

# The Case for Full Restitution for Child Pornography Victims

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## ABSTRACT

*To address the serious harms resulting from federal sex offenses, including the creation, distribution, and possession of child pornography, Congress created an expansive statutory regime in the Mandatory Restitution for Sex Crimes provision of the Violence Against Women Act, 18 U.S.C. § 2259, requiring federal district courts to direct defendants to pay the “full amount” of losses incurred by any victim of their offense. Section 2259 provides that such losses can include the cost of psychological treatment, lost income, and attorneys’ fees.*

*Despite this congressional mandate, courts are divided on what the restitution statute requires when thousands of defendants possess images that collectively harm one victim. The differing outcomes largely turn on a question the Supreme Court will consider this term: whether a victim must show that her losses were the proximate result of a defendant’s crime. This is a threshold issue for determining whether victims receive full, some, or no restitution from convicted child pornography defendants.*

*This Article contends that Congress meant what it said in § 2259. Child pornography victims are entitled to restitution for the “full amount” of their losses from defendants convicted of collecting or distributing their images. This comprehensive approach is based on Congress’s well-founded recognition that the collection and distribution of child pornography causes significant harm to the victims depicted in those images. Compensating victims for the financial losses they suffer is consistent with not only the plain language of*

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Paul Cassell and James Marsh represent child pornography victims at every level of the federal court system in their efforts to obtain restitution. The Supreme Court recently granted certiorari to consider a case involving the restitution efforts of one of their clients, known as “Amy,” who the authors will represent at oral arguments in 2014. See *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012) (en banc), cert. granted sub nom. Paroline v. United States, 133 S. Ct. 2886 (2013). Jeremy Christiansen assisted in preparing briefs filed for Amy through the University of Utah Appellate Clinic.

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*the statute but also the well-established tort principle that an intentional wrongdoer is jointly and severally liable with other wrongdoers for an innocent victim's losses.*

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## INTRODUCTION

Sadly, recent years have witnessed an almost insatiable world-wide demand for child pornography images and videos. To satisfy this demand, pedophiles and child molesters use digital media to memorialize their sexual exploitation of children and then distribute the resulting images and videos via the internet to others with similar sexual interests.<sup>1</sup> The child victims are, of course, harmed by the sex offenses committed against them.<sup>2</sup> But they are also grievously injured by the subsequent circulation of the images and videos depicting their sexual abuse. The global, ubiquitous circulation of a victim's images or videos creates a never-ending invasion of privacy that is both psychologically traumatizing and emotionally disturbing.<sup>3</sup>

Congress addressed these serious harms by including the Mandatory Restitution for Sex Crimes provision within the Violence Against Women Act of 1994.<sup>4</sup> As part of this expansive statutory regime, 18 U.S.C. § 2259 requires federal courts to issue restitution orders to victims of certain sex crimes, including the creation, distribution, and possession of child pornography. Such mandatory restitution orders direct defendants to pay the “full amount” of the losses, such as the cost of psychological treatment, lost income, and attorneys' fees incurred by any victim of their offense.<sup>5</sup>

Over the past four years, child pornography victims have increasingly turned to the courts to obtain full restitution.<sup>6</sup> Yet despite a con-

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<sup>1</sup> See Emily Bazelon, *Money Is No Cure*, N.Y. TIMES MAG., Jan. 27, 2013, at 22, 25.

<sup>2</sup> See *id.* at 29.

<sup>3</sup> See, e.g., *id.* at 25 (describing one victim's suffering from, among other things, the “excruciating” knowledge that “so many men have witnessed and taken pleasure from her abuse”).

<sup>4</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40113(b)(1), 108 Stat. 1902, 1904 (codified at 18 U.S.C. §§ 2248, 2259 (2012)). This Article specifically addresses the provision codified at 18 U.S.C. § 2259, providing mandatory restitution for various offenses involving the sexual exploitation of children, found in §§ 2251–2258.

<sup>5</sup> 18 U.S.C. § 2259(b) (2012). The statute enumerates six categories of losses that might be recovered by a victim, which are discussed in further detail *infra* Part II.B, including:

(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.

*Id.* § 2259(b)(3).

<sup>6</sup> See Bazelon, *supra* note 1, at 26–29; see also, e.g., *United States v. Monzel*, 641 F.3d 528, 530 (D.C. Cir. 2011) (explaining that child pornography victim “Amy” sought \$3.26 million in restitution from defendant who possessed her image, reflecting her “total losses from the creation and distribution of pornographic images of her as a child”), *cert. denied*, 132 S. Ct. 756 (2011).

gressional mandate requiring defendants to pay the “full amount” of a victim’s losses, federal trial and appellate courts are deeply divided on what the restitution statute requires when thousands of defendants possess the same images, and thereby collectively harm one victim.<sup>7</sup> Some courts have ruled that each individual defendant must pay the full amount of a victim’s losses,<sup>8</sup> while other courts have decided that each defendant must pay just a tiny fractional share of the total losses suffered by the victim.<sup>9</sup> A few courts have denied victims any restitution whatsoever.<sup>10</sup> These differing outcomes largely turn on a single question, which the Supreme Court will consider this term: whether a child pornography victim must show that her losses were the proximate result of the defendant’s possession of her images.<sup>11</sup> This is essentially a threshold issue for determining whether such victims receive full, some, or no restitution from convicted child pornography defendants.<sup>12</sup> In that regard, proximate cause also serves as a determinate for who must bear the burden of a victim’s losses—the victim or the defendant—and in what proportion.

Predictably, this issue has sparked attention in the media, both because the Supreme Court will consider it in the near future and, perhaps more importantly, because of the all-too-real human dimension of these emerging victims.<sup>13</sup> These limited examinations, how-

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<sup>7</sup> See, e.g., *United States v. Brannon*, No. 4:09-CR-38-RLV-WEJ, 2011 WL 2912862, at \*9 (N.D. Ga. May 26, 2011) (noting recent National Center for Missing and Exploited Children (“NCMEC”) statistics indicate that there are approximately 9,200 cases in the country associated with approximately 44,000 images of child pornography victim “Vicky”).

<sup>8</sup> See, e.g., *In re Amy Unknown*, 701 F.3d 749, 769–70 (5th Cir. 2012) (en banc) (explaining such an outcome ensures child pornography victims receive the “full amount of [their] losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution”), *cert. granted sub nom.* *Paroline v. United States*, 133 S. Ct. 2886 (2013).

<sup>9</sup> See, e.g., *United States v. Fast*, 709 F.3d 712, 723 (8th Cir. 2013) (affirming district court award of \$3,333 against defendant convicted of possessing images of Vicky); *Monzel*, 641 F.3d at 530 (noting district court awarded “nominal” restitution of \$5,000).

<sup>10</sup> See, e.g., *United States v. Plachy*, No. 4:12CR3049, 2013 WL 1914613, at \*12 (D. Neb. May 8, 2013) (denying restitution request where victims “suffered substantial mental injuries with long-term effects as the result of the widespread dissemination of [their images]” but finding such injuries are attributable to numerous other persons who accessed the same pornographic material); *United States v. Paroline*, 672 F. Supp. 2d 781, 793 & n.12 (E.D. Tex. 2009) (denying child pornography victim’s restitution request based on proximate cause analysis in a possession case but acknowledging such victims have “a great need for counseling and medical care”), *vacated sub nom.* *In re Amy Unknown*, 701 F.3d 749.

<sup>11</sup> See *Paroline v. United States*, 133 S. Ct. 2886 (2013).

<sup>12</sup> See generally *Plachy*, 2013 WL 1914613, at \*7 (surveying circuit split on proximate causation question under § 2259 with respect to victims of child pornography).

<sup>13</sup> See generally Bazelon, *supra* note 1, at 24 (discussing the cases of two child pornography victims in need of restitution).

ever, have not fully considered the complex legal issues at stake. Although the issue has received modest attention from academia, many of the commentaries are reluctant to conclude that Congress really intended for child pornography victims to receive full restitution for all of their losses from any individual defendant.<sup>14</sup> Instead, they contend that § 2259 contemplates restitution subject to causation or damage allocation limitations that result in a victim being able to recover only small portions of her losses, or nothing at all, from each defendant convicted of possessing her images.<sup>15</sup> Acknowledging that such limitations prevent victims from actually receiving the full amount of their losses, some of these commentators have proposed abandoning the § 2259 framework altogether in favor of victim compensation funds, civil actions, or other means of redress.<sup>16</sup> But such

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<sup>14</sup> See, e.g., Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 349 (2013) (characterizing restitution sought by child pornography victims as “emotional damages for future speculative losses” for which “courts should not compensate crime victims”). But see Steven Joffe, *Avenging “Amy”: Compensating Victims of Child Pornography Through 18 U.S.C. § 2259*, 10 WHITTIER J. CHILD. & FAM. ADVOC. 201, 205 (2011) (arguing that “Section 2259 should be applied and interpreted according to its plain language and legislative intent in order to ensure that child pornography victims receive full compensation for their harms”); Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333, 352, 354 (2011) (advocating that defendants be held jointly and severally liable for the full amount of a victim’s losses).

<sup>15</sup> See, e.g., Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 CARDOZO L. REV. 297, 327–28 (2011) (arguing that any losses sought by child pornography victims under § 2259 are limited by a generalized proximate cause requirement); Katherine M. Giblin, Comment, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109, 1137 (2011) (same); Adam D. Lewis, Note, *Dollars and Sense: Restitution Orders for Possession of Child Pornography Under 18 U.S.C. § 2259*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 430 (2011) (same); see also Melanie Reid & Curtis L. Collier, *When Does Restitution Become Retribution?*, 64 OKLA. L. REV. 653, 689 (2012) (advocating for apportionment of losses among defendants based on “a reasonable assumption of individual culpability” of each possession defendant).

<sup>16</sup> See, e.g., Tyler Morris, Note, *Perverved Justice: Why Courts Are Ruling Against Restitution in Child Pornography Possession Cases, and How a Victim Compensation Fund Can Fix the Broken Restitution Framework*, 57 VILL. L. REV. 391, 414–16 (2012) (proposing compensation fund for victims of child pornography); Bradley P. Reiss, Note, *Restitution Devolution?*, 85 ST. JOHN’S L. REV. 1621, 1643–44 (2011) (same); see also Mary Margaret Giannini, *Slow Acid Drips and Evidentiary Nightmares: Smoothing Out the Rough Justice of Child Pornography Restitution with a Presumed Damages Theory*, 49 AM. CRIM. L. REV. 1723, 1769–74 (2012) (arguing for set statutory or liquidated damages to determine restitution awards); Robert William Jacques, Note, *Amy and Vicky’s Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1188–89, 1191 (2011) (proposing mandatory baseline fine of \$3,000 that could increase or be mitigated due to offense-specific variables); Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1355–61 (2011) (proposing victims seek remedies through tort or civil restitution claims).

alternatives are unnecessary given the clear and workable framework provided by § 2259.

This Article contends that Congress meant what it said in § 2259's mandatory restitution provision: child pornography victims are entitled to restitution for the "full amount" of their losses from defendants convicted of possessing or distributing their images.<sup>17</sup> This expansive remedy is based on Congress's well-founded recognition that the possession and distribution of child pornography causes significant harm to the victims depicted in those images. The endless circulation of a victim's child sex images subjects victims to continuous invasions of privacy that cause lasting psychological injury—injury that produces economic losses. Compensating these victims for the financial losses they suffer as a consequence of these crimes is consistent with not only the plain language of the statute but also the well-established tort principle that an intentional wrongdoer is jointly and severally liable with other wrongdoers for an innocent victim's losses. By ordering defendants to pay full restitution, courts can ensure victims are made whole by restoring only those losses to which they are entitled under § 2259—nothing less and nothing more.

Part I discusses why restitution is necessary for child pornography victims and how Congress properly responded to this need when it enacted the mandatory restitution statute. It is indisputable that child pornography victims incur serious financial losses from the uncontainable worldwide circulation of their images, including the cost of extensive psychological counseling and lost income. Section 2259 properly provides restitution for such losses.

Part II explains how the plain language of § 2259 requires federal district courts to order every defendant convicted of possessing child pornography to pay each victim the full amount of the victim's losses.<sup>18</sup> Specifically, under § 2259, child pornography victims need not demonstrate that the costs of their psychological counseling or lost income, for example, were proximately caused by any individual defendant.<sup>19</sup> Rather, victims need only show, under a limited actual causation standard, that they were harmed as a result of the possession or distribution of their images.<sup>20</sup> This conclusion is based on the plain

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<sup>17</sup> 18 U.S.C. § 2259(b) (2012).

<sup>18</sup> As a practical matter, defendants ordered to pay full restitution typically make only small payments toward the amount ordered by the court. *See infra* text accompanying notes 164–167.

<sup>19</sup> *See* 18 U.S.C. § 2259(b)(3); *see also* Joffe, *supra* note 14, at 216–23.

<sup>20</sup> *See* Joffe, *supra* note 14, at 216–23.

language of § 2259, basic canons of statutory construction, and the underlying congressional purpose of fully compensating victims of sexual exploitation.<sup>21</sup>

Part III explains why traditional principles of tort law independently support an interpretation of § 2259 that awards child pornography victims the full amount of their losses from defendants who possessed or distributed their images. Restitution statutes are frequently construed to be consistent with tort law because both tort law and restitution have the same remedial purpose.<sup>22</sup> General tort law principles require that, where multiple intentional wrongdoers contributed to a victim's pecuniary losses, each of those wrongdoers must be held jointly and severally liable for all of that victim's losses.<sup>23</sup> The principles guiding such analogous tort law situations also support the conclusion that child pornography defendants should each be held liable for the full amount of a victim's losses under § 2259. The burden to pursue contribution actions to sort out the proportionate liability (if they wish to do so) falls on those guilty of crime rather than on their innocent victims.

#### I. RESTITUTION IS A NECESSITY FOR CHILD PORNOGRAPHY VICTIMS

The restitution issues that have bedeviled the federal courts and academic commentators stem from 18 U.S.C. § 2259, which mandates restitution for the “full amount” of losses suffered by victims of child sexual exploitation crimes.<sup>24</sup> The remedial purpose behind § 2259 is readily apparent: in adopting this law, Congress intended “to make whole . . . victims of sexual exploitation.”<sup>25</sup> By making restitution mandatory, Congress generally sought to “ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.”<sup>26</sup> Accordingly, § 2259 makes restitution for federal sex offenses, including possession or distribution of child pornography, “mandatory.”<sup>27</sup>

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<sup>21</sup> *See id.*

<sup>22</sup> *See infra* note 74.

<sup>23</sup> *See infra* notes 182–191 and accompanying text.

<sup>24</sup> 18 U.S.C. § 2259(b).

<sup>25</sup> *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001).

<sup>26</sup> *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (quoting S. REP. NO. 104-179, at 13 (1995)).

<sup>27</sup> 18 U.S.C. § 2259(a), (b)(4)(A) (“The issuance of a restitution order under this section is mandatory.”).

Any discussion of restitution for child pornography victims must begin with an understanding of how these victims are harmed. This Part describes the psychological injuries and financial losses suffered by child pornography victims, and explains how these injuries translate into economic losses that can be restored through restitution. In so doing, the authors draw on their experiences working closely with several child pornography victims in their efforts to obtain full restitution.<sup>28</sup>

A. *Harms Endured by Victims of Child Pornography Crimes*

As an initial matter, it is worth noting that although the term “child pornography” is widely used,<sup>29</sup> it carries misleading cultural connotations. The term “pornography” equates child pornography with erotic material appealing to the viewer’s normative sexual interest,<sup>30</sup> and is neither the best nor the most accurate term to describe, for example, images and videos which graphically record children being raped.<sup>31</sup> As one doctor who works closely with victims explained:

In the context of children . . . there can be no question of consent, and use of the word pornography may effectively allow us to distance ourselves from the material’s true nature. A preferred term is *abuse images*, and this term is increasingly gaining acceptance among professionals working in this area. Using the term abuse images accurately describes the process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported.<sup>32</sup>

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<sup>28</sup> As noted above, Paul Cassell and James Marsh represent child pornography victims “Amy” and “Vicky” as their attorneys at all levels of the federal court system in their efforts to obtain restitution.

<sup>29</sup> Federal law criminalizes possession of “child pornography,” 18 U.S.C. § 2252A, although in other places it is referred to as “material involving the sexual exploitation of minors,” 18 U.S.C. § 2252.

<sup>30</sup> A similar minimization is found in the term “kiddie porn,” which some prominent commentators have used. See, e.g., Douglas A. Berman, *If “Most Egregious and Horrific” Kiddie Porn Offender Gets 15 Years, What Should Mere Downloaders Get?*, SENT’G L. & POL’Y BLOG (May 13, 2011, 10:01 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/05/if-most-egregious-and-horrific-kiddie-porn-offender-gets-15-years-what-should-mere-downloaders-get.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/05/if-most-egregious-and-horrific-kiddie-porn-offender-gets-15-years-what-should-mere-downloaders-get.html); cf. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 864 (2011) (contending that sentences for child pornography crimes have become entangled with the sentences for the underlying sex abuse).

<sup>31</sup> NCMEC quite accurately refers to these images as “crime scene photos.” Brief of the National Center for Missing and Exploited Children on Issues of Restitution for Victims of Child Pornography Under 18 U.S.C. § 2259 at 6, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (No. 6:08-CR-61) [hereinafter NCMEC Brief].

<sup>32</sup> Motion of the National Crime Victim Law Institute for Leave to Participate as Amicus

Given the widespread usage of the term “child pornography”—especially in the criminal context<sup>33</sup>—this Article will use that term interchangeably with the phrase “child sex abuse images.” But behind these simple terms stands almost unimaginable human suffering. Congress was well aware of the anguish inflicted on victims of this furtive crime. The relevant congressional reports quote extensively from the leading Supreme Court case of *New York v. Ferber*,<sup>34</sup> which recognized the serious long-term physiological, emotional, and mental harms to victims who are sexually exploited through the production, distribution, and possession of child pornography:

[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.

[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt [her] in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.<sup>35</sup>

*Ferber* elucidates an unfortunate reality for victims of child pornography crimes—the initial production of the images and videos of their sexual abuse is only the beginning of a lifetime of despair. Victims deal with intense physical and emotional anguish for decades as a direct result of the distribution and possession of their child sex abuse images. The following brief accounts are illustrative of the harms they suffer on a daily basis. Two of the victims who are most active in attempting to secure restitution, “Amy” and “Vicky,”<sup>36</sup> have detailed their experiences in their own words through victim impact statements and psychological reports.

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Curiae in Support of Petitioners at 1, *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2012) (No. 12-651) (quoting 1 SHARON W. COOPER ET. AL., *MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION* 258 (2005)).

<sup>33</sup> See, e.g., 18 U.S.C. § 2252A.

<sup>34</sup> *New York v. Ferber*, 458 U.S. 747 (1982); see also *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (collecting legislative history relying on *Ferber*); S. REP. NO. 104-358, at 12, 14, 18–19 (1996) (discussing *Ferber*).

<sup>35</sup> *Ferber*, 458 U.S. at 758–59 nn.9–10 (internal quotation marks and citations omitted).

<sup>36</sup> These names are pseudonyms used in all court hearings to protect the victims’ privacy.

### 1. *Accounting for the Harms to “Amy”*<sup>37</sup>

Amy was just four years old when her uncle began sexually abusing her.<sup>38</sup> At a time when most girls her age were just learning about letters and numbers, Amy was forced to endure repeated rape, cunnilingus, fellatio, and digital penetration by her uncle, a trusted family member.<sup>39</sup> Her uncle perpetrated some of the sexual assaults in order to produce child pornography for a child molester living in the Seattle area. Thus, Amy’s child sexual abuse also turned into child sexual exploitation.<sup>40</sup>

When she was nine years old, immediately after the initial abuse ended, Amy received psychological counseling to cope with the trauma from the physical sexual abuse and production of child pornography. When her treatment concluded in 1999, Amy’s therapist reported that Amy was “back to normal” and engaged in age-appropriate activities like dance.<sup>41</sup> Although Amy always suspected her child sex abuse images were probably somewhere on the Internet, at age seventeen, Amy discovered that the images in fact were being widely collected and traded by countless individuals.<sup>42</sup> Amy’s use of a pseudonym reflects a painful irony: she seeks anonymity, but hers is among the most widely trafficked “series” of child pornography in the world.<sup>43</sup>

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<sup>37</sup> The harms Amy suffers from child pornography are detailed in the expert evaluations and her own victim impact statements that accompany her restitution requests in various cases. This Part relies specifically on the reports and statements contained as attachments to one of Amy’s recent restitution requests, submitted in March 2013. *See* Letter from James R. Marsh, Counsel for “Amy,” Marsh Law Firm PLLC, to Camil Skipper, Appellate Chief, E.D. Cal. U.S. Attorney’s Office (Mar. 22, 2013) [hereinafter *Amy’s Restitution Request*] (on file with authors). Attachment 1 of this request contains Amy’s victim impact statement, hereinafter referred to as “Amy’s 2013 Impact Statement;” Attachment 2 contains Dr. Joyanna Silberg’s November 21, 2008 report of her psychological evaluation of Amy, hereinafter referred to as “Amy’s Psychological Evaluation;” and Attachment 6 contains Dr. Stan V. Smith’s September 15, 2008 report that calculates Amy’s lost income and other economic losses attributable to the distribution of her images, hereinafter referred to as “Amy’s Economic Loss Report.”

<sup>38</sup> Amy’s 2013 Impact Statement, *supra* note 37, at 1.

<sup>39</sup> *See* Amy’s Psychological Evaluation, *supra* note 37, at 2.

<sup>40</sup> *See id.*; *see also* Bazelon, *supra* note 1, at 25 (describing how Amy’s uncle forced her to perform sexual poses for photographs in response to specific requests from anonymous internet users).

<sup>41</sup> Amy’s Psychological Evaluation, *supra* note 37, at 2–3 (quoting notes of Amy’s original therapist, Dr. Ruby Salazar).

<sup>42</sup> *Id.* at 3; Amy’s 2013 Impact Statement, *supra* note 37, at 1.

<sup>43</sup> Amy is the victim portrayed in what law enforcement officials have identified as the “Misty” series. As of July 2009, analysts at NCMEC had encountered over 35,570 separate images associated with the “Misty” series, received from law enforcement officials around the world. NCMEC Brief, *supra* note 31, at 5.

This knowledge and ongoing victimization by possessors and distributors of Amy’s child sex abuse images have caused “long lasting and life changing impact[s] on her” that “are more resistant to treatment than those that would normally follow a time limited trauma, as her awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation in [her post-traumatic] symptoms.”<sup>44</sup> As a result, Amy will require counseling for the rest of her life—counseling that, of course, costs money.<sup>45</sup> Amy also has difficulty maintaining gainful employment in jobs that require even routine interaction with the public.<sup>46</sup> Thus, she experiences not only ongoing psychological trauma but also substantial financial losses.

## 2. *Accounting for the Harms to “Vicky”*<sup>47</sup>

“Vicky” suffered a similar fate as Amy at the hands of her father

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<sup>44</sup> Amy’s Psychological Evaluation, *supra* note 37, at 8. Dr. Silberg explains that the feelings of shame and humiliation that are typically felt by victims of sexual abuse are “multiplied exponentially for victims of internet child pornography.” *Id.* at 9. With typical sexual abuse victims, therapists can offer “anonymity” along with the “acknowledgment that they deserve this protection of privacy.” *Id.* Dr. Silberg explains, however, that “knowing one’s image is out there at all times is an invasion of privacy of the highest degree which makes the victim feel known, revealed and publically shamed, rather than anonymous.” *Id.* The course of treatment for these victims must account for the unique harms involved as certain therapeutic techniques useful to survivors of sexual abuse might actually be “ineffective and potentially harmful” to victims of child pornography. *See id.* The “imagery technique,” for example, is used to help victims cope with flashbacks of abuse and requires the victim to imagine herself “going back in time and standing up to the abuser to undo the experience of victimization in their imagination.” *Id.* But, as Dr. Silberg explains, “[f]or victims like Amy, such a technique would actually be harmful as she has to face [that] she can never erase the ongoing ‘evidence’ and ‘proof’ of what she was forced to do. Such an exercise would add to her feelings [of] helplessness.” *Id.*

<sup>45</sup> *See* Amy’s Economic Loss Report, *supra* note 37, at 3.

<sup>46</sup> *See* Amy’s 2013 Impact Statement, *supra* note 37, at 3.

<sup>47</sup> The facts about the harms Vicky suffers from child pornography come from the reports and statements contained within one of Vicky’s recent restitution requests, which is included as an unsealed exhibit (Exhibit B) to a government sentencing memorandum, which itself is still sealed. *See* Government’s Resentencing Memorandum Regarding Restitution at Exhibit B, *United States v. Kennedy*, No. 2:08-CR-00354-RAJ-1 (W.D. Wash. Aug. 21, 2012) [hereinafter *Vicky’s Restitution Request*]. The restitution request itself contains several relevant exhibits: Exhibit 1 contains an August 2012 letter from Vicky to a district court judge in Washington State regarding the sentencing of a defendant convicted of possessing her images, hereinafter referred to as “Vicky’s Letter to Sentencing Judge;” Exhibit 2 contains two victim impact statements written by Vicky, hereinafter referred to as “Vicky’s 2008 Impact Statement” and “Vicky’s 2011 Impact Statement,” respectively; Exhibit 4 contains two reports of her psychological evaluations conducted by Dr. Randall L. Green, which will be referred to hereinafter as “Vicky’s May 2009 Psychological Evaluation” and “Vicky’s Dec. 2009 Psychological Evaluation,” respectively; and Exhibit 9 contains Dr. Stan V. Smith’s November 10, 2010 report calculating Vicky’s lost income

when she was ten and eleven years old.<sup>48</sup> And as with Amy's abuse, Vicky's abuse was made to order. She was forced to perform scripted videos of rape, sodomy, and bondage based on requests placed with her abuser by child molesters and pedophiles who later downloaded and traded her videos.<sup>49</sup>

Vicky also first learned that her images were in circulation when she was seventeen years old.<sup>50</sup> As detailed in her victim impact statement, Vicky suffers ongoing serious psychological trauma because of the possession and distribution of her child sex abuse images and videos.<sup>51</sup> Indeed, her condition deteriorated markedly in the years following her discovery of the widespread proliferation of the images of her childhood sexual abuse.<sup>52</sup> When she became aware of how many people around the world are "entertained by [her] shame and pain," Vicky started having nightmares about strangers staring at images of her naked body on their computer screens.<sup>53</sup> She is further burdened by the thought that her images "might be used to groom another child for abuse," which is a seduction technique utilized by pedophiles that her own father used on her as a child.<sup>54</sup>

Vicky also suffers immense fear and anxiety that she will encounter individuals who have seen the worst moments of her life—fear and anxiety that is not unjustified.<sup>55</sup> Multiple child pornography users

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and other economic losses attributable to the distribution of her images, hereinafter referred to as "Vicky's Economic Loss Report."

<sup>48</sup> See Vicky's May 2009 Psychological Evaluation, *supra* note 47, at 18–21; *see also* Vicky's 2008 Impact Statement, *supra* note 47, at 1.

<sup>49</sup> Vicky's May 2009 Psychological Evaluation, *supra* note 47, at 20.

<sup>50</sup> Vicky's 2008 Impact Statement, *supra* note 47, at 1.

<sup>51</sup> See Vicky's 2011 Impact Statement, *supra* note 47, at 1 ("My world came crashing down the day I learned that pictures of me being sexually abused had been circulated on the internet. Since then, little has changed except my understanding that the distribution of these pictures grows bigger and bigger by the day and there is nothing I can do about it."); *see also* Vicky's May 2009 Psychological Evaluation, *supra* note 47, at 24–29 (detailing Vicky's experiences following her discovery of the worldwide distribution of her images).

<sup>52</sup> See Vicky's Dec. 2009 Psychological Evaluation, *supra* note 47, at 2–8 (describing Vicky's deteriorating emotional state in the wake of learning about the circulation of her images online). Dr. Green categorized the "knowledge of the dissemination and proliferation of the images of [Vicky] at her times of greatest humiliation and degradation" as a Type II trauma, which represents a "chronic, toxic condition, the knowledge of which continuously works like corrosive acid on the psyche of the individual." Vicky's May 2009 Psychological Evaluation, *supra* note 47, at 6. Other examples of stressors that constitute Type II traumas include the "challenges endured by those who live near Chernobyl, Three Mile Island or the Love Canal or a war zone." *Id.* at 6–7.

<sup>53</sup> Vicky's 2011 Impact Statement, *supra* note 47, at 1.

<sup>54</sup> Vicky's Letter to Sentencing Judge, *supra* note 47, at 2.

<sup>55</sup> Vicky's 2011 Impact Statement, *supra* note 47, at 1–2.

have contacted Vicky, even sending her emails suggesting that she “mak[e] porn” with them.<sup>56</sup> One so-called “end user” of her images and videos actually stalked her through a social media page and harassed her with pointed sexual questions.<sup>57</sup> Unable to cope with the demands of college life while at the same time dealing with her immense emotional suffering, Vicky returned home for counseling.<sup>58</sup> Vicky also limits her employment to jobs that do not involve dealing with the public because of the difficulty she experiences when interacting with unknown male adults.<sup>59</sup> She left her job at an ice cream store, for example, because each encounter with a stranger, each smile from a man at the counter, struck at Vicky’s deepest fear—has he seen me in the most humiliating moments of my life?<sup>60</sup>

### B. *Translating the Harms to Economic Losses*

Unsurprisingly, the knowledge that thousands of individuals possess images and video of oneself being raped and sexually abused in humiliating fashion can inflict deep, life-lasting trauma that extends well beyond the initial sexual abuse. This emotional trauma results in economic burdens like the ones that Congress contemplated in § 2259, particularly for psychological counseling costs and lost income.<sup>61</sup> Al-

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see Press Release, U.S. Dep’t of Justice, Man Who Harassed and Stalked Victim of Child Pornography Series Sentenced to 25 Years in Prison (April 28, 2010), <http://www.justice.gov/usao/nv/news/2010/04282010.html>.

<sup>58</sup> Vicky’s 2011 Impact Statement, *supra* note 47, at 3; see also Vicky’s Dec. 2009 Psychological Evaluation, *supra* note 47, at 4–5 (“[Vicky] says that if there had been a way to afford to stay in college and seek therapy rather than return to her home town, she would have much preferred doing so. [Vicky] says, ‘Coming home is difficult because so many know and ask about [her depiction in child pornography].’ However, she says that she has learned that she can’t escape her issues by changing her geographical location, in view of the impact of the universal reach of the Internet. She explains, ‘They follow me.’”).

<sup>59</sup> Vicky’s Letter to Sentencing Judge, *supra* note 47, at 2.

<sup>60</sup> Vicky’s Dec. 2009 Psychological Evaluation, *supra* note 47, at 2, 4–5, 8. Vicky offered insight into this fear in a statement she wrote for the recent sentencing of defendant Joshua Kennedy:

I understand that [Kennedy] had a good job, and that many people who are looked up to in the community came to make statements on his behalf at his first sentencing. This tells me that he blended into society and would have previously been seen as someone who was law-abiding and not someone who enjoyed looking at pictures of children being raped. This feeds my paranoia even more, and confirms for me that I do need to be afraid of people that I see on an everyday basis, because anyone I see is suspect of being a consumer of child pornography. I could have walked past Joshua Kennedy on the street any time and he might have recognized me from those pictures he had of my sexual abuse. This chills me to the bone.

Vicky’s Letter to Sentencing Judge, *supra* note 47, at 2.

<sup>61</sup> 18 U.S.C. § 2259(b)(3)(A)–(F) (2012).

though each victim may suffer a baseline amount of harm as a result of such trauma, no two victims are exactly alike. Determining each victim's losses requires a careful analysis of how each victim's life is impacted by child pornography.

For victims like Amy and Vicky, the economic losses are substantial. Both Amy and Vicky enlisted experts who calculated their losses using standard econometric tools based on their individual circumstances.<sup>62</sup> These calculations serve as the basis for the restitution requests that Amy and Vicky made under § 2259 from possessors and distributors of their images—restitution that is vitally important to their recovery. The restitution payments have helped them secure not only psychological counseling, but also vocational and educational training to move forward with their lives.<sup>63</sup>

Consider the restitution request Vicky recently filed in a federal criminal case in Washington.<sup>64</sup> In that request, Vicky documented “economic losses” totaling \$1,327,166.<sup>65</sup> The losses comprised \$106,900 in future psychological counseling expenses, \$147,830 in educational and vocational counseling needs, \$722,511 in lost earnings, \$52,110 in expenses paid for such things as forensic evaluations and court costs, and \$297,815 in attorneys' fees.<sup>66</sup> Supporting each request was an expert report or declaration.<sup>67</sup>

For example, concerning lost income—the largest item requested—Vicky submitted a forensic economic analysis by Stan V. Smith, an expert economist who isolated the offset in Vicky's earning potential due to the trauma associated with the worldwide circulation of her images and videos.<sup>68</sup> In doing so, Dr. Smith quantified the losses attributable to Vicky's difficulties both in pursuing a college degree and in maintaining employment following her identification as a victim of child pornography. Vicky entered college, but then had to

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<sup>62</sup> See Amy's Economic Loss Report, *supra* note 37; Vicky's Economic Loss Report, *supra* note 47.

<sup>63</sup> See Bazelon, *supra* note 1, at 45–47.

<sup>64</sup> See Vicky's Restitution Request, *supra* note 47.

<sup>65</sup> *Id.* at 1.

<sup>66</sup> *Id.* at 1–2.

<sup>67</sup> See *id.* at exhibit 4 (original and updated psychological evaluation reports); *id.* at exhibit 7 (vocational evaluation report); *id.* at exhibit 9 (forensic economic analysis report); *id.* at exhibit 13 (declaration of attorneys' fees and costs).

<sup>68</sup> See Vicky's Economic Loss Report, *supra* note 47, at 2–5. To assess her specific situation, Dr. Smith relied on the victim impact statements of Vicky and her mother, the reports of vocational and psychological experts who evaluated Vicky, and his own interview of Vicky. *Id.* at 1.

withdraw to focus on therapy.<sup>69</sup> In attempting to hold various jobs, she suffered panic attacks when interacting with men who could have viewed her images.<sup>70</sup> Dr. Smith quantified the economic consequences of a delayed completion of a college degree as well as the reduced employment opportunities that come from restricting her employment to situations where she does not have to interact with unknown men.<sup>71</sup> Accounting for these variables and limitations, Dr. Smith determined Vicky’s net loss of earnings capacity attributable to her ongoing “psychological injuries” related to the worldwide circulation of her images is \$722,511.<sup>72</sup> In Vicky’s restitution requests, this number comprises the “lost income” category of losses enumerated in § 2259.<sup>73</sup>

The simple purpose of § 2259 is to restore to victims the losses they suffer as a result of the terrible crimes committed against them. In other words, its purpose is restorative, not punitive.<sup>74</sup> Yet there often seems to be a misunderstanding about the nature of the losses sought by child pornography victims like Amy and Vicky. For example, one academic commentator, Professor Cortney Lollar, recently argued that restitution in such cases is being imposed “not as disgorgement of unlawful economic gains, but as a punitive mechanism of compensation for emotional, psychological, and hedonic losses in a manner resembling civil damages.”<sup>75</sup> Professor Lollar then paradoxi-

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<sup>69</sup> *Id.* Although she returned to school after taking a year off, her psychologist has recommended that due to her “reduced tolerance for stress,” she should take a reduced course load each semester, which will further delay her career. *Id.* at 4.

<sup>70</sup> *Id.*; see *supra* notes 59–60 and accompanying text.

<sup>71</sup> Specifically, Dr. Smith determined her net loss of earnings capacity is \$722,511 to age sixty-seven for full-time employment assuming a three-year delay of entry into the workforce and twenty percent reduction in worklife as she will likely experience more frequent job changes and time off work than her peers. Vicky’s Economic Loss Report, *supra* note 47, at 5.

<sup>72</sup> *Id.* at 1.

<sup>73</sup> See 18 U.S.C. § 2259(b)(3)(D) (2012) (designating “lost income” as a type of loss victims are entitled to receive through restitution).

<sup>74</sup> Most federal courts have agreed that restitution is remedial in nature and therefore not subject to Eighth Amendment punishment or “excessive fine” limitations, but a circuit split exists on this issue. Compare, e.g., *In re Amy Unknown*, 701 F.3d 749, 771–72 (5th Cir. 2012) (en banc) (holding Eighth Amendment not applicable to § 2259 because the purpose of restitution “is remedial, not punitive”), with *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) (“[R]estitution under the [Mandatory Victim Restitution Act (“MVRA”)] is punishment” and subject to Eighth Amendment limitations “because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes.” (citation omitted)), *cert. denied sub nom. Dean v. United States*, 525 U.S. 975 (1998). We believe that restitution is nonpunitive for the reasons articulated in *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1318–23 (D. Utah 2004) (Cassell, J.).

<sup>75</sup> Lollar, *supra* note 14, at 346.

cally argues that such restitution is actually harmful to child pornography victims.<sup>76</sup>

To describe Amy's and Vicky's restitution requests as involving emotional or hedonic losses is inaccurate. Amy and Vicky are only seeking restitution for the kinds of out-of-pocket pecuniary losses that are typically recoverable from convicted criminals in restitution actions.<sup>77</sup> Indeed, Professor Lollar is ultimately forced to concede that "the restitution being requested and ordered is technically for future therapy and mental health treatment and sometimes future lost wages."<sup>78</sup> This is entirely consistent with the text of § 2259, which specifically enumerates *pecuniary* losses related to "psychological care" and "lost income" as those that are compensable.<sup>79</sup> Professor Lollar maintains, however, that "in practice, judges are ordering restitution for purposes that go beyond compensation for specific ascertainable

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<sup>76</sup> *Id.* at 382. Federal law affords child pornography victims the right to receive (and to opt out of receiving) notifications when a defendant is arrested or charged in connection with their images or videos. See Crime Victims' Rights Act of 2004, 18 U.S.C. §3771(a) (2012); Crime Control Act of 1990, 42 U.S.C. § 10607(b)–(c) (2006); see also CHILD PORNOGRAPHY VICTIMS ASSISTANCE (CPVA) PROGRAM, A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS, available at [http://www.fbi.gov/stats-services/victim\\_assistance/brochures-handouts/cpva.pdf](http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf) (describing victims' opt-out rights). According to Professor Lollar, victims would be better off not being notified about the circulation of their images and not receiving restitution for the losses associated with their injuries because:

Money is not going to make the young women depicted in child pornography emotionally whole or restore what was lost. Yet by notifying child pornography victims of all known uses of their images and then ordering compensation, legislators and courts are reinforcing the message that a young woman's worth is in her body and is linked to the sexual acts in which she participates . . . . Notification and restitution reaffirm the damaging messages the young women learned during their abuse.

*Id.* Vicky herself, though, has pointedly responded to such criticism in her victim impact statement, explaining:

I have a right to know who has my pictures and who is trading them. While it hurts to know, not knowing makes me feel more in danger. To be criticized for wanting to know what is going on with the humiliating pictures of me, to exercise the few rights I have under the law, only makes the hurt that much worse. How can such people not understand, or care?

Vicky's 2011 Impact Statement, *supra* note 47, at 1.

<sup>77</sup> In fact, Dr. Smith calculated hedonic damages (reduction in the value of life) for Vicky to be an additional \$2,615,542, on top of the economic losses he calculated in light of her lost earnings. See Vicky's Economic Loss Report, *supra* note 47, at 7. Vicky, however, has never requested restitution in a criminal case on the basis of such losses.

<sup>78</sup> Lollar, *supra* note 14, at 348 n.10. Notably, although they deny responsibility, even the defendants in these cases have not challenged the calculation of the losses. See, e.g., *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012) (noting defendant did not challenge the district judge's calculation of Amy's and Vicky's losses, which were \$3,367,854 and \$1,224,697.04, respectively).

<sup>79</sup> See 18 U.S.C. § 2259(b)(3)(A)–(F) (2012) (specifying economic-based losses available to victims of child pornography).

losses.”<sup>80</sup> This assertion, however, is unsupported by any specific evidence.<sup>81</sup> It is simply untrue given the restitution statute’s clear requirement that victims can only receive restitution for specifically enumerated losses.<sup>82</sup> Even the cases that were the most generous to victims clearly stated that the statute only authorizes restitution for the statutorily enumerated losses.<sup>83</sup>

Implicit in Professor Lollar’s argument, however, is that it is somehow unfair to require any one defendant to shoulder the burden of paying for all of the losses that the pool of child pornography defendants collectively imposes on its victims. Responding to such a claim requires careful consideration of how Congress intended principles of causation and allocation of losses to function under § 2259, the issues discussed in Parts II and III, respectively.

## II. SECTION 2259 MANDATES CHILD PORNOGRAPHY DEFENDANTS EACH BE HELD LIABLE FOR THE FULL AMOUNT OF THEIR VICTIMS’ LOSSES

Child pornography victims seeking restitution proceed under § 2259, which promises them that courts “shall” order defendants to pay the “full amount” of a victim’s losses.<sup>84</sup> This Part explains that the

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<sup>80</sup> Lollar, *supra* note 14, at 348 n.10.

<sup>81</sup> Lollar claims that courts order excessive restitution in part because they rely on what she considers to be a false assumption that the “chief harm” is the circulation of images, rather than the initial abuse itself. *Id.* at 368. Lollar asserts, somewhat tautologically, that harms to the victim associated with the viewing and distribution of child pornography is “derivative of the harm associated with the child sex abuse that led to the creation of that pornography. Without the initial abuse, the circulation of pornographic images would not be so damaging to the person depicted in those images.” *Id.* at 369 (footnote omitted). This is true, but unhelpful. Of course victims would not suffer at all from the circulation of their images except for the creation of the images. This, however, glosses over an inconvenient truth about Amy and Vicky—their images were created specifically to satisfy the marketplace: collectors and viewers of child pornography. There are certainly distinct harms caused by the initial abuse. But the initial abuse had *as its purpose* the creation and dissemination of the abuse to other viewers. See generally Abigail Bray, S. Caroline Taylor & Ann-Claire Larsen, *The New Victim Blaming Genre: A Critique of Lollar’s ‘Child Pornography and the Restitution Revolution’ Paper*, (July 9, 2013) (unpublished manuscript) (on file with The George Washington Law Review) (arguing “in favor of restitution for victims whose electronic images of their sexual abuse as children contribute to a global multibillion dollar criminal industry”).

<sup>82</sup> It is true that 18 U.S.C. § 2259(b)(3)(F) provides an open-ended authorization for “any other losses suffered by the victim as a proximate result of the offense.” But neither Amy nor Vicky, for example, sought restitution under this provision, confining their requests to such things as psychological counseling costs and lost income. See *supra* Part I.B.

<sup>83</sup> See, e.g., *In re Amy Unknown*, 701 F.3d 749, 773 (5th Cir. 2012) (en banc) (“Because Amy is a victim, § 2259 required the district court to award her restitution for the ‘full amount of [her] losses’ as defined under § 2259(b)(3).”).

<sup>84</sup> 18 U.S.C. § 2259(b)(1) (2012).

statute's plain language sets out a single-step causation standard to determine whether an individual is a "victim" under the statute. If the individual qualifies as a victim, they then are entitled to "the full amount" of the types of losses enumerated in the statute. This approach differs from the way the majority of appellate courts have interpreted § 2259—an interpretation that requires a victim seeking restitution to demonstrate both that she is a "victim" under the statute and that the defendant was the proximate cause of all the particular losses she is seeking.<sup>85</sup>

At the outset, it is important to emphasize that no serious debate exists that a convicted defendant who collected or distributed child pornography has one or more "victims" of his crimes. As the Ninth Circuit explained:

Amy and Vicky presented ample evidence that the viewing of their images caused them emotional and psychic pain, violated their privacy interests, and injured their reputation and well-being. Amy, for example, stated that her "privacy ha[d] been invaded" and that she felt like she was "being exploited and used every day and every night." Vicky described having night terrors and panic attacks due to the knowledge that her images were being viewed online. Even without evidence that Amy and Vicky knew about [the defendant's] conduct, the district court could reasonably conclude that Amy and Vicky were "harmed as a result of" [the defendant's] participation in the audience of individuals who viewed the images.<sup>86</sup>

Every circuit to address this issue has agreed with the Ninth Circuit that, for purposes of § 2259, the children depicted in child pornography are the "victims" of those who possess or distribute their child sex abuse images.<sup>87</sup> Thus, the threshold causation requirement for an individual to obtain restitution under § 2259 is met where such a child can be identified in the materials possessed by a defendant, as in the cases of Amy and Vicky. This Part explains why this single-step causation standard is all that is necessary for victims seeking certain enu-

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<sup>85</sup> See *infra* Part II.A.

<sup>86</sup> *United States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011) (citation omitted).

<sup>87</sup> See, e.g., *United States v. Kearney*, 672 F.3d 81, 94 (1st Cir. 2012) ("Any argument that Vicky has not suffered harm as a result of Kearney's crimes defies both fact and law."); *United States v. McDaniel*, 631 F.3d 1204, 1208 (11th Cir. 2011) ("McDaniel 'harmed' Vicky under the meaning of section 2259(c) by possessing images of her sexual abuse as a minor."). See generally Beth Bates Holliday, Annotation, *Construction and Application of Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C.A. § 2259*, 70 A.L.R. FED. 2D 409 (2012) (collecting and discussing cases applying § 2259 to child pornography victims).

merated losses under § 2259. An important disagreement has emerged, however, that prevents victims from obtaining the full amount of their losses.

*A. Disagreement Among Courts Regarding the Causation Standard Under § 2259*

An important disagreement has emerged about whether victims like Amy and Vicky must show that all their statutorily enumerated losses are the proximate result of an individual defendant's crime. The Fifth Circuit held en banc that a victim need not demonstrate that her losses were the proximate result of an individual defendant's possession of her images.<sup>88</sup> Nearly all of the other circuits disagree, holding that § 2259 contains a generalized "proximate result" requirement that significantly restricts awards to victims.<sup>89</sup> In these circuits, to recover any significant part of her losses, a victim such as Amy or Vicky must demonstrate how the defendant's possession of her image proximately caused each dollar of loss sought in restitution.<sup>90</sup> This presents significant obstacles for victims seeking restitution.

As the Supreme Court recently explained, proximate cause stands for the concept that "[i]njuries have countless causes, and not all should give rise to legal liability."<sup>91</sup> When proximate cause is required, the scope of liability is "arbitrarily" defined based on considerations of "convenience, of public policy, [or] of a rough sense of justice."<sup>92</sup> If proximate cause is required under § 2259, victims like Amy must demonstrate that there is a sufficient causal relationship to her losses so a defendant who possessed her images can be held liable.<sup>93</sup>

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<sup>88</sup> *In re Amy Unknown*, 701 F.3d at 774.

<sup>89</sup> See *United States v. Benoit*, 713 F.3d 1, 20–21 (10th Cir. 2013); *United States v. Fast*, 709 F.3d 712, 721–22 (8th Cir. 2013); *United States v. Laraneta*, 700 F.3d 983, 989–90 (7th Cir. 2012); *United States v. Burgess*, 684 F.3d 445, 456–57 (4th Cir. 2012); *Kearney*, 672 F.3d at 95–96; *United States v. Evers*, 669 F.3d 645, 658–59 (6th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *Kennedy*, 643 F.3d at 1260–64; *United States v. Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); *McDaniel*, 631 F.3d at 1208–09. The Third Circuit has suggested the same conclusion, albeit in dicta. See *United States v. Crandon*, 173 F.3d 122, 125–26 (3d Cir. 1999).

<sup>90</sup> While § 2259 uses the term "proximate result," this Article uses that term interchangeably with its more familiar analog, "proximate cause." The two phrases are interchangeable: if a loss is the "proximate result" of an action, then that action "proximately caused" the loss.

<sup>91</sup> *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011).

<sup>92</sup> *Id.* (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

<sup>93</sup> *Fast*, 709 F.3d at 725.

Showing precisely what loss each individual defendant, out of a pool of thousands, proximately caused a child pornography victim is a daunting, if not impossible, task. For example, the National Center for Missing and Exploited Children (“NCMEC”) reports that it has examined at least 35,000 “extremely graphic” images of Amy’s abuse among the evidence in over 3,200 child pornography cases since 1998.<sup>94</sup> Of course, these numbers represent only those criminals that law enforcement agencies have caught, and do not include others who possess Amy’s images but have thus far evaded detection. Against the backdrop of this widespread dissemination of images among countless criminals (both inside and outside the United States), it may not be possible for a child pornography victim to tie her losses specifically to the crime of any one defendant.<sup>95</sup> A victim may require, for example, weekly psychological counseling sessions to deal with the sad reality that on a daily basis innumerable criminals are collecting, viewing, and distributing images of her being raped and sexually abused as a child. Whether the expenses for such counseling sessions are the “proximate result” of any one defendant’s possession crime is difficult to say. In practice, then, interpreting § 2259 as containing a general proximate cause requirement will, as more than one court has candidly acknowledged, “present serious obstacles for victims seeking restitution in these sorts of cases.”<sup>96</sup> The crucial legal question, then, is whether victims must surmount a generalized proximate cause requirement before they are entitled to receive restitution for the “full amount” of their losses.<sup>97</sup>

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<sup>94</sup> *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (en banc).

<sup>95</sup> See *United States v. Plachy*, No. 4:12CR3049, 2013 WL 1914613, at \*12 (D. Neb. May 8, 2013) (denying restitution request and concluding “[t]here is no evidence from which the court can discern the relative value of the incremental injury inflicted by [the defendant’s accessing of the images] as compared to the fault of the countless others who collectively inflicted these harms on the victims”).

<sup>96</sup> *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011); see also *United States v. Paroline*, 672 F.Supp.2d 781, 793 (E.D. Tex. 2009) (“Although [establishing proximate cause] may seem like an impossible burden for the [victim], the Court is nevertheless bound by the requirements of the statute.”). After surveying cases, one court explained that courts that read a proximate cause requirement into § 2259 generally require a threshold showing that the defendant committed acts “above and beyond the possession and limited dissemination of the [pornographic] material.” *Plachy*, 2013 WL 1914613, at \*12. In practice, courts have found proximate cause where a defendant creates web pages featuring the victims, posts on blogs about the victims, or attempts to contact the victims. *Id.* That kind of conduct, they find, involves a “less tenuous causal connection between the victims’ substantial injuries and the actions of an individual defendant.” *Id.*

<sup>97</sup> 18 U.S.C. § 2259(b)(3) (2012).

*B. The Text of § 2259 Contains No Generalized Proximate Cause Requirement*

Since restitution for child pornography victims is governed by statute, the text of § 2259 is the obvious starting point for resolving this question. Section 2259 provides that the district courts “shall direct the defendant to pay the victim . . . the *full amount* of the victim’s losses.”<sup>98</sup> The statute then goes on to list six categories of losses, only one of which makes any mention of “proximate result[s]”:

- (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.<sup>99</sup>

The plain text alone strongly suggests that there is no generalized proximate cause requirement in § 2259. Through the language of § 2259, Congress required that victims of child pornography need only prove that their losses were a “proximate result” of the offense when seeking to recover any of the broad, uncategorized “other losses” contemplated in § 2259(b)(3)(F)—losses which neither Amy nor Vicky have sought in their restitution requests. For more precisely defined categories of losses—notably psychological care and lost income—victims need not make a proximate result showing because no such requirement appears in these other subsections.<sup>100</sup> This distinction reflects Congress’s sound policy judgment to allow victims to recover

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<sup>98</sup> *Id.* § 2259(b)(1) (emphasis added).

<sup>99</sup> *Id.* § 2259(b)(3) (emphasis added).

<sup>100</sup> The Fifth Circuit Court of Appeals, sitting en banc, recently reached precisely this conclusion, explaining that § 2259:

[O]nly imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the [victim] to show proximate cause to trigger a defendant’s restitution obligations for the categories of losses in § 2259(b)(3)(A)–(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses.

*In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (en banc). In other words, because the proximate result limitation is found in § 2259(b)(3)(F), it applies only in § 2259(b)(3)(F)—not elsewhere.

certain identifiable and predictable losses with a threshold showing of basic causation (i.e., “victim” status), and to likewise prevent victims from recovering “any other” potentially more attenuated losses unless they can satisfy a proximate cause requirement. Several considerations support this plain text reading: relevant canons of construction, similar restitution statutes, and the underlying congressional purpose of making the victim whole.

### 1. *Relevant Canons of Statutory Construction*

Principles of statutory interpretation strongly support the plain language interpretation of § 2259. A well-established canon of statutory construction known as the “rule of the last antecedent” dictates that the proximate result language applies only to the subsection in which it appears in the statute—that is, § 2259(b)(3)(F)—and not the preceding five subsections outlining specific forms of losses that victims might recover. This canon directs that “[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.”<sup>101</sup> This rule is “the legal expression of a commonsense principle of grammar,”<sup>102</sup> having been relied on recently by the Supreme Court<sup>103</sup> as well as every circuit court in the country.<sup>104</sup>

Applying the rule of the last antecedent to the child pornography restitution statute, the qualifying language requiring that losses must be suffered “as a proximate result” of the defendant’s conduct applies only to the immediately preceding antecedent—that is, the “any other losses” catchall included in § 2259(b)(3)(F)—and not to more distant

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<sup>101</sup> 2A SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47:33 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) [hereinafter SUTHERLAND ON STATUTES]; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 144 (2012) (“A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.”).

<sup>102</sup> SCALIA & GARNER, *supra* note 101, at 144.

<sup>103</sup> See *Barnhart v. Thomas*, 540 U.S. 20, 27–28 (2003).

<sup>104</sup> See, e.g., *In re Amy Unknown*, 701 F.3d at 762 (5th Cir. 2012); *United States v. Rodriguez-Rodriguez*, 663 F.3d 53, 57 (1st Cir. 2011); *Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 508 (4th Cir. 2011); *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 335–36 (2d Cir. 2011); *In re Airadigm Commc’ns, Inc.*, 616 F.3d 642, 655–56 (7th Cir. 2010); *Hays v. Sebelius*, 589 F.3d 1279, 1281 (D.C. Cir. 2009); *Cincinnati Ins. Co. v. Bluewood, Inc.*, 560 F.3d 798, 803 (8th Cir. 2009); *In re Sanders*, 551 F.3d 397, 399–400 (6th Cir. 2008); *United States v. Bishop*, 469 F.3d 896, 903 (10th Cir. 2006), *abrogated on other grounds by* *Gall v. United States*, 552 U.S. 38, 47 (2007); *J.C. Penney Life Ins. Co. v. Piloni*, 393 F.3d 356, 365–66 (3d Cir. 2004); *In re Paschen*, 296 F.3d 1203, 1208–09 (11th Cir. 2002); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 832 (9th Cir. 1996) (noting that the Ninth Circuit has “long followed this interpretive principle”).

antecedents found in other subsections of the statute, such as the costs of psychological care, lost income, etc. This application is straightforward and adheres to the statutory dictate that victims receive “the full amount” of their losses.<sup>105</sup>

The Supreme Court’s decision in *Barnhart v. Thomas*<sup>106</sup> provides a good illustration of how the rule of the last antecedent should apply to § 2259.<sup>107</sup> *Barnhart* reversed a Third Circuit decision that erroneously interpreted a disability insurance benefits provision of the Social Security Act.<sup>108</sup> The statute contained qualifying language that could be read as applying either broadly or narrowly:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in *any other* kind of substantial gainful work which exists in the national economy . . . .<sup>109</sup>

Considering this provision, the Third Circuit reasoned that “[w]hen a sentence sets out one or more specific items followed by ‘any other’ and a description, the specific items must fall within the description.”<sup>110</sup> Proceeding on that assumption, it applied the qualifying language following the words “any other” to all of the other, earlier parts of the sentence.<sup>111</sup> Thus, it concluded that an individual’s “previous work” must be regarded as a type of “substantial gainful work which exists in the national economy” in determining whether the claimant’s ability to perform such work would disqualify him from disability status.<sup>112</sup>

The Supreme Court unanimously reversed, citing the rule of the last antecedent. The Court recognized that, although the rule of the last antecedent “is not an absolute,” the relative clause “which exists in the national economy” modified only the noun-phrase that it immediately follows, “any other kind of substantial gainful work,” but not the preceding noun-phrase, “previous work.”<sup>113</sup> *Barnhart* is particu-

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<sup>105</sup> See 18 U.S.C. § 2259(b)(3) (2012).

<sup>106</sup> *Barnhart v. Thomas*, 540 U.S. 20 (2003).

<sup>107</sup> *Barnhart* has been described as the “seminal authority” on the last antecedent rule. See SCALIA & GARNER, *supra* note 101, at 145 (footnote omitted).

<sup>108</sup> 42 U.S.C. § 423(d)(2)(A) (2006); *Barnhart*, 540 U.S. at 29–30.

<sup>109</sup> 42 U.S.C. § 423(d)(2)(A) (emphasis added).

<sup>110</sup> *Thomas v. Comm’r of Soc. Sec.*, 294 F.3d 568, 572 (3d Cir. 2002), *rev’d sub nom.* *Barnhart v. Thomas*, 540 U.S. 20 (2003).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citation omitted).

<sup>113</sup> *Barnhart*, 540 U.S. at 26.

larly instructive because exactly the same two qualifying words—i.e., “any other”—also appear in § 2259.<sup>114</sup> Just as the Third Circuit was wrong to read qualifying language following those words as applying broadly throughout the statute at issue there, it is wrong to read the qualifying language in § 2259(b)(3)(F) as applying broadly throughout § 2259 generally. Doing so “stretches the modifier too far.”<sup>115</sup>

In response to the rule of the last antecedent, the Eleventh Circuit has concluded that a different interpretive approach to § 2259 is appropriate.<sup>116</sup> The court held that the phrase “proximate result” should be applied throughout § 2259 based on the approach taken by the 1920 Supreme Court decision in *Porto Rico Railway, Light and Power Company v. Mor*.<sup>117</sup> In *Porto Rico Railway*, the Court explained, “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.”<sup>118</sup>

This *Porto Rico Railway* approach has recently been described as the “‘series-qualifier’ canon.”<sup>119</sup> Although the question of whether it rises to the level of a “canon” is debatable,<sup>120</sup> Justice Antonin Scalia and Brian Garner do recognize a similar canon in their recent book on statutory construction.<sup>121</sup> But they typically limit this canon to situations where “there is a straightforward, parallel construction that involves all nouns or verbs in a series” as in “unreasonable search and seizures”—the adjective “unreasonable” being straightforwardly applicable to two nouns that follow.<sup>122</sup> The grammatical structure of § 2259 is vastly different. Furthermore, Scalia and Garner note that this series-qualifier canon is “perhaps more than most[ ] [canons] . . . subject to defeasance by other canons.”<sup>123</sup> These limitations are im-

<sup>114</sup> See 18 U.S.C. § 2259(b)(3)(F) (2012).

<sup>115</sup> *In re Amy Unknown*, 701 F.3d 749, 764 (5th Cir. 2012) (en banc) (quoting *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 342 (2005)).

<sup>116</sup> See *United States v. McDaniel*, 631 F.3d 1204, 1208–09 (11th Cir. 2011); see also *United States v. Gamble*, 709 F.3d 541, 547 (6th Cir. 2013) (approving application of *Porto Rico Railway*’s series-qualifier rule to § 2259); *In re Amy Unknown*, 701 F.3d at 776 (Davis, J., concurring in part and dissenting in part).

<sup>117</sup> *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345 (1920).

<sup>118</sup> *Id.* at 348.

<sup>119</sup> *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012) (Posner, J.).

<sup>120</sup> For example, SUTHERLAND ON STATUTES, *supra* note 101, the most widely used treatise on statutory construction, does not even cite *Porto Rico Railway*, much less elevate the decision to a broadly applicable canon of construction.

<sup>121</sup> SCALIA & GARNER, *supra* note 101, at 147.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 150.

portant because without them, the series-qualifier canon would simply cancel the rule of the last antecedent, providing no guidance either way. Indeed, one court simply threw up its hands in defeat when interpreting § 2259, concluding that “either canon could apply to it; we don’t know how to choose between them.”<sup>124</sup> Such constrained analysis is hardly convincing. Careful consideration of the context and structure of § 2259 reveals that any series-qualifier canon must give way to the rule of the last antecedent when interpreting § 2259.

The Fifth Circuit persuasively explained why the series-qualifier approach found in *Porto Rico Railway* is not applicable to § 2259.<sup>125</sup> The court observed that:

The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction ‘or,’ with the modifier . . . following the conjoined phrases . . . . Section 2259, in contrast, begins with an introductory phrase composed of a noun and verb (“‘full amount of the victim’s losses’ includes any costs incurred by the victim for—”) that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language “proximate result.” A double-dash opens the list, and semi-colons separate each of its elements, leaving [it] with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separations.<sup>126</sup>

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<sup>124</sup> *Laraneta*, 700 F.3d at 989; cf. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* app. C at 521–28 (1960) (collecting competing canons of construction and explaining “there are two opposing canons on almost every point”). Perhaps this is a classic illustration of the Posnerian Pragmatism Canon in which “[the] pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.” RICHARD A. POSNER, *HOW JUDGES THINK* 13 (2008). Application of this canon to § 2259 merely results, however, in “judge-made limitations patently at odds with the purpose of the legislation.” *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting), *rev’d on other grounds*, 697 F.3d 306 (5th Cir. 2012).

<sup>125</sup> See *In re Amy Unknown*, 701 F.3d 749, 762–63 (5th Cir. 2012).

<sup>126</sup> *Id.* at 763. Specifically, the statutory provision at issue in *Porto Rico Railway* stated: “Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico.” *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S 345, 346 (1920). The issue was whether the phrase “not domiciled in Porto Rico” applied to aliens (“citizens or subjects of a foreign state or states”) as well as to American citizens (“citizens of a state, territory, or district of the United States”). *Id.* at 348–49. The Supreme Court determined that the “not domiciled in Porto Rico” qualifier applied equally to both under the statute. *Id.* at 349.

Echoing these observations, Scalia and Garner explain that “[p]unctuation is often integral to the sense of written language.”<sup>127</sup> Of particular relevance here, they note that “semicolons insulate words from grammatical implications that would otherwise be created by the words that precede or follow them.”<sup>128</sup> For the “proximate result” limitation to apply, for example, to the costs of psychological care, one must read that limitation backwards, past four separate semicolons.

Finally, the approach in *Porto Rico Railway* applies, by its own terms, only where “several words are followed by a clause which is applicable *as much* to the first and other words as to the last” based on relevant contextual considerations.<sup>129</sup> There is good reason why the words “proximate result” found in § 2259(b)(3)(F) do not apply “as much” to the five earlier subsections of § 2259(b)(3). As the Fifth Circuit carefully explained, it “makes sense” that Congress would impose the proximate cause limitation in § 2259 only to the catchall provision, not to the other provisions involving more precisely defined and readily determinable kinds of losses (e.g., medical expenses, lost income, attorneys’ fees, etc.) because “[b]y construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.”<sup>130</sup>

In light of the statute’s grammatical construction and Congress’s policy-based reason for imposing proximate cause on the catchall category of losses but not on the other defined categories, the language of § 2259 contains no “ambiguity, much less one offering *two equal interpretations* (a prerequisite for the application of the principle of statutory construction in question).”<sup>131</sup>

## 2. Differences in Language of Parallel Restitution Provisions

In addition to the rule of the last antecedent, comparing § 2259 with parallel restitution provisions supports the plain language reading that § 2259 contains no generalized proximate cause limitation. The Supreme Court has been unwilling to interject requirements not found in the text of a statute because the Court “do[es] not lightly

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<sup>127</sup> SCALIA & GARNER, *supra* note 101, at 162.

<sup>128</sup> *Id.*

<sup>129</sup> *Porto Rico Ry.*, 253 U.S. at 348 (emphasis added).

<sup>130</sup> *In re Amy Unknown*, 636 F.3d 190, 198 (5th Cir. 2011), *aff’d*, 701 F.3d 749 (5th Cir. 2012) (en banc).

<sup>131</sup> *United States v. Hagerman*, 827 F. Supp. 2d 102, 112–13 (N.D.N.Y. 2011).

assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.”<sup>132</sup> The Court’s “reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”<sup>133</sup>

Application of this principle to § 2259 suggests that, with regard to victim restitution statutes, Congress “knows how to make [a proximate cause] requirement manifest.”<sup>134</sup> Indeed, Congress demonstrated its aptitude for crafting clear, generalized proximate cause limitations on recoverable losses in a restitution statute for telemarketing fraud victims that it enacted on *the very same day* as § 2259.<sup>135</sup> Like § 2259, the telemarketing fraud statute mandates restitution for “the full amount of the victim’s losses.”<sup>136</sup> But, instead of enumerating determinable losses like lost income as § 2259 does, the telemarketing restitution statute provides: “For purposes of this subsection, the term ‘full amount of the victim’s losses’ means *all losses suffered by the victim as a proximate result of the offense.*”<sup>137</sup> This demonstrates that if Congress’s intent was to impose a proximate cause limitation in § 2259 on every kind of loss suffered by victims of child pornography, there would be no need to enumerate six different categories of losses in § 2259(b)(3)(A)–(F). Instead, Congress could have adopted the same formulation for victims of child pornography that it did for victims of telemarketing fraud and limited the definition of losses to only those “suffered . . . as a proximate result of the offense.”<sup>138</sup>

Congress’s purpose in drafting six separate subsections of recoverable losses under § 2259 was to distinguish the well-defined losses that do not require proximate cause (i.e., those losses identified in § 2259(b)(3)(A)–(E)), from the uncategorized and unpredictable losses which do require proximate cause (i.e., § 2259(b)(3)(F)). If certain unanticipated losses claimed by a victim under the catchall category are too attenuated from the defendant’s conduct, the proximate cause limitation allows a court to limit liability as whatever a “rough

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<sup>132</sup> *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Senior Citizens Against Marketing Scams Act of 1994, Pub. L. No. 103-322, § 250002(a)(2), 108 Stat. 2081, 2082 (signed into law by the President on September 13, 1994). Compare 18 U.S.C. § 2259(b)(3) (2012) (defining “full amount of the victim’s losses” for victims of sexual exploitation), with 18 U.S.C. § 2327(b)(3) (defining “full amount of the victim’s losses” for victims of telemarketing fraud).

<sup>136</sup> 18 U.S.C. § 2327(b)(3).

<sup>137</sup> *Id.* (emphasis added).

<sup>138</sup> *Id.*

sense of justice” might require.<sup>139</sup> Considering the starkly different contexts in which these two statutes operate, it makes sense *why* Congress would deem it appropriate to burden telemarketing fraud victims, but not child pornography victims, with the onerous task of proving that any losses they sought to recover were the proximate result of a defendant’s conduct; the former relates to an economic crime directed at adults, while the latter relates to a crime of violence directed at children.

Also crucial is § 2259’s materially different—and broader—definition of “victim” from that found in other federal restitution statutes, which contain “directly and proximately” qualifiers for the harm necessary to impact “victim” status.<sup>140</sup> The telemarketing fraud restitution statute, for example, defines a “victim” as an individual “*directly and proximately* harmed as a result of the [crime].”<sup>141</sup> Section 2259 defines victim more broadly as “the individual harmed as a result of a commission of a crime under this chapter,”<sup>142</sup> pointedly omitting the qualifiers “directly and proximately.” Looking at the corpus juris of restitution statutes reveals that § 2259 is purposefully distinct—it provides more extensive protections for victims of child sexual exploitation, a particularly vulnerable group.

### 3. *The Purposes Underlying § 2259*

Finally, reading the “proximate result” limitation found in § 2259(b)(3)(F) as applying only to that subsection is consistent with the clear purpose of the statute. Section 2259 is a “mandatory” restitution statute that commands district courts to award crime victims the “full amount” of their losses.<sup>143</sup> It thus fits into a pattern of statutes addressing “a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms.”<sup>144</sup>

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<sup>139</sup> See *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

<sup>140</sup> See *United States v. Kearney*, 672 F.3d 81, 95 (1st Cir. 2012) (comparing definition of “victim” in § 2259 with other restitution statutes); see also, e.g., 18 U.S.C. § 3663(a)(2); *id.* § 3663A(a)(2) (defining “victim” for purposes of restitution in connection with certain crimes of violence).

<sup>141</sup> 18 U.S.C. §§ 2327(c), 3663(a)(2) (emphasis added).

<sup>142</sup> *Id.* § 2259(c).

<sup>143</sup> *Id.* § 2259(b)(4), (b)(1).

<sup>144</sup> *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) (citing Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121, 110 Stat. 3009–3026 (describing Congress’s finding that “where children are used in its production, child pornography permanently records the victim’s abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years”)).

In adopting § 2259, Congress wanted child pornography victims to have an “expansive” remedy for recovering all of their losses, rather than a “cumbersome procedure” that would make recovery difficult.<sup>145</sup> Allowing victims to recover the full amount of their losses from each defendant fulfills Congress’s unambiguous purpose to provide mandatory and full restitution to victims of child pornography crimes.<sup>146</sup> On the other hand, reading § 2259 to contain a generalized proximate cause requirement creates “serious obstacles for victims seeking restitution in these sorts of cases.”<sup>147</sup> It forces victims to parse out harms that, although they are very real, are difficult to disaggregate from one another. Requiring victims to demonstrate proximate cause in order to receive restitution under § 2259 either dooms victims to collecting miniscule awards that the sentencing judge feels are “reasonable” under the circumstances,<sup>148</sup> or to being denied any restitution at all.<sup>149</sup> An interpretation that fulfills the statutory purposes rather than thwarts them is preferred. For all of these reasons, the plain language of § 2259 makes it clear that victims need not generally prove that their losses were the proximate result of an individual defendant’s crime.

### III. TORT PRINCIPLES INDEPENDENTLY SUPPORT HOLDING INDIVIDUAL DEFENDANTS LIABLE FOR THE FULL AMOUNT OF A VICTIM’S LOSSES UNDER § 2259

Perhaps because the plain language interpretation of § 2259 weighs so strongly against a general proximate result limitation, several courts of appeals have declined to limit liability on the basis of the statute’s text. Instead, these courts have cited traditional tort principles to limit defendants’ liability in these cases. This Part will explain why, contrary to the conclusion of these appellate decisions, no con-

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<sup>145</sup> *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *see also* *United States v. Gamble*, 709 F.3d 541, 552 (6th Cir. 2013) (“18 U.S.C. § 2259 is meant to ensure full restitution to the victim, understanding restitution in an expansive way.”).

<sup>146</sup> *See* 18 U.S.C. § 2259 (requiring “mandatory” restitution for “the full amount of the victim’s losses”).

<sup>147</sup> *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011).

<sup>148</sup> For example, in one case, a district judge awarded Vicky \$3,333 in restitution for losses proximately caused by a defendant’s receipt of her child sex abuse images. The judge believed, however, that it would “gild the lily” to award Vicky any more than \$3,333 in restitution, even though at the time she had over one million dollars in unrecovered losses. *United States v. Fast*, 876 F. Supp. 2d 1087, 1088 n.3, 1090 (D. Neb. 2012).

<sup>149</sup> *See, e.g., United States v. Covert*, No. 09-332, 2011 WL 134060, at \*9 (W.D. Pa. Jan. 14, 2011) (denying Amy any restitution from defendant who possessed her images because the proximate cause requirement was not met where Amy had not “suffered any additional loss [from the defendant] above and beyond what [she] had already experienced” (citation omitted)).

flict exists between traditional common law tort principles and awarding full restitution for child pornography victims. Indeed, traditional tort law principles strongly support the conclusion that § 2259 should be read to impose liability on each child pornography defendant and that each defendant should be liable for the full amount of their victim's losses. General principles of tort law support the notion that child pornography victims suffer indivisible losses that intentional tortfeasors (i.e., criminals) must jointly and severally pay in their entirety.

A. *Cases Citing Tort Principles to Restrict Restitution Awards*

Citing tort principles, several courts of appeals have restricted awards to victims under § 2259 through limitations on causation and allocation of losses. Some courts—including the D.C. Circuit, joined later by the Second and Fourth Circuits—have concluded that it is appropriate to inject a proximate cause limitation into § 2259, assuming that “traditional” tort principles would require such a limitation by default.<sup>150</sup> These courts argue that, under conventional tort law, a plaintiff seeking recovery for losses is required to allocate her losses among the various responsible tortfeasors.<sup>151</sup> Proceeding on that assumption, they construe § 2259 in the same fashion, requiring victims to pinpoint exactly what portion of their losses is attributable to each defendant's crime.<sup>152</sup>

This approach is primarily susceptible to the rejoinder that in creating § 2259, Congress decided to deviate from the common law principles of proximate cause. Courts must enforce Congress's chosen words, even when doing so creates a new approach. In enacting a statute to provide restitution for child pornography victims, Congress

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<sup>150</sup> See *United States v. Burgess*, 684 F.3d 445, 456–57 (4th Cir. 2012) (relying on *Monzel* and the “well-recognized principle that a defendant is liable only for harm that he proximately caused”); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011) (relying on *Monzel* and explaining “Congress did not abrogate” such principles when it drafted § 2559); *United States v. Monzel*, 641 F.3d 528, 535 & n.5 (D.C. Cir. 2011) (“Although § 2559 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party. Thus, tort doctrine informs our thinking here.” (citations omitted)).

<sup>151</sup> See, e.g., *Monzel*, 641 F.3d at 535 (citing “bedrock rule” that “defendant is only liable for harms he proximately caused”).

<sup>152</sup> See *Burgess*, 684 F.3d at 460 (remanding for the district court to determine “the quantum of loss attributable to Burgess for his participation in Vicky's exploitation”); *Aumais*, 656 F.3d at 154 (reversing the district court's \$48,482 restitution order to Amy and noting that Amy's expert psychological evaluation only “describe[d] generally what Amy suffers from knowing that people possess her images,” but did not “speak to the impact on Amy caused by *this defendant*”); *Monzel*, 641 F.3d at 540 (remanding for the district court to “determin[e] the dollar amount of [the] victim's losses attributable to the defendant”).

confronted a vast new problem by putting in place a statutory regime designed “to make whole . . . victims of sexual exploitation.”<sup>153</sup> This well-supported public policy goal should have overriding importance in construing the statute, rather than applying outdated common law principles concerning proximate cause.<sup>154</sup>

Several courts of appeals have similarly declined to award victims the full amount of their losses under § 2259 by citing traditional principles of tort law governing the allocation of damages among multiple tortfeasors. These courts mistakenly held that joint and several liability is not an appropriate mechanism to distribute the losses among defendants in these cases.<sup>155</sup> Three cases are particularly instructive.

Among the thousands of people who possess images of Amy and Vicky being sexually abused are three convicted criminals—Albert Burgess, Christopher Laraneta, and Michael Monzel. Each of these cases were considered by the courts of appeals and resulted in three decisions which relied primarily on tort law principles to award less-than-full restitution. All three defendants were convicted of various child pornography offenses,<sup>156</sup> including the possession of child sex abuse images of either Amy or Vicky, or both.<sup>157</sup>

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<sup>153</sup> *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (explaining that “Congress chose unambiguously to use unqualified language in prescribing full restitution for victims”).

<sup>154</sup> If so, § 2259 would hardly be the only example of Congress eschewing hard-to-define common law proximate cause principles. For example, the Supreme Court recently held that the Federal Employers’ Liability Act, 45 U.S.C. §§ 51–60 (2006), does not incorporate “proximate cause” standards developed in nonstatutory common law tort actions. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2638 (2011). The Court explained that historically “[c]ommon-law ‘proximate cause’ formulations varied, and were often both constricted and difficult to comprehend.” *Id.* at 2637. Accordingly, it applied a causation standard that is “relaxed” compared to common law tort litigation. *Id.* at 2636–37.

<sup>155</sup> *See, e.g., United States v. Gamble*, 709 F.3d 541, 551–52 (6th Cir. 2013) (declining to apply joint and several liability based on tort principles); *Burgess*, 684 F.3d at 448 (declining to apply joint and several liability based on tort principles); *United States v. Laraneta*, 700 F.3d 983, 991–93 (7th Cir. 2012) (declining to apply joint and several liability in cases of possession, but endorsing such an approach for cases of distribution); *Monzel*, 641 F.3d at 537–40 (declining to apply joint and several liability).

<sup>156</sup> *See Burgess*, 684 F.3d at 448 (jury convicted defendant of two felonies involving possession and receipt of child pornography where Burgess possessed a total of 791 video recordings and 4735 still images of child pornography); *Laraneta*, 700 F.3d at 984 (defendant plead guilty to seven counts of child pornography laws, including possession and distribution); *Monzel*, 641 F.3d at 530 (defendant plead guilty to one count of possession and one count of distribution of child pornography).

<sup>157</sup> *See Burgess*, 684 F.3d at 448 (identifying Vicky as the victim portrayed in pornographic images possessed by the defendant); *Laraneta*, 700 F.3d at 984–85 (identifying Amy and Vicky); *Monzel*, 641 F.3d at 530 (identifying Amy).

Although Amy and Vicky made similar requests for full restitution, the district courts in these cases took two different approaches. The district court in *United States v. Monzel*<sup>158</sup> read a proximate cause limitation into § 2259 and found no evidence tying Amy's losses specifically to the defendant's possession of her child sex abuse images.<sup>159</sup> The court awarded Amy only "nominal" restitution of \$5,000, acknowledging that it was less than the harm that Monzel had actually caused her.<sup>160</sup> In its restitution order, the district court also refused to hold Monzel jointly and severally liable for all of Amy's losses, citing "substantial logistical difficulties in tracking awards made and money actually recovered."<sup>161</sup>

In contrast, the district courts in *United States v. Burgess*<sup>162</sup> and *United States v. Laraneta*<sup>163</sup> did not read a general proximate cause requirement into § 2259.<sup>164</sup> Both courts simply awarded Amy and Vicky "the full amount" of their losses.<sup>165</sup> As a practical matter, neither Burgess nor Laraneta actually had to pay the full amount of losses to either victim. In *Laraneta*, for example, the district court ordered the defendant to pay restitution from his prison wage at a rate of \$100 a year.<sup>166</sup> But in the event that either defendant "c[ame] into money," the amount owed to Amy or Vicky would be "restituted away from [the defendants]."<sup>167</sup>

The courts of appeals in these cases significantly restricted awards to the victims by relying on so-called traditional tort law principles. On appellate review in *Monzel*, the D.C. Circuit noted that "[a]lthough § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party."<sup>168</sup> Accordingly, the court concluded that "tort doctrine [would] inform[ ] [its] thinking" in this case.<sup>169</sup> Using what it described as "traditional principles" of tort law, the court rejected Amy's argument that Monzel should be held jointly and severally liable for all of her losses because Monzel was essentially a joint

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<sup>158</sup> *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011).

<sup>159</sup> *See id.* at 531.

<sup>160</sup> *See id.* at 530.

<sup>161</sup> *See id.* at 531 (citation omitted) (internal quotation marks omitted).

<sup>162</sup> *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012).

<sup>163</sup> *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012).

<sup>164</sup> *See id.* at 989; *Burgess*, 684 F.3d at 455.

<sup>165</sup> *See Laraneta*, 700 F.3d at 988; *Burgess*, 684 F.3d at 455.

<sup>166</sup> *Laraneta*, 700 F.3d at 993.

<sup>167</sup> *Id.*

<sup>168</sup> *Monzel*, 641 F.3d at 535 n.5.

<sup>169</sup> *Id.*

tortfeasor with other criminals who had caused her indivisible injuries.<sup>170</sup> Because Monzel’s possession of a “single image” was not independently sufficient to cause the entirety of Amy’s injury, the court reasoned that it could not therefore be viewed as creating an “indivisible” injury.<sup>171</sup> Likewise, because Amy suffered separate injuries each time someone viewed her images, the defendant was obligated to pay restitution only for the separate injury for which he was individually responsible.<sup>172</sup>

In *Burgess*, the Fourth Circuit explicitly adopted *Monzel*, albeit in a much more summary fashion, holding that joint and several liability was “not applicable in this context” because each defendant caused each victim a separate injury.<sup>173</sup> Vicky could not recover the full amount of her losses from *Burgess* because, the court explained, “a defendant can only be responsible for the damage flowing from the injury *he* proximately caused, and not for the injuries inflicted by others at different times.”<sup>174</sup> Although a dissenter in *Burgess* argued that the court of appeals should have remanded to the trial court the questions of whether a child pornography victim’s injury was indivisible and whether joint and several liability was applicable,<sup>175</sup> the majority dismissed this concern by maintaining that defendants can only be liable for injuries they proximately cause.<sup>176</sup> Similarly, in *Laraneta*, the Seventh Circuit (through Judge Posner) read § 2259 as containing a generalized proximate cause requirement and, although the amount of total losses was not challenged, remanded for the district court to apportion the losses for which *Laraneta* was responsible.<sup>177</sup>

These appellate courts confused the question of the factual cause of the victims’ losses with the question of dividing up the victim’s losses among those responsible. For example, the D.C. Circuit in *Monzel* concluded that Amy’s injuries were divisible because “Monzel’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 Monzel

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<sup>170</sup> *Id.* at 538 (rejecting Amy’s argument that because Monzel’s possession was intentional and contributed to an indivisible injury, he should be held jointly and severally liable).

<sup>171</sup> *Id.* at 538–39.

<sup>172</sup> *Id.* at 538.

<sup>173</sup> *United States v. Burgess*, 684 F.3d 445, 458–59 (4th Cir. 2012).

<sup>174</sup> *Id.* at 459 n.11 (emphasis added).

<sup>175</sup> *Id.* at 461 (Gregory, J., concurring in part and dissenting in part).

<sup>176</sup> *Id.* at 459 n.11 (majority opinion) (emphasis added).

<sup>177</sup> *United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012).

did.”<sup>178</sup> Judge Posner made a similar argument in *Laraneta*, asserting that if a defendant merely possessed images of Amy or Vicky, without distributing them, “it is beyond implausible that the victims would have suffered the harm they did had [Laraneta] been the only person in the world to view pornographic images of them.”<sup>179</sup> The thrust of this argument is that possession alone, by a single person, is not enough to cause the full amount of the psychological harm Amy and Vicky suffered.<sup>180</sup> But this simply recounts a conundrum about factual causation that modern tort theory resolved long ago.<sup>181</sup>

As the *Restatement (Third) of Torts* describes the problem, “In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff’s harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm.”<sup>182</sup> The appellate courts were confronted with this same situation. Take the case of *Monzel*, for example: by itself, Monzel’s crime may be insufficient to cause all of Amy’s harm (e.g., her costs of psychological counseling), because she presumably would have needed less counseling if he was the only person in the world viewing her images, as opposed to the thousands who are actually doing so. When Monzel’s crime is combined with crimes by other defendants, however, the conduct overdetermines, or is more than sufficient to cause the harm (i.e., the costs of counseling), because Amy will presumably need the same amount of counseling regardless of whether the number of defendants possessing her images was 999 (without Monzel) or 1,000 (with him). In such situations, the standard answer in tort law is *not* the one reached by the D.C. Circuit—that is, concluding that Monzel has not caused all of the losses. Instead, the standard answer, as recounted in the *Restatement (Third) of Torts*, is that “the fact that the other person’s conduct is sufficient to cause the harm does *not* prevent the actor’s conduct from being a factual cause of harm.”<sup>183</sup>

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<sup>178</sup> United States v. Monzel, 641 F.3d 528, 538 (D.C. Cir. 2011).

<sup>179</sup> *Laraneta*, 700 F.3d at 991.

<sup>180</sup> Judge Posner, however, did recognize that in a distribution case, tort law would likely recognize the harm as “indivisible,” thus warranting joint and several liability. See *infra* note 189.

<sup>181</sup> See generally Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 88–92 (2005) (explaining development of the “multiple sufficient causal sets” rule which emerged as the “dominant theory of causation among tort scholars”).

<sup>182</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2000).

<sup>183</sup> *Id.* (emphasis added). See generally Johnson, *supra* note 181, at 88–92 (same); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1791–94 (1985) [hereinafter Wright,

The Sixth Circuit's decision in *Michie v. Great Lakes Steel Division, National Steel Corp.*<sup>184</sup> offers a good illustration of this point. In that case, several air polluters argued that plaintiffs could not proceed with a nuisance action against them when their pollutants “mix[ed] in the air so that their separate effects in creating the individual injuries [were] impossible to analyze.”<sup>185</sup> The Sixth Circuit rejected this approach, holding that Michigan tort law allowed the polluters to be held liable as joint tortfeasors for the indivisible injuries caused.<sup>186</sup> The court noted that “it is clear that there is a manifest unfairness in putting on the injured party the impossible burden of proving the specific shares of harm done by each.”<sup>187</sup> The rule in such cases is that “[w]hen the triers of the facts decide that they cannot make a division of injuries we have, by their own finding, nothing more or less than an indivisible injury, and the precedents as to indivisible injuries will control.”<sup>188</sup>

The application of this principle to § 2259 cases is clear. Although it is possible that an individual tortfeasor's action—such as polluting the air or possessing child pornography—is neither “necessary” nor “sufficient” by itself to cause all of the injuries, the general approach in American tort law is to hold each tortfeasor fully liable for the entire injury caused.<sup>189</sup> The injury to victims of child pornogra-

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*Causation*] (surveying duplicative causation cases where plaintiffs are not required to prove each contributing factor was independently sufficient to cause injury); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1106–07 (2001) (same).

<sup>184</sup> *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974); see also Wright, *Causation*, *supra* note 183, at 1792 & n.239 (explaining courts have allowed plaintiffs in pollution cases, including *Michie*, to recover from “each defendant who contributed to the pollution that caused the injury, even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury”).

<sup>185</sup> *Michie*, 495 F.2d at 215.

<sup>186</sup> *Id.* at 217.

<sup>187</sup> *Id.* at 216 (internal quotation marks omitted) (quoting *Maddux v. Donaldson*, 108 N.W.2d 33, 36 (Mich. 1961)).

<sup>188</sup> *Maddux*, 108 N.W.2d at 37; accord John Henry Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458, 459 (1923) (“Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each *for the whole*.” (emphasis added)).

<sup>189</sup> In his Seventh Circuit opinion, Judge Posner curiously recognized that this principle applied to child pornography cases, but only if the defendant was convicted of *distributing* child pornography, not just possessing it. He explained:

The number of pornographic images of a child that are propagated across the Internet may be independent of the number of distributors. A recipient of the image may upload it to the Internet; dozens or hundreds of consumers of child pornography on the Internet may download the uploaded image and many of them may then

phy due to possession or distribution manifests itself in the same way as other harms caused by multiple tortfeasors. And although some injuries may be theoretically divisible, where it is practically impossible to divide up the injury by causation, “the modern approach has been to hold each defendant . . . jointly and severally liable for all the injuries.”<sup>190</sup> Thus, the appellate courts should have paid closer attention to one of the most compelling reasons to apply joint and several liability in analogous tort situations—that is, joint and several liability is applicable where “there is no reasonable basis for division” of the injury suffered.<sup>191</sup>

*B. Traditional Principles of Tort Law Support Full Restitution Awards*

All three of these appellate courts rested their decisions to deny full restitution to child pornography victims on the assumption that general principles of tort law do not allow a child pornography victim to recover the full amount of her losses from any one tortfeasor. But several well-established principles support the use of joint and several liability in the § 2259 context and demonstrate why the appellate courts holding otherwise got it wrong. First and foremost, traditional principles of tort law sanction the use of joint and several liability as a suitable mechanism in analogous situations where victims suffer indivisible injuries, and responsibility cannot be reasonably divided among defendants. Joint and several liability, and its attendant burden-shifting to defendants, is particularly relevant in cases such as

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upload it to their favorite child-pornography web sites; and the chain of downloading and uploading and thus distributing might continue indefinitely. That would be like the [indivisible injury] case.

United States v. Laraneta, 700 F.3d 983, 992 (7th Cir. 2012). Judge Posner distinguished distribution from possession, explaining that if Laraneta did not upload any of Amy and Vicky’s images to the internet, “then he didn’t contribute to those images ‘going viral.’” *Id.* at 991. He continued, “If we consider only [Laraneta] having seen those images, and imagine his being the only person to have seen them, Amy’s and Vicky’s losses would not have been as great as they were.” *Id.* But this logic does not provide any clear reason to distinguish between distributors and possessors, especially because it is each act of possession that creates the harm to a child pornography victim. *See infra* note 224 (discussing how all child pornography defendants are part of a de facto joint enterprise). Further, this misses the implication of what it means to “go viral.” A video, for example, can be “distributed” by being put on YouTube where the general public can view it, but it only “goes viral” once many people *actually view* it.

<sup>190</sup> Brief of Amici Curiae of American Law Professors in Support of Respondents, *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (No. 01-963), 2002 WL 1964118, at \*17 [hereinafter Brief of American Law Professors].

<sup>191</sup> 74 AM. JUR. 2d *Torts* § 65 (2013); *see also infra* note 193 (collecting sources on indivisibility principle).

these where the defendants are intentional, as opposed to negligent, wrongdoers.

### 1. *Child Pornography Victims Suffer Indivisible Injuries*

Joint and several liability is commonly invoked in situations where multiple defendants have contributed to a single, indivisible injury. Because an indivisible injury cannot be attributed separately to each defendant, each defendant is treated as the cause of the entire injury. The victim can only be fully restored by holding each of the defendants jointly and severally liable for the indivisible injury.

The crucial underlying assumption that appellate courts have made in denying full restitution under § 2259 is that victims of widely disseminated child pornography do not suffer indivisible injuries—that is, that their injuries can be divided by causation among different defendants.<sup>192</sup> This indivisibility principle is reflected in Prosser and Keeton’s distinction between “injuries which are reasonably capable of being separated and injuries which are not.”<sup>193</sup> Relying on this source, the D.C. Circuit, for example, held that Amy’s injuries were not indivisible and could be divided by causation, and thus joint and several liability did not apply.<sup>194</sup>

Unfortunately, the D.C. Circuit offered no explanation of how Amy’s losses could be divided up among various defendants. This is because such division is essentially impossible. When Amy pays for an hour of psychological counseling, for example, she does not spend the first five minutes receiving therapy for Monzel’s crime, then the

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<sup>192</sup> See, e.g., *United States v. Burgess*, 684 F.3d 445, 458–59 (4th Cir. 2012) (“In situations such as Vicky’s, individuals viewing her video recordings inflict injuries at different times and in different locations. Therefore, those individuals cannot have proximately caused a victim the *same* injury.”).

<sup>193</sup> See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 52, at 345 (W. Page Keeton ed., 5th ed. 1984) (“If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury between them, and each will be liable for all of it.”); see also *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 26(b), at 320 (“Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine: (1) that any legally culpable conduct of a party . . . was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct. Otherwise, the damages are indivisible and thus the injury is indivisible.”); 1 DAN B. DOBBS ET AL., *LAW OF TORTS* § 192 (2d ed. 2011) (noting that when one negligent tortfeasor injures the plaintiff’s arm and another tortfeasor negligently injures the plaintiff’s leg, each will be liable proportionally, but that “when the plaintiff suffers injuries that are similar in nature or consequences . . . [and] they cannot be attributed separately to the separate tortfeasors, each tortfeasor is treated as a cause of the entire indivisible injury”).

<sup>194</sup> *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011).

next five minutes for Burgess's crime, then the next five minutes for Laraneta's crime, and so forth. She receives counseling for dealing with the reality that a large group of deviant criminals (some apprehended and some not) are collecting and trading her child sex abuse images. The costs of her psychological counseling are not capable of apportionment among different defendants.<sup>195</sup>

The practical impossibility of dividing Amy's injuries and losses is demonstrated by what happened on remand from the D.C. Circuit to the district court. Instructed to divide up Amy's losses, the district court declined to award Amy *any* restitution because "[t]here is absolutely no evidence as to what degree Monzel's conduct contributed to the injuries suffered by Amy, and, therefore, it is impossible to fashion a formula that pinpoints his degree of responsibility for Amy's suffering."<sup>196</sup> Remarkably, the district court recognized that its decision "fails to make a victim whole, fails to impose a meaningful financial sanction against the perpetrator of the victim's losses, and does not carry out Congressional intent."<sup>197</sup> But the district court felt constrained to reach this conclusion because of the D.C. Circuit's direction that restitution must be divided up among different defendants by causation—a task that the district court simply found impossible to discharge.<sup>198</sup>

The district court's inability to apportion Amy's injuries is analogous to the difficulty of apportionment in other commonly cited tort law scenarios where the loss is "by [its] very nature . . . obviously incapable of any reasonable or practical division."<sup>199</sup> Prosser and Keeton offer illustrations of multiple tortfeasors contributing to a single resultant injury such as death, a broken leg, the destruction of a house by fire, or the sinking of a barge:

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<sup>195</sup> *Cf., e.g., Maddux v. Donaldson*, 108 N.W.2d 33, 36 (Mich. 1961) (explaining that a victim struck by two different cars may suffer from a "composite injury, the ingredients of which are . . . impracticable to isolate in treatment" where victim's "psychiatric treatment [might] be related to the fracture of the femur, or to the multiple lacerations of the face, with its 'jagged facial scars,' or to the overall condition").

<sup>196</sup> *United States v. Monzel*, No. 1:09-CR-00243-GK, at 8 (D.D.C. Nov. 6, 2012) (EFC #70).

<sup>197</sup> *Id.* at 10.

<sup>198</sup> As the district court explained, apportionment would require "the government to prove what is in essence unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim." *Id.* (quoting *United States v. Tallent*, No. 1:11-cr-84, 2012 WL 2580275, at \*11 (E.D. Tenn. June 22, 2012)). The district court's decision not to award any restitution was challenged on appeal by both the Government and Amy. Following the grant of certiorari by the Supreme Court in *Paroline*, the D.C. Circuit decided to hold the case in abeyance until the Supreme Court considers the issue. *United States v. Monzel*, No. 1:09-cr-00243-GK-1 (D.C. Cir. June 27, 2013).

<sup>199</sup> KEETON ET AL., *supra* note 193, § 52, at 347.

No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.<sup>200</sup>

Likewise here, no “ingenuity” can determine what share of Amy’s counseling sessions are linked to any individual defendant’s crime<sup>201</sup>—her costs are indivisible, and each defendant is thus responsible for the entire loss.<sup>202</sup>

The indivisibility of child pornography victims’ injuries is even more apparent when one considers that even the proponents of divisibility cannot devise a reasonable basis for apportioning losses. Conventional tort law requires that “[a] party alleging that damages are divisible has the burden to prove that they are divisible.”<sup>203</sup> To our knowledge, no defendant has ever suggested a way of dividing up the losses suffered by victims like Amy and Vicky.<sup>204</sup> If defendants want to allege that child pornography losses are divisible, then they should prove it. Their failure to do so in hundreds of cases speaks clearly to the conclusion that no reasonable division is possible.

The appellate courts may have gone astray because they were conflating two different concepts: the percentage of comparative responsibility and the percentage of the losses caused. In theory, it may be possible to assign comparative responsibility to all of the defendants who harmed Amy. For example, a judge could simply allocate a percentage of responsibility to each defendant based on his “market

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<sup>200</sup> *Id.* (noting that such “entire liability is imposed both where some of the causes are innocent, as where a fire set by the defendant is carried by a wind, and where two or more of the causes are culpable” (footnotes omitted)).

<sup>201</sup> *See, e.g.,* *United States v. Burgess*, 684 F.3d 445, 461 (4th Cir. 2012) (Gregory, J., concurring in part and dissenting in part) (“I do not believe that a fact finder could meaningfully say precisely  $x$  amount of Vicky’s psychological injuries were caused by Burgess’s watching the video, that  $y$  amount was caused by Defendant # 2’s watching the same video, and so on.”).

<sup>202</sup> *Cf. KEETON ET AL., supra* note 193, § 52, at 345 (“Where a factual basis can be found for some rough practical apportionment, which limits a defendant’s liability to that part of the harm of which that defendant’s conduct has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.”).

<sup>203</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 cmt. h at 324 (2000).

<sup>204</sup> Instead, defendants have repeatedly and exclusively argued that the victim bears the burden of dividing up her losses. *See, e.g.,* Defendant–Appellee’s Brief on Rehearing En Banc, *United States v. Paroline*, 697 F.3d 306 (5th Cir. 2012) (Nos. 09-41238, 09-41254), 2012 WL 1111550, at \*40 (advocating that the court deny Amy any amount of restitution).

share” of the harm<sup>205</sup> (e.g., the number of images he possessed depicting Amy as a percentage of the total images of her in existence), his “per capita” responsibility based on the total number of defendants convicted of the same offense,<sup>206</sup> or some other method of allocation.<sup>207</sup> Some states take these kinds of comparative responsibility approaches in deciding how to allocate responsibility for damages in a situation where damages are indivisible.<sup>208</sup>

But the question of comparative responsibility is different than the question of whether the damages are divisible, or in other words, whether the damages can be divided among defendants by causation. Even if it can be said, for example, that a defendant was only one of a thousand criminals who harmed Amy by possessing her images (1/1000),<sup>209</sup> that does not change her overall losses for psychological counseling. For damages to be divisible, there must be a “reasonable basis for the factfinder to determine . . . the amount of damages separately *caused* by [an individual tortfeasor’s] conduct.”<sup>210</sup> There is no such basis to determine what part of the counseling costs were “caused” by an individual defendant’s crime. Even if a defendant is one among 1000 who possessed Amy’s images, that does not mean that that defendant caused 1/1000th of her losses. As Professor Richard Wright, a well-known expert on tort law, explained:

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<sup>205</sup> See, e.g., *Sindell v. Abbott Lab.*, 607 P.2d 924, 937 (Cal. 1980) (holding each defendant-manufacturer liable for the proportion of the judgment represented by its market share unless it could demonstrate that it “could not have made the product which caused plaintiff’s injuries”); see also *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 & n.3 (N.Y. 1989) (adopting “national market theory” to apportion damages among all diethylstilbestrol drug manufacturers where identification of particular manufacturer liable for each plaintiff’s harm was “generally impossible” and market share theory necessarily involved “lack of a logical link between liability and causation in a single case”).

<sup>206</sup> See, e.g., *Loui v. Oakley*, 438 P.2d 393, 397 (Haw. 1968) (holding that if “rough apportionment” of damages among tortfeasors based on how much of plaintiff’s damages can be attributed to each one’s negligence is impossible, then damages must be apportioned equally among the tortfeasors from each separate accident).

<sup>207</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B18, at 168 (2000) (“If two or more persons’ independent tortious conduct is the legal cause of an indivisible injury, each defendant . . . is severally liable for the comparative share of the plaintiff’s damages assigned to that defendant by the factfinder.”).

<sup>208</sup> See *id.* § 17, Reporters’ Note, cmt. a (listing comparative responsibility jurisdictions); *id.* § A18. Other states follow a different approach. See *id.* § A18 (noting that some states follow joint and several liability).

<sup>209</sup> Problems with such a “per capita” determination are discussed below. See *infra* notes 246–251 and accompanying text.

<sup>210</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(b), at 320 (2000) (emphasis added) (explaining that “[o]therwise, the damages are indivisible and thus the injury is indivisible”).

[T]here is a fundamental difference between each tortfeasor's *individual full responsibility* for an injury that it tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the tortfeasors' individual full responsibilities for the injury. For example, if two defendants were each negligent, actual, and proximate causes of a plaintiff's injury, neither is merely "50% negligent," a cause of only 50% of the injury, or only "50% responsible." Such statements make as much sense as saying that someone is 50% pregnant or caused 50% of a death or a broken leg. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual and proximate cause of 100% of the injury. Each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury.<sup>211</sup>

By the same reasoning, it may be that defendant Monzel—for example, when compared to other defendants—bears less than 1% of the total comparative responsibility for Amy's psychological counseling costs. But that does not mean that he caused a small percentage of her costs. He and the other defendants are all jointly responsible for causing 100% of her costs by causing her to go to counseling in the first place.

## 2. *Child Pornography Defendants Are Intentional Tortfeasors*

Appellate courts have also failed to consider the most appropriate tort principles in their analysis, which includes those relating to intentional torts. Specifically, these courts have borrowed tort law principles involving mere negligence and applied them to criminal restitution issues. Negligent tortfeasors act unintentionally; but *criminals* act intentionally.<sup>212</sup> Thus, the relevant tort law principles applicable to child pornography crimes are those pertaining to intentional torts. This distinction is crucial and strengthens the rationale that joint and several liability results in full restitution under § 2259 on the widely accepted principle that defendants are held more broadly responsible for losses when their conduct is deliberate, not accidental.<sup>213</sup>

<sup>211</sup> Brief of American Law Professors, *supra* note 190, at \*12–13.

<sup>212</sup> *See, e.g.*, 18 U.S.C. § 2252A (2012) (defining child pornography crimes as involving actions taken "knowingly").

<sup>213</sup> *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459

Common law has held intentional tortfeasors jointly and severally liable for over two hundred years.<sup>214</sup> The *Restatement (Third) of Torts* § 12 sets out the well-settled principle that “[e]ach person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct.”<sup>215</sup> The *Restatement* gives several rationales for this conclusion, including that “there is, so far as we are aware, no authority whatsoever for exempting intentional tortfeasors from joint and several liability.”<sup>216</sup> Joint and several liability is, quite simply, the common law principle for intentional torts.<sup>217</sup>

An application of this principle is found in the recent case of *Smith v. Islamic Emirate of Afghanistan*,<sup>218</sup> where surviving family members of victims of the 9/11 terrorist attacks sued Al Qaeda, the Taliban, Osama bin Laden, Saddam Hussein, the Republic of Iraq, and the Islamic Emirate of Afghanistan to collect for lost earnings, pain and suffering, loss of solatium,<sup>219</sup> and punitive damages.<sup>220</sup> The district court held all the defendants jointly and severally liable for

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U.S. 519, 547–48 (1983) (Marshall, J., dissenting) (“Although many legal battles have been fought over the extent of tort liability for remote consequences of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.”); see also *Seidel v. Greenberg*, 260 A.2d 863, 871 (N.J. Super. Ct. 1969) (“It is well settled that where the acts of a defendant constitute an intentional tort . . . as distinguished from mere negligence, the aggravated nature of his acts is a matter to be taken into account in determining whether there is a sufficient causal relation to plaintiff’s harm to make the actor liable therefor.” (citing RESTATEMENT (SECOND) OF TORTS § 501(2) (1965)); KEETON ET AL., *supra* note 193, § 43, at 293 (noting that “it may be especially likely that the ‘foreseeability’ limitation [of causation] will be cast aside [in the area of] intentional torts”).

<sup>214</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 12 Reporters’ Note cmt. b, at 111 (2000) (“Intentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799) . . .”).

<sup>215</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 12, at 110 (2000).

<sup>216</sup> *Id.* at § 12 Reporters’ Note cmt. b, at 113.

<sup>217</sup> This refers to common law principles. Since the tort-reform era of the 1980s, some states have statutorily abolished joint and several liability. See William E. Westerbeke, *In Praise of Arbitrariness: The Proposed 83.7% Rule of Modified Comparative Fault*, 59 U. KAN. L. REV. 991, 1013 n.116 (2011) (collecting statutes). But if we are relying on traditional tort principles, as the D.C. Circuit and other courts have urged, see *supra* notes 150–152 and accompanying text, then the age-old concept of joint and several liability for intentional wrongdoers is clearly applicable.

<sup>218</sup> *Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003), amended by No. 01 Civ.10132(HB), 2003 WL 23324214 (S.D.N.Y. May 19, 2003).

<sup>219</sup> Lost solatium is defined as “[d]amages allowed for injury to the feelings, or ‘for the mental anguish, bereavement, and grief that those with a close relationship to the decedent experience as a result of the decedent’s death.’” *Id.* at 234 (citations omitted).

<sup>220</sup> *Id.* at 232–40.

damages in excess of \$20 million,<sup>221</sup> relying on “traditional tort principles.”<sup>222</sup> Specifically, the court turned to the *Restatement (Third) of Torts* § 12 in applying joint and several liability and noted that, although the general rule in New York for apportioning liability is based on relative “culpability” of the multiple tortfeasors, such a rule is “inapplicable where, as here, the actions require proof of intent.”<sup>223</sup> Just as all of the members of Al Qaeda and the Taliban are responsible to pay for all of the damages from the 9/11 attacks, all of the criminals who possessed Amy’s child sex abuse images should be responsible to pay for all of her related losses.<sup>224</sup>

Considerations of administrative ease and fairness support the conclusion that the numerous intentional tortfeasors should each be held jointly and severally liable for the indivisible injuries of child pornography victims. Some appellate courts that have declined to apply joint and several liability to child pornography defendants have cited the administrative difficulties of such an approach.<sup>225</sup> Given the alternatives, joint and several liability is the most administrable and most comports with traditional principles of fairness to an injured victim. Indeed, the *Restatement (Third) of Torts* suggests one advantage of using joint and several liability for intentional torts is one of administrative convenience, explaining:

[O]ne reason for including all tortfeasors in a comparative-responsibility apportionment system is the administrative difficulty of doing otherwise when intentional, negligent, and strictly liable defendants are all liable for a plaintiff’s indivisible injury. There are no comparable administrative complexities to holding one [intentional] tortfeasor jointly and severally liable for the same harm for which another tortfeasor is held only severally liable.<sup>226</sup>

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<sup>221</sup> *See id.* at 240.

<sup>222</sup> *Id.* at 220, 240–41.

<sup>223</sup> *Id.* at 233 n.27 (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 12, at 110 (2000)).

<sup>224</sup> Although it is not necessary to this analysis, it can even be argued that child pornography defendants are all part of a de facto joint enterprise. As the Third Circuit explained, “[T]he consumer of child pornography ‘creates a market’ for the abuse by providing an economic motive for creating and distributing the materials.” *United States v. Goff*, 501 F.3d 250, 260 (3d Cir. 2007) (citing *Osborne v. Ohio*, 495 U.S. 103, 109–12 (1990); *New York v. Ferber*, 458 U.S. 747, 755–56 (1982)).

<sup>225</sup> *See supra* note 155.

<sup>226</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 12 Reporter’s Note cmt. b, at 113 (2000).

This point about administrative convenience is especially relevant to child pornography restitution. As the *Monzel* remand illustrates, lower courts have struggled to determine what percentage of a victim's losses should be assigned to any individual defendant.<sup>227</sup> These difficulties all disappear in a system of joint and several liability. All a trial court must do to calculate restitution is determine the full amount of a victim's losses and then order the defendant to pay them all. The additional—and quite difficult—step of determining what share of the losses should be assigned to any one defendant is simply eliminated, saving not only courts, but also probation officers, prosecutors, and defense attorneys, considerable time.

Finally, any unfairness created by a system of joint and several liability in this context is justified by the well-settled principle that defendants should bear the burden of their own wrongdoing, particularly when there is no contributory negligence on the part of the plaintiff.<sup>228</sup> Apportioning losses involves assigning risks of insolvency and burdens of collection. In a situation where a victim is harmed by tortfeasors *A*, *B*, *C*, and *D* a system of comparative responsibility means that *A*, *B*, *C*, and *D* each pay the portion of losses for which they are deemed responsible; the victim then bears the burden of collecting those sums from each of the defendants. But if, for example, *D* is responsible for twenty-five percent of the damages but became insolvent, then a system of comparative responsibility shifts the burden of twenty-five percent of the loss from the responsible party (*D*) to the innocent victim. On the other hand, in a system of joint and several liability, *A*, *B*, *C*, and *D* are all responsible for 100% of the victim's losses and the victim can collect all of her losses from any one defendant. If it turns out that one of the defendants is insolvent, then that becomes a burden borne by other defendants, rather than the victim.<sup>229</sup>

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<sup>227</sup> See *United States v. Monzel*, 641 F.3d 528, 540 (D.C. Cir. 2011) (“We recognize, of course, that determining the dollar amount of a victim's losses attributable to the defendant will often be difficult.”).

<sup>228</sup> In the general context of a merely negligent tortfeasor and a possibly contributorily negligent plaintiff, it may be reasonable to consider whether assigning all of the losses to one defendant is unfair. See RESTATEMENT (SECOND) OF TORTS § 433B, at 441–42 (1965) (discussing this issue in the context of negligent torts). But in the specific context of child pornography victims, any such debate is unreasonable. Amy, for example, is entirely innocent of wrongdoing; she did not choose to be raped as a young girl and then have her resulting child sex abuse images viewed by Monzel, Laraneta, and countless others. That was *their* choice—a criminal choice that caused harm to Amy. Fairness dictates assigning all the losses to such criminals.

<sup>229</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C21 cmt. a (2000).

The difficulties of collection and the risks of insolvency are not a mere theoretical problem for child pornography victims. Many defendants do not have the means to pay the substantial losses that the victims of their offenses seek to recover.<sup>230</sup> A system of proportional several liability may well mean that victims never receive compensation for all of their losses. On the other hand, a system of joint and several liability effectively spreads the losses on criminal defendants.<sup>231</sup> Because they are the culpable—indeed, criminally culpable—parties, they should be the ones to bear this burden.<sup>232</sup> Joint and several liability will ensure that victims of child pornography are fully compensated. As the Fifth Circuit explained:

Holding wrongdoers jointly and severally liable is no innovation. It will, however, enable [child pornography defendants] to distribute “the full amount of the victim’s losses” across other possessors of [the victim’s] images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.<sup>233</sup>

The principle that innocents are favored over wrongdoers is well settled in American law. Joint and several liability “represents a social policy choice [to] mak[e] a plaintiff whole over any concerns that

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<sup>230</sup> See U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES 162 fig.6-23 (2012) (72.2% of all federal child pornography defendants had \$10,000 or less in net assets at time of conviction, 47.5% of which had negative assets); see also Mary Sanchez, *Insurance Coverage for Child Sexual Abuse After J.C. Penney Casualty Insurance Co. v. M.K.*, 22 Sw. U. L. REV. 1229, 1247 (1993) (noting prevalence of judgment-proof criminal defendants); see also, e.g., Supplemental Brief for the United States on Rehearing En Banc at 10–12, *United States v. Wright*, 668 F.3d 776 (5th Cir. 2012) (No. 09-31215).

<sup>231</sup> See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 26 cmt. h (2000) (explaining that several courts adopted the rule that “when a plaintiff could show that each defendant caused some of the damages, each was jointly and severally liable for the entire damages unless the defendants could prove the magnitude of each part”).

<sup>232</sup> See *id.* (“[A] culpable defendant should bear the risk that evidence is unavailable to permit division.”). If a defendant feels that he is somehow paying more than his “fair” share, he will then be free to sue other defendants to sort out who owes what to whom. See, e.g., *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (holding that the district court properly ordered a defendant’s restitution award to be “joint and several” with eleven other persons who were already convicted, which gave him the right to “seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owes”).

<sup>233</sup> *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011) (citation omitted) (citing Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607(a) (2006)). CERCLA, commonly known as Superfund, establishes a trust fund to provide cleanup at abandoned hazardous waste sites when no responsible party can be identified. *CERCLA Overview*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Sept. 29, 2013).

excessive liability could be imposed on an individual defendant,”<sup>234</sup> and shifts the burdens associated with recovery to culpable defendants, rather than innocent plaintiffs.<sup>235</sup> Thus, Congress’s clearly manifested intent, when considered against a backdrop of “traditional principles” of tort law, points to joint and several liability as the best method for ensuring that victims of child pornography actually collect the full amount of their losses.

### 3. *Allocating Losses on a Per Capita Basis Is Inconsistent with Traditional Tort Principles*

When apportionment by causation is not possible, as is the case here, a “last resort” might be to apportion losses using a per capita approach by dividing a victim’s losses evenly among multiple responsible defendants, albeit in varying degrees.<sup>236</sup> The Department of Justice (“DOJ”) has endorsed this approach in child pornography restitution cases.<sup>237</sup> Despite DOJ’s contention that the per capita approach comports with general tort law principles,<sup>238</sup> dividing losses in this manner poses significant obstacles to victims seeking to recover the full amount of their losses and runs contrary to the sole purpose of § 2559—to make victims whole.

Under the per capita approach, courts adopt an  $x/n$  formula for determining victim restitution, where  $x$  equals the victim’s total losses and  $n$  equals the number of defendants convicted of possessing her images.<sup>239</sup> For example, if a child pornography victim incurs losses of

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<sup>234</sup> 74 AM. JUR. 2D *Torts* § 66 (2013).

<sup>235</sup> See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § C21 cmt. a (2000).

<sup>236</sup> William L. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 439 (1937).

<sup>237</sup> See, e.g., Supplemental Brief for the United States on Rehearing En Banc, *supra* note 230, at 66–69. In its recent Supreme Court brief, however, the DOJ adopts the position that district courts should have discretion to allocate a victim’s aggregate losses in any “reasonable manner.” Brief for the United States at 47, *Paroline v. United States*, No. 12-8561 (U.S. Sept. 27, 2013). Still, the DOJ endorses a modified version of per capita allocation when it suggests that courts

consider a number of factors including, for example, the number of criminal defendants who contributed to the victim’s harm, as well as whether the defendant produced or distributed images of the victim; how many images the defendant possessed; and any other fact relevant to measuring the defendant’s culpability relative to the other relevant actors.

*Id.* at 49 (citation and internal quotation marks omitted).

<sup>238</sup> See, e.g., Supplemental Brief for the United States on Rehearing En Banc, *supra* note 230, at 57–58 (discussing how “traditional tort law principles” inform the DOJ’s position); *cf.* Brief for the United States, *supra* note 237, at 48–49 n.20 (noting that allocating a victim’s aggregate losses based on each defendant’s relative contribution to such losses is similar to the market share allocation approach used by courts in the tort law context).

<sup>239</sup> See, e.g., Supplemental Brief for the United States on Rehearing En Banc, *supra* note

\$1,000,000 and 100 defendants were convicted of possessing her images, then the victim will receive \$10,000 (that is, \$1,000,000 divided by 100) from the most recently convicted defendant.<sup>240</sup> This approach to assigning losses does have some small measure of logic to it. None other than Professor Prosser noted that “[a]s a last resort, in the absence of anything to the contrary, it may be presumed that the defendants are equally responsible, and the damages may be divided equally between them.”<sup>241</sup> Legal authority supporting a per capita approach to dividing damages, however, is “sparse” and the *Restatement (Third) of Torts* declined to endorse it.<sup>242</sup>

In the particular context of child pornography restitution, the per capita approach suffers from substantial problems. Perhaps the most fundamental difficulty is that there is no way to determine the denominator—or the number of defendants who will all share, per capita, in paying for the victim’s losses—as the victim’s child sex abuse images will continue to circulate indefinitely around the globe.<sup>243</sup> Indeed, an unprincipled incentive exists when a defendant’s restitution obligation is reduced as the number of responsible defendants increases, risking what Professor Wright aptly called the creation of a “tortfest.”<sup>244</sup> Specifically, such a formula means that defendants are in some sense encouraged to perpetuate the victim’s abuse, because it reduces each defendant’s obligation to pay restitution. Of course, traditional principles of tort law, when properly employed, are specifically designed to discourage wrongdoing, not encourage it.<sup>245</sup> Yet the  $x/n$  approach per-

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230, at 66–69 (claiming that such a formula “reflects the reality that many individuals have contributed to [each victim’s] harms and losses, and seeks to distribute responsibility for the total amount of proven losses [the victim] has incurred and will incur in treating those harms among the most culpable and readily-definable population of offenders”).

<sup>240</sup> In 2012, DOJ estimated the total number of defendants convicted of possessing Amy’s child sex abuse images, for example, was approximately 150. *Id.* at 68.

<sup>241</sup> Prosser, *supra* note 236, at 439; *see also* Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267, 341 (1996) (per capita default apportionment is “driven by a sense of fairness to all the parties”).

<sup>242</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 cmt. h, at 325 (2000).

<sup>243</sup> *United States v. Gamble*, 709 F.3d 541, 554 (6th Cir. 2013) (approving per capita formula for the time being but acknowledging that over time “it may become apparent that there are fundamental problems with the Government’s proposal that make it unworkable”).

<sup>244</sup> Brief of American Law Professors, *supra* note 190, at \*14–15 (describing “tortfest” as a situation in which “the more tortfeasors there [are], the less liable each would be, although the tortious behavior of each defendant remain[s] constant and [is] an actual cause of the plaintiff’s entire injury”).

<sup>245</sup> KEETON ET AL., *supra* note 193, § 4, at 25 (“The ‘prophylactic’ factor of preventing future harm has been quite important in the field of torts.”).

versely encourages defendants to hide in a crowd and then raise the defense that “everyone is doing it.”

Particularly in the context of the widespread distribution of child pornography, the  $x/n$  approach may never result in victims recovering “the full amount” of their losses. A restitution award under an  $x/n$  formula progressively regresses towards zero as the number of defendants grows.<sup>246</sup> For example, both Amy and Vicky are identified victims in hundreds of individual criminal cases.<sup>247</sup> Courts have sentenced more than one hundred defendants to pay restitution to each of them.<sup>248</sup> If the  $x/n$  formula was applied, they would receive restitution awards of less than one percent of their total losses. If all of these awards were immediately collectable and payable in full, it would theoretically be possible for Amy and Vicky to aggregate  $x/n$  amounts into full restitution. The reality, however, is that many child pornography defendants are incarcerated for lengthy prison terms and enter prison with few assets.<sup>249</sup> Any belief that restitution awards are quickly collectable is a pipe dream.

Additionally, because the  $x/n$  formula produces different size awards over time, it creates anomalies. Consider three different defendants who have all harmed Amy and Vicky in exactly the same way by possessing the same images, but are convicted at different points in time: Defendant #1 is the first defendant convicted; Defendant #50 is the fiftieth defendant convicted; and Defendant #500 is the five hundredth defendant convicted. Again, assuming \$1,000,000 in losses, Defendant #1 will have a restitution obligation of \$1,000,000; Defendant #50 will have a restitution obligation of \$20,000; and Defendant #500 will have a restitution obligation of only \$2000.<sup>250</sup> Thus, the earlier defendants will pay far more than the later offenders, contrary to

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<sup>246</sup> See *United States v. Monzel*, No. 1:09-CR-00243-GK, at 8 (D.D.C. Nov. 6, 2012) (EFC #70) (explaining that the government’s proposed “averaging of awards” approach “unfairly” results in “lower and lower awards of restitution [for the victim] as time goes on because the amount of money sought will be divided by a larger and larger number of convicted defendants”). The District Court for the District of Columbia also noted that such an approach is unfair to defendants as well, as it “fails, as required by the [D.C. Circuit] to establish the ‘connection between the act or omission of the defendant and the damages which the [victim] has suffered.’” *Id.* (quoting *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011)).

<sup>247</sup> See *Bazon*, *supra* note 1, at 25; see also *supra* note 76.

<sup>248</sup> See *Reid & Collier*, *supra* note 15, at 657 (surveying 116 cases for Amy and 153 cases for Vicky).

<sup>249</sup> See U.S. SENTENCING COMM’N, *supra* note 230, at fig.6-23.

<sup>250</sup> See, e.g., *United States v. Church*, 701 F. Supp. 2d 814, 816 (W.D. Va. 2010) (awarding nominal restitution of \$100); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at \*4 (W.D.N.C. Jan. 12, 2010) (awarding \$1,500 to Vicky and \$6,000 to Amy); *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 WL 2567832, at \*5 (E.D. Cal. Aug. 18, 2009) (awarding \$3,000).

the important objective of equal treatment under the law—a particularly important objective in federal sentencing.<sup>251</sup>

Finally, DOJ’s approach creates perverse incentives that result in uncertainty and disparities in the distribution of restitution awards across a given pool of defendants. In theory, the denominator represents the number of defendants convicted of possessing a victim’s images, but in practice, this number turns on the number of cases in which the victim has sought restitution up to that point.<sup>252</sup> This creates financial incentives for crime victims to delay seeking restitution, particularly early in the process, countering the restitution law’s underlying goal of compensating victims. Given that a victim knows that additional restitution claims will increase the formula’s dominator, and thus shrink the size of her awards, it might be desirable for her to withhold restitution claims until the rare, successful conviction of a wealthy defendant. For example, she might let the first 100 cases go by in hopes that the 101st case will involve a wealthy defendant who can pay all of her losses. She will then file her first restitution claim, thereby obtaining satisfaction from the rich defendant for 100% of her losses, because under the  $x/n$  formula  $1/1$  equals 100%. Of course, this approach turns restitution into a crapshoot, both for victims and defendants, because neither side can be entirely sure when restitution will be sought and ordered. Joint and several liability, on the other hand, incentivizes victims to indiscriminately seek restitution from every defendant, a result that better fulfills the promises of both full restitution to victims and equal treatment to defendants under the law. Thus, the Government’s anomalous  $x/n$  approach is not consistent with traditional tort principles, and should be rejected as an approach to interpreting § 2259 in favor of awarding full restitution from each defendant.<sup>253</sup>

#### CONCLUSION

Courts should interpret § 2259 to give child pornography victims restitution for the full amount of their losses without any general requirement that they trace out their losses to individual defendants. As

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<sup>251</sup> See *United States v. Booker*, 543 U.S. 220, 253 (2005).

<sup>252</sup> The record of conviction typically only reflects that the defendant possessed child pornography, not any specific victim’s pornography. A subsidiary determination that the defendant has possessed the victim’s image will only be made if and when she seeks restitution. See *United States v. Hagerman*, 827 F. Supp. 2d 102, 109–10 (N.D.N.Y. 2011), *rev’d on other grounds*, 506 F. App’x 14 (2d Cir. 2012).

<sup>253</sup> Of course, one advantage of the DOJ’s approach is that it provides at least some restitution to victims, which is far more preferable than awarding them no restitution at all.

explained at length in this Article, the statute's plain language, as well as its underlying purpose dictates this conclusion. Congress directly stated, in a "mandatory" restitution statute, that courts must award victims the "full amount" of their losses. Requiring child pornography victims to do what is practically impossible—by identifying what percent of their losses were caused by each defendant—renders the statute unworkable. Courts should prefer an interpretation that achieves the statute's aims and respects Congress's commands. Given the serious need for restitution that child pornography victims require and the culpability of the criminals who have harmed them, full restitution is entirely appropriate.

Holding each defendant liable for the full amount of a victim's losses under § 2259 is also consistent with well-established tort law principles. Tort law has long dealt with the situation of multiple, culpable wrongdoers who cause a single indivisible harm to a victim. In such situations, the common law has always favored the innocent victim and allowed her to recover all of her losses from the wrongdoers, leaving them to sort out among themselves who should bear what percentage of the loss. The harms inflicted by child pornography criminals, while technologically novel, are simply a variant on an old theme. Moreover, because convicted criminals have, by definition, intentionally inflicted harm (as compared to tortfeasors who have negligently inflicted harm), the case for full recovery of losses is overwhelming. Courts should interpret § 2259 to distribute the burden of losses to the criminal wrongdoers, as conventional tort law principles recommend.

The issues surrounding the proper interpretation of § 2259 should force us to think more broadly about how courts should award restitution to all victims of crime. The plight of child pornography victims is hardly unique. In many circumstances, it is difficult for crime victims to trace their losses with perfect precision to an individual defendant or a particular crime. In such situations, it hardly seems fair that the burden of losses falls on innocent crime victims instead of convicted criminals. To avoid such unfairness, the model of an expansively interpreted § 2259 may serve as a useful precedent for expanding restitution more generally and ensuring that all crime victims recover the full amount of their losses from criminals who have harmed them.