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RESTITUTION DEVOLUTION?

BRADLEY P. REISS[†]

INTRODUCTION

Child pornography is one of the great tragedies of our technological age.¹ The child pornography industry, nearly eradicated during the 1980s, has enjoyed a modern resurgence with the rise of the Internet, which has provided a haven for the trafficking of illegal materials.² Child pornography is now a multi-billion-dollar enterprise, and its growth continues unabated.³ Estimates suggest that the abuse of more than one million children has been recorded for pornographic purposes.⁴

“Amy” is one of the many individuals whose life has been altered by the child pornography underworld.⁵ Starting at the age of four, Amy was sexually abused by her uncle.⁶ Like many pedophiles, Amy’s uncle documented his exploits with pictures,

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¹ There is controversy over the use of the term “child pornography.” See Meg Garvin, *How Current Restitution Law is Failing Victims in Child Abuse Image Cases*, NCVLI NEWS, 12th ed. 2010, at 1, 1 n.1. The word “pornography,” it is suggested, inaccurately implies willingness on the part of the child victim. *Id.* Advocates for the abolition of the term suggest “child abuse images” as a replacement. *Id.* While the term “child pornography” might carry some misleading connotative baggage, most courts still use the term, and so it will be used in this Note.

² *Child Pornography Fact Sheet*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (last visited Mar. 30, 2012).

³ *Id.*; see also Press Release, National Center for Missing & Exploited Children, Child Porn Among Fastest Growing Internet Businesses (Aug. 18, 2005), available at http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2064.

⁴ JEFF ANDERSON & ASSOCS., PA, CHILD PORNOGRAPHY INITIATIVE: MASHA’S LAW 3 (2010), available at <http://andersonadvocates.com/Files/94/Child-Porn-Initiative-Materials.aspx> (last visited Mar. 30, 2012).

⁵ “Amy” is a pseudonym used to protect the victim’s identity. See *United States v. Faxon*, 689 F. Supp. 2d 1344, 1352 (S.D. Fla. 2010) (discussing Amy’s history).

⁶ Victim Impact Statement of Amy – the Victim in the Misty Series, available at http://regmedia.co.uk/2010/10/19/amy_victim_impact_statement.pdf (last visited Mar. 30, 2012) [hereinafter Victim Impact Statement].

and these pictures soon entered the vast child pornography market.⁷ Amy's images became so popular among pedophiles that they were given a nickname: "The Misty Series."⁸ Amy's uncle was eventually brought to justice, but Amy found it difficult to move on.⁹ This was due in no small part to constant notifications from the National Center for Missing and Exploited Children ("NCMEC") that her images were appearing on the hard drives of those arrested for child pornography possession.¹⁰ In an effort to stem the tide of notices, Amy's family hired a lawyer, who devised a novel legal theory: in each trial where Amy's images arose, he would seek restitution pursuant to 18 U.S.C. § 2259.¹¹ This unassuming statutory provision, found within a chapter entitled "Sexual Exploitation and Other Abuse of Children," requires a court to order restitution for individuals harmed as a result of offenses under the chapter, among them, various child pornography offenses.¹² Amy's lawyer would argue that by merely possessing Amy's images, offenders were causing Amy irreparable harm for which they could be held jointly and severally liable.¹³ He enlisted several experts, including a child psychologist who testified that the circulation of Amy's images represented a constant "re-victimization" that would prevent her from ever recovering emotionally.¹⁴ An economist was also employed to calculate damages, including the cost of a lifetime's worth of counseling and lost wages—over \$3 million in total.¹⁵ Amy herself drafted a victim impact statement, in which she narrated the horrors she faced every day knowing that the images of her abuse continued to circulate the world.¹⁶

⁷ See *id.*

⁸ John Schwartz, *Pornography, and an Issue of Restitution at a Price Set by the Victim*, N.Y. TIMES, Feb. 3, 2010, at A19.

⁹ See Victim Impact Statement, *supra* note 6.

¹⁰ See *Faxon*, 689 F. Supp. 2d at 1352; see also 18 U.S.C.A. § 3771(a)(2) (West 2011) (describing the rights of crime victims in federal court, including "[t]he right to reasonable, accurate, and timely notice of any public court proceeding").

¹¹ See Schwartz, *supra* note 8.

¹² 18 U.S.C. § 2259(a) (2006).

¹³ See Schwartz, *supra* note 8.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ *Id.* One commentator claims that Amy's psychologist, not Amy herself, was the author of the victim impact statement. See John Floyd & Billy Sinclair, *Child Porn Restitution Run Amok*, JOHN T. FLOYD LAW FIRM (Mar. 22, 2010), <http://www.johntfloyd.com/comments/march10/Restitution-Child-Pornography.htm>.

On February 23, 2009, Amy's novel theory of restitution achieved its first judicial blessing.¹⁷ A judge in the District of Connecticut ordered Alan Hesketh, a disgraced corporate executive, to pay Amy nearly \$200,000.¹⁸ Although the judge recognized that he was "dealing with a frontier," he justified the imposition of restitution on the grounds of society's "revulsion" for the type of conduct at issue.¹⁹ Several commentators, however, did not share the judge's zeal, one even remarking that this ruling was "highly questionable."²⁰ Since this first success, Amy's lawyer has requested restitution in hundreds more federal child pornography cases.²¹ Courts' responses have varied widely—some courts have refused to award restitution entirely, other courts have awarded partial restitution, and at least one court has awarded the entire \$3 million-plus sum sought.²²

This Note is an attempt to address the simple, but highly sensitive question that these cases raise: whether those who are convicted of non-production child pornography offenses—that is, distribution, receipt, and possession—should have to pay restitution directly to the children depicted in the images they possessed. This Note ultimately answers this question in the negative, though this is neither due to a lack of sympathy for the victims nor a lack of revulsion for the heinous crimes at issue. Rather, this Note shows that granting restitution in such cases is improper under the statute and unjustifiable policy-wise. To fill the void, this Note proposes a more equitable, non-restitution-based system of relief: a victim compensation fund. Such a fund, if correctly established, would avoid many of the thorny issues that make restitution such a disastrous remedy in non-production cases.

¹⁷ See John Christoffersen, *CT Sets New Precedent for Child Porn Cases*, NBC CONN. (Feb. 24, 2009), <http://www.nbcconnecticut.com/news/local-beat/Man-With-Child-Porn-Must-Pay-Victim-.html>; Peter Rost, *Executive from Pfizer's Legal Department Pleads Guilty to Child Pornography*, PETER ROST BLOG (July 30, 2008), <http://peterrost.blogspot.com/2008/07/executive-from-pfizers-legal-department.html>.

¹⁸ See Christoffersen, *supra* note 17.

¹⁹ *Id.* (quoting Senior United States District Court Judge Warren W. Eginton).

²⁰ *Court Orders Former Pfizer Executive To Pay \$200,000 to Woman Photographed as a Child While Being Sexually Abused*, JONATHAN TURLEY (Feb. 24, 2009), <http://jonathanturley.org/2009/02/24/court-orders-former-viagra-executive-to-pay-200000-to-woman-photographed-as-a-child-while-being-sexually-abused>.

²¹ Joel Stashenko Albany, *Judge Orders Viewer of Child Pornography Posted on the Internet To Pay Restitution to the Victim*, N.Y. L.J., Aug. 11, 2010, at 1, 1.

²² See *infra* Part II.

Part I of this Note traces the development of criminal restitution and child pornography law, placing the current federal statutory framework in its historical context. Part II surveys the cases that have dealt with the issue raised by Amy's restitution claims, and explains the wide range of approaches courts have taken. Part III argues that restitution is a poor fit for non-production child pornography offenses. This section first shows how victims' lawyers are misinterpreting the statute, and then moves into broader policy arguments in favor of disallowing restitution. Finally, Part IV of this Note proposes a victim compensation fund as an alternative to the unwieldy system of restitution under 18 U.S.C. § 2259. This section examines how such funds have been successfully implemented in other areas of the law and provides a sketch of how such a fund might operate for the benefit of child pornography victims.

I. THE HISTORY OF FEDERAL CHILD PORNOGRAPHY LAW AND FEDERAL CRIMINAL RESTITUTION

A. *The Development of Federal Child Pornography Law*

Before delving into the cases, it is first necessary to trace the interlocking threads that comprise the backdrop of this Note's controversy. The first of these threads is the development of United States child pornography law. The production of images in which nude children are depicted is hardly a new phenomenon, and can be traced back to Victorian times²³ Changing social mores during the 1960s and 1970s, combined with a perceived correlation between production of such images and the abuse of children, led many states to enact laws barring the production and dissemination of child pornography and, by the 1980s, most states and the federal government had such laws in place.²⁴ For many years, it was unclear to what extent child pornography was protected by the First Amendment.²⁵

²³ See Anne Higonnet, Child Pornography—Encyclopedia of Children and Childhood in History and Society, <http://www.faqs.org/childhood/Bo-Ch/Child-Pornography.html> (last visited Mar. 30, 2012); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 243 (2002) (discussing, among other things, Shakespeare's *Romeo and Juliet*).

²⁴ See *New York v. Ferber*, 458 U.S. 747, 749 (1982).

²⁵ See *id.*

In 1982, the Supreme Court addressed child pornography in the landmark case of *New York v. Ferber*, in which it held that child pornography is so reviled that it falls outside the scope of First Amendment protection—regardless of its classification as obscene.²⁶ The Court noted that there were strong bonds between child pornography and the sexual abuse of children, that child pornography had *de minimis* expressive value, and that there was a compelling state interest in battling the then-crude child pornography “distribution network.”²⁷ Several years later, in *Osborne v. Ohio*, the Supreme Court reiterated that states had a compelling interest in safeguarding children, and that states were constitutionally permitted to stamp out child pornography possession, even where the images were in the sole possession of the defendant.²⁸ The Court spoke once again of the market theory, reasoning that the aggressive prosecution of possessors of child pornography would reduce demand and stave off its production.²⁹

Unfortunately, the advent of widespread Internet access in the early to mid-1990s transformed the child pornography market from a loosely connected, rag-tag network into an international, multi-billion-dollar enterprise.³⁰ Sensing these changing tides, Congress enacted the Child Pornography

²⁶ See *id.* at 760–61.

²⁷ See *id.* at 756–57, 759, 762.

²⁸ See 495 U.S. 103, 111 (1990).

²⁹ *Id.* at 109–10.

³⁰ The U.S. Department of Justice discusses the state of child pornography production in the United States in the 1980s:

By the mid-1980’s [sic], the trafficking of child pornography within the United States had been almost completely eradicated through a series of successful campaigns waged by law enforcement. Child pornographers had become lonely and hunted individuals. Producing child abuse images was both difficult and expensive, and reproducing images was equally difficult and expensive. Purchasing and trading such images was extremely risky. Anonymous distribution and receipt was not possible and it was difficult for pedophiles to find and interact with each other. Unfortunately, technology has changed the situation.

Child Pornography Law, HG.org, <http://www.hg.org/child-pornography.html> (last visited Mar. 30, 2012) (quoting Child Exploitation and Obscenity Section, *Child Pornography*, U.S. DEPARTMENT JUST., <http://www.justice.gov/criminal/ceos/childporn.html> (last updated Nov. 6, 2007)). Today, virtually all child pornography trafficking occurs digitally. See Child Exploitation and Obscenity Section, *Child Pornography*, U.S. DEPARTMENT JUST., <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html> (last visited July 1, 2012).

Prevention Act of 1996 ("CPPA").³¹ This legislation attempted to rein in the exploding child pornography market by, among other things, expanding the definition of child pornography to include "virtual" child pornography, that is, computer-generated images designed to look like genuine child pornography but made without the involvement of actual children.³²

The high watermark of pro-prosecution federal child pornography jurisprudence came in *United States v. Norris* when the Third Circuit, channeling *Ferber*, drastically expanded the definition of "victim" by holding that a child was a victim of the federal crime of *receiving* child pornography.³³ Three policy bases were offered to justify this conclusion:

(1) The dissemination of the images perpetuates the abuse therein.³⁴

(2) Child pornography invades the privacy of the child depicted.³⁵

(3) Consuming child pornography creates an economic motive for creating and distributing new child pornography.³⁶

This assertive holding was a response to the new realities of the Internet age—the "distribution network" discussed in *Ferber* had become larger than the *Ferber* Court could have ever imagined, and prosecutors needed new weaponry to battle the growing scourge.

It was not until 2002 that momentum started to swing in the other direction.³⁷ In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down several federal child pornography statutes, particularly those dealing with "virtual" child pornography, as facially overbroad.³⁸ The *Ashcroft* Court wrote that because the production of "virtual" child pornography did not involve the direct abuse of children, the *Ferber* market theory did not apply.³⁹ Though a majority of the statutory scheme remained intact, *Ashcroft* was significant in that it showed there

³¹ 18 U.S.C. § 2251 (2008 & Supp. II); *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–242 (2002).

³² *See Ashcroft*, 535 U.S. at 239–42.

³³ *See* 159 F.3d 926, 931 (5th Cir. 1998).

³⁴ *See id.* at 929–30.

³⁵ *Id.* at 930.

³⁶ *Id.*

³⁷ *See Ashcroft*, 535 U.S. at 256, 258.

³⁸ *See id.*

³⁹ *See id.* at 254.

was a limit as to how far the government could go in fighting child pornography. *Ashcroft* also made prosecution more cumbersome, since federal prosecutors would now have to prove that the children depicted in any images were *real* children, a task made difficult by advances in image manipulation technology.⁴⁰ Today, however, as the child pornography distribution network continues to grow in both scope and sophistication, the powers of prosecutors and law enforcement are expanding once again.⁴¹

B. *History of Criminal Restitution*

Running parallel to the strengthening of child pornography laws has been a strong push towards the revitalization of criminal restitution, and Amy's cases present the first instances of the doctrine being used against child pornography possessors. Restitution, loosely defined, is a remedy designed to restore an individual to a position he or she occupied before an event.⁴² It is an ancient doctrine, perhaps as old as law itself.⁴³ References to restitution can be found in the Old Testament and the Code of Hammurabi.⁴⁴ Scholars speculate that restitution served to stabilize early civilizations by preventing blood feuds and vigilantism.⁴⁵ During the Middle Ages, however, as a dichotomy between criminal and civil wrongs developed, criminal acts began to be seen as affronts to the state rather than individual members of society, and restitution as a criminal punishment fell out of favor.⁴⁶

⁴⁰ *Child Victim Identification Program (CVIP)*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444 (last visited Feb. 6, 2012) ("Because of the U.S. Supreme Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), there is a need for federal prosecutors to prove that the children depicted in child pornography images are real children.").

⁴¹ See, e.g., *United States v. Irving*, 452 F.3d 110, 122 (2d Cir. 2006).

⁴² *Hughey v. United States*, 495 U.S. 411, 416 (1990).

⁴³ See Catharine M. Goodwin et. al., FEDERAL CRIMINAL RESTITUTION § 2:1 (2011); see also *United States v. Vaknin*, 112 F.3d 579, 582 (1st Cir. 1997).

⁴⁴ See *Vaknin*, 112 F.3d at 582; 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, 2717 (2005).

⁴⁵ See *Vaknin*, 112 F.3d at 582; Kleinhaus, *supra* note 44.

⁴⁶ See *Vaknin*, 112 F.3d at 582; Kleinhaus, *supra* note 44, at 2717–18.

Although restitution continued to be a viable doctrine in the civil arena, it was not until 1925 that it was reintroduced into United States federal criminal law.⁴⁷ In that year, Congress granted federal courts the discretion to order criminal restitution, but only as a condition of probation.⁴⁸ In 1982, as the ink was drying on *Ferber*, and in response to Reagan-era victims' rights reforms, Congress passed the Victim and Witness Protection Act ("VWPA").⁴⁹ The VWPA allowed federal courts to order restitution in *any* criminal case arising out of Title 18 of the United States Code, a drastic expansion of the remedy.⁵⁰ In 1994, Congress passed the Violent Crime Control and Law Enforcement Act ("VCCLEA"), which added mandatory restitution provisions to pre-existing sections dealing with sexually-related crimes.⁵¹ One of these new provisions was 18 U.S.C. § 2259, the statute at the center of this Note's controversy, which was added to a chapter covering "Sexual Exploitation and Other Abuse of Children," much of which had been in existence since the early 1980s.⁵² Mandatory restitution provisions were also added to chapters dealing with sexual abuse, domestic violence, and stalking.⁵³ The provisions were all identical, requiring a court to order restitution for "the full amount of the victim's losses," while defining a "victim" as an "individual harmed as a result of a commission of a crime."⁵⁴ Two years later, restitution was expanded to a host of other federal crimes upon the passage of the Mandatory Victims Restitution Act of 1996 ("MVRA").⁵⁵ The new "catchall" restitution provisions of the MVRA, unlike the provisions of the earlier VCCLEA, defined a victim as "a person directly and proximately harmed as a result of the commission of an offense . . ."⁵⁶ The Crime

⁴⁷ See *United States v. Agate*, 613 F. Supp. 2d 315, 320 (E.D.N.Y. 2009).

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009).

⁵⁰ See *Agate*, 613 F. Supp. 2d at 320.

⁵¹ *Id.*

⁵² 18 U.S.C. § 2259 (2006); *Agate*, 613 F. Supp. 2d at 320; see also *infra* Part I.C.

⁵³ *Id.* §§ 2248, 2264 (2006); see also *infra* Part I.C.

⁵⁴ *Id.* § 2259(b)(1), (c).

⁵⁵ *Agate*, 613 F. Supp. 2d at 320.

⁵⁶ 18 U.S.C. § 3663A(a)(2) (2006); see also Goodwin et. al., *supra* note 43, at § 1:4 ("Rather, with the 1996 addition of the definition of a victim as one 'directly and

Victims' Rights Act ("CVRA"), enacted in 2004, further expanded the MVRA, and allowed victims to petition courts of appeals for writs of mandamus if proper restitution requests were denied.⁵⁷ Over a relatively short span of time, restitution had transformed from a tool in a judge's sentencing tool belt to a mandatory and integral component of many federal criminal sentences.

Today, though restitution now enjoys a centralized role in federal criminal law, its true purpose is not a settled issue.⁵⁸ Some courts suggest that like its civil counterpart, criminal restitution is a doctrine of compensation, an equitable remedy designed to help restore the victim to a prior state rather than punish the wrongdoer.⁵⁹ Others suggest that the purpose of criminal restitution is rehabilitative—having to pay back the victim might help the wrongdoer come to terms with his criminal acts and reintegrate into society.⁶⁰ Finally, some simply recognize that, like the rest of the sentence, criminal restitution serves a deterrent and/or punitive purpose.⁶¹ Of course, these categories are not mutually exclusive, and many courts end up using a hybrid approach when justifying the positions they

proximately harmed,' the analysis is more one of causation, in which the issue is whether a harm was 'reasonably foreseeable' or 'proximately caused' by an offense.").

⁵⁷ See *United States v. Hardy*, 707 F. Supp. 2d 597, 602 (W.D. Pa. 2010). This is exactly what happened in *In re Amy Unknown*, 636 F.3d 190, 193 (5th Cir. 2011), discussed in Part II.

⁵⁸ See *Hardy*, 707 F. Supp. 2d at 603–04. The *Hardy* court, surveying the law, found criminal restitution's "purposes are not only punitive but also retributive, and perhaps even rehabilitative." *Id.* at 604.

⁵⁹ See *United States v. Crandall*, 525 F.3d 907, 916 (9th Cir. 2008) ("The purpose of restitution is to make the victims whole while the Sentencing Guidelines serve a punitive purpose." (internal quotation marks omitted)); see also *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at *5 (E.D. Cal. Aug. 18, 2009); *Agate*, 613 F. Supp. 2d at 325; Goodwin et. al., *supra* note 43. Black's Law Dictionary takes the compensation approach, defining restitution as "[c]ompensation for loss; esp., 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." BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶⁰ See *Dickman*, *supra* note 49, at 1701–02; see also *Kelly v. Robinson*, 479 U.S. 36, 52–53 (1986).

⁶¹ See *United States v. Faxon*, 689 F. Supp. 2d 1344, 1356 (S.D. Fla. 2010) ("Restitution has been found to be a criminal penalty meant to have a strong deterrent and rehabilitative effect. It is not a civil matter even though restitution resembles a judgment for the benefit of a particular victim. It is penal rather than compensatory."); see also *United States v. Maestrelli*, 156 F. App'x 144, 146 (11th Cir. 2005); Kleinhaus, *supra* note 44, at 2723.

take.⁶² Criminal restitution is truly an enigma, and courts' opinions on its underlying purpose affect the way they interpret—or perhaps misinterpret—18 U.S.C. § 2259.

Whatever the purpose of restitution, however, federal criminal prosecutions have taken a drastic, victim-centric turn. Judges are now mandated to order full restitution for most federal offenses.⁶³ The economic circumstances of the offender are no longer given any weight.⁶⁴ Nor is any weight given to the fact that the “victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.”⁶⁵ Prosecutors now have duties to the victim, which can include proving harms at sentencing and defending challenged restitution orders on appeal.⁶⁶ These duties stand in stark contrast to traditional prosecutorial duties, at times blurring the line between criminal and civil litigation. Restitution orders last twenty years, and though the remedy is civil-like in the sense that it benefits the victim financially, restitution orders are considered criminal sanctions.⁶⁷

C. *The Current State of Federal Child Pornography Law*

Title 18 of the United States Code, Chapter 110, entitled “Sexual Exploitation and Other Abuse of Children,” is the current federal statutory framework for dealing with child pornography-related crimes.⁶⁸ Chapter 110 defines child pornography as “any visual depiction . . . of sexually explicit conduct, where . . . the production of such visual depiction involves the use of [any person under eighteen years old].”⁶⁹ The chapter defines the offenses of production,⁷⁰ distribution,⁷¹ receipt,⁷² and possession of child pornography.⁷³ Chapter 110

⁶² See *Hardy*, 707 F. Supp. 2d at 603 (“Restitution in criminal cases serves more than one purpose.”).

⁶³ See Goodwin, *supra* note 43, § 1:3.

⁶⁴ 18 U.S.C. § 2259(b)(4)(B)(i) (2006).

⁶⁵ *Id.* § 2259(b)(4)(B)(ii).

⁶⁶ See Goodwin, *supra* note 43, § 1:3.

⁶⁷ See *id.*

⁶⁸ 18 U.S.C. § 2259.

⁶⁹ *Id.* § 2256(1), (8) (2006 & Supp. II).

⁷⁰ *Id.* § 2251(a) (2006 & Supp. II).

⁷¹ 18 U.S.C.A. § 2252A(a)(1)–(2) (West 2011).

⁷² *Id.*

⁷³ *Id.* § 2252A(a)(5)(B).

also incorporates punishment and remedial provisions, including criminal forfeiture,⁷⁴ civil forfeiture,⁷⁵ a civil remedy for personal injuries,⁷⁶ and of course, mandatory restitution.⁷⁷

18 U.S.C. § 2259, entitled “Mandatory restitution,” requires a court to order restitution, notwithstanding the general restitution provisions,⁷⁸ for any offense under Chapter 110.⁷⁹ Restitution covers “the full amount of the victim’s losses,” which can include any of the following:

- (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.⁸⁰

Section 2259 goes on to define a “victim” as an “individual harmed as a result of a commission of a crime under this chapter.”⁸¹ This definition stands in contrast to some federal mandatory restitution provisions,⁸² but is identical to others.⁸³ Because relatively little legislative history exists to elucidate the motives of Congress in enacting § 2259, it is vital to analyze a cross-section of the growing body of case law that interprets the statute. This issue will be addressed in Part II.

⁷⁴ 18 U.S.C. § 2253(a) (2006). Criminal forfeiture can be quite harsh. See *United States v. Ownby*, 926 F. Supp. 558, 563–64 (W.D. Va. 1996) (forfeiture of a home appraised at \$358,000 did not violate the Eighth Amendment), *aff’d* 131 F.3d 138 (4th Cir. 1997); see also Susan Brenner, *Child Pornography and Criminal Forfeiture*, CYB3RCRIM3 (May 31, 2010), <http://cyb3rcrim3.blogspot.com/2010/05/child-pornography-and-criminal.html>.

⁷⁵ 18 U.S.C. § 2254 (2006).

⁷⁶ *Id.* § 2255(a) (2006).

⁷⁷ *Id.* § 2259 (2006).

⁷⁸ *Id.* §§ 3663 (2006 & Supp. II); *id.* § 3663A (2006).

⁷⁹ *Id.* § 2259(a) (2006).

⁸⁰ *Id.* § 2259(b)(3).

⁸¹ *Id.* § 2259(c).

⁸² See *id.* § 3663(a)(2) (“For the purposes of this section, the term ‘victim’ means a person *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered . . .” (emphasis added)); *id.* § 3663A(a)(2) (same); *id.* § 2327(c) (2006) (same).

⁸³ See *id.* § 1593(c) (2006 & Supp. II); *id.* §§ 2248(c), 2264(c) (2006).

II. A TRIP THROUGH THE CASES

A. *Hypothetical*

You have been arrested and charged with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).⁸⁴ You had thought (naively) that your Internet activity was anonymous and untraceable, but the FBI has managed to find you. The authorities now have your computer, which contains several hundred illicit images, including images depicting prepubescent children being sexually abused.⁸⁵ Though this is your first brush with the law, your lawyer tells you that you are facing harsh penalties, including a mandatory minimum sentence, large fines, forfeiture of your property, and registration as a sex offender.⁸⁶ Your lawyer delivers more bad news: your case is virtually unwinnable.⁸⁷ You decide to plead guilty and hope that the court imposes a lenient sentence.⁸⁸

An interesting development then occurs—you find out that another lawyer has intervened. This lawyer represents one of the children whose pictures were found on your computer. He has asked the prosecutor to request mandatory restitution pursuant to 18 U.S.C. § 2259 on behalf of the now-grown child. Even though you never had any direct contact with the child, her lawyer intends to argue that you owe her restitution for a lifetime's worth of psychological counseling and lost wages. At an evidentiary hearing, you listen to experts testify that by possessing this person's images, you have inflicted on them irreparable harm for which you are now liable. Your lawyer attempts to argue that this harm is too general and, at any rate, not causally connected to your possession of the images, but the judge seems sympathetic to the victim's arguments.

⁸⁴ 18 U.S.C.A. § 2252A(a)(5)(B) (West 2011).

⁸⁵ See JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN ix (2005), available at http://www.missingkids.com/en_US/publications/NC144.pdf.

⁸⁶ 18 U.S.C.A. § 2252A(b)(2) (West 2011); see also A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 22, 2010, at A1.

⁸⁷ See Dan Levine, *Suicides Follow Porn Crackdown*, THE RECORDER, May 28, 2008, <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202421729759>.

⁸⁸ See *id.*

This hypothetical situation encapsulates most of the narrative arc of the cases to follow, though courts have varied widely on the dénouement. With such a common starting point, one might expect some measure of consistency, but the opposite has been true. What follows is a representative cross-section of the cases that have confronted the above fact pattern. Most of the following cases involve Amy, the victim from the Introduction.

B. Varied Approaches

At least one circuit court has been wholly receptive to the argument that victims of child pornography possession are entitled to restitution under 18 U.S.C. § 2259, and that the statute requires no proximate causation showing for many of its enumerated elements of damages. In *In re Amy Unknown*, the Fifth Circuit held that a clear error of law was committed when a district court “graft[ed] a proximate causation requirement onto the CVRA.”⁸⁹ Stating that § 2259 “manifests a congressional purpose to award broad restitution,” the court held that the phrase “proximate cause” as found in 18 U.S.C. § 2259 was limited to § 2259(b)(3)(F), the catchall provision.⁹⁰ The court explained that the defendant was protected by the fact that “[t]he statute itself includes a general causation requirement in its definition of a victim.”⁹¹ According to the court, any Eighth Amendment disproportionate punishment concerns would be mitigated by employing the doctrine of joint and several liability, which would allow the defendant to seek contribution from other offenders.⁹²

⁸⁹ 636 F.3d 190, 193 (5th Cir. 2011).

⁹⁰ *Id.* at 199–201.

⁹¹ *Id.* at 200.

⁹² *Id.* at 201.

In *United States v. Staples*, the Southern District of Florida adopted a similar approach.⁹³ In an opinion striking in its brevity, the court held that a Vietnam veteran and first-time offender who possessed a *single image* of Amy was jointly and severally liable to Amy for a restitution award of \$3,680,153.⁹⁴ The court was persuaded by Amy's expert, a child psychologist who testified that the dissemination of the images caused Amy to be constantly "re-victimized."⁹⁵ The court did not address proximate causation, instead agreeing with the victim's lawyer that § 2259 only required the showing of a generalized harm.⁹⁶

Other federal appellate courts have held that while § 2259 *does* require that proximate causation be demonstrated for all damages, this burden can be met by child pornography victims under mere possession circumstances. In *United States v. McDaniel*, the Eleventh Circuit held that being subjected to the "slow acid drip" of trauma caused by receiving periodic NCMEC notifications was enough to satisfy proximate causation and justify imposition of a \$12,700 restitution award.⁹⁷ Similarly, in *United States v. Baxter*, the Ninth Circuit, affirming a restitution award of \$3,000, held that proximate causation was demonstrated simply because harm to the victim was "generally foreseeable to casual users of child pornography . . ."⁹⁸ A number of district courts have followed this middle-of-the-road approach, awarding restitution sums in the \$1,000 to \$10,000 range.⁹⁹ In contrast to *In re Amy Unknown*, many of these courts

⁹³ No. 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla. Sept. 2, 2009). The award included "\$3,204,353.00 for the loss of future wages and employee benefits through 67 years of age," and "\$475,800.00 for future treatment and counseling costs through 81 years of age." *Id.* at *3. The court even seemed to suggest that Amy could have obtained *more* money, had she requested it: "[Amy's attorney] withdrew his request for any amount for loss of value of life, which arguably could be sought as 'any other losses suffered by the victim as a proximate result of the offense.' Therefore, the Court did not consider any submissions in support of this claim in ordering restitution." *Id.* at *3 n.2.

⁹⁴ See *id.* at *1; see also Dan Goodin, *Child Porn Victims Seek Multimillion-Dollar Payouts*, THE REGISTER (Nov. 2, 2010), http://www.theregister.co.uk/2010/11/02/child_restitution_claims/.

⁹⁵ *Staples*, 2009 WL 2827204, at *1-2.

⁹⁶ See *United States v. Hardy*, 707 F. Supp. 2d 597, 606 (W.D. Pa. 2010) (discussing *Staples*, 2009 WL 2827204).

⁹⁷ 631 F.3d 1204, 1209 (11th Cir. 2011).

⁹⁸ 394 F. App'x 377, 379 (9th Cir. 2010).

⁹⁹ See *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at *4 (W.D.N.C. Jan. 12, 2010) (\$6,000 for one victim and \$1,500 for another victim), *aff'd*, 393 F. App'x 76 (4th Cir.

have refused to impose joint and several liability, placing the onus of collecting restitution on the victim. In *United States v. Hicks*, the Eastern District of Virginia, adopting a \$3,000 restitution award, explained the rationale in this way: “The Court believes that at least fifty defendants will be successfully prosecuted for unlawfully possessing or receiving the [images at issue], given the numbers prosecuted to date. If restitution orders of \$3,000 per case result, [the victim] will be compensated in full.”¹⁰⁰ This stands in stark contrast to *In re Amy Unknown*, where the court justified the imposition of joint and several liability because it “shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.”¹⁰¹

Still other courts have held that § 2259 imposes a proximate cause requirement, but have expressed greater skepticism about a victim like Amy’s ability to meet it. In *United States v. Monzel*, the District of Columbia Circuit reversed a “nominal” restitution award of \$5,000.¹⁰² The court stated that “[defendant’s] possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses. She would have suffered tremendously from her sexual abuse regardless of what [defendant] did.”¹⁰³ Finding that the lower court “had no basis upon which to calculate the amount of harm” caused by the defendant, the court remanded the case.¹⁰⁴

Finally, some courts have simply found that no proximate cause exists, and have thus disallowed restitution as a matter of law.¹⁰⁵ The Second Circuit, drawing inspiration from *Monzel*, assessed the situation in this manner in *United States v. Aumais*:

2010); *United States v. Brown*, No. CR 08-01435-RGK, 2009 U.S. Dist. LEXIS 113942, at *1 (C.D. Cal. Oct. 5, 2009) (\$5,000); *United States v. Renga*, No. 1:08-CR-0270 AWI, 2009 WL 2579103, at *6 (E.D. Cal. Aug. 19, 2009) (\$3,000); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at *5 (E.D. Cal. Aug. 19, 2009) (\$3,000); *United States v. Monk*, No. 1:08-CR-0365 AWI, 2009 WL 2567831, at *5 (E.D. Cal. Aug. 18, 2009) (\$3,000 for each of the two victims).

¹⁰⁰ No. 1:09-cr-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009).

¹⁰¹ 636 F.3d 190, 201 (5th Cir. 2011).

¹⁰² 641 F.3d 528, 539 (D.C. Cir. 2011).

¹⁰³ *Id.* at 538.

¹⁰⁴ *Id.* at 539–40.

¹⁰⁵ See *United States v. Chow*, 760 F. Supp. 2d 335, 343 (S.D.N.Y. 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. Berk*, 666 F. Supp. 2d 182, 192–93 (D. Me. 2009); *United States v. Simon*, No. CR-08-0907 DLJ, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009).

This opinion does not categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images. We have no basis for rejecting Dr. Silberg's findings that Amy has suffered greatly and will require counseling well into the future. But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested—or might as well have been—we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image.¹⁰⁶

III. THE CASE AGAINST RESTITUTION IN FEDERAL CHILD PORNOGRAPHY POSSESSION CASES

Part II displayed the wide variety of approaches by courts when dealing with restitution in possession-only child pornography cases. This Part further delves into the arguments advanced by both sides, and demonstrates that the marginal financial benefits provided to some under the current restitution regime are not worth the greater systemic costs. Part III first looks at 18 U.S.C. § 2259 and, aided by the familiar tools of statutory interpretation, demonstrates that the statute contains a proximate cause requirement that simply cannot be met under these circumstances. Broader policy considerations are then raised, and restitution is shown to be harmful to all interested parties.

A. *Wrong on the Law*

The heart of this controversy is an issue of statutory ambiguity in 18 U.S.C. § 2259; thus, the logical starting point for resolving it is to employ the common instruments of statutory interpretation.¹⁰⁷ The bone of contention here is whether or not the phrase “proximate result” applies to each item of an enumerated list of compensable damages, or only to the last item of the list, a “catchall” provision.¹⁰⁸ As expected, victims' lawyers argue that the proximate causation clause be restricted to the catchall provision, thereby eliminating the requirement to show proximate causation for the five other enumerated damages.¹⁰⁹

¹⁰⁶ 656 F.3d 147, 155 (2d Cir. 2011).

¹⁰⁷ See Goodwin, *supra* note 43.

¹⁰⁸ For the statutory text, see *supra* Part I.C.

¹⁰⁹ United States v. Hardy, 707 F. Supp. 2d 597, 607–08 (W.D. Pa. 2010).

One defender of this approach, purporting to apply the “plain language” canon of statutory construction, suggests that “[t]he presumptively intentional omission of ‘proximate result’ in the first five subsections suggests that Congress did not want burden [sic] victims of child abuse images with a requirement that they show a proximate cause for these losses.”¹¹⁰ Without a proximate cause requirement, restitution essentially becomes automatic upon a successful conviction—a victim need only demonstrate that her images were in the possession of the defendant in order to trigger restitution.¹¹¹

Such a reading of the statute does damage to ordinary principles of statutory interpretation and common sense. It is no surprise that even the government, which is obligated to act on behalf of the victim, has been reluctant to adopt this reading of the statute.¹¹² In *United States v. Hardy*, the court conducted a thorough statutory analysis of § 2259.¹¹³ Using the canon of *ejusdem generis*, which suggests that general words should be understood in light of the specific words surrounding them, the court held that proximate cause applied to each of the statute’s enumerated damages.¹¹⁴ It was simply more logical, held the court, to apply the limiting clause at the end of the list—“as a proximate result of the offense”—to each member of the list, not just the last one.¹¹⁵ The legislative history of § 2259 further bolsters this conclusion.¹¹⁶

Once it is recognized that proximate causation applies to all of the damages listed in § 2259, it becomes extremely difficult for a victim to demonstrate that any particular defendant proximately caused her alleged injury. Invariably, the victim must admit that not only has she never met the defendant

¹¹⁰ See Garvin, *supra* note 1, at 22.

¹¹¹ See *Hardy*, 707 F. Supp. 2d at 605.

¹¹² *Id.* The government has been arguing that though the statute requires a showing of proximate causation, such a showing can be made. *Id.*; see also Schwartz, *supra* note 8 (discussing a memorandum in which a government lawyer stated that the law did not support restitution for “mere possession”).

¹¹³ *Hardy*, 707 F. Supp. 2d at 607.

¹¹⁴ *Id.* at 607–08.

¹¹⁵ *Id.* (quoting *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999)) (collecting cases).

¹¹⁶ *Id.* at 609 (“[T]he Court must consider whether the distinction was part of Congress’s intent. But, the legislative history of § 2259 and § 3663A suggest that it was not.”). The *Hardy* court offers a detailed analysis of § 2259’s legislative history. See *id.* at 609–10.

before, and was thus unaware that he was looking at her images, but also that there are innumerable other pedophiles doing the very same.¹¹⁷ Lawyers for the victims argue that “the defendant should not benefit from the fact that everyone’s doing it,”¹¹⁸ but it is not clear why this should not be the case. The common law has traditionally refused to hold an offender liable for a “greater amount of losses than those caused by his particular offense,” and there is no compelling reason here to depart from such a long-established tradition.¹¹⁹ Victims’ lawyers have attempted to argue that each offender is a “substantial factor” in causing the ultimate harm, and thus can be held jointly and severally liable for the whole amount, but this stretches the doctrine too far.¹²⁰ One can easily imagine the administrative nightmare of apportioning damages and adjudicating indemnification proceedings between a nearly limitless and amorphous class of offenders.¹²¹ This type of liability can also be dangerous if adapted to other classes of conduct—for example, should a user of cocaine owe restitution to victims of violence related to the production of cocaine?¹²²

All of this is not to suggest that child pornography victims do not suffer a harm. The harm, however, is simply too remote and abstract to be recognized by the time-tested instruments of

¹¹⁷ See, e.g., *United States v. Paroline*, 672 F. Supp. 2d 781, 792 n.11 (E.D. Tex. 2009).

¹¹⁸ *Here & Now* (90.9 WBUR radio broadcast Feb. 23, 2010, at 17:30), available at <http://www.hereandnow.org/2010/02/23/rundown-223-2>.

¹¹⁹ *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009). See Brief for Defendant-Appellee at 27, *In re Amy*, 636 F.3d 190 (5th Cir. 2011) (No. 09-41254 & 09-41238) (“To the extent that restitution is ordered for harm not proximately caused by the offense of conviction, the restitution constitutes an excessive find [sic] and cruel and unusual punishment.”).

¹²⁰ *United States v. Faxon*, 689 F. Supp. 2d 1344, 1360 (S.D. Fla. 2010).

This Court has no conceivable idea as to how many defendants may be involved in this type of criminal conduct. This would most certainly be the starting point for attempting to “apportion” damages [among] various defendants who have committed criminal acts similar to the Defendant. This Court finds that there is absolutely no factual or evidentiary basis in the record upon which this Court could conduct such an exercise in attempting to apportion damages.

Id.

¹²¹ See *id.*

¹²² See *United States v. Norris*, 159 F.3d 926, 928 (5th Cir. 1998).

proximate causation.¹²³ Part IV of this Note proposes a non-litigation approach to compensating child pornography victims better suited to the type of harm at issue.

B. *Wrong as a Matter of Policy*

Where issues of statutory interpretation end, broader policy considerations often begin.¹²⁴ This section demonstrates that mandatory restitution under 18 U.S.C. § 2259 for child pornography victims is harmful to each of the three major interested parties: the government, the victims, and the offenders.

1. The Government

From the government's perspective, awarding restitution to child pornography victims is incredibly resource-intensive. To the court system, the monetary burden of a single restitution order, including litigation and administrative costs, averages \$2,000.¹²⁵ Awarding restitution to child pornography victims often involves the use of expert testimony, additional evidentiary hearings, further briefing, appeals, and added procedural technicalities if the victim is a minor.¹²⁶ These are all factors that can drastically drive up costs; but even with a conservative estimate of \$2,000, the remarkable inefficiency becomes clear. Amy's lawyer has asked for restitution in no less than 500 cases so far.¹²⁷ Thus, the cost to the court system for Amy's case alone

¹²³ See *Causation in the Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/causation-law/> (last updated Nov. 17, 2010).

¹²⁴ *United States v. Hardy*, 707 F. Supp. 2d 597, 607 (W.D. Pa. 2010) ("The statutory language is only a starting point, however, and [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (alternations in original) (internal quotation marks omitted).

¹²⁵ See *Dickman*, *supra* note 49, at 1708 ("Each restitution order imposed by the courts increases administrative expenditures by approximately \$400 to \$500. Additionally, according to the Congressional Budget Office, when 'litigation and enforcement costs of the United States Attorneys' are factored in, the total cost of imposing a single restitution order is approximately \$2,000.").

¹²⁶ See, e.g., *In re Amy*, 591 F.3d 792, 795 (5th Cir. 2009) ("The district court permitted extensive briefing and conducted two evidentiary hearings on the issue of restitution . . ."); Elizabeth Dunbar, *Challenges Lie Ahead in Child Pornography Lawsuits*, MINN. PUB. RADIO NEWS (May 27, 2010), <http://minnesota.publicradio.org/display/web/2010/05/27/challenges-for-porn-lawsuits>.

¹²⁷ See *Albany*, *supra* note 21.

has been at least \$1,000,000. Amy's lawyer has indicated that approximately \$170,000 has been recovered.¹²⁸ If Amy hopes to recover all of the \$3 million-plus she is requesting, many more restitution requests will have to be filed, and the systemic costs will continue to rise. If other victims begin to employ this strategy, and they have, costly restitution litigation will become a permanent coda of federal child pornography trials.¹²⁹

Federal prosecutors are also taxed heavily by child pornography restitution. Part II of this Note discussed the fact that federal prosecutors now have duties to the victim of a crime as well as to the government.¹³⁰ Fulfilling such duties takes time and resources, and since the federal prosecutor is essentially serving two masters, these duties can create conflict.¹³¹ For example, there can be disagreements about trial strategy or statutory interpretation.¹³² This is hardly idle speculation—a federal judge in Minnesota chided federal prosecutors and demanded a memorandum explaining why they refused to request restitution on a victim's behalf.¹³³ “The Court will no longer accept silence,” said the judge.¹³⁴ Child pornography victims deserve help, but this method of obtaining it is incredibly wasteful and inefficient from the government's perspective.

¹²⁸ United States v. Faxon, 689 F. Supp. 2d 1344, 1346 (S.D. Fla. 2010).

¹²⁹ “Vicky” has begun to follow Amy's recovery strategy. *See, e.g., id.* at 1351. Like Amy, Vicky is a victim of child pornography, and her images are likewise frequently found on the hard drives of those arrested for child pornography offenses. *Id.* at 1348.

¹³⁰ *See supra* Part I.

¹³¹ *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R 1.7 (2010).

¹³² *See In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009) (“The crux of Amy's petition is the legal argument that 18 U.S.C. § 2259 permits a victim to receive mandatory restitution irrespective of whether the victim's harm was proximately cause [sic] by the defendant. The government agreed with the district court that Section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct.”); *see also* United States v. Hardy, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010) (“The attorney representing Amy argues that the wording of 18 U.S.C. § 2259 indicates that no causal connection need be shown, that the award of restitution is automatic. The Government and Defendant both argue that there is a proximate cause requirement, though they would each have the Court apply that requirement differently.”) (internal citation omitted).

¹³³ James Walsh, *Judge Asks Prosecutors To Put a Price on Child Porn*, STAR TRIB. (Minneapolis, MN), Jan. 5, 2010, at 1B. The prosecutors ultimately claimed that the restitution order was not filed until after a plea agreement had been reached. *See* Associated Press, *New Legal Issue: Payment for Child Porn Victims*, ABC11.COM (Feb. 08, 2010), http://abclocal.go.com/wtvd/story?section=news/national_world&id=7264344.

¹³⁴ Walsh, *supra* note 133.

2. The Victims

Litigation is an indelicate, contentious, and often traumatic enterprise, and thus it is no surprise that most child pornography victims have chosen not to engage in such litigation, even if it would probably result in monetary gain.¹³⁵ In fact, the act of seeking restitution might exacerbate the very psychological harm victims suffer from, and all but guarantee that victims will never be able to fully recover.¹³⁶ One of the victim's lawyers attributed the victim's not testifying at a sentencing hearing to "recent severe psychological trauma from attending multiple sentencing hearings for other offenders."¹³⁷ Another victim was apparently "doing well, and [engaging] in normal age appropriate activities," until the government notifications began to arrive, resulting a "resurgence of the trauma" and "post traumatic stress."¹³⁸

Another drawback for victims under the current system is that when courts *do* order restitution, the victims only receive a fraction of the money, since the lawyers representing them are operating on a one-third contingency fee basis.¹³⁹ One lawyer admitted that out of the \$40,000 that the victim been awarded, only \$10,000 had actually gone to the victim—the remaining \$30,000 was comprised of lawyers' fees and costs advanced.¹⁴⁰ Some onlookers, recognizing the "cash-cow" aspect of this litigation strategy, have derisively suggested that the victims' lawyers are merely exploiting a sympathetic victim and an

¹³⁵ See *The Koyo Nnamdi Show: Restitution for Child Pornography Victims* (WAMU 88.5 radio broadcast Mar. 9, 2010), available at <http://thekojonnamdishow.org/shows/2010-03-09/restitution-child-pornography-victims>; Dunbar, *supra* note 126. ("[The president and CEO of the National Center for Missing and Exploited Children] said only a few civil lawsuits have been filed in child pornography cases, even though the option for victims to sue has been around for more than two decades.").

¹³⁶ See *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009); see also Goodin, *supra* note 94 (discussing the view that the current restitution framework might disincentivize recovery).

¹³⁷ Dan Hinkel, *Prosecutors Seek Nearly \$200k for Child Porn Victim*, NWI TIMES (Hammond, IN) (Jan. 4, 2010, 12:05 AM), http://www.nwitimes.com/news/local/lake/article_c6221830-13a8-5755-9e45-4f70be85dbb0.html (internal quotation marks omitted).

¹³⁸ *Staples*, 2009 WL 2827204, at *2.

¹³⁹ See *United States v. Faxon*, 689 F. Supp. 2d 1344, 1351, 1353 (S.D. Fla. 2010).

¹⁴⁰ *Id.* at 1351.

ambiguous statute to collect a steady stream of income.¹⁴¹ This concern is not allayed by the fact that at least one lawyer receives his client's victim notifications *directly*, completely removing the victim from the process.¹⁴²

3. The Offenders

Fundamental principles of justice dictate that a criminal sentence ought to fit the crime, but it is unclear that making offenders pay restitution to child pornography victims serves any of the purported policy justifications of criminal restitution.¹⁴³ Criminal restitution is but a small part of the sentence faced by federal child pornography offenders. It is thus doubtful that a restitution order, especially a stratospheric restitution order like the one in *Staples*, serves any rehabilitative purpose.¹⁴⁴ Rather, it places offenders in a Sisyphus-like situation, burdening them with an obligation they cannot meet, no matter how hard they try, which disincentives even trying at all.¹⁴⁵ The amount of outstanding criminal debt in the United States, most of which is comprised of unpaid restitution, totaled \$50 billion in 2007.¹⁴⁶ Permitting restitution for child pornography victims simply creates more outstanding criminal debt while doing nothing to improve the lives of most child pornography victims.

The arguments that such restitution serves a deterrent purpose are equally as suspect. Some commentators suggest that since attacking the producers and distributors does little to stem the flow of child pornography, it is necessary to send a strong message to the end-users.¹⁴⁷ The notion that punishing end-users, even harshly, somehow disturbs a market is flawed—the failed War on Drugs stands as a stark testament to this faulty line of reasoning.¹⁴⁸ The fact that the child pornography market

¹⁴¹ The New York Times quoted Amy's lawyer as saying "This is a lawyer's dream." See Schwartz, *supra* note 8. This is hardly surprising—he stands to make more than \$1 million from Amy alone!

¹⁴² See Faxon, 689 F. Supp. 2d at 1351.

¹⁴³ See *supra* Part I.B.

¹⁴⁴ United States v. Staples, No. 09-14017-CR, 2009 WL 2827204, at *2 (S.D. Fla. Sept. 2, 2009).

¹⁴⁵ See Dickman, *supra* note 49, at 1696.

¹⁴⁶ See *id.* at 1691-92.

¹⁴⁷ See New York v. Ferber, 458 U.S. 747 (1982).

¹⁴⁸ See Charles Shaw, *Joe Public Blog: European Blueprint Signals Way for America To End the War on Drugs*, THE GUARDIAN (Nov. 15, 2010), <http://www.guardian.co.uk/society/joepublic/2010/nov/15/america-war-on-drugs>.

is an international one further reduces the impact of any deterrent measures, since the market segment governed by United States law is but a small fraction of the total market. Finally, criminal restitution is but a small facet of a larger sentence, and it is unlikely that a monetary penalty will deter someone where the penalty of certain incarceration and lifetime humiliation does not. If you are convicted of child pornography offenses, restitution is truly the least of your troubles.

Others justify harsh punishments, including restitution, on the grounds of a perceived link between child pornography offenses and actual child abuse. According to an oft-cited Mayo Clinic study, 30% to 80% of individuals who viewed child pornography and 76% of individuals who were arrested for internet child pornography had molested a child.¹⁴⁹ Other studies, however, have failed to establish such a correlation.¹⁵⁰ At least one researcher even suggests that the proliferation of child pornography actually *decreases* incidents of actual child abuse, because it provides pedophiles with a safe outlet for their sexual urges.¹⁵¹ The imposition of significant financial burdens should be halted until more conclusive evidence is presented. Restitution is simply an improper way to approach this issue.

IV. LOOKING TOWARDS VICTIM COMPENSATION FUNDS AS AN OPTIMAL SOLUTION

In Part III, restitution under 18 U.S.C. § 2259 for federal non-production child pornography cases was shown to be an inequitable and inefficient remedy. To address this unique problem, it is necessary to forego the traditional tools of litigation and look to victim compensation funds as an alternative means of recovery. Though such a solution would be a drastic departure from the current, restitution-based regime of liability, it is not such a radical suggestion—courts¹⁵² and advocates on both sides

¹⁴⁹ See Anderson, *supra* note 4, at 6.

¹⁵⁰ *Study Finds No Link Between Child Porn and Sex Abuse*, THE DAILY TELEGRAPH (Sydney) (July 14, 2009, 9:41AM), <http://www.dailytelegraph.com.au/news/breaking-news/study-finds-no-link-between-child-porn-and-sex-abuse/story-e6freuyi-1225749645592>.

¹⁵¹ Daniela Lazarová, *Child Porn Consumers Safe From Prosecution in the Czech Republic*, ČESKÝ ROZHLAS (Feb. 9, 2007), <http://www.radio.cz/en/section/curraffrs/child-porn-consumers-safe-from-prosecution-in-the-czech-republic>.

¹⁵² See *United States v. Paroline*, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009).

of the debate have all commented favorably on the possibility of implementing such a system.¹⁵³ A compensation fund would allow child pornography victims to recover quickly and fairly without having to relive the horrors of their experiences. This Part looks at the history and structure of victim compensation funds, outlines some general concerns, and finally offers a model solution to the controversy.

A. *The Structure of Victim Compensation Funds*

Broadly speaking, a victim compensation fund is a government-administered program established to allow individuals to quickly recover for certain losses, outside the realm of litigation.¹⁵⁴ The relatively quick recovery such funds provide to victims, however, often comes at the price of waiving any right to sue on the same injuries.¹⁵⁵ Because such funds can drastically impact people's rights, Kenneth Feinberg, the legal architect of many high-profile compensation funds—including those dealing with the 9/11 attacks, the Virginia Tech shootings,

While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely unworkable in the context of criminal restitution. 18 U.S.C. § 2255, however, does provide a civil remedy for those victims able to obtain counsel to pursue it. There is a great need for counseling and medical care for victims of child pornography. 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.

Id.; see also *United States v. Solsbury*, 727 F. Supp. 2d 789, 797 n.1 (D.N.D. 2010).

Congress could also consider establishing a compensation fund for identified victims of child pornography offenses. Another legislative alternative could be the establishment of a fine schedule that would require the payment of fines by child pornography offenders to a national fund under the Department of Justice and monies then disbursed to victims for treatment and counseling expenses and other economic losses. These are only a few suggestions for consideration which would arguably offer a more practical solution to the unworkable restitution provisions in 18 U.S.C. § 2259.

Id.

¹⁵³ See *The Kojo Nnamdi Show: Restitution for Child Pornography Victims*, *supra* note 135.

¹⁵⁴ See Case School of Law, *The 9/11 Victim Compensation Fund: Private Pain and Public Compensation*, YOUTUBE (Mar. 6, 2007), http://www.youtube.com/watch?v=gSR05_au3VM (Kenneth Feinberg guest speaking).

¹⁵⁵ *Id.*

and the BP oil spill—sees such funds as remedies-of-last-resort, only to be employed where litigation is simply inadequate to address the problem at hand.¹⁵⁶

Victim compensation funds come in many shapes and sizes.¹⁵⁷ They can have fixed or indefinite durations, can operate in the civil or criminal context, and can draw funding from various sources.¹⁵⁸ Many funds have quasi-judicial mechanisms built in, allowing for hearings, mediation, and appeals of determinations deemed unfair.¹⁵⁹ Since victim compensation funds are closely related to the victims' rights movement, especially in the criminal context, victim autonomy is a central concern. This concern is often addressed by setting up multiple "tracks," allowing the victim to be as involved, or uninvolved, as she wants to be. Since the majority of child pornography victims have chosen not to pursue restitution under the current statutory scheme, flexibility is a crucial feature for any potential alternative system, including a victim compensation fund.

In the civil realm, compensation funds have generally arisen in mass tort settlement agreements.¹⁶⁰ Such was the case in many infamous mass tort class action lawsuits, including asbestos, DES, the Dalkon Shield, Agent Orange, silicone breast implants, and tobacco.¹⁶¹ In some of these cases, limited-duration funds were set up to distribute fixed sums to finite classes of victims.¹⁶² In the criminal context, funds have traditionally taken a different form. Every state has established compensation funds to provide recompense to victims of certain state and federal crimes.¹⁶³ Such funds draw their money

¹⁵⁶ *Id.*

¹⁵⁷ See Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 81–84, 124 (1997).

¹⁵⁸ *See id.* at 94–98, 124–26.

¹⁵⁹ *See id.* at 146–48, 160–61.

¹⁶⁰ *See id.* at 80–81.

¹⁶¹ *Id.*

¹⁶² *See id.* at 82–83.

¹⁶³ *See General Information*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=5> (last visited Mar. 31, 2012). For examples of some state victim compensation programs, visit THE N.Y. ST. OFF. VICTIM SERVICES, <http://www.ovs.ny.gov/home.aspx> (last visited Mar. 31, 2012); *Crime Victims' Compensation*, ATT'Y GEN. TEX., https://www.oag.state.tx.us/victims/about_comp.shtml (last visited Mar. 31, 2012); or *Welcome to the VCGCB*, ST. CAL. VICTIM COMPENSATION & GOV'T CLAIMS BOARD, <http://www.vcgcb.ca.gov> (last visited Mar. 31, 2012).

primarily from criminal fines and the federal government.¹⁶⁴ Although there is no direct federal victim compensation fund, the federal government provides support to state programs through the Crime Victims Fund, which pays millions of dollars each year to state compensation programs.¹⁶⁵ In many states, acceptance of an award from a crime victim fund creates a lien for the state on any restitution, providing another source of replenishment.¹⁶⁶

B. The Three F's of a Successful Victim Compensation Fund: Funding, Fairness, and Flexibility

1. Funding—Show Me the Money

Perhaps the most important question when it comes to establishing a victim compensation fund is “Where will the money come from?” Here, the most promising source of funding is criminal fines. Judges are authorized to impose fines that can reach almost seven figures for child pornography offenses.¹⁶⁷ Since child pornography offenders are more affluent than average criminal defendants—they have computers and internet connections, after all—there is also a greater likelihood of collection.¹⁶⁸ Each appropriation would not have to be large to

¹⁶⁴ *OVC Fact Sheet: Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, <http://www.ojp.usdoj.gov/ovc/publications/factshts/cvf2010/intro.html> (last visited Mar. 31, 2012). The Crime Victims Fund, established as part of the Victims of Crime Act of 1984, is administered by the Office of Victims for Crime. *See id.* It is also funded through forfeited appearance bonds, certain criminal forfeitures, special assessments, and of course, gifts and donations from private individuals. *Id.*

¹⁶⁵ *Id.* An alternative to an independent compensation fund approach might be to simply bring non-production child pornography cases within the fold of pre-existing state victim compensation funds. Of course, such an approach would require action from all fifty states. The Office for Victims of Crime, the federal agency established to administer the Crime Victims Fund, could use its purse-string power to pressure states to recognize such offenses and to promulgate a uniform set of guidelines for dealing with them. The great benefit of this approach is that it simply leverages pre-existing compensation mechanisms, thus saving administrative costs. A major weakness of this approach, however, is that victims would still be forced to recover on a case-by-case basis.

¹⁶⁶ *E.g.*, *Legal Information*, N.Y. ST. OFF. VICTIM SERVICES, <http://www.ovs.ny.gov/legalinformation/legalinformation.aspx> (last visited Mar. 31, 2012).

¹⁶⁷ Kristen Harker, *Man Indicted in Connection with Distributing Child Porn*, WSAZ.COM (Nov. 18, 2010, 7:21 AM), http://www.wsaz.com/news/headlines/Man_Indicted_In_Connection_With_Distributing_Child_Porn_108914889.html?ref=889 (discussing a potential fine of \$750,000).

¹⁶⁸ *See* WOLAK ET AL., *supra* note 85, at 3.

make an enormous difference in the aggregate. The Justice Department concluded 1,209 child pornography cases in 2006, with a 95% conviction rate.¹⁶⁹ If just \$10,000, were collected from each of the 1,148 people convicted, \$10,000,000 could accumulate within a year, a substantial sum even factoring in overhead costs. Since the child pornography industry is still growing, this number will only get larger.¹⁷⁰ Drawing the money from criminal fines has the added benefit of sidestepping many of the difficult constitutional and causation issues discussed in Part III—unlike restitution, the imposition of a criminal fine is far less prone to constitutional attack.¹⁷¹

2. Fairness—Putting a Price on Harm

Quantifying damages is another central issue in establishing a victim compensation fund. The courts that have chosen to award restitution to victims of child pornography have, with few exceptions, opted for sums between \$1,000 and \$10,000.¹⁷² Payouts from state victim compensation funds are within the same order of magnitude. For example, the average claim paid out by the New York Crime Victims Board during the 2008–2009 fiscal year, for all manner of violent crimes, was \$1,717.¹⁷³ The government could conduct an independent study of child pornography victims' needs, but awards in the vicinity of \$10,000 seem like an appropriate starting ground based on current case law, perhaps with added reimbursements for psychological counseling costs. Such an award is likely large enough to provide an attractive alternative to litigation, especially since no lawyer would be extracting a contingency fee.¹⁷⁴ Studies demonstrating that victim satisfaction is based almost entirely on *whether or not* money is paid rather than *how much* money is paid further bolster this conclusion.¹⁷⁵

¹⁶⁹ See Levine, *supra* note 87.

¹⁷⁰ See *supra* Part I.

¹⁷¹ See *supra* Part III.

¹⁷² See *supra* Part II.

¹⁷³ Compare *Claims Accepted and Compensation Expenditures*, N.Y. ST. OFF. VICTIM SERVICES, <http://www.ovs.ny.gov/Files/Claims%20Accepted%20FY%202008%2009.pdf> (last visited Mar. 31, 2012), with *Disbursements by Claim Type: Fiscal Year 2008–09*, N.Y. ST. OFF. VICTIM SERVICES, <http://www.ovs.ny.gov/Files/Disbursements%20by%20Claim%20Type%20fy08%2009.pdf> (last visited Mar. 31, 2012).

¹⁷⁴ See Case School of Law, *supra* note 154, at 6:10–6:40, 56:10–56:55.

¹⁷⁵ See Dickman, *supra* note 49, at 1698.

Whether the amount of money a victim is entitled to should scale with severity of the images, or perhaps the number of images in circulation, is also an open question.¹⁷⁶ It would not be difficult to tie recovery to something like the United Kingdom's COPINE scale, a conceptual hierarchy that categorizes child pornography into different levels of severity based on certain extenuating factors.¹⁷⁷ Of course, every subtle gradation inevitably leads to disparity of treatment, which itself can cause victim unhappiness. It is important that each victim feels that she is being treated equally, and too wide a variation in awards can undermine this purpose. Careful balancing of these competing interests would be required.

3. Flexibility—To Waive, Or Not To Waive?

In order to partake in a victim compensation fund, victims must usually waive their right to sue on the same injury, ostensibly to prevent double-recovery. In the context of child sex crimes, however, Congress has indicated that it is perfectly content with victims being able to recover twice—18 U.S.C. § 2259 explicitly says that “[a] court may not decline to issue [restitution] because of . . . 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.”¹⁷⁸ Waiver, therefore, need not be a facet of a compensation fund for child pornography victims.¹⁷⁹ It is unlikely that not requiring waiver will present too many problems; after all, very few victims have pursued recovery in the courts thus far, and these avenues of recovery might soon be limited anyway.¹⁸⁰ Moreover, it is important to give victims a sense of flexibility and control. Getting rid of a waiver requirement eliminates a disincentive for seeking

¹⁷⁶ After all, child pornography is an umbrella term that can include everything from the “merely” suggestive to full-on rape, torture, and bestiality. See *What is Child Pornography?*, NAT'L CENTER FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.com/missingkids/servlet/PageServlet?PageId=1504> (last visited Mar. 31, 2012).

¹⁷⁷ KERRY SHELDON & DENNIS HOWITT, *SEX OFFENDERS AND THE INTERNET* 33–37 (2007).

¹⁷⁸ 18 U.S.C. § 2259(b)(4)(B) (2006).

¹⁷⁹ The unique situation presented by these cases also creates logistical problems for waiver. The victim would have to waive claims against innumerable defendants, including *future* defendants that have either not yet been caught, or have not yet committed the crime.

¹⁸⁰ See *supra* Part III.

compensation from a fund. Hypothetical victims who just want closure can simply take the money, while those victims who seek further vindication from pursuing a *civil* remedy in court still have the option of doing so.

C. *Model Solution*

There are a variety of models a compensation fund for child pornography victims could follow, and the following is just a brief sketch of one possible model. One promising solution is to create an entirely separate “national fund under the Department of Justice” for victims of child pornography.¹⁸¹ Such a fund would disburse money “to victims for treatment and counseling expenses and other economic losses,” becoming a surrogate for court-ordered restitution.¹⁸² Eligibility would be determined by the National Center for Missing & Exploited Children’s Child Victim Identification Program, the organization currently tasked with identifying child pornography victims, and one that is well equipped to determine eligibility and weed out false claims.¹⁸³ Once a victim is deemed eligible, she would be authorized to immediately receive a one-time lump sum, somewhere in the \$10,000 range, to compensate her for her past and future psychological harm. The program would also reimburse victims for medical and counseling costs for a fixed period of years, perhaps five years as suggested by the lower court in *Aumais*.¹⁸⁴ The fund might even be able to support full-time, salaried, dedicated psychological counselors for such victims. Many victims would choose to take the money and move on with their lives, but for those who desired more involvement, there would be options for that as well. A fund could sponsor group counseling sessions, meetings between victims and offenders, and other rehabilitative activities. Once again, participation in the fund would not require waiver of any legal claims, so particularly brave victims could continue to seek vindication in the courts.

¹⁸¹ United States v. Solsbury, 727 F. Supp. 2d 789, 797 n.1 (D.N.D. 2010).

¹⁸² *Id.*

¹⁸³ See *Child Victim Identification Program (CVIP)*, NAT’L CENTER FOR MISSING & EXPLOITED CHILD., http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444 (last visited Mar. 30, 2012).

¹⁸⁴ United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *8–9 (N.D.N.Y. Jan. 13, 2010).

Ultimately, such a program will provide more help to more victims, in a more efficient and fair manner, while easing the strain on the court system.

CONCLUSION

Though it is likely that the Supreme Court will soon weigh in on the divisive issue of child pornography restitution, their decision will have little impact on the majority of child pornography victims, who have chosen *not* to wade into the tangled and traumatic sea of litigation. An ambiguous statute, overzealous attorneys, and general societal acrimony towards child pornography offenders have coalesced to create a legal environment where inequity runs rampant and personal feelings trump sound legal principles. Although it is indisputable that child pornography offenses are heinous crimes, no crime is so heinous so as to warrant discarding proximate causation, a conceptual pillar without which criminal punishment cannot be justified. To suggest otherwise does damage to principles of statutory interpretation and makes a mockery of the doctrine of restitution. Child pornography victims *and* child pornography offenders both deserve better than the status quo.

Unique problems call for unorthodox solutions, and a victim compensation fund strikes the right balance as a surrogate for court-ordered restitution. Properly administered, a compensation fund will help more child pornography victims recover emotionally, ease the strain on the court system and federal prosecutors, and provide a modicum of procedural fairness to child pornography offenders. The District of North Dakota, in denying a recent restitution request, summed up the current state of affairs rather succinctly:

[T]he current statutory framework designed to assist victims of child pornography is unworkable in the criminal arena. The undersigned believes that the controversial subject of restitution awards in child pornography cases is one best left for Congress to resolve. These troublesome cases cry out for an appropriate restitution remedy but one best determined by Congress—not by a variety of conflicting and inconsistent awards and decisions as have evolved over the past year.¹⁸⁵

¹⁸⁵ *Solsbury*, 727 F. Supp. 2d at 796–97.

Federal courtrooms are simply inappropriate forums for addressing the sensitive needs of child pornography victims. By employing a victim compensation fund, in any form, Congress can meet the needs of the ever-growing number of children whose lives have been irreparably damaged by child pornography, and restore faith in the equity and impartiality of our system of criminal punishment.

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