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FUNDING THE HEALING: GETTING VICTIMS PROPER RESTITUTION IN CHILD PORNOMOGRAPHY POSSESSION CASES

By Julia Jarrett*

Introduction

When Vicky was ten years old, her father, a former deputy sheriff, abused her and posted videos of the abuse on the Internet. During his weekend visits with Vicky, her father would dress her up as a hooker and force her to say dirty words into the video camera. He would make her take off all of her clothes, demand that she take showers with him, have her touch his penis and fondle him, and ultimately force her to have sex with him, including raping her while she was bound with ropes. At one point, she was being raped or sexually molested as much as once or twice a day. As Vicky’s father interacted with the online pedophilia community, he began to introduce viewer-requested scripted scenarios where Vicky was forced to perform a sexual role, sometimes involving adults other than her father, which were taped and posted online.

Years later, Vicki learned that there were at least twenty videos of her childhood abuse on the Internet and they had been downloaded tens of thousands of times by viewers around the world. The knowledge that

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1 Vicky is a pseudonym used in court documents to protect the victim’s identity. The name comes from the name of the series of child pornography videos in which she was abused. United States v. Brannon, No. 4:09-CR-38-RLV-WEJ, 2011 WL 2912862, at *1 (N.D. Ga. May 26, 2011).

2 Corrected Appendix of Appellant at 26, United States v. Crawford, No. 11-5544 (6th Cir. Aug. 13, 2011) [hereinafter Crawford Appendix].


4 Id.


6 Kraemer, supra note 3.

7 Crawford Appendix, supra note 2, at 33.

8 Id. at 6.

9 Faxon, 689 F. Supp. 2d at 1349.

10 Kraemer, supra note 3.

11 Crawford Appendix, supra note 2, at 37-38.
thousands viewed her abuse for perverted sexual pleasure spurred a very difficult emotional rollercoaster.\(^\text{12}\)

Now approximately twenty-one years old, Vicky has been stalked and contacted by “fans” of the pornography.\(^\text{13}\) She is continually “reminded of other . . . pedophiles who continue to sexualize and objectify her in her most powerless, degrading moments of her life—a ten year old child’s worst moments frozen in time and reco[r]ded forever for the prurient interests of others.”\(^\text{14}\)

Unfortunately, Vicky is not the only person dealing with the trauma that comes from abuse images being on the Internet. “Sex crimes,” which includes child pornography, is one of the fastest growing crime categories in the U.S., with the increase largely fueled by child pornography crimes.\(^\text{15}\) There are currently over 3700 identified victims of child pornography.\(^\text{16}\) For example, Amy,\(^\text{17}\) also now a young adult, was abused as a child by her uncle, and her abuse images make up the widespread “Misty” series, which has over 35,000 downloads.\(^\text{18}\)

Unlike other trauma and abuse victims, Vicky and Amy are not merely recovering from one incident or several incidences in the past. Instead, they are experiencing continued trauma with the knowledge of the growing number of pedophiles viewing their abuse images, which is reopening wounds and making it difficult for them to move on and heal.\(^\text{19}\)

\(^{12}\) See id. at 38.

\(^{13}\) Id. at 6. This includes one “fan” who tried to send her additional pornographic content, one who hacked her MySpace account to try to convince her to make a pornographic video with him, and one who took a variety of images from Vicky’s abuse and with two recent pictures of Vicky and her family, created a video entitled, “Where is Vicky now?” Id.

\(^{14}\) See id. at 39.


\(^{17}\) Amy is also a pseudonym used for court documents to preserve the identity of the victim. United States v. Paroline, 672 F. Supp. 2d 781, 783 n.1 (E.D. Tex. 2009), vacated, In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).


\(^{19}\) See Crawford Appendix, supra note 2, at 52-53.
In attempting to deal with and recover from this trauma, Vicky, Amy, and other victims\(^{20}\) are demanding restitution from the possessors of the pornographic abuse images.\(^{21}\) However, receiving restitution, in this case seeking financial compensation for the harms from the possession of the child pornography, including therapy costs, lost wages, and attorney fees,\(^{22}\) has been difficult, and victims have had limited success.\(^{23}\) Although restitution for child pornography crimes is specifically provided for by law,\(^{24}\) courts struggle with a variety of issues in awarding restitution to victims of child pornography possession.

Two main issues continue to plague the courts. First, courts are split on whether victims must prove proximate causation: that the specific defendant’s possession of the images caused the harm as opposed to the cumulative harm from all individuals possessing the images.\(^{25}\) A court ruling that the victims need to prove proximate causation is typically fatal to the restitution claim.\(^{26}\) Unfortunately, the current trend in the circuit courts is to require proximate causation for restitution awards.\(^{27}\) The second issue is that, while defendants can always appeal a restitution order, some courts have found that victims do not have a means of direct appeal on a denied restitution order and can appeal only via the much more limited and discretionary mandamus procedure.\(^{28}\) This severely

\(^{20}\) Lesser-known victims, Tara and L.S. (pseudonyms), have also started making restitution requests in limited cases across the country. Motion for Restitution Order Ex. A, United States v. Mahoney, No. 2:10-cr-075 (D. N.D. Jan. 7, 2011) [hereinafter Mahoney Restitution Chart] (chart showing all the cases, as voluntarily reported by Assistant U.S. Attorneys, where restitution had been requested for child pornography possession as of Dec. 7, 2010). Tara’s violent sexual abuse at the hands of her father involved increasingly violent videos including one where her father held a knife toward Tara’s naked body in front of the camera. See Mark Davis, International Porn Case Leads to Georgia, ATLANTA J.-CONST., June 17, 2008, at 1B. Tara is still a pre-teen and the requests are being made by her mother on Tara’s behalf. See Crawford Appendix, supra note 2, at 1.

\(^{21}\) United States v. Faxon, 689 F. Supp. 2d 1344, 1349 (S.D. Fla. 2010). Amy is at the helm of over 250 requests for restitution across the country. Paroline, 672 F. Supp. 2d at 784 n.4.

\(^{22}\) See Crawford Appendix, supra note 2, at 150.

\(^{23}\) See Mahoney Restitution Chart, supra note 20.


\(^{26}\) Paroline, 672 F. Supp. 2d at 793.


\(^{28}\) See e.g., United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011).
restricts victims’ ability for recourse on an unfavorable restitution award decision. 29

To better address restitution for these victims, this Article argues that Congress should overhaul the restitution structure by setting up a fine schedule and a victim fund to allow victims to make a single restitution claim against a national fund for all harm from all possessors collectively. This solution avoids the proximate causation battle and creates a right to appeal through a federal claims action.

Part I of this Article provides an overview of child pornography and the laws surrounding restitution for child pornography crimes. Part II recounts the history of restitution as applied to child pornography possession cases. Part III discusses the main challenges victims face in receiving restitution for harms resulting from child pornography possession. Part IV proposes a change to the system of restitution for child pornography possession crimes, arguing that Congress should overhaul the entire restitution system to create a process that is separate from the criminal prosecution of each defendant. Part IV also identifies how the proposed system would alleviate or improve the challenges victims face by putting reality more in line with Congress’s original intent for victim restitution in child pornography possession crimes.

I. Child Pornography Crimes and Restitution

When we think of child pornography, we often think about the sick individuals who abuse children and create images of the abuse. We also often think of the young children who were the victims of that abuse. We may even think about the federal prosecutions across the country to bust child pornographers. One thing we may not think of is the victim years later and all grown up, now dealing with the aftermath of the images of the abuse being viewed by thousands of individuals time and time again. Congress, however, remembered these grown-up child victims and created laws not only prohibiting the possession of child pornography but also allowing the victims to receive restitution from the possessors for the harms these victims suffer.

A. What is Child Pornography?

Child pornography is defined in 18 U.S.C. § 2256 30 as any visual depiction 31 of a minor 32 engaging in sexually explicit conduct. 33 Among

29 Id.
31 “[C]hild pornography’ means any visual depiction, including any photograph,
other things, the child pornography statute criminalizes and prohibits the production, distribution (meaning the sending of the materials to another person), sale (or promotion of sale), receipt, and possession of child pornography.  

When child pornography pictures or videos are of the same victim, the creators of these images often categorize them together as a “series,” identifiable by a fictitious name given to the victim to conceal the victim’s identity and evade law enforcement. Each series can contain both pornographic and non-pornographic images of the child victim. 

The series are then traded between pedophiles via the Internet in controlled groups or rings. Access to these online groups is zealously guarded by members to protect user identities including the use of encrypted sites and timed quizzes to test users’ knowledge of child pornography to prevent unwanted access to the sites. These groups also typically ban members from chatting or phoning other members to make sure that users could not identify other members of the group in the case of

film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct. . . . “ 18 U.S.C. § 2256(8). Visual depiction also includes “undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.” 18 U.S.C. § 2256(5). Child pornography also includes a “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct, or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. § 2256(8).

A minor is anyone under eighteen years of age. 18 U.S.C. § 2256(1); 18 U.S.C. § 2256(8).

Sexually explicit conduct can include “actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256(2)(A).

In this context, production and distribution are not professional terms of art. Production merely refers to the actual creation of the abuse images, professional or amateur, and distribution merely refers to passing along the image from one person to another for pay or not. Production and distribution should not necessarily be viewed as a professional economic enterprise in and of itself.

Paroline NCMEC Amicus Brief, supra note 18, at 5; United States v. Paroline, 672 F. Supp. 2d. 781, 783 (E.D. Tex. 2009).

Paroline NCMEC Amicus Brief, supra note 18, at 5.


Id.
police intervention. Some groups are very sophisticated and organized, one even having a bank account for the group for the purposes of ordering more child pornography from producers around the world. These groups, shrouded in secrecy, contribute to the thousands of images downloaded each year that continually harm the victims in the images.

B. How Does Child Pornography Possession Harm Victims?

Courts have recognized that while the children depicted in child pornography are victims of the crime of abuse that led to the creation of the pornography in the first place, the children are also victims of the crime of possession of the pornography. Child pornography is a permanent record of the abuse of the victim as a child, and the victim’s knowledge that this record is continually being shared and viewed around the world causes psychological harm to the victim separate from the initial abuse.

The Fifth Circuit, in United States v. Norris, identified three specific ways that possessors of child pornography cause harm to the victims depicted in child pornography: by perpetuating the initial abuse, by continually invading the privacy of the victims, and by providing an economic motive for future production of pornography. First, the dissemination and widespread possession of the pornography further perpetuates the initial abuse created by the producer. The Supreme Court, in New York v. Ferber, acknowledged the harm that child pornography distribution has on the victims through the continued existence and dissemination of these abuse records. Extending the harm from the initial abuse, child victims continually “experience intense feelings of powerlessness from knowing that there is nothing they can do to prevent others from viewing their pornographic images.” This perpetual possession and distribution deprives child pornography victims of the capability to control when, how, and to whom they disclose their abuse, a significant part of the healing process.

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39 Id.
40 Id.
42 Id.
43 United States v. Norris, 159 F.3d 926 (5th Cir. 1998).
44 Id. at 929.
45 Id.
46 Ferber, 458 U.S. 747.
47 Id. at 759.
48 Monzel NCMEC Amicus Brief, supra note 16, at 10.
49 Id.
Second, the widespread possession of the images continually invades the privacy of the child victim even into adulthood. In a statute to protect against child pornography crimes, Congress found that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.” The Supreme Court has cited studies, which found that the possession of child pornography is a greater threat to the victim’s future well-being than the initial sexual abuse or even prostitution because of the potential for the images to continually haunt the victim in the future. This invasion of privacy complicates normal moral and sexual development, even if the child never sees the images, just because of the victim’s knowledge that the images exist and that the images are being viewed by strangers who take pleasure in the abuse.

Third, the wide possession of child pornography provides an economic motive for producing and distributing child pornography. Possession often leads to more production, which creates more abused children and more victims of child pornography—one could not live without the other. If a particular child’s abuse is ongoing, wide possession of those abuse images could mean that that child will suffer more abuse and exploitation for the abuser’s financial or reputational gain. Looking to Vicky’s situation, she was further abused in part because of viewers’ requests for specific sexual scenes and scripts for her to act out. Although some images are traded quid pro quo between pedophiles, many times pedophiles will purchase child pornography from producers or subscribe to child pornography websites.

Possession of abuse images is extraordinarily harmful to the child depicted and future children because the possession perpetuates the initial abuse, it violates the child’s privacy into adulthood, and it could instigate

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50 Norris, 159 F.3d at 930. Although similar, this second reason about the privacy of the child is different than the first reason of extending and drawing out the harm from the initial abuse. The second reason deals with the specific right to privacy being violated perpetually into adulthood. Though the results may be the same, the rights violated are distinct. See id.
52 Ferber, 458 U.S. at 759 n.10.
54 Norris, 159 F.3d at 930.
55 Id.
56 Crawford Appendix, supra note 2, at 6. Tara also fell under this category. See Bluestein, supra note 37.
further abuse to that child or other children because possession creates an economic motive to produce child pornography. Unfortunately, the prevalence of child pornography and the corresponding harms to victims has only increased over time.

C. Increased Prevalence and Prosecution of Child Pornography Crimes

Although child pornography has existed for ages, the invention and proliferation of the Internet has exponentially increased the problem. The Internet has increased the ability to produce child pornography, the availability of child pornography, and the anonymity of the users. At any one time, there are an estimated four million websites containing images of child pornography, some containing images of very young child victims, even under the age of two. As of 2004, there were an estimated 480,000 websites devoted solely to child pornography, an increase from 261,653 in 2001. Reports to the CyberTipline, a national hotline for leads relating to child sexual exploitation, increased by 86% between 2009 and 2010, and the proportion of these tips relating to child pornography increased by 100% in that same time period.

The United Nations Human Rights Council estimates that in 2009 there were 750,000 child predators on the Internet. These offenders may possess collections of child pornography numbering over one million images, with approximately 200 images of child pornography being added to the Internet daily. Many of these images include sexual abuse of very young children—83% of perpetrators in the U.S. had images of children between six and twelve years old; 39% of perpetrators had images of children between three and five years old; and 19% of perpetrators had images of babies and infants under the age of three. The severity of the

59 Id. at 9-12.
61 Id. at 9.
62 Monzel NCMEC Amicus Brief, supra note 16, at 1.
64 Id.
65 Id.
images has increased over time as well, with the number of images depicting “serious child exploitation,” such as violent rape and torture, quadrupling between 2003 and 2007.66

In response to the increased prevalence of online child pornography, the federal government has clamped down on child pornography crimes.67 The number of suspects arrested and booked for a sex offense increased approximately 15% annually from 1994 to 2004, making sex offenses one of the fastest growing crime categories in the United States.68 Child pornography accounted for 82% of this increase.69 Not only did the number of perpetrators increase, but also the rate of prosecution increased from 40% (313 cases) of child sexual exploitation arrests prosecuted in 1994 to 57% of arrests prosecuted (2039 cases) in 2006.70 Additionally, the number of offenders sent to prison for these crimes also increased.71 In 1996, only 77% of those convicted of child pornography crimes received a prison sentence, while in 2006, 98% of those convicted of child pornography crimes went to jail.72

In May 2006, the Department of Justice rolled out a national strategy on child exploitation, Project Safe Childhood.73 Since the launch, the number of cases prosecuted by United States Attorney's Offices dealing with the sexual exploitation of minors has increased by another 40%.74 The government now has multiple programs to focus on the investigation and prosecution of child pornography and exploitation.75 Despite the increased prosecution, however, the legal framework still imposes hurdles for victims to recover for the harm.

66 Id.
67 Motivans & Kyckelhahn, supra note 15, at 1.
68 Id.
69 Id.
70 Id. at 2.
71 Id. at 5.
72 Id.
74 Id.
75 Motivans & Kyckelhahn, supra note 15, at 2. The FBI has an Innocent Images National Initiative to investigate crimes against children and the National Center for Missing and Exploited Children, which helps to identify child pornography victims. As mentioned, the Department of Justice instituted Project Safe Childhood, an initiative which seeks to increase attention on prosecution child sex exploitation and also has an Internet Crimes Against Children Task Force, which combines the efforts of federal and state law enforcement to crack down on Internet predators. Immigration and Customs Enforcement has Operation Predator which targets child sex tourism and international child pornography networks. See id.
D. Development of Child Pornography Law

Over time, Congress has consistently strengthened laws against child pornography, including laws prohibiting production, possession, and distribution. Congress has also created stiff penalties and sentences for breaking child pornography laws.

In 1978, Congress passed the first federal law specifically addressing child pornography.\(^76\) This law generally prohibited the manufacture and commercial distribution of obscene materials involving minors under the age of sixteen.\(^77\) However, at that time, determining whether something was “obscene” was difficult, as neither Congress nor the Supreme Court had concretely defined the term.\(^78\) In 1982, the Supreme Court separated child pornography from other types of obscenity laws and essentially declared that child pornography was per se obscene,\(^79\) rejecting arguments that child pornography could be considered protected speech under the First Amendment.\(^80\) Two years later, the Child Protection Act of 1984\(^81\) codified this distinction between mere obscenity and child pornography and raised the age of a minor covered by the law to eighteen years old.\(^82\)

The courts continued to expand the definition of child pornography from just that which was “obscene” to include that which was “lascivious,” such as the exhibition of a child’s genitals or pubic area, even if clothed.\(^83\) This test, created in 1986 by a trial court in California, 


\(^{77}\) Id.


\(^{79}\) See New York v. Ferber, 458 U.S. 747, 764-65 (1982) (stating that per se obscene means that you do not need to look to the content of the image beyond the fact that it is child pornography to determine whether it is obscene or not).

\(^{80}\) Id.


\(^{82}\) Id.

\(^{83}\) United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff’d sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987), aff’d, 813 F.2d 1231 (9th Cir. 1987). The Dost test instructs that courts should consider the following factors to see if an image of a minor constitutes a “lascivious exhibition of the genitals or pubic area”:

1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;
was called the *Dost* test, and it also differentiated “lasciviousness” for minors and “lasciviousness” for adults. The test acknowledges that a non-lascivious pose for adults could be lascivious if a child posed that way.

Congress has also strengthened the sentences in child pornography cases, including mere possession. For a first-time offender charged with possession of child pornography, the sentencing guidelines recommend 108-135 months (nine years to just over eleven years) imprisonment where sentencing enhancements apply—and they do apply in the majority of cases.

Congress’s efforts to pass laws banning child pornography have, over time, worked in conjunction with and built on the courts’ liberal interpretation of those laws to restrict an individual’s rights to possess and distribute child pornography. For example, the courts made the private possession of child pornography illegal where before only manufacture and commercial distribution of child pornography were illegal. Congress later made the use of a computer to depict or advertise child pornography illegal. These expanded definitions and strengthened laws vastly improved the ability of police and prosecutors to successfully convict defendants accused of child pornography crimes.

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

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See Woodlee, *supra* note 86, at 1031. Sentencing enhancements include the addition of several levels (each level represents an increase in the recommended sentencing range) for the use of a computer which occurs in almost every case these days, and the addition of several levels based on the size of the collections, the size of which has increased over time because of the use of computers. See id.

Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947).


See PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE
Lawmakers continue to attempt to strengthen or modify child pornography laws. In the 112th Congress, lawmakers introduced two bills dealing with child pornography. Their passing would have further added to the behaviors that are criminalized under the child pornography and exploitation statutes and increase sentencing penalties for violation of these statutes.

In addition to strengthening laws against the offenders, Congress has also tried to help victims recover restitution for the harms the victims sustained by creating a separate statute just for restitution in child pornography cases over and above that which is required in other crimes.

II. Restitution and How It Applies to Pornography Possession Cases

Although as a concept, restitution, “a making good of or giving an equivalent for some injury,” may be familiar to many individuals from daily life, it is a relatively new concept to the American criminal justice system and even newer when applied to child pornography possession cases.

A. What is Restitution?

Individuals who are harmed by another’s actions typically use tort law to pursue civil damages against the perpetrator. A tort claim was the only way a victim could recover financially from the perpetrator until 1982, when Congress passed the Victim and Witness Protection Act (“VWPA”),

INTERNET 38 (2001). There were, however, limits as to how far these restrictions on child pornography could go. According to the Supreme Court, Congress, taking advantage of the fact that that laws restricting or punishing child pornography garnered wide public support, may have gone too far when it attempted to expand the definition of child pornography to include virtual images of children and those images which appeared to be of a minor but did not actually contain a minor. Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121, 110 Stat. 3009–26 (1996), partially declared unconstitutional by Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). The Supreme Court struck this part of the law down, finding that criminalizing sexualized images of an individual who just appeared to be a minor was too expansive. Free Speech Coal., 535 U.S. at 256.

92 See H.R. 1981; see also S. 596.
95 See infra Part II.A-B.
which created victim restitution within the criminal system.\textsuperscript{96} The VWPA allowed, but did not require, judges to order restitution for the victim.\textsuperscript{97} Since then, Congress has passed several other restitution statutes that have strengthened a victim’s position for recovery. In 1996, Congress enacted the Mandatory Victims Restitution Act (“MVRA”), which required judges to order restitution for victims of certain crimes when the victim suffered a physical injury or pecuniary loss from the commission of the crime.\textsuperscript{98} Restitution could include returning property that was taken, paying for damaged or irretrievable property, or if the victim was physically harmed, paying for medical expenses and lost wages.\textsuperscript{99}

Congress later created a separate statute, 18 U.S.C. § 2259,\textsuperscript{100} just for restitution from offenses involving the sexual exploitation and abuse of children, which includes the possession of child pornography.\textsuperscript{101} Section 2259 requires restitution for these victims for the “full amount of the victim's losses as determined by the court.”\textsuperscript{102} The full amount of the victim’s losses includes:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.\textsuperscript{103}

\textsuperscript{97} See 96 Stat. 1248.
\textsuperscript{101} Id.
\textsuperscript{102} See id. at (b)(1).
\textsuperscript{103} See id. at (b)(3).
Courts cannot refuse to issue a restitution order on the basis of the defendant’s economic circumstances or based on the victim’s prior compensation for these harms from any other source. Section 2259 was written without the same limitations as earlier restitution laws, demonstrating Congress’s intent to fully compensate child victims of these specific heinous sexual exploitation crimes; the full compensation being much more generous than restitution for other crimes only covered under the MVRA. Additionally, in the legislative history of § 2259, Congress focused on the intense harms that victims of child pornography suffer, showing that Congress recognized the problem and intended § 2259 to help rectify the harm.

Congress ensured that victims can pursue damages in civil actions too, even though civil suits still pose practical obstacles to recovery. Masha’s Law, enacted as part of the Adam Walsh Child Protection and Safety Act, allows minor victims of sexual exploitation, including child pornography, to file a suit in district court against the offender.

Masha’s Law expanded earlier civil damages statutes, in part, by providing a longer statute of limitations: six years after the action first accrues or three years after the victim reaches the age of majority, if the victim was under sixteen at the time of the abuse. The statute of limitations means that most child victims must bring the suit on or before turning twenty-one years old for damages from abuse that occurred before turning sixteen. For example, if a girl is abused at the age of nine and has injuries immediately, the three-year statute of limitation applies from the age of majority, and the child has until her twenty-first birthday to file suit. However, if the victim does not discover the child pornography until much later and has injuries as a result, the six-year statute of limitations would apply from the date of discovery of the harm.

This expanded statute of limitations shows Congress’s intent to include harms that occur from the discovery of child pornography years after the abuse occurred.

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104 See id. at (b)(4).
105 See United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001).
106 Id.
108 18 U.S.C. § 2255 (2006). The statute was named after Masha Allen who was adopted by a single American man at the age of five. See James R. Marsh, Masha’s Law: A Federal Civil Remedy for Child Pornography Victims, 61 SYRACUSE L. REV. 459, 459 (2011). This man then turned her into one the world’s most widely known child porn stars by producing and distributing over 200 sexually explicit images which are now found “on eighty percent of the computers of apprehended child molesters worldwide.” Id.
110 See Marsh, supra note 108, at 473.
The statute additionally provides for $150,000 minimum damages for these cases, showing Congress’s further intent to provide substantial compensation for these victims.\textsuperscript{111} Masha’s Law is drafted so that the civil remedy would apply to child pornography possession cases with multiple defendants, awarding $150,000 to the victim from each defendant.\textsuperscript{112} This shows how seriously Congress took the harms that a victim suffers from child pornography possession.

Although the civil remedy does strengthen victim rights somewhat, a civil lawsuit is often not feasible for victims with thousands of circulating images like Vicky and is burdensome on the court system. First, in a criminal restitution hearing, the restitution happens at the sentencing portion of the process, so the crime of child pornography possession has already been established, and the defendant has already been convicted.\textsuperscript{113} All the judge needs to determine is how much the defendant should pay in restitution.\textsuperscript{114} In contrast, if a separate civil case were filed under Masha’s Law, the victim must put forth a full case for each defendant.\textsuperscript{115} All of the elements of the child pornography possession would need to be proven all over again in a separate trial with a separate jury from the criminal trial, which can be difficult to do.\textsuperscript{116}

Second, the civil process is incredibly burdensome, cost-prohibitive, and extremely time consuming, especially when a child is victimized by individuals all over the country and the collection of the awards is very difficult.\textsuperscript{117} Amy, the child featured in the Misty series, and her attorney estimate that just filing the lawsuits against the over 1000 offenders who violated Amy thus far would have cost over $450,000; the costs escalate from there.\textsuperscript{118} Third, if the victim is a minor at the time that the suit is filed, the court must follow special procedures to make sure that a guardian is appointed for the child victim, which consumes time and court resources.\textsuperscript{119} Therefore, only a handful of these cases have ever been filed, most victims opting instead for restitution through the criminal system where the burden is still great but not prohibitive.\textsuperscript{120} Plaintiffs have only

\begin{footnotes}
\footnote{111}{18 U.S.C. § 2255(a).}
\footnote{112}{See Marsh, supra note 108, at 473.}
\footnote{113}{See id. at 474.}
\footnote{114}{See id. at 474-75.}
\footnote{115}{See Elizabeth Dunbar, Challenges Lie Ahead in Child Pornography Lawsuits, MINN. PUB. RADIO (May 27, 2010), http://minnesota.publicradio.org/display/web/2010/05/27/challenges-for-porn-lawsuits/.
\footnote{116}{See id.}
\footnote{117}{Id.}
\footnote{118}{Id.}
\footnote{119}{Id.}
\footnote{120}{Id.}
\end{footnotes}
used Masha’s Law successfully twice to recover civil damages for child pornography creation, let alone distribution or possession. In addition to the hurdles, the courts’ inconsistent holdings further complicate victims’ recovery. Although Congress has shown its intent to strengthen the laws for victims of child pornography to recover for the harms, courts have struggled in applying the restitution framework to child pornography possession defendants.

B. Restitution Applied to Child Pornography Possession Cases

Restitution awards in child pornography possession cases have neither been consistent in courts’ applications nor easy for the victims to recover. Although Congress enacted § 2259, allowing restitution in all sexual exploitation cases, in 1994, the first court award of restitution in a child pornography possession case did not happen until 2009 in United States v. Freeman. Amy decided to seek compensation under § 2259, demanding that the Mandatory Restitution be applied in her case for the harms that Freeman caused by possessing her images. Mr. Freeman was involved in a sex exploitation business in addition to possessing the images of Amy’s abuse and received a life sentence for his crimes. The court in this case read the statute quite literally and awarded Amy the “full amount of the

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122 United States v. Freeman, No. 3:08-CR22-002/LAC (N.D. Fla. July 9, 2009). The first time a court encountered this issue, in United States v. Hesketh, No. 3:08-CR00165 (D. Conn. Feb. 23, 2009), it was settled out of court so there was no official restitution award. Warren Richey, A Bold Gambit to Reduce Demand for Child Porn, CHRISTIAN MONITOR (Aug. 16, 2009), http://www.csmonitor.com/USA/Justice/2009/0808/p22s01-usu.html. Although it was a bench opinion, Hesketh changed the landscape for victims like Vicky to receive restitution. Id. Alan Hesketh, a former Pfizer executive, was sentenced to seventy-eight months in jail after pleading guilty to trading child pornography images. See Government’s Memorandum Regarding Restitution at 7-9, Hesketh, No. 3:08-CR00165.

As the National Center for Missing and Exploited Children processed the images found on Hesketh’s computer, it notified Amy that her images were among those found. Transcript of Restitution Hearing, Hesketh, No. 3:08-CR00165. Amy decided to seek compensation under § 2259, demanding that the mandatory restitution statute be applied in her case for the harms that Hesketh caused her by his possession of her images. Id. Understanding that he was carving new ground, Judge Eginton was wary and cautious in the restitution proceeding and ended up encouraging the parties to instead settle the amount between the parties. Id. The settlement ended with Mr. Hesketh agreeing to pay Amy $130,000. Richey, supra.

123 Richey, supra note 122.
victim’s losses,”124 in the amount of $3,263,758.125 This figure was based on Amy’s past and future lost wages provided she would have worked until the age of sixty-five—assuming she would be unable to work due to emotional trauma—plus the future cost of Amy’s counseling and treatment.126

Since Freeman, the road to restitution has been difficult for child pornography possession victims, even though the facts in each case are essentially identical.127 District courts all over the country have dealt with restitution in child pornography possession cases, but the approaches have drastically varied.128 Whether restitution is awarded at all largely depends on the court’s interpretation of the proximate causation clause in § 2259.129 Some courts have held that victims need to show how all of the damages claimed in the restitution requested directly stemmed from the actions of this specific defendant.130

Among those courts that do award restitution, the amounts and the methodology to calculate the restitution amounts widely differ. A few courts, like the court in Freeman, award the entire amount requested by the victim as the full amount of the losses.131 Some courts, such as the Central District of California, award a standard “nominal” restitution amount in each case, $5000.132 Other courts calculate the full loss that the victim suffered, estimate the number of defendants that the victim could likely make restitution claims against, and award the victim the full

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125 Amended Judgment in a Criminal Case at 1, Freeman, No. 3:08-CR-22-002/LAC.
126 Restitution Clarification, Freeman, No. 3:08-CR-22-002/LAC. Several defendants in this case, including Mr. Freeman, appealed the sentences and Mr. Freeman appealed the restitution award. United States v. McGarity, 669 F.3d 1218, 1218 (11th Cir. 2012). The sentences were upheld but the restitution order was vacated. Id. at 1265.
127 See Monzel Petition, supra note 27, at 17.
129 See Monzel Petition, supra note 27, at 18-19.
130 See id. at 19 (partial list of courts denying restitution because of the victim’s lack of showing of proximate causation).
amount divided by the number of potential defendants. Still other courts base calculations on the civil statute minimum award of $150,000 and then try to apportion what percentage of the total harm the victim experienced was actually caused by the defendant in that case.

There are also circuit divides on whether restitution requires a showing of proximate causation and whether there is a direct right to appeal for victims who are denied a restitution award. Of the circuits to address these issues, the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have all concluded that proximate causation is required and made restitution decisions on this basis, although the courts still differ in how they determine if proximate cause is present. Only the Fifth Circuit has found that a victim can receive restitution without a proximate cause showing. Even in the Fifth Circuit there was disagreement until two similar cases were reheard en banc, finally deciding that proximate causation was not required for a victim to get restitution.

Circuits are likewise split as to whether the victim has the right to directly appeal a restitution order through the ordinary appellate channels or merely mandamus review. The Second, Third, Ninth, and Eleventh Circuits have allowed crime victims (all crime victims, not just sexual exploitation victims) to receive ordinary appellate review of restitution orders under the Crime Victims’ Rights Act (“CVRA”). In contrast, the Fifth, Sixth, Tenth, and D.C. Circuits all have denied victims this right,

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135 See, e.g., United States v. Kearney, 672 F.3d 81, 81 (1st Cir. 2012) (finding proximate cause was present and upholding restitution award, calculated by averaging victim’s recovery in other cases); United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011); United States v. Crandon, 173 F.3d 122, 126 (3d Cir. 1999); United States v. Burgess, 684 F.3d 445, 459 (4th Cir. 2012), cert. denied, 133 S. Ct. 490 (2012); United States v. Crawford, No. 11-5544, 2013 WL 692512 (6th Cir. Feb. 27, 2013); United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012); United States v. Kennedy, 643 F.3d 1251, 1262 (9th Cir. 2011); United States v. McDaniel, 631 F.3d 1204, 1208 (11th Cir. 2011); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 756 (U.S. 2011).
136 See In re Amy Unknown, 636 F.3d 190, 198-99 (5th Cir. 2011).
137 In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).
138 See, e.g., In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562 (2d Cir. 2005); In re Walsh, 229 F. App’x 58, 61, 2007 WL 1156999, at *2 (3d Cir. 2007); Kenna v. U.S. Dist. Court C.D. Cal., 435 F.3d 1011, 1017 (9th Cir. 2006); In re Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008).
relegating the claim to mandamus review only. Both of these issues have even been brought to the Supreme Court, but cert was denied. Other similar cert petitions are still pending before the Court. Even a quick look at this jurisprudence underscores the numerous and onerous obstacles victims face in seeking restitution in child pornography possession cases.

1. Victim Identification and Notice

Victims face obstacles from the very beginning—finding out about the child pornography in time to file a restitution claim. The National Center for Missing and Exploited Children (“NCMEC”) is a non-profit organization designated by Congress as “the official national resource center and information clearinghouse for missing and exploited children.” As such, NCMEC serves as the central repository for child pornography images and reports. NCMEC operates a CyberTipline which, since 1998, has received over 1,040,000 reports of images of child pornography, 161,000 in the first eight months of 2011 alone. NCMEC also operates the Child Victim Identification Program (“CVIP”), which reviews the child pornography images seized by law enforcement in an investigation to see if any of the victims in those images match the child victims previously identified by law enforcement. The matching is done visually as well through the use of software that codes or tags the images with a unique identifier then matches up the images to existing identified images with the use of the tag. CVIP has conducted more than 28,000 reviews of evidence involving more than fifty-three million images but only has information on 3700 identified victims. This means there are a lot of victims out there who have not yet been identified.

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139 See, e.g., In re Dean, 527 F.3d 391, 394 (5th Cir. 2008); In re Acker, 596 F.3d 370, 372 (6th Cir. 2010); In re Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008); Monzel, 641 F.3d 528 at 535.
143 Monzel NCMEC Amicus Brief, supra note 16, at 1.
144 Id. at 2.
145 Id. at 3.
146 Id.
147 Id. at 4.
Since the Child Victims’ Rights Act\(^{148}\) passed in 2004, crime victims must be sent notice of any public court proceeding involving that specific crime.\(^{149}\) Therefore, every time the CVIP identifies an image as matching an identified victim from the collection of an offender who is facing charges, the government sends notice to that victim to make the victim aware of the proceeding and of the victim’s right to request restitution from that offender.\(^{150}\) Amy has received over 800 notices in six years.\(^{151}\) Vicky has received more notifications than would “overflow a 55 gallon drum.”\(^{152}\) An average of thirty notices arrive at her house each day.\(^{153}\) While this notice process can arguably cause harm by itself, proper notice from the government allows victims to understand the extent to which the victim’s images are out there and the restitution rights associated with each possession. Without notice the victim would have no opportunity for restitution requests.

Victims must request restitution at least sixty days before the sentencing portion of the defendant’s trial or request up to a ninety-day delay for a separate restitution hearing.\(^{154}\) If a victim is not identified until after a defendant has been prosecuted and sentenced, that victim cannot receive restitution from that defendant, even though they may have been injured by that defendant’s actions. With only 3700 victims currently identified, this systemic bar on restitution could have an enormous impact on the now-unidentified victims.

2. **Definition of a Victim**

Even if victims are notified and they file for restitution in a timely manner, some judges may not find that they are considered victims under the law. Under § 2259, a victim is the “individual harmed as a result of a commission of a crime.”\(^{155}\) Determining who constitutes a victim will typically be straightforward in pornography production cases—it will be

\(^{149}\) See id. § 3771(a)(2).
\(^{153}\) Crawford Appendix, supra note 2, at 144.
the child who was abused and depicted in the images. Possession cases pose a greater problem, however, as the collections found in possession cases often include hundreds or thousands of images and videos involving many different children.\textsuperscript{156}

One reading of the statute may limit the class of victims to those who are depicted in images specifically listed in a count of the indictment.\textsuperscript{157} Because prosecutors find it impractical to list every image discovered in the defendant’s possession, a standard indictment for child pornography possession lists only one or two images for each count. Therefore, under this reading of the statute, even in cases that involve a collection of 1000 or more images, only the child depicted in the single image (or few images) listed in the indictment could recover for harm, even though the children in the other images may be equally harmed.\textsuperscript{158} Limiting victims to only those listed in the indicting document potentially makes the U.S. Attorney’s selection of which images to list in the indictment a very high-stakes proposition for the victims.\textsuperscript{159}

In a case interpreting § 2259 for child pornography production, the Ninth Circuit found that the charging documents restricted who could claim restitution.\textsuperscript{160} The government argued that all of the images are taken into account at the sentencing stage even when not listed in the charging document, but the court denied this argument, stating that “a court may hold a defendant responsible for a broader range of harms connected with the defendant’s crimes when it calculates a sentence than it may consider when it crafts a restitution order.”\textsuperscript{161} However, in interpreting a related law, the Tenth Circuit found that the Crime Victims’ Rights Act “does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document.”\textsuperscript{162} Neither of these cases dealt with the possession of child pornography, and due to the relatively recent nature of restitution cases for possession, the question of who is eligible to file for restitution in possession cases remains unaddressed and open in many courts across the country.

\textit{3. Proximate Causation}

\textsuperscript{156} See Restitution Update, CEOS QUARTERLY NEWSLETTER, Sept. 2009 [hereinafter Restitution Update].
\textsuperscript{157} United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999).
\textsuperscript{158} See Restitution Update, supra note 156.
\textsuperscript{159} Id.
\textsuperscript{160} Laney, 189 F.3d at 965.
\textsuperscript{161} Id.
\textsuperscript{162} In re Stewart, 552 F.3d 1285, 1289 (11th Cir. 2008).
By far the biggest obstacle to victims receiving an award of restitution is proximate causation. As discussed supra, § 2259 requires restitution for these victims for the “full amount of the victim’s losses as determined by the court.”\textsuperscript{163} The full amount of the victim’s losses includes:

(A) medical services relating to physical, psychiatric, or psychological care;
(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income;
(E) attorneys’ fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense.\textsuperscript{164}

Courts are not clear whether the last clause in subsection (f), “suffered by the victim as a proximate result of the offense,” applies to the entire preceding listed or just the last clause.\textsuperscript{165} For example, does the lost income in subsection (e) need to be suffered as a proximate result of the offense, or do only the “any other losses” as specified in subsection (f) need to be suffered as a proximate result of the offense?

All circuits that have addressed this issue, with the exception of the Fifth Circuit, have found that some proximate cause requirement applies to all losses claimed for restitution under § 2259.\textsuperscript{166} The Fifth Circuit and several lower courts found that proximate causation does not apply to restitution awards in this context.\textsuperscript{167} Instead, these courts held that the proximate causation requirement in § 2259 applies only to the last clause, “any other losses.”\textsuperscript{168} The court reasoned that Congress wanted to provide for specific losses but could not anticipate for other types of losses and therefore wanted an open statement but needed to limit it in some respects.\textsuperscript{169} The court also pointed out that § 2259 was drafted differently than other restitution statutes, which specifically require proof of

\textsuperscript{164} See id. § 2259(b)(3).
\textsuperscript{165} Id.
\textsuperscript{166} See supra note 135 and accompanying text.
\textsuperscript{167} In re Amy Unknown, 636 F.3d 190, 198 (5th Cir. 2009), reversing 591 F.3d 792 (2009).
\textsuperscript{168} Id.
\textsuperscript{169} Id.
proximate causation.\textsuperscript{170} For example, the MVRA defines a victim as an individual “directly and proximately harmed as a result of the commission of an offense.”\textsuperscript{171} In contrast, § 2259 defines a victim as an individual “harmed as a result of a commission of a [child pornography] crime.”\textsuperscript{172} This difference in language was enough to convince the Fifth Circuit that this was no mistake and was indicative of congressional intent.\textsuperscript{173}

The remainder of the circuits that have addressed the issue have found that proximate causation is required.\textsuperscript{174} Some circuits read this requirement as coming from the catch-all statutory language of proximate causation applying to all of the preceding types of losses.\textsuperscript{175} In addition to the catch-all statutory provision, other circuits have imposed a proximate causation requirement based on the definition of the victim, which states that a victim is a person “harmed as a result of a commission of a crime.”\textsuperscript{176} Yet other circuits applied the common law construction of proximate causation, “presuming that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply.”\textsuperscript{177} If proximate causation is held to apply, that determination is typically fatal to a claim of restitution in a pornography possession case because the court then requires the victim to show how the specific actions of that particular defendant directly caused the victim’s injuries.\textsuperscript{178} Even the courts that impose the burden often state that if the statute is interpreted to have the proximate causation requirement, the burden is nearly impossible to overcome.\textsuperscript{179} In 2009, one judge expressed this sense: “Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.”\textsuperscript{180} Imposition of a proximate causation requirement such as this does not coincide with

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 199 (citing 18 U.S.C. § 2259(c) (2006)).
\textsuperscript{173} Id.
\textsuperscript{174} See Monzel Petition, supra note 27, at 10.
\textsuperscript{175} See, e.g., United States v. McDaniel, 631 F.2d 1204, 1208-09 (11th Cir. 2011).
\textsuperscript{176} See, e.g., United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999); United States v. Kennedy, 643 F.3d 1251, 1260 (9th Cir. 2011); 18 U.S.C. § 2259(c).
\textsuperscript{177} United States v. Monzel, 641 F.3d 528, 536 (D.C. Cir. 2011).
\textsuperscript{178} United States v. Paroline, 672 F. Supp. 2d 781, 793 (E.D. Tex. 2009), vacated sub nom. In re Unknown, 697 F.3d 306 (5th Cir. 2012), opinion withdrawn and superseded on reh'g en banc sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012), vacated sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).
\textsuperscript{179} Id.
\textsuperscript{180} Id.
Congress’s intent to provide restitution for victims of child pornography possession.

4. Restitution Awards

Once the court finds that the victim in a particular case is considered a victim under the law, the victim still faces an enormous battle because of the many approaches that the courts take in deciding how restitution should be calculated.\textsuperscript{181} An additional issue the courts struggle with is whether restitution awards are constitutional under the Eighth Amendment prohibiting excessive fines.\textsuperscript{182} There is continuing debate on whether restitution in general is a criminal punishment or a civil remedy merely contained within criminal proceedings. Some courts have held that restitution is a criminal penalty, part of a criminal sentence, and serves the same purposes as criminal punishment.\textsuperscript{183} If restitution is a criminal punishment, then it must be analyzed under the Eighth Amendment to determine if a restitution award is an excessive fine or could be considered cruel and unusual punishment.\textsuperscript{184} The test under the Eighth Amendment is whether the award is “grossly disproportional to the gravity of a defendant’s offense.”\textsuperscript{185} Because district courts are awarding the restitution themselves, they would not likely make the award and then find that the restitution award is grossly disproportional. However, it is an appropriate question for circuit courts and provides good fodder for a defendant’s appeal.

Victims also struggle with actually receiving the restitution award. Although Vicky has been awarded upwards of $2 million,\textsuperscript{186} as of May 2011, Vicky has actually received payment only in the tens of thousands of dollars.\textsuperscript{187} The Financial Litigation Unit in the U.S. Attorney’s Office is tasked with enforcing restitution awards.\textsuperscript{188} The Unit will monitor payment

\textsuperscript{181} See supra Part II.
\textsuperscript{182} U.S. CONST. amend. VIII.
\textsuperscript{184} U.S. CONST. amend. VIII.
for up to twenty years, including the time the defendant is incarcerated and on probation, if applicable. A victim may also attempt to file a lien against the defendant for the amount awarded in the restitution hearing. Although a restitution award is not dischargeable in bankruptcy, it is also not a guarantee that the victim will ever actually receive the money. As many of the defendants are indigent and then incarcerated for long periods of time after conviction, the opportunity for the victim to actually recover the award is not always present.

5. Right to Appeal

When a defendant is ordered to pay restitution, that defendant has the right to appeal directly to the next higher court. When a victim asking for restitution is denied restitution, the circuits are divided on which appellate remedies are available to that victim: direct appellate review, a non-deferential CVRA “mandamus” review, or merely a typical deferential mandamus review.

A mandamus petition asks a higher court to order a lower court to do something. For a typical mandamus petition the higher court has discretion whether to hear the appeal or not. The CVRA “mandamus” review, however, is not a true mandamus review because the plain language of the statute authorizing CVRA “mandamus” review explicitly requires the courts of appeal to “take up and decide” the crime victim’s petition. This language is much stronger, and less deferential, than standard mandamus review—effectively no different than a direct right of appeal.

Still, courts interpreting this CVRA “mandamus” process are split on what standard of review victims are entitled to receive. The Fifth, Sixth, Tenth, and D.C. Circuits have held that under the CVRA, victims only have deferential mandamus review for restitution petitions. The Second,
Third, Ninth, and Eleventh Circuits, however, have all granted victims ordinary appellate review under the CVRA.198 Congress did not intend for courts to have discretion in whether to review crime victims’ appeals.199 Senator Kyl recently wrote a letter to the Justice Department, noting that the CVRA was “intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary appellate standards.”200 The differing interpretations in the courts means that victims in different parts of the country are currently receiving different protection and have different rights to appeal restitution awards, with some courts not reviewing the cases at all.201

Additionally, circuits are divided on whether victims can take a direct appeal to the courts of appeals under the general appeals statute, 28 U.S.C. § 1291.202 Two circuits, the Third and Sixth Circuits, have allowed victims to directly appeal restitution awards;203 while a plurality of circuits have held that victims lack sufficient standing to directly appeal a restitution award.204 This split leaves a landscape where district courts across the country are exercising drastically different approaches to restitution awards with equally drastically different results on essentially identical facts, yet the victim often has no or extremely limited recourse in the way of appellate review.

III. Recommendation: Centralized Child Pornography Possession Victim Restitution Fund

Given the deep divide among district and circuit courts on the issues surrounding restitution for child pornography victims, congressional intervention is necessary to bring the reality of the system in line with

198 See supra note 138 and accompanying text.
200 Id.
201 See, e.g., United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004).
202 See Monzel Petition, supra note 27, at 34.
Congress’s intent and to make application of § 2259 consistent for each case.

A. A Proposed Solution – Fixing a Broken System

Congress must overhaul the current restitution system for child pornography possession. Child pornography possession is different than other types of crime in that the offender did not have direct contact with the victim but still has an immense impact on the victim and harms the victim in a very real way. This requires a different approach for restitution.

Congress should create a victim restitution fund for child pornography victims and have the U.S. Federal Claims Court administer the fund. At sentencing, district courts would order each convicted defendant to pay a specified amount into the victim restitution fund regardless of whether the children in the defendant’s pornography collection are identified and regardless of whether the victims are making legal restitution claims at the time of sentencing.\(^\text{205}\) The amount the defendant is required to pay into the fund could be based on the number of images the defendant possessed or alternatively, on the number of victims in the images. Once the children are identified, or if they later decide to make restitution claims for any reason,\(^\text{206}\) the funds are available to compensate for the full loss. This money would accrue, and each victim would make a single claim against the fund with the understanding that any additional claims will be barred even if further harms are incurred.

This type of fund is not unprecedented. In 1984, Congress established the Crime Victims Fund,\(^\text{207}\) through the Victims of Crime Act of 1984.\(^\text{208}\) Each year, millions of dollars are deposited into the fund from “criminal

\(^{205}\) In opinions, even courts that have denied restitution have acknowledged the need to provide assistance to child pornography victims and suggested something similar to a fund. In Paroline, the court suggested that:

[ paraphrase of Paroline, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009).]

\(^{206}\) Some conceivable reasons are that victims may not experience the full impact of the harms until later in life, or some parents of child victims may not want to pursue restitution but when the victim gets older, the victim may want to seek restitution on their own. See New York v. Ferber, 458 U.S. 747, 758 (1982) (recounting research of the effects child pornography victims experience into adulthood).


fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorneys' Offices, federal U.S. courts, and the Federal Bureau of Prisons.\textsuperscript{209} These monies are then distributed through grants to victim services organizations.\textsuperscript{210} Although the Crime Victims Fund differs from the proposed fund in respect to whom the money is distributed (grants to organizations versus directly to the child pornography victims), the goal of helping victims is the same.

Another example of a victim compensation fund is the Vaccine Injury Compensation Trust Fund.\textsuperscript{211} The program is funded through a tax on vaccines and is administered by the U.S. Department of Health and Human Services and the U.S. Federal Court of Claims.\textsuperscript{212} Claimants file claims in the Federal Court of Claims and the court decides which claims warrant compensation for harms.\textsuperscript{213} The victims still preserve their right to sue civilly with some restrictions if they are denied compensation or reject the award.\textsuperscript{214} One of the problems with the Vaccine Injury Fund is the difficulty of proving that the injuries sustained are from a vaccine,\textsuperscript{215} just as proximate causation is currently a challenge for restitution awards for child pornography possession.

In contrast, the burden of proof for showing causation in the proposed restitution fund would be less stringent than the current proximate causation standard because the proof of causation is not focused on a single defendant. A victim would no longer have to prove that his/her injuries were proximately caused by a specific defendant: just that the harm was caused by the wide possession of the child pornography in general.

The administration of restitution awards would be centralized, consistent, and streamlined. One court would deal with all of the country's claims, resolving the wide variance in interpretation in the current system. Judicial efficiency would be served because of the fewer number of suits—one per victim—and a centralized administration. The victim could

\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} 42 U.S.C. § 300aa-10 (2006).
\textsuperscript{213} Id.
receive restitution for the full amount of the victim’s losses without filing in every district court across the country in hundreds of suits.

Some have suggested that Congress amend the statute to soften the perceived proximate causation requirement and allow more victims to recover.\textsuperscript{216} However, this would only placate one problem with the current system of restitution and still leaves each district court open to interpret the new statute. A new system is necessary to address the wide variety of current problems.

B. How the Proposed System Would Address Current Problems

Although the proposed system is not a perfect solution, it elegantly addresses or alleviates several of the recurring problems.

1. Victim Notification and Notice

Because restitution is currently tied to an individual defendant’s criminal trial, a victim has to satisfy a very rigid timetable in order to make a restitution claim.\textsuperscript{217} Under the proposed system, delayed victim identification would not impact a victim’s ability to claim restitution because the fund would be collecting money from the defendants who possessed that child’s images over time, even before the child was identified. The money would be waiting in the fund.

Also, the proposed system would help to alleviate much of the trauma that occurs when the victim gets continued victim notices each time a new defendant is found with the victim’s abuse images. Under the new system, these notices would not be necessary after the victim has received full restitution from the fund because all future restitution claims would be barred.

2. Definition of a Victim

In some courts, a victim is currently limited to only those children in the specific images listed in the indicting document.\textsuperscript{218} Under the proposed system, the issue of which images were included in an indictment would have no bearing on a victim’s right to claim restitution. When you separate


\textsuperscript{218} United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999).
an individual defendant’s trial from the victim’s restitution process, these mechanical issues are no longer an issue and a victim cannot be barred by an Assistant U.S. Attorney’s early mistake. The victim would be considered a victim if the images exist and any prosecuted defendant possessed them.

3. Proximate Causation

By far the most challenging obstacle for a victim to overcome is showing how the victim’s injuries and harm is proximately caused by that specific defendant in the case in which the victim is claiming restitution.\textsuperscript{219} This standard is an effective bar to claiming restitution. Under the proposed system, the victim would still have to show that the injuries were caused by possession of the victim’s abuse images, but the causation does not have to be tied to any one defendant. This alleviates the problems that the courts currently see when a victim can only prove harms caused by a cumulative effect and not by the actions of a specific possessor.

4. Restitution Awards

From the differential in the size of awards to the actual collection of the money from the defendants, the current restitution is a nightmare both for the courts and for the victims claiming restitution. This problem would be greatly improved by the proposed system. The government would collect money from the defendant and deposit that money into the fund. Because the victims would make claims directly against the fund instead of the defendant, victims would not have to wait for defendants to pay up in order to receive restitution. While the government may still have difficulty collecting from certain individuals, the victim would not have to chase down the money or file liens on a defendant’s property to receive the court-ordered full amount of the victim’s harms.

5. Right to Appeal

While a defendant has the right to directly appeal a restitution order, many courts only allow a discretionary mandamus review of a restitution award, restricting the victim’s ability to get full review of a restitution denial.\textsuperscript{220} The proposed system would clear all of these cases out of the

\textsuperscript{219} United States v. Paroline, 672 F. Supp. 2d 781, 793 (E.D. Tex. 2009), vacated sub nom. In re Unknown, 697 F.3d 306 (5th Cir. 2012), opinion withdrawn and superseded on reh’g en banc sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012), vacated sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).

\textsuperscript{220} See supra note 139 and accompanying text.
district and circuit courts and centralize them in one court system, the Federal Court of Claims, and would provide a direct right of appeal for all restitution awards. With this basic right available, and a consistent approach, victims will finally have the rights and restitution that Congress intended.

Conclusion

Child pornography is increasingly prevalent in this Internet age. With the ability for images to travel across the world or just across the street anonymously and in an instant, the children in the abuse images are being violated over and over again. Although the initial abuse was extraordinarily difficult, now these victims have to go through life knowing that thousands of perverts are taking pleasure in the most humiliating and traumatizing moments in the victim’s life. Congress recognized these harms and created restitution to help the victims get the help they need and be compensated for the deep damages the pornography has caused.

Vicky has been filing restitution claims all over the country for nearly three years now. Courts have denied her restitution claims because she could not prove exactly how one specific defendant’s actions contributed to her harm. Even from the courts that did order restitution, actually getting the money is another battle. If the court makes a restitution determination, the defendant can appeal the result, but the victim cannot appeal directly and only has access to further review through a mandamus proceeding. These bars on receiving restitution are not what Congress intended.

As more images of child pornography are produced, and as more victims are identified by law enforcement, this problem will only get worse. Failing to reform the system will just compound the confusion, increase the inefficiency, and restrict the restitution. These victims deserve better. Congress must overhaul this system to provide these victims a simpler solution. A streamlined restitution process in the Federal Court of Claims, with victims claiming against a victim restitution fund, would go a long way to making sure that these individuals, who were abused and victimized time and time again by the pedophiles around the world, are not also victims of a broken system.