer the consequences of crime with some means of recouping their personal and financial losses.”).

⁶¹ See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253 (codified as amended in scattered sections of 18 U.S.C.) (permitting judges to order restitution for certain offenses); Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 202, 204, 110 Stat. 1227, 1227–29 (mandating restitution for certain offenses); Dickman, *supra* note 47, at 1688 (discussing alterations to restitution due to federal legislation).

⁶² Although compensation has become a primary goal of restitution, restitution continues to have a dual primary purpose: penal punishment. *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010).

independently of a sentence of probation.”⁶³ It was intended to give priority status to restitution in federal sentencing procedures.⁶⁴ In passing the VWPA, Congress affirmed

[t]he principle of restitution [as] an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also [ensure] that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.⁶⁵

In expanding the authority of federal courts to impose an order of restitution on defendants, Congress also imposed limitations on judicial discretion. The most important requirement—which eventually led to congressional dissatisfaction with the VWPA—was that courts had to consider a defendant’s and any of his dependent’s financial resources, financial needs, and earning ability in determining whether to order restitution.⁶⁶ The effect of this limitation ensured that restitution judgments were not greater than what an offender could reasonably pay.⁶⁷

Congress became dissatisfied with the VWPA’s effect (or lack thereof) in pushing courts to order payment of restitution to victims;⁶⁸ as a result, it passed the Mandatory Victims Restitution Act of 1996 (MVRA), which made significant changes to the restitution process and continued to reflect the changing

⁶³ S. REP. NO. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536. Before the VWPA, 18 U.S.C. § 3651 provided that “[w]hile on probation . . . the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had” 18 U.S.C. § 3651 (repealed 1984).

⁶⁴ S. REP. NO. 97-532, at 30.

⁶⁵ *Id.*

⁶⁶ Victim and Witness Protection Act of 1982 § 3580; Dickman, *supra* note 47, at 1688.

⁶⁷ See Dickman, *supra* note 47, at 1688 (“[The VWPA] had the practical effect of ensuring that restitution judgments did not exceed offenders’ ability to pay.”).

⁶⁸ See Holliday, *supra* note 24, at 283 (noting that Congress enacted the Mandatory Victims Restitution Act of 1996 “to reflect a fundamental shift in the purpose of restitution” and the greater financial need of victims).

understanding of restitution's primary purpose.⁶⁹ A perception existed that the VWPA's restitution framework inadequately compensated victims,⁷⁰ so the MVRA was intended "to ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime. To that end, the bill modifie[d] [the] law to mandate that restitution be awarded by the court in *most* [f]ederal criminal proceedings."⁷¹ Perhaps the greatest change was decreased judicial discretion in issuing orders of restitution.⁷² Under the MVRA, "[a] court may not decline to issue an order [for restitution] because of . . . the economic circumstances of the defendant."⁷³ Finally, the MVRA intended to create uniformity among restitution statutes.⁷⁴

C. PROXIMATE CAUSATION AND THE DISTRICT COURT DIVIDE

1. *The Majority: Proximate Causation in § 2259.* In enacting 18 U.S.C. § 2259,⁷⁵ Congress mandated that judges order payment of

⁶⁹ See *United States v. Hardy*, 707 F. Supp. 2d 597, 609 (W.D. Pa. 2010) (noting that the MVRA made sweeping changes to the restitution process to reflect a more cohesive scheme); Holliday, *supra* note 24, at 283 (stating the effects and purposes of the MVRA).

⁷⁰ Dickman, *supra* note 47, at 1689.

⁷¹ H.R. REP. NO. 104-16, at 4 (1995) (emphasis added).

⁷² Dickman, *supra* note 47, at 1688.

⁷³ 18 U.S.C. § 2259(b)(4)(B) (2006); see also 18 U.S.C. § 3664(f)(1)(A) (2006) ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and *without consideration of the economic circumstances of the defendant.*" (emphasis added)).

⁷⁴ See *Hardy*, 707 F. Supp. 2d at 609 (explaining that by adding § 3663A and amending 18 U.S.C. §§ 2248, 2259, 2264, and 3663A, "Congress intended to create a streamlined process that only awarded restitution to all identifiable victims suffering an actual loss"). As discussed later, *infra* notes 87–90 and accompanying text, this fact is important in how some courts have interpreted 18 U.S.C. § 2259.

⁷⁵ The text of the provision provides:

- (a) IN GENERAL.—Notwithstanding section 3663 or 3663A . . . the court shall order restitution for any offense under this chapter.
- (b) Scope and Nature of Order.—
 - (1) DIRECTIONS.—The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
 - (2) ENFORCEMENT.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

restitution for victims of child pornography.⁷⁶ From the plain language of § 2259, it is not clear whether causation between the defendant's crime and victim's harm is required for an award of restitution.⁷⁷ Most courts (the Fifth Circuit is a notable exception),⁷⁸ however, petitioned by Amy or Vicky for restitution

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- (3) DEFINITION.—For purposes of this subsection, the term “full amount of the victim's losses” includes any costs incurred by the victim for—
 - (A) medical services relating to physical, psychiatric, or psychological care;
 - (B) physical and occupational therapy or rehabilitation;
 - (C) necessary transportation, temporary housing, and child care expenses;
 - (D) lost income;
 - (E) attorneys' fees, as well as other costs incurred; and
 - (F) any other losses suffered by the victim as a proximate result of the offense.
 - (4) ORDER MANDATORY.—(A) The issuance of a restitution order under this section is mandatory.
 - (B) A court may not decline to issue an order under this section because of—
 - (i) the economic circumstances of the defendant; or
 - (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.
 - (c) DEFINITION.—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter

18 U.S.C. § 2259.

⁷⁶ See *id.* (mandating restitution for any offense under the chapter).

⁷⁷ Compare *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009) (“A showing of causation is not specifically enumerated in [§ 2259] as a prerequisite to an award of restitution.”), with *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009) (“[T]he plain language of the statute clearly requires that losses—to be recoverable in restitution—must have been proximately caused by the acts which constitute the offense of conviction.”).

⁷⁸ *In re Amy Unknown*, 636 F.3d 190, 198–201 (5th Cir. 2011) (criticizing statutory analysis that has found proximate causation necessary under § 2259); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *2–4 (S.D. Fla. Sept. 2, 2009) (focusing on the mandatory language of § 2259 and ignoring proximate causation in holding that Amy was harmed and entitled to restitution). Before the Fifth Circuit ruled on March 22, 2011, the court in *Staples* was an outlier from other courts by not including proximate causation in its analysis. Accordingly, this Note was written on the premise that proximate causation is required. Because a court of appeals has found otherwise, the validity of the Note's assumption is in greater doubt. Unfortunately, this Note cannot fully address the Fifth Circuit's holding because of time constraints. It is worth noting, however, on what bases the Fifth Circuit determined proximate causation does not apply for most types of losses under § 2259.

have held that the Government must show the defendant's offense proximately caused the victim's loss to receive restitution under § 2259.⁷⁹ In reaching this conclusion, courts have relied primarily on the statutory construction of § 2259 and the legislative history of the VWPA and MVRA.⁸⁰

First, a proximate cause requirement can be constructed from the language of § 2259(b)(3), which defines the "full amount of the victim's losses" [as] includ[ing] any costs incurred by the victim for . . . any other losses suffered by the victim as a *proximate result* of the offense."⁸¹ Although no other subsection of § 2259(b)(3) says

The Fifth Circuit's analysis is summarized as follows: Rather than applying to all categories of harm listed in 18 U.S.C. § 2259(b)(3), "proximate causation applies only to the catchall category" for several reasons. *In re Amy Unknown*, 636 F.3d at 198. First, the MVRA "defines a victim as 'the individual harmed as a result of a commission of a crime,'" *id.* at 199 (alteration in original) (quoting 18 U.S.C. § 2259(c)), rather than "a person directly and proximately harmed as a result of the commission of an offense," as defined in the VWPA. *Id.* at 198 (alteration in original) (quoting 18 U.S.C. § 3663A(a)(2)) (internal quotation marks omitted). "Comparing these statutes . . . demonstrates Congress's choice to abandon a global requirement of proximate causation." *Id.* at 199. Second, the statute interpreted in *Porto Rico Railway, Light & Power Co. v. Mor.*, 253 U.S. 345 (1920), is distinguishable because the grammar in § 2259 is organized with a double-dash and semicolons separating elements rather than "a blurry composite of lists, separated by commas and without any numbering or introductory punctuation." 636 F.3d at 199. Even if *Porto Rico Railway* applies, proximate causation should still be limited to § 2259(b)(3)(F) because a statutory provision should be construed "as to effectuate the general purpose of Congress" if the application of causation is doubtful, and limiting the proximate causation requirement would better effectuate the purpose for broad availability of restitution behind § 2259. *Id.* (quoting *Porto Rico Ry.*, 253 U.S. at 348) (quotation mark omitted). Similarly, a court should not use *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), to interpret the catchall provision's causation requirement as applicable to other losses because "the Court in *Seatrain* took its cues from 'the statutory scheme' and what it says about congressional intent." 636 F.3d at 200 (quoting *Seatrain*, 411 U.S. at 734). Finally, the Fifth Circuit said "the statute's built-in causation requirement[,] the volume of causation evidence in the context of child pornography," and the possibility of contribution from other defendants who are also ordered to pay restitution make any concerns about offending the Eighth Amendment misplaced. *Id.* at 201.

⁷⁹ See, e.g., *Hardy*, 707 F. Supp. 2d at 610 ("18 U.S.C. § 2259 does require that a victim's losses be proximately caused by the criminal acts of the defendant for restitution to be awarded."); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) ("[Section] 2259 requires the government to show . . . that the defendant's offense proximately caused a specific loss on the claimants' part.").

⁸⁰ See, e.g., *Hardy*, 707 F. Supp. 2d at 609–10 (stating that "the legislative history [of the MVRA] also suggests that § 2259 includes a proximate cause requirement"); *Hicks*, 2009 WL 4110260, at *3 (reasoning that a requirement of causation must be implied from the statute).

⁸¹ 18 U.S.C. § 2259(b)(3) (2006) (emphasis added).

that losses must have been a proximate result of the offense, courts can construct this requirement through *ejusdem generis*:⁸² “When 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.”⁸³ Courts have used this doctrine to determine that “the natural construction of the statute demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statute.”⁸⁴

Second, the legislative histories of the VWPA and MVRA suggest that Congress intended to require a showing of proximate causation for mandatory restitution. For a person to be a victim under §§ 3663 and 3663A, the person must have been “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”⁸⁵ In amending federal restitution laws, Congress expressed its intent to:

[r]equire[] that there be an identifiable victim who suffers a physical injury or pecuniary loss before mandatory restitution provisions would apply. The committee intends this provision to mean . . . that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss *directly and proximately caused by* the course of conduct under the count or counts for which the offender is convicted.⁸⁶

Congress also intended to “conform the mandatory and permissive restitution provisions . . . to the provisions of [the] act”

⁸² See *United States v. Paroline*, 672 F. Supp. 2d 781, 788 (E.D. Tex. 2009) (rejecting the argument that proximate causation is only required for § 2259’s catchall category of losses); see also BLACK’S LAW DICTIONARY 594 (9th ed. 2009) [hereinafter BLACK’S] (defining *ejusdem generis* as a “canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed”).

⁸³ *Porto Rico Ry.*, 253 U.S. at 348.

⁸⁴ *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009).

⁸⁵ 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2) (2006); see also *Hardy*, 707 F. Supp. 2d at 606 (noting how § 3663(a)(2) and § 3663A(a)(2) define victim using the same language).

⁸⁶ *Hardy*, 707 F. Supp. 2d at 609 (quoting S. REP. NO. 104-179, at 29–30 (1995)).

and “subject to the consolidated procedural requirements of 18 U.S.C. [§] 3664.”⁸⁷ This would create a “streamlined process” for victims and reduce confusion about how to apply different restitution statutes by harmonizing them.⁸⁸ With this comes a universal proximate causation requirement.⁸⁹ From legislative intent and statutory construction, most courts have determined that a proximate cause requirement is inherent in § 2259.⁹⁰

2. *The Split: Causal Harm in Non-Production Offenses.* Although most courts agree that a showing of proximate causation is required under § 2259, there has been a clear split among courts on whether defendants who receive, possess, or distribute contraband images can be ordered to pay restitution to their victims.⁹¹ The first order for a defendant to pay restitution for possession of child pornography was issued on February 23, 2009.⁹² Commenting that “[w]e’re dealing with a frontier here,” Judge Warren W. Eginton ordered the defendant (a former vice president of Pfizer) to pay \$200,000 and cited for authority the discretion judges have with criminal restitution orders.⁹³ Subsequent outcomes over the issue have varied greatly. Other courts have ignored any issue of proximate cause in awarding

⁸⁷ *Id.* (internal quotation marks omitted) (citing S. REP. NO. 104-179).

⁸⁸ *See id.* (discussing Congress’s intent in enacting the MVRA).

⁸⁹ *Id.*

⁹⁰ *See id.* at 610 (“Given the unanimity of the Circuits that have addressed the question, the language of the statute, and the legislative history of its amendments, this Court finds that 18 U.S.C. § 2259 does require that a victim’s losses be proximately caused by the criminal acts of the defendant for restitution to be awarded.”). Courts have also reasoned that the rule of lenity requires any ambiguity in the criminal statute be resolved in favor of the defendant. *United States v. Church*, 701 F. Supp. 2d 814, 829–30 (W.D. Va. 2010).

⁹¹ *See infra* notes 107–10 and accompanying text.

⁹² *Child Porn Damages Precedent Set*, BBC NEWS (Feb. 24, 2009), <http://news.bbc.co.uk/2/hi/americas/7907053.stm>; John Christoffersen, *CT Sets New Precedent for Child Porn Cases*, NBC CONNECTICUT (Feb. 24, 2009), <http://www.nbcconnecticut.com/news/local/Man-With-Child-Porn-Must-Pay-Victim-.html>. Although a seminal case on the issue of restitution for child pornography offenses, this case has not been published.

⁹³ *See* Christoffersen, *supra* note 92 (noting the judge’s understanding of the new precedent he was setting while also reasoning it is appropriate due to the “feeling of revulsion about this type of conduct” (quoting Judge Eginton) (internal quotation mark omitted)).

restitution;⁹⁴ found a lack of evidence to suggest the offense caused quantifiable loss;⁹⁵ adopted a set amount for each defendant convicted of possession;⁹⁶ and permitted the Government and defendant to stipulate a restitution amount.⁹⁷

Courts that deny restitution reason that proximate causation between defendants' crimes and the victims' harm is too attenuated to justify restitution. For example, in *United States v. Berk*, the District Court of Maine found that no specific loss was proximately caused by the defendant possessor because "[t]he losses described . . . are generalized and caused by the idea of their images being publicly viewed rather than caused by [the] particular Defendant having viewed their images [T]here is no evidence . . . the Victims suffered any additional loss above and beyond what they had already experienced."⁹⁸

Similarly, the court in *United States v. Van Brackle* held "a restitution award would be pure speculation and would risk violating the Eighth Amendment" because, rather than establishing a specific harm, the evidence established "a total amount of harm resulting from all the abuses suffered, including the initial abuse and the initial distribution of the child pornography. The restitution request seeks to recover from defendant all losses resulting from all acts by all abusers, without regard to proximate causation."⁹⁹ In summary, these courts

⁹⁴ See, e.g., *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *4 (S.D. Fla. Sept. 2, 2009) (ignoring any issue of proximate cause in ordering the defendant to pay restitution).

⁹⁵ See, e.g., *United States v. Simon*, No. CR-08-0907 DLJ, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (holding that restitution was not proper because it was not shown by a preponderance of the evidence that Amy was harmed by the defendant's offense).

⁹⁶ See, e.g., *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (awarding \$3,000 in restitution for Vicky as a compromise between Congress's intent to compensate victims of child pornography and any due process concerns of the defendant).

⁹⁷ See *United States v. Berk*, 666 F. Supp. 2d 182, 190 (D. Me. 2009) (reviewing the victims' varying success in obtaining restitution from defendants across the country).

⁹⁸ *Id.* at 191-92. The court noted, however, that "if there was evidence that the Victims had to attend even one additional counseling session due to [the defendant's] actions, then restitution may have been appropriate." *Id.* at 192. This suggests that the method of pleading damages and whether the harm occurred after learning of the defendant's possession is critical to a proximate cause analysis.

⁹⁹ *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009).

declined to order payment of restitution because the defendants were not but-for causes of the victims' losses and no specific, calculable injury from the defendants' offenses could be shown by a preponderance of the evidence.

Courts that treat the proximate cause issue more liberally emphasize that the application of § 2259 is mandatory when a harm is shown by the victim and these victims sufficiently prove their harm. For example, in *United States v. Brunner*, the court imposed restitution on the defendant because he "participated in an ongoing cycle of abuse and thereby contributed to the victims' mental and emotional trauma."¹⁰⁰ The court noted the "relaxed standard" of a rule of reasonableness, where proximate causation exists if the injury was a reasonably foreseeable result of the offense,¹⁰¹ is applied because of the strong congressional intent behind § 2259 to compensate victims.¹⁰² The court then concluded a definite harm exists and that it had the discretion to "apportion liability among the defendants to reflect the level of contribution to the victim's loss."¹⁰³ Furthermore, the court in *United States v. Renga* awarded \$3,000 in restitution because anything less would be "inconsistent with Congress's findings on the harm to child victims of child pornography."¹⁰⁴ Finally, in *United States v. Hardy*, the court reasoned that:

¹⁰⁰ *United States v. Brunner*, No. 5:08CR16, 2010 WL 148433, at *2 (W.D.N.C. Jan. 12, 2010). The end-user of child pornography contributes to the "cycle of abuse" in at least three ways:

(1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child's continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child's privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject.

United States v. Paroline, 672 F. Supp. 2d 781, 786 (E.D. Tex. 2009).

¹⁰¹ See *United States v. Church*, 701 F. Supp. 2d 814, 830 (W.D. Va. 2010) (explaining that proximate cause is typically satisfied if there is a reasonable connection between the wrongdoing and injury).

¹⁰² *Brunner*, 2010 WL 148433, at *3.

¹⁰³ *Id.* (quoting 18 U.S.C. § 3664(h) (2006)).

¹⁰⁴ *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009). Although the court noted that there could be due process and windfall

the real issue is not whether Defendant has caused Amy harm—he has, because he circulated the images—but whether his doing so is a substantial factor in her overall harm. It is undoubtedly true that harmful images of Amy would be circulating on the internet even if it were not for the conduct of Defendant. But, in this Court's estimation, Amy has shown by a preponderance of the evidence that Defendant's conduct aided in the circulation of said images, that the circulation has harmed her, and that, therefore, Defendant's conduct caused at least part of her overall harm. She has, therefore, shown that Defendant's conduct is a substantial factor in her psychological harm and economic losses.¹⁰⁵

In summary, courts that have ordered payment of restitution for non-production child pornography offenses reason that Congress's clear intent is to compensate victims in such situations and that there is reasonably foreseeable harm from the activities of these sex offenders.

D. A SUMMARY OF THE STATUS QUO

At the time of this Note's writing,¹⁰⁶ a slight majority of courts have ordered non-production offenders to pay restitution. Since restitution was first awarded by Judge Eginton on February 23, 2009,¹⁰⁷ thirteen district courts¹⁰⁸ and three circuits¹⁰⁹ have

concerns, the issues were not present in that case because the court was "confident [\$3,000] is somewhat less than the actual harm [the] particular defendant caused" and the victim had not yet recovered full restitution for her losses from other defendants. *Id.*

¹⁰⁵ *United States v. Hardy*, 707 F. Supp. 2d 597, 613–14 (W.D. Pa. 2010).

¹⁰⁶ This portion of the Note was completed on April 13, 2011.

¹⁰⁷ See *supra* notes 92–93 and accompanying text.

¹⁰⁸ *United States v. McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011) (affirming an order from the Northern District of Georgia to pay restitution); *United States v. Scott*, No. 10-4155, 2011 WL 322833, at *1–2 (10th Cir. Feb. 3, 2011) (enforcing an appeal waiver from the District of Utah where the defendant was ordered to pay \$219,546.10); *United States v. Baxter*, 394 F. App'x 377, 378 (9th Cir. 2010) (discussing the order of restitution imposed by the District of Montana); *United States v. Barkley*, Criminal No. 1:10-CR-143, 2011 WL 839541, at *1 (M.D. Pa. Mar. 7, 2011); *United States v. Morris*, Criminal No. 3:09-CR-101-D(01), 2011 WL 766551, at *1 (N.D. Tex. Feb. 23, 2011); *United States v. Monzel*, 746 F.

awarded restitution, while thirteen district courts¹¹⁰ have denied restitution. In fact, there has even been a split *within* districts.¹¹¹ As Amy, Vicky, and other victims continue to petition courts and appeals are brought, there is likely to be a continued split among courts that must be resolved.

III. A PROPOSAL FOR CHILD PORNOGRAPHY RESTITUTION REFORM

A. THE CURRENT FRAMEWORK: CLEAR MESSAGE, INADEQUATE GUIDANCE

While both groups of courts have weighty arguments to support their positions, one conclusion is indisputable: 18 U.S.C. § 2259

Supp. 2d 76 (D.D.C. 2010); *United States v. Laursen*, No. 08-00263-01-CR-W-HFS, 2010 WL 3834322, at *1–2 (W.D. Mo. Sept. 27, 2010) (following the Ninth Circuit decision in *Baxter*, 394 F. App'x 377); *Hardy*, 707 F. Supp. 2d at 599; *United States v. Church*, 701 F. Supp. 2d 814, 816 (W.D. Va. 2010); *United States v. Aumais*, No. 08-CR-711 (GLS), 2010 WL 3033821, at *1 (N.D.N.Y. Jan. 13, 2010); *Brunner*, 2010 WL 148433, at *4; *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at *1 (E.D. Va. Nov. 24, 2009); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla. Sept. 2, 2009).

¹⁰⁹ *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011); *McDaniel*, 631 F.3d at 1206; *Baxter*, 394 F. App'x at 379.

¹¹⁰ *United States v. Brannon*, Criminal No. 2:09CR19, 2011 WL 251168, at *3–4 (W.D.N.C. Jan. 26, 2011); *United States v. Covert*, Criminal No. 09-332, 2011 WL 134060, at *1 (W.D. Pa. Jan. 14, 2011); *United States v. Rhodes*, No. CR 10-14-M-DWM, 2011 WL 108951, at *3 (D. Mont. Jan. 12, 2011); *United States v. Chow*, No. 09-CR-165 (KMK), 2010 WL 5608794, at *1 (S.D.N.Y. Nov. 22, 2010); *United States v. Rowe*, No. 1:09CR80, 2010 WL 3522257, at *5 (W.D.N.C. Sept. 7, 2010); *United States v. Solsbury*, 727 F. Supp. 2d 789, 790 (D.N.D. 2010); *United States v. Strayer*, No. 8:08CR482, 2010 WL 2560466, at *15 (D. Neb. June 24, 2010); *United States v. Patton*, No. 09-43 (PAM/JSM), 2010 WL 1006521, at *2 (D. Minn. Mar. 16, 2010); *United States v. Woods*, 689 F. Supp. 2d 1102, 1112 (N.D. Iowa 2010); *United States v. Faxon*, 689 F. Supp. 2d 1344, 1346 (S.D. Fla. 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, 783 (E.D. Tex. 2009), *mandamus denied sub nom*, *In re Amy*, 591 F.3d 792, 793 (5th Cir. 2009), *reh'g granted*, *In re Amy Unknown*, 636 F.3d at 190; *United States v. Berk*, 666 F. Supp. 2d 182, 184 (D. Me. 2009).

¹¹¹ *Compare Staples*, 2009 WL 2827204, at *1 (finding the defendant jointly and severally liable—without discussing proximate causation—for Amy's harm for possessing, distributing, and transporting child pornography in interstate commerce), *and Brunner*, 2010 WL 148433, at *4 (awarding \$6,000 and \$1,500 in restitution to Misty and Vicky respectively from a defendant that transported child pornography in interstate commerce), *with Faxon*, 689 F. Supp. 2d at 1358 (acknowledging *Staples* but distinguishing it on the grounds that the *Staples* facts are not known and that the "Court can only accept the evidence presented in this case"), *and Rowe*, 2010 WL 3522257, at *1, *5 (citing *Brunner* initially but subsequently denying Vicky's request for restitution from a defendant convicted of possessing child pornography).

does not provide sufficient guidance on whether non-production offenders must pay restitution and how damages should be calculated. In turn, there are two unfortunate, polar consequences: some courts bar recovery for victims while others force offenders to pay large amounts that have an attenuated connection to the harm actually caused.¹¹²

Faced with this predicament, courts that grant any restitution tend to award a nominal amount, usually about \$3,000.¹¹³ This amount is influenced by the congressional mandate for restitution, considerations of due process, and the presumed damages of \$150,000 in 18 U.S.C. § 2255—the civil remedy statute.¹¹⁴

[\$3,000] is two percent of the \$150,000 amount reflected in [§] 2255. Given the high amount of the deemed damages in [§] 2255, . . . an amount less than \$3,000 [is] inconsistent with Congress's findings on the harm to children victims of child pornography. At the same time, . . . \$3,000 is a level of restitution . . . somewhat less than the actual harm [possession offenders] cause [] each victim, resolving any due process concerns.¹¹⁵

The central difficulties that face courts come from the established principle in criminal restitution that a restitution

¹¹² See, e.g., *Aumais*, 2010 WL 3033821, at *1, *9 (awarding Amy \$48,483 from a defendant convicted of possessing and transporting child pornography in foreign commerce); *Staples*, 2009 WL 2827204, at *1, *4 (holding an offender convicted for possessing, distributing, and transporting child pornography via interstate commerce jointly and severally liable for Amy's harm in the amount of \$3,680,153).

¹¹³ See, e.g., *Church*, 701 F. Supp. 2d at 835 (ordering "the Defendant to pay [Amy] a nominal figure of restitution in the amount of one hundred dollars"); *Hicks*, 2009 WL 4110260, at *1 (awarding Vicky \$3,525 for restitution); *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009) (awarding Amy and Vicky each \$3,000 for restitution).

¹¹⁴ 18 U.S.C. § 2255(a) (2006) ("Any person who, while a minor, was a victim of a violation of [a federal statutory sex crime] and who suffers personal injury as a result of such violation . . . may sue . . . 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.").

¹¹⁵ *Zane*, 2009 WL 2567832, at *5 (rationalizing an award value of \$3,000 each for Amy and Vicky).

amount should not exceed the actual loss that the defendant's offense caused the victim, and the requirement that there be a preponderance of the evidence with "explicit findings of fact supporting [a] calculation of 'the full amount of the victim's losses.'" ¹¹⁶ When there is no such explicit evidence, a court is confined to award a nominal figure in conformity with the congressional mandate. ¹¹⁷ Due to the inherent difficulty of calculating damages for non-production child pornography offenses, ¹¹⁸ a nominal award could be the most effective solution for the courts and Congress.

B. HOW A FINE AND CONGRESSIONAL GUIDANCE COULD ALLEVIATE OTHER ISSUES OF THE CURRENT RESTITUTION FRAMEWORK

Congress should amend the law so that lower courts have more guidance and victims can recover compensation for their losses. ¹¹⁹ However, rather than merely making it more explicit that restitution must be awarded for child pornography victims, Congress should address other issues that have arisen because of the restitution framework and problems in prosecuting child pornography offenses generally. These problems include a counterintuitive requirement that victims be notified of new "victimizers" to gain restitution, low prosecution rates, the difficult task of identifying victims, and low satisfaction of restitution orders. ¹²⁰ In *United States v. Paroline*, Judge Leonard Davis suggested a workable framework that could address these problems:

¹¹⁶ *Church*, 701 F. Supp. 2d at 829, 832 (quoting 18 U.S.C. § 2259 (2006)).

¹¹⁷ *See Zane*, 2009 WL 2567832, at *5 (balancing the congressional mandate with a defendant's due process concerns).

¹¹⁸ *See supra* notes 98–99 and accompanying text.

¹¹⁹ Some could argue that the need for legislative action is minimal because Congress has already provided a civil remedy for victims: 18 U.S.C. § 2255. *See United States v. Strayer*, No. 8:08CR482, 2010 WL 2560466, at *15 (D. Neb. June 24, 2010) (noting that Vicky may still "pursue a civil action for damages under 18 U.S.C. § 2255" despite the court's denial of a restitution order). Nothing suggests, however, that a claim for damages under this statute would not suffer the same issues that arise under § 2259. *See* 18 U.S.C. § 2255(a) (implying a similar causal requirement as § 2259 in that victims must "suffer[] personal injury as a result" of the defendant's offense).

¹²⁰ *See* discussion *infra* Part III.B.2–4 (discussing how current restitution problems may be resolved by changing the restitution framework).

Perhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.¹²¹

Although Judge Davis was probably speaking only to the general problem of providing restitution for victims under § 2259, his footnote hints at a solution to other issues plaguing the mandatory restitution framework.

1. *A Congressional Formula.* A new framework for non-production child pornography restitution could build on what lower courts have been doing: awarding a nominal figure to compensate victims.¹²² However, instead of forcing courts to make arbitrary attempts at calculating damages caused by a specific offender to a specific victim, Congress should mandate a fine (e.g., \$3,000) that could increase or be mitigated due to certain variables (e.g., the offender's involvement in the proliferation of child pornography and the amount of pornographic material possessed).¹²³ Also, rather than imposing restitution only for

¹²¹ United States v. Paroline, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009).

¹²² See *supra* note 113 and accompanying text.

¹²³ Specific provisions, guidelines, and methodology are beyond the scope of this Note. However, a table—albeit using arbitrary guidelines—is provided below to illustrate what a scheme could look like, using Beech typologies of child pornography offenders. See SUZANNE OST, CHILD PORNOGRAPHY AND SEXUAL GROOMING: LEGAL AND SOCIETAL RESPONSES 43 (2009) (quoting Beech offender typologies).

<i>Offender Type</i>	<i>Images/Videos Possessed</i>	<i>Fine Amount</i>
Possessor without a pattern of offline contact offending	Under 100	\$3,000
Possessor without a pattern of offline contact offending	100 or more	\$5,000
Possessor with a pattern of offline contact offending	Under 100	\$5,000
Possessor with a pattern of offline contact offending	100 or more	\$10,000
Person distributing images not for profit	Under 100	\$10,000
Person distributing images not for profit	100 or more	\$15,000
Person distributing images for profit	Under 100	\$15,000
Person distributing images for profit	100 or more	\$25,000

offenders with identifiable victims who petition courts, the fine should apply to *all* child pornography offenders in federal courts. Because the entire *class* of offenders causes harm to victims, such changes to the restitution framework offer significant advantages.¹²⁴

As stated previously, the victims' rights movement has made compensation a primary goal of restitution and sentencing frameworks;¹²⁵ in fact, many statutes and constitutions describe an order of restitution for compensation as a *right*.¹²⁶ Additionally, every state has a crime victim compensation program that provides financial assistance to victims and their families.¹²⁷ Today, about \$500 million is paid each year to more than 200,000 victims from state compensation programs.¹²⁸ Most of this money comes from fines and fees imposed on state offenders; 35% comes from federal grants to compensation programs, which are also funded by offender fines and assessments.¹²⁹ There are some

¹²⁴ See discussion *infra* Part III.B.2–4 (detailing ways in which a new restitution framework could alleviate problems with the current framework).

¹²⁵ See *supra* notes 52–61 and accompanying text (describing the rise of the victims' rights movement and its effect on the role of restitution).

¹²⁶ *What You Can Do If You Are a Victim of Crime*, U.S. DEPT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, http://www.ojp.usdoj.gov/ovc/publications/infores/whatyoucando_2010/W hatUCanDo_508.pdf (last visited Mar. 20, 2011).

¹²⁷ *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=14> (last visited Feb. 26, 2011) [hereinafter *Compensation Overview*].

¹²⁸ *Id.* Victims from a wide array of crimes, primarily "assault, rape, domestic violence, child abuse, drunk driving, and other violent crimes," may collect through these programs. *Eligibility Requirements*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=6> (last visited Feb. 26, 2011).

¹²⁹ See *Compensation Overview*, *supra* note 127 (detailing the disbursement and sources of funding for state victim compensation funds). The Office for Victims of Crime—a part of the Department of Justice—administers the Victims of Crime Act, Crime Victim Compensation formula grant program, and discretionary grant program. *Crime Victim Assistance* (16.575), FED. GRANTS WIRE, <http://www.federalgrantswire.com/crime-victim-assistance.html> (last visited Feb. 26, 2011); *Crime Victim Compensation* (16.576), FED. GRANTS WIRE, <http://www.federalgrantswire.com/crime-victim-compensation.html> (last visited Feb. 26, 2011); *Crime Victim Assistance/Discretionary Grants* (16.582), FED. GRANTS WIRE, <http://www.federalgrantswire.com/crime-victim-assistancediscretionary-grants.html> (last visited Feb. 26, 2011).

limitations, however, on these state programs.¹³⁰ In a revised federal statutory framework, Congress could provide additional funding for these state programs or, in the alternative, create a national compensation fund similar to Judge Davis's suggestion.¹³¹

2. *The Problem of Notice.* Perhaps the most counterintuitive aspect of the current restitution framework—as applied to child pornography victims—is that victims typically must be notified of their offenders and petition courts for compensation.¹³² This knowledge reaffirms the paranoia involved with the lasting psychological harm of child pornography.¹³³ Vicky recounted this difficulty in *United States v. Woods*:

I learn about each [defendant] because of the Victim Notices. I have a right to know who has the pictures of me. The Notice puts [a] name on the fear that I already had and also adds to it. When I learn about one defendant having downloaded the pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about it.¹³⁴

As Vicky implied, notice of defendants could sometimes be therapeutic for victims; however, forcing victims to learn the identities of their offenders to receive compensation might cause more harm than good.¹³⁵ Although preventing dissemination of child pornography is a primary goal of law enforcement that would

¹³⁰ See *Compensation Overview*, *supra* note 127 (describing limitations of state compensation programs, such as maximum benefits available per victim averaging \$25,000 and funds not being available to victims covered by insurance).

¹³¹ See *supra* note 121 and accompanying text (quoting Judge Davis's proposed solution). The benefits and disadvantages of the federal government administering these funds are beyond the scope of this Note.

¹³² See *Attorney General Guidelines for Victim and Witness Assistance*, U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, 20 (2005), http://www.justice.gov/olp/pdf/ag_guidelines.pdf (explaining the victim notification process).

¹³³ See *supra* note 11 and accompanying text (describing Type II abuse from child pornography).

¹³⁴ *United States v. Woods*, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010).

¹³⁵ However, if a victim wants to learn of her offenders, then she should still have a right to do so. Whether or not this knowledge is therapeutic may vary from victim to victim.

lessen psychological harm, victim ignorance of new offenders could also mitigate the harm.¹³⁶ Notifications reinforce victim paranoia; through a mandatory fine for all child pornography offenders, victims would have the option to circumvent being notified of the certain, continuous stream of offenders.

3. *The Problems of Offender Apprehension and Victim Identification.* Two major steps that must be met for victims to receive restitution are (1) finding offenders and (2) identifying victims. Authorities cannot seek restitution for years (if ever) until a victim can be identified;¹³⁷ victim identification can be difficult because of the Internet's anonymity, which requires technologically sophisticated law enforcement to decipher.¹³⁸ This task is even more complicated because a great deal of child pornography comes from foreign countries, which makes the chance of victim identification remote.¹³⁹

Sex offenders should not be able to escape compensating victims and benefit because of the complex difficulties that face law enforcement in monitoring the Internet.¹⁴⁰ If courts imposed mandatory fines on all child pornography offenders, wrongdoers

¹³⁶ See Christian Turner, *The Burden of Knowledge*, 43 GA. L. REV. 297, 341 (2009) (reasoning that as to the person whom information concerns, ignorance can achieve the same end as preventing the dissemination of stigmatizing information).

¹³⁷ See Susan Donaldson James, *'Misty Series' Haunts Girl Long After Rape*, ABC NEWS (Feb. 8, 2010), <http://abcnews.go.com/Health/internet-porn-misty-series-traumatizes-child-victim-pedophiles/story?id=9773590> ("For years, authorities could not seek restitution because victims could not be identified.").

¹³⁸ See Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 237 (2007) ("The difficulty in identifying child victims is only further complicated . . . by the anonymity of the internet."); Dan Koenig, *Investigation of Cybercrime and Technology-Related Crime*, NAT'L EXECUTIVE INST. ASSOCIATES, MAJOR CITIES CHIEFS ASS'N AND MAJOR COUNTY SHERIFF'S ASS'N, <http://www.neiassociates.org/cybercrime.htm> (last visited Mar. 14, 2011) ("The investigation of Computer Crimes requires highly specialized skills.").

¹³⁹ See McLean, *supra* note 138, at 237 ("The difficulty in identifying child victims is only further complicated by the global nature of the child pornography industry . . ."); Tiffany Stevens, *Student Arrested on Child Pornography Charges*, RED & BLACK (Oct. 15, 2010), <http://www.redandblack.com/2010/10/14/student-arrested-on-child-pornography-charges/> (quoting a police chief in regard to the production of child pornography abroad stating that law officials "found [out] years ago that many of these images were coming from foreign countries").

¹⁴⁰ This set of circumstances violates the principle "[c]ommodum ex injuria sua non habere debet. (The wrongdoer) should not derive any benefit from his own wrong." BLACK'S, *supra* note 82, at 1821.

could not escape the duty Congress created to compensate their victims, and the overall amount of resources available to victims should increase. Also, by spreading payments across all offenders, the average payment and burden on individual defendants should become more proportional to the harm of their individual offense.

4. *The Problems of High Order Amounts and Low Victim Satisfaction.* Getting a judge's order is one matter; a convict's payment is another. Perhaps the greatest consequence of the MVRA is that judges now lack the discretion to consider the economic circumstances of defendants.¹⁴¹ Sex offenders may have a limited ability to pay restitution because of incarceration, indigency, or unemployment.¹⁴² Over 85% of federal criminal defendants are indigent at the time of arrest, and a criminal conviction decreases the chance of gaining employment afterwards.¹⁴³ Since the MVRA was passed, federal criminal debt has increased from \$6 billion in 1996 to \$50 billion in 2007, with 80% of the increase due to uncollected restitution orders.¹⁴⁴ While increased debt would seem to imply increased compensation for victims, the MVRA "has not resulted in any appreciable increase in compensation to the victims of crime, in most cases, because of the defendants' inability to pay."¹⁴⁵

Several reasons exist for low collection rates,¹⁴⁶ but the greatest impediment is the discrepancy between the ordered amount and

¹⁴¹ See 18 U.S.C. § 2259 (2006) (prohibiting consideration of individual economic circumstances in ordering restitution); 18 U.S.C. § 3664(f)(1)(A) (2006) ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and *without consideration of the economic circumstances of the defendant.*" (emphasis added)); Dickman, *supra* note 47, at 1688–89 (describing the MVRA's mandate for restitution).

¹⁴² See Pamela Blume Leonard, "All But Death, Can Be Adjusted": Recognizing Victims' Needs in Death Penalty Litigation, CHAMPION, Dec. 2006, at 40, 41 ("[O]ffenders, being incarcerated, indigent, unemployed or in other adverse circumstances, are often very limited in their ability to 'restore' victims through restitution.").

¹⁴³ Dickman, *supra* note 47, at 1695.

¹⁴⁴ *Id.* at 1691–92.

¹⁴⁵ *Id.* at 1693–94.

¹⁴⁶ See Susan Sarnoff, *Restoring Justice to the Community: A Realistic Goal?*, FED. PROBATION, June 2001, at 33, 34 ("The reality of restitution is [not] perfect, because the majority of offenders are never caught or convicted; many offenders who are convicted are indigent, unable to work, or simply unwilling to make restitution payments; and poor collection methods fail to obtain most of the restitution that is ordered by the courts.").

the feasibility of collecting it.¹⁴⁷ Because judges must order restitution without regard to the individual offenders' ability to pay, the "collection of the total restitution assessed may be unrealistic from the outset."¹⁴⁸

Some scholars have suggested that mandatory restitution also decreases victim satisfaction and offender rehabilitation.¹⁴⁹ Financially, when faced with an excessive restitution amount, an offender might feel no incentive to earn more than necessary to survive.¹⁵⁰ Psychologically, an offender might perceive an excessive order as unjust and feel "victimized" by the criminal justice system.¹⁵¹ Victims also suffer because unfulfilled expectations that they will be compensated lead to anger, pain, and dissatisfaction with the criminal justice system.¹⁵²

Although fully compensating victims and recovering judgments from offenders are worthy goals, they can be mutually exclusive. In amending § 2259, Congress should be cognizant of this conflict in setting a *reasonable* mandatory fine for all child pornography offenders. By making a fine universal for all federal child pornography defendants, no convict will escape contributing to victim compensation; in fact, spreading the amount of funds required for victims across every offender should make the amount paid more proportional to the crime committed, while also preventing excessive order amounts on individual defendants. Finally, while a high fine would instinctively seem the best way to

¹⁴⁷ Dickman, *supra* note 47, at 1694.

¹⁴⁸ *Id.* at 1695 (citation omitted) (internal quotation marks omitted); see also Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 296 (1977) ("[I]t seems naively optimistic to suppose that offenders will be able or willing to work at all, much less earn their keep and pay reparations as well.")

¹⁴⁹ See Dickman, *supra* note 47, at 1696 (describing why criminals might lack incentive to work to pay off restitution orders); *Crime Victim Restitution Today: Achievement of Goals and Objectives*, ST. OF W. VA.: VICTIM WITNESS ASSISTANCE PROGRAM, <http://www.vwapwv.com/restitutiongoals.html> (last visited Feb. 26, 2011) (discussing how "[v]ictims' inability to obtain full restitution for losses suffered as a result of crime can impede not only their economic recovery, but also their psychological recovery from crime and overall satisfaction with the criminal justice system").

¹⁵⁰ Dickman, *supra* note 47, at 1696.

¹⁵¹ See *id.* at 1697 ("[A]t least some offenders whose restitution judgments far exceed their financial means are less likely to pay restitution as a result of perceived distributive or procedural inequity . . .").

¹⁵² *Id.* at 1698.

compensate victims and deter future crimes, the difficulty in collecting payment because of low offender resources continues to temper such vigor for large fines. It is best, however, for Congress to make such findings and strike a balance between the factors rather than judges.¹⁵³

C. IMPLICATIONS FOR THE VICTIMS' RIGHTS MOVEMENT

A reformed restitution framework for child pornography would further the victims' rights movement's goals while recognizing obstacles that arise in the child pornography context. As to child pornography, several of the rationales for victim involvement in the criminal justice process simply are not applicable.¹⁵⁴ Rather than correcting a wrong,¹⁵⁵ victim notification might only further the wrong's harm.¹⁵⁶ Also, the often dire reality of actual restitution orders and low satisfaction might send a negative message to victims rather than one of concern.¹⁵⁷ Recognition of these weaknesses and the need for reform should strengthen the basic principles and goals of the victims' rights movement; resistance to change and perpetuation of inconsistent, ineffective remedies will not.

IV. CONCLUSION

There are few crimes that arouse such strong, universal disgust as sexual exploitation and child pornography.¹⁵⁸ Furthermore, there are few crimes that stay with the victims—physically and psychologically—like child pornography. The victims often require

¹⁵³ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (“As an institution, . . . Congress is far better equipped than the judiciary to ‘amass and evaluate . . . vast amounts of data’ bearing upon [complex issues].” (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985))).

¹⁵⁴ See *supra* note 55 and accompanying text.

¹⁵⁵ See Zitter, *supra* note 53, § 2[a] (surveying the advantages and disadvantages of victim participation).

¹⁵⁶ See *supra* Part III.B.2.

¹⁵⁷ See *supra* Part III.B.3–4.

¹⁵⁸ See, e.g., *Matthew* 18:6 (“Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone hung around his neck and to be drowned in the depths of the sea.”).

therapy and, thus, financial resources to overcome their trauma.¹⁵⁹ Unfortunately, the federal restitution framework has only haphazardly and with varying results provided compensatory justice to victims such as Amy and Vicky. Even when restitution is awarded, it can be a frustrating struggle to recover the award from convicts whom often lack financial resources themselves or otherwise lack a compelling incentive to work for the benefit of another.

Rather than relying on the discretion of lower courts in finding proximate cause and making arbitrary calculations of losses, Congress should provide clear guidance—in the form of a base level fine and damages formula—to judges so that no offender goes free without paying a sum to victims and no victim is denied help. In effect, there would no longer be “restitution” to individual victims, but victims as a group will have more funds available without having to become entangled in the criminal justice system. A new framework is important for the numerous victims of child pornography, such as Amy and Vicky, to have a supportive environment to recover.

Robert William Jacques

¹⁵⁹ See *supra* notes 13–14, 23, 41–46 and accompanying text.