

PUTTING A PRICE ON CHILD PORN:  
REQUIRING DEFENDANTS WHO POSSESS  
CHILD PORNOGRAPHY IMAGES TO PAY RESTITUTION  
TO CHILD PORNOGRAPHY VICTIMS

ABSTRACT

The Mandatory Restitution for Sexual Exploitation section of the Violence Against Women Act of 1994 made it mandatory for federal courts to order restitution to victims of certain crimes. The purpose of the statute is not being fulfilled, however, when courts hold there is no causal connection between defendants who possess pornographic images of children and the victims of child pornography. This article argues defendants possessing child pornography images should be required to pay restitution to child pornography victims under the mandatory restitution statute. Restitution is necessary in order to fully compensate victims of child pornography for their losses. Part II of this article gives a brief overview of federal criminal restitution in order to give context to the mandatory restitution statute. It also describes the statute and the elements of restitution to which child pornography victims are entitled under the statute. Part III analyzes the definition of “victim” under the statute and discusses the causation issues that arise in defining a victim entitled to restitution under the statute. Part IV describes a proposed amendment to the statute that would aid in eliminating controversy surrounding the causation issue. Part V concludes with the statute’s impact on the North Dakota federal court system.

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## I. INTRODUCTION

*Federal Judge Asks Prosecutors to Put a Price on Child Porn*,<sup>1</sup> *Child Pornography, and an Issue of Restitution*,<sup>2</sup> and *Attorney Shifts Focus to Target Child Porn*,<sup>3</sup> all recently published newspaper articles, illustrate the growing importance of holding defendants who possess child pornography images accountable to the victims by ordering the defendants to pay restitution to the victims. The Mandatory Restitution for Sexual Exploitation and Other Abuse of Children section of the Violence Against Women Act of 1994 made it mandatory for federal courts to order restitution to victims of certain crimes.<sup>4</sup> Congress enacted the mandatory restitution statute to formally recognize the need for victims of child pornography to be fully compensated for their losses.<sup>5</sup> The purpose of the statute is not being fulfilled, however, when courts hold there is no causal connection between defendants who possess pornographic images of children and the victims of child pornography.<sup>6</sup>

The express language of the statute clearly dictates that restitution shall be ordered to any “individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18].”<sup>7</sup> Defendants who possess pornographic images of children continually harm the victims every time they view the images.<sup>8</sup> Under the statute, the child depicted in the pornographic images is a victim, and the defendant convicted of possessing the images is required to pay restitution.<sup>9</sup>

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1. James Walsh, *Federal Judge Asks Prosecutors to Put a Price on Child Porn*, STAR TRIBUNE, Jan. 5, 2010, <http://www.startribune.com/local/stpaul/80672902.html?page=1&c=y>.

2. John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES, Feb. 2, 2010, at A19, available at <http://www.nytimes.com/2010/02/03/us/03offender.html?emc=eta1>.

3. *Attorney Shifts Focus to Target Child Porn*, THE FORUM (Fargo, N.D.), May 26, 2010, <http://www.inforum.com/event/article/id/279876/group/homepage/>.

4. See 18 U.S.C. § 2259(4)(A) (2010) (“The issuance of a restitution order under this section is mandatory.”).

5. See *id.* § 2259(b)(1) (stating “[t]he order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim’s losses as determined by the court . . .”).

6. See discussion *infra* Part III.B.

7. See § 2259(c) (defining the term “victim” as “the individual harmed as a result of a commission of a crime under this chapter . . .”).

8. See discussion *infra* Part III.C (discussing how the defendant causes the child to suffer by receiving and viewing the pornographic images, thus perpetuating the existence of the images and creating an economic incentive for creating and distributing the materials).

9. See discussion *infra* Part III.A (defining “victim” under the mandatory restitution statute); see also Meg Garvin, *How Current Restitution Law is Failing Victims in Child Abuse Image Cases*, 12 NAT’L CRIME VICTIM L. INST. 1, 23 (2010) (noting it is well-established that child

This article argues defendants possessing child pornography images should be required to pay restitution to child pornography victims under the mandatory restitution statute.<sup>10</sup> Restitution is necessary in order to fully compensate victims of child pornography for their losses.<sup>11</sup> Part II of this article gives a brief overview of federal criminal restitution in order to give context to the mandatory restitution statute. It also describes the statute and the elements of restitution to which child pornography victims are entitled under the statute. Part III analyzes the definition of “victim” under the statute and discusses the causation issues that arise in defining a victim entitled to restitution. Recent court opinions examining the causal requirements of the statute are also discussed in this section. Part IV describes a proposed amendment to the statute that would help eliminate some of the controversy regarding the causation issue. Part V concludes with the statute’s impact on the North Dakota federal court system.

## II. FEDERAL CRIMINAL RESTITUTION

Federal criminal restitution is a relatively new area of law, especially with regard to compensating victims of child pornography.<sup>12</sup> In order to fully understand the mandatory restitution statute, it is necessary to briefly describe the history of federal criminal restitution and the policy behind it. Part A of this section provides an overview of federal restitution statutes. This discussion is essential to a thorough understanding of § 2259 because of the similarities between other federal restitution statutes and § 2259. Part B of this section describes the Mandatory Restitution for Sexual Exploitation and Other Abuse of Children statute and the elements of restitution to which child pornography victims are entitled.

### A. OVERVIEW OF FEDERAL CRIMINAL RESTITUTION

Federal criminal restitution has become an increasingly important issue, and legislatures continue to enact and amend restitution statutes in order to compensate victims of certain crimes.<sup>13</sup> As the concept of federal criminal restitution has evolved, Congress has increasingly recognized

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victims depicted in child abuse images should receive restitution from the defendants who possess their images).

10. See discussion *infra* Part III.C (stating that victims of child pornography cases are harmed by the defendant’s crimes and have a right to be compensated).

11. § 2259(b)(1).

12. See *infra* note 721 and accompanying text (describing that until recently, prosecutors had not sought restitution on behalf of child pornography victims).

13. CATHARINE M. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION, §§ 1:1, 1:3, at 1, 3 (2008).

victims' interests.<sup>14</sup> This increased recognition of victims' interests has resulted in broader statutory criteria and, as a result, stronger implementation by federal courts.<sup>15</sup>

### 1. *History of Federal Restitution Law*

The first federal restitution act, the Federal Probation Act, was enacted in 1925.<sup>16</sup> Under the Act, restitution was only imposed as a condition of supervision.<sup>17</sup> In 1982, legislatures enacted the Victim Witness Protection Act (VWPA) to allow courts to impose restitution as a separate component of the sentence.<sup>18</sup> Restitution under the original VWPA was only discretionary, directing courts to take into account the defendant's ability to pay and the extent of the victim's harm when ordering restitution.<sup>19</sup> One of the best known portions of the Comprehensive Crime Control Act of 1984,<sup>20</sup> The Sentencing Reform Act of 1984,<sup>21</sup> recodified the VWPA and reaffirmed restitution as a separate component of the sentencing process.<sup>22</sup>

In the 1990 case *Hughey v. United States*,<sup>23</sup> the United States Supreme Court held that the VWPA allowed restitution only for harm caused by an offense of the conviction.<sup>24</sup> After *Hughey*, Congress amended the VWPA to allow restitution to be included for a scheme, pattern, or conspiracy if an element of the offense.<sup>25</sup> Parties could now agree to restitution to any extent, in any case.<sup>26</sup> Furthermore, parties could agree that restitution be paid to persons other than the victims of the offense.<sup>27</sup>

In 1992, Congress enacted the first mandatory restitution statute, the Child Support Recovery Act.<sup>28</sup> This Act did not give courts discretion to determine whether restitution should be awarded; the Act required courts to order restitution in an amount equal to the total unpaid child support

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14. *Id.* § 1:2, at 2.

15. *Id.*

16. Pub. L. No. 68-596, 43 Stat. 1260 (1925), *repealed by* Pub. L. No. 98-473, 98 Stat. 1987, 2031 (1987).

17. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION, *supra* note 13, § 1:2, at 2.

18. *See* Victim Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 3663-3664).

19. *Id.*

20. Pub. L. No. 98-473, 98 Stat. 1976 (1984).

21. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3663-3664).

22. GOODWIN ET AL., *supra* note 13, § 1:3, at 3.

23. 495 U.S. 411 (1990).

24. *Hughey*, 495 U.S. at 413.

25. GOODWIN ET AL., *supra* note 13, § 1:3, at 3.

26. *Id.*

27. *Id.*

28. Pub. L. No. 102-521, 106 Stat. 340 (1992).

existing at the time of sentencing.<sup>29</sup> Congress enacted further mandatory restitution statutes in 1994 under the Violent Crime Control and Law Enforcement Act.<sup>30</sup> This Act ordered defendants to pay restitution for certain title 18 offenses, such as violence against women, exploitation of children, and telemarketing.<sup>31</sup> The Mandatory Victims Restitution Act (MVRA) of 1996 greatly improved victim compensation by making restitution mandatory for a number of federal crimes.<sup>32</sup> The MVRA dictated that victims must be “directly and proximately” harmed by the offense of the conviction in order to be awarded restitution under the Act.<sup>33</sup> The MVRA also required courts to compensate victims for the “full amount” of the victims’ losses.<sup>34</sup> Even though a number of federal restitution statutes exist, the general purpose of all the restitution statutes remains the same.<sup>35</sup> The next section explores Congress’ purpose in enacting restitution statutes.

## 2. Purpose of Federal Restitution Law

The principal of restitution is an integral part of the criminal justice system.<sup>36</sup> “Restitution” means restoring someone to the position occupied before a particular event took place.<sup>37</sup> The purpose of restitution is to make a victim whole.<sup>38</sup> Congress enacted federal criminal restitution statutes to improve the administration of justice by requiring federal criminal defendants to pay full restitution to the identifiable victims of their crimes.<sup>39</sup> It is essential to the criminal justice system that offenders be held accountable

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29. 18 U.S.C. § 228(c) (1992).

30. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1904 (1994).

31. 18 U.S.C. § 2248 (mandating restitution for sexual abuse crimes under §§ 2241-2245); § 2259 (mandating restitution for sexual exploitation of children crimes under §§ 2251-2258); § 2264 (mandating restitution for domestic violence crimes under §§ 2261-2262); § 2327 (mandating restitution for telemarketing crimes under §§ 1028-1029 and §§ 1341-1345).

32. § 3663(a)(1)(A) (mandating restitution for most federal offenses in which there is a victim); § 3664(f)(1)(A) (mandating that restitution be for the “full” amount of the victims’ harms, regardless of the defendant’s financial experiences).

33. § 3663(a)(2).

34. § 3664(f)(1)(A).

35. See discussion *infra* Part II.A.2 (discussing the purposes of federal restitution law).

36. GOODWIN ET AL., *supra* note 13, § 2:1, at 12.

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

38. *United States v. Crandall*, 525 F.3d 907, 916 (9th Cir. 2008).

39. See S. Rep. No. 104-79, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 925 (favorable report out of the Judiciary Committee on the Victims Justice Act of 1995, which became the Mandatory Victims Restitution Act); see also *United States v. Reano*, 298 F.3d 1208, 1211-12 (10th Cir. 2002) (citing the legislative history of the Mandatory Victims Restitution Act); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1249 (D. Utah 2004) (affirming the policy of federal criminal restitution); *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1330 (D. Utah 2004) (affirming the policy of federal criminal restitution).

for their actions.<sup>40</sup> The Judiciary Committee, in enacting the MVRA, stated that justice cannot be served until full restitution is made to the victim of a crime.<sup>41</sup>

The purpose of ordering a defendant to pay a monetary fine, often in addition to serving a prison sentence, forces an individual defendant to address the harm his crime has caused to the individual victims of his crime and to society.<sup>42</sup> Victims, especially victims of child pornography, frequently suffer both financial and emotional losses because they have to seek counseling or medical services for the rest of their lives.<sup>43</sup> The federal government is responsible for requesting victim restitution and advocating victims' interests.<sup>44</sup> It is the federal government's goal that federal crime victims receive the fullest possible restitution from criminal wrongdoers.<sup>45</sup> The federal government must work to achieve this goal while balancing both the resources available to assist the victims and the constitutional rights of the defendant.<sup>46</sup> Congress also works to advocate victims' interests by enacting legislation such as the Mandatory Restitution for Sexual Exploitation of Children statute in order to protect child pornography victims and compensate the victims for their losses.<sup>47</sup> The next section describes the mandatory restitution statute for sexual exploitation of children crimes and the elements of restitution to which victims are entitled under the statute.

#### B. MANDATORY RESTITUTION FOR SEXUAL EXPLOITATION OF CHILDREN

The Mandatory Restitution for Sexual Exploitation and Other Abuse of Children statute makes restitution mandatory for any offense under chapter 110 of the United States Code.<sup>48</sup> Courts have continued to affirm the

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40. See S. Rep. No. 104-79, *supra* note 39, at 12.

41. *Id.*

42. *Id.*; see also H. Rep. No. 104-16, at 5 (1995).

43. See United States' Response Re: Mandatory Restitution For Victims of Persons Who Possess Child Pornography at 13, *United States v. Cook*, No. 4:08-cr-00024-RRB (D. Alaska July 16, 2009) (citing to the child pornography victim's psychological consultation where the psychologist indicated that the victim would struggle with the effects of the abuse for the rest of her life and the victim would require weekly therapy and perhaps even inpatient treatment at times, throughout the course of her lifetime).

44. See GOODWIN ET AL., *supra* note 13, § 17:22, at 549.

45. 128 Cong.Rec. 27391 (1982) (remarks of Rep. Rodino).

46. See *Hughey v. United States*, 495 U.S. 411, 420 (1990) (describing the policy behind the Victim Witness Protection Act).

47. 18 U.S.C. § 2259(b)(1) (2010).

48. § 2259(c). Chapter 110 includes the following crimes: sexual exploitation of children; selling or buying children; certain activities relating to material involving the sexual exploitation of children; and certain activities relating to material constituting or containing child pornography.

mandatory nature of restitution for crimes included in this chapter.<sup>49</sup> Historically, most courts have imposed restitution under § 2259 in cases where the defendant sexually abused the child victim or participated in the production of child pornography in which the child victim was depicted.<sup>50</sup> However, § 2259 applies to all of the offenses in chapter 110, regardless of whether a defendant personally participated in the sexual abuse, production, and initial distribution of child pornography.<sup>51</sup> Restitution is mandatory as

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*Id.* §§ 2251, 2251A, 2252, 2252A. The full text of 18 U.S.C. § 2259(a) states, “[n]otwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution of any offense under this chapter.” § 2259(a) (emphasis added). Further, subsection (b) provides, “[t]he issuance of a restitution order under this section is mandatory.” § 2259(b)(4)(A).

49. *See, e.g.*, *United States v. Scheidt*, No. 1:07-CR-00293, 2010 WL 144837, at \*2 (E.D. Cal. Jan. 11, 2010) (stating “it is clear that restitution is mandatory for any offense in [Chapter 110]”); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1249 n.101 (D. Utah 2004) (noting that the court “shall order” restitution for offenses under Chapter 110, in a case in which defendant was convicted of sexual exploitation of a child under 18 U.S.C. § 2251(a)); *United States v. Searle*, 65 Fed. Appx. 343, 346 (2d Cir. 2003) (stating “18 U.S.C. § 2259 provides that a person convicted of sexual exploitation *must* pay restitution” (emphasis added)); *United States v. Julian*, 242 F.3d 1245, 1246-47 (10th Cir. 2001) (referring to 18 U.S.C. § 2259 as the mandatory restitution for sexual exploitation crimes); *United States v. Laney*, 189 F.3d 954, 964-65 (9th Cir. 1999) (noting that § 2259 “requires a sentencing court to order a defendant convicted of a crime involving the sexual exploitation of children to pay restitution to the victim of that crime”); *United States v. Crandon*, 173 F.3d 122, 125-26 (3rd Cir. 1999) (noting that restitution was mandatory under § 2259).

50. *See United States v. Johnston*, No. 7:09-CR-72-D, 2010 WL 1640933, at \*2 (E.D.N.C. Apr. 6, 2010) (ordering the defendant to pay restitution under § 2259 totaling \$1,662,930 for manufacturing child pornography); *United States v. Doe*, 488 F.3d 1154, 1160-62 (9th Cir. 2007) (upholding a \$16,475 restitution order compensating eight victims for future expenses, including two years of counseling, alternative education programs, vocational training, and a case management fee, in a case in which the defendant was convicted of producing child pornography and engaging in illicit sexual conduct with minors in foreign places); *United States v. Estep*, 378 F. Supp. 2d 763, 770-74 (E.D. Ky. 2005) (ordering \$221,480.10 in restitution to three child victims of sexual abuse and exploitation); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1249 (D. Utah 2004) (ordering the defendant to pay \$79,968 to the victim in a case in which the defendant (the victim’s adoptive father) was convicted of sexual exploitation of a child under 18 U.S.C. § 2251(a)); *Searle*, 65 Fed. Appx. at 346 (upholding a \$17,582.85 restitution order compensating victims’ guardians for counseling, transportation to counseling expenses, the cost of remodeling their home to accommodate the victims, and some of the cost of a vehicle purchased when custody of the victims was transferred to the guardians, in a case in which the defendant was convicted of receiving and producing child pornography); *United States v. Julian*, 242 F.3d 1245, 1247-48 (10th Cir. 2001) (finding that child victims were entitled to restitution for past medical and counseling expenses, and future counseling or treatment costs in a case in which the defendant was convicted of sexual abuse, sexual exploitation, and conspiracy to commit offense, or to defraud the United States); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (upholding a \$304,200 district court restitution order compensating the victim for the anticipated costs of future therapy in a case in which the victim’s father was convicted of improper sexual contact with his daughter); *Laney*, 189 F.3d at 964-67 (upholding a \$60,000 restitution order in a case in which the defendant was convicted of conspiracy to sexually exploit children in violation of §§ 2251 and 2252, and distribution of visual depictions of minors); *Crandon*, 173 F.3d at 125-26 (upholding a \$57,050.96 restitution order compensating the victim for medical expenses in a case in which the defendant was convicted of receiving child pornography in violation of § 2252(a)(2), but facts showed the defendant also participated in the production of the images).

51. *See* 18 U.S.C. §§ 2252(a)(2), (a)(4) (2010).

a matter of law in cases involving the possession and distribution of images depicting the sexual abuse of minors.<sup>52</sup> If a defendant is convicted of a crime under chapter 110, a court shall order the defendant to pay the victim “the full amount of the victim’s losses.”<sup>53</sup> The term “full amount of the victim’s losses” includes any costs incurred by the victim for: medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorney’s fees, as well as other costs incurred; and any other losses suffered by the victim as a proximate result of the offense.<sup>54</sup> This section next explores the six categories of “losses” for which child pornography victims are entitled to restitution under § 2259. The frequency in which courts order restitution awards for each of these categories is also discussed.

1. *Medical Services Relating to Physical, Psychiatric, or Psychological Care*

Offenders who are convicted of a crime under chapter 110 are required to pay restitution to the victim for any of the victim’s costs incurred for medical services relating to physical, psychiatric, or psychological care.<sup>55</sup> Courts have upheld strong and broad restitution orders for medical services when the costs are ascertainable at the time of sentencing.<sup>56</sup> In *United States v. Crandon*,<sup>57</sup> the Third Circuit Court of Appeals upheld a restitution award under § 2259 for psychiatric care where the defendant was convicted of molesting a fourteen-year-old victim whom the defendant had met on the Internet.<sup>58</sup>

The Ninth Circuit Court of Appeals, in *United States v. Laney*,<sup>59</sup> upheld a restitution award for future psychological treatment and counseling for the victim and her family.<sup>60</sup> The award of future medical services was an issue

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52. *Id.* § 2259(a).

53. *Id.* § 2259(b)(1).

54. *Id.* § 2259(b)(3)(A)-(F).

55. *Id.* § 2259(b)(3)(A).

56. *See* *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (holding Congress mandated broad restitution for a minor victim following an offender’s conviction of federal sexual child exploitation and abuse offenses); *see also* *United States v. Johnston*, No. 7:09-CR-72-D, 2010 WL 1640933, at \*2 (E.D.N.C. Apr. 6, 2010) (stating Congress chose generous terms in an effort to fully compensate child victims for the care needed to address the long-term effects of their abuse).

57. 173 F.3d 122 (3d Cir. 1999).

58. *Crandon*, 173 F.3d at 125-26.

59. 189 F.3d 954 (9th Cir. 1999).

60. *Laney*, 189 F.3d at 966.

of first impression for the Ninth Circuit in *Laney*.<sup>61</sup> The defendant challenged the award for future medical services, claiming that § 2259 did not authorize compensation for amounts the victims have not yet spent.<sup>62</sup> The *Laney* court dismissed the defendant's argument and held that compensation for future counseling expenses was proper where the cost of the counseling was ascertainable at the time of sentencing.<sup>63</sup> In *United States v. Danser*,<sup>64</sup> the Seventh Circuit Court of Appeals held the costs of future psychiatric therapy were ascertainable where the district court conducted a hearing that addressed the victim's need for long-term counseling, and the victim's treating psychologist provided figures to determine the weekly cost of counseling for the next seventy-five years.<sup>65</sup>

The Second Circuit Court of Appeals in *United States v. Pearson*,<sup>66</sup> using the same reasoning as the Ninth Circuit in *Laney*, and the Seventh Circuit in *Danser*, stated a restitution order pursuant to § 2259 might include an amount for future medical expenses.<sup>67</sup> However, the district court had not adequately explained the restitution award for future medical expenses.<sup>68</sup> Thus, the case was remanded to the district court for a more thorough explanation of the \$974,902 restitution award.<sup>69</sup> This long line of cases demonstrates that restitution can be awarded for both past and future medical expenses, as long as the costs are ascertainable at the time of sentencing.<sup>70</sup>

## 2. *Physical and Occupational Therapy or Rehabilitation*

Restitution for the cost of physical and occupational therapy or rehabilitation can also be awarded under § 2259.<sup>71</sup> Recently, the United States District Court for the Eastern District of North Carolina, in *United States v. Johnston*,<sup>72</sup> awarded restitution to the male and female victims for physical health care costs resulting from the defendant's sexually abusive conduct.<sup>73</sup>

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61. *Id.*

62. *Id.*

63. *Id.* at 967 n.14 (noting the cost of future counseling was ascertainable because the government's estimate of the amount was well-supported and exact and the defendant did not contest it).

64. 270 F.3d 451 (7th Cir. 2001).

65. *Danser*, 270 F.3d at 455-56.

66. 570 F.3d 480 (2d Cir. 2009).

67. *Pearson*, 570 F.3d at 486.

68. *Id.* at 487.

69. *Id.*

70. See cases cited *supra* notes 57-69.

71. 18 U.S.C. § 2259(b)(3)(B) (2010).

72. No. 7:09-CR-72-D, 2010 WL 1640933 (E.D.N.C. Apr. 6, 2010).

73. *Johnston*, No. 7:09-CR-72-D, 2010 WL 1640933, at \*4.

Typically, however, the government does not seek restitution under this element for child pornography victims because their losses are emotional rather than physical.<sup>74</sup> If a victim requires restitution for physical therapy or rehabilitation, a court has the ability to authorize an award under § 2259.<sup>75</sup>

### 3. *Necessary Transportation, Temporary Housing, and Child Care Expenses*

An offender may be required to compensate the victim, or the victim's family, for transportation, temporary housing, and child care expenses under § 2259.<sup>76</sup> In *United States v. Estep*,<sup>77</sup> the court held that restitution was owed to the mother of a child victim for the child's transportation expenses to a new school.<sup>78</sup> The court calculated the anticipated future cost of driving the child to school until the child was old enough to take the school bus to middle school.<sup>79</sup> The *Estep* court held that the cost of transportation was a proximate result of the defendant's crimes, and thus the victim's mother was entitled to restitution.<sup>80</sup> Therefore, if the costs of transportation, temporary housing, and child care expenses can be reasonably calculated, and are ascertainable at the time of sentencing, the court is required to award restitution for these costs pursuant to § 2259.<sup>81</sup>

### 4. *Lost Income*

Section 2259 requires the defendant to compensate the victim for income lost as a result of the offense.<sup>82</sup> Lost income under the statute can be difficult to calculate for child victims because they have never been employed. Any monetary figure presented would be a speculative calculation of income the victim might lose in the future.<sup>83</sup> Restitution for future lost income represents a significant development in federal criminal

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74. See discussion *supra* Part II.B.1 (noting many child pornography victims seek restitution for medical services relating to psychiatric or psychological care).

75. § 2259(b)(3)(B).

76. § 2259(b)(3)(C). "Victims" includes the abused and exploited children and their guardians. § 2259(c).

77. 378 F. Supp. 2d 763 (E.D. Ky. 2005).

78. *Estep*, 378 F. Supp. 2d at 772.

79. *Id.*

80. *Id.*

81. § 2259(b)(3)(C).

82. § 2259(b)(3)(D).

83. See, e.g., *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at \*5 (N.D. Ga. Dec. 17, 2009) (illustrating the government's evidence in possession cases is often an actuarial analysis containing a monetary figure of what the victim's lost future income would likely be).

restitution jurisprudence.<sup>84</sup> Courts have frequently held that lost future income cannot be awarded to the victim if the costs are unascertainable at the time of sentencing.<sup>85</sup> Because very few courts have analyzed the question of future lost income in the context of restitution to the victim of a child exploitation offense, it is helpful to review such claims under a primary restitution statute such as the MVRA.<sup>86</sup>

In *United States v. Oslund*,<sup>87</sup> the Eighth Circuit Court of Appeals noted the MVRA did not distinguish between past and future income.<sup>88</sup> The *Oslund* court stated “because future income is income that is lost to the victim as a direct result of the crime, the plain language of the statute leads to the conclusion that lost future income can be included in a restitution order.”<sup>89</sup> However, the Seventh Circuit Court of Appeals, in *United States v. Fountain*,<sup>90</sup> held that because the term “future” was not in the statute, “an order requiring a calculation of lost future earnings unduly complicates the sentencing process and is thus not authorized.”<sup>91</sup> Other circuits analyzing future lost income awards under federal restitution statutes have held that restitution may be awarded for lost future income.<sup>92</sup> These cases illustrate

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84. GOODWIN ET AL., *supra* note 13, § 7:18 (“[Restitution for future lost income] represents one of the most expansive new areas of authorized restitution under the restitutions statutes, for a non-listed harm. This is particularly remarkable because future lost income is historically a distinctively civil kind of damage, or remedy.”).

85. *See, e.g.*, *United States v. Fountain*, 768 F.2d 790, 801-02 (7th Cir. 1985) (reversing a restitution award, granted under a different restitution statute that compensated for an injured victim’s lost future wages). “[T]he difficult[y] . . . of translating an uncertain future stream of earnings into a present value” means that “projecting lost future earnings has no place in criminal sentencing if the amount or present value of those earnings is in dispute.” *Id.*

86. *See, e.g.*, *United States v. Laney*, 189 F.3d 954, 967 n.14 (9th Cir. 1999) (declining to order restitution for future lost wages and suggesting that “an order of restitution for future losses may be inappropriate because the amount of loss is too difficult to confirm or calculate.” (citing *Fountain*, 768 F.2d at 801-02 )); *United States v. Danser*, 270 F.3d 451, 455 n.5 (7th Cir. 2001) (distinguishing future counseling expenses from future earnings and suggesting the mental trauma the victim suffered resulted in a loss that had been incurred and that “will continue to manifest itself for years,” as opposed to compensation for future wages that had not yet been earned).

87. 453 F.3d 1048 (8th Cir. 2006).

88. *Oslund*, 453 F.3d at 1062-63.

89. *Id.*

90. 768 F.2d 790 (7th Cir. 1985).

91. *Fountain*, 768 F.2d at 801-02.

92. *See* *United States v. Serawop*, 505 F.3d 1112, 1124-25 (10th Cir. 2007) (holding the district court properly exercised its “abundant discretion” when it ordered restitution under the MVRA for future lost income to the estate of a three-month-old homicide victim); *United States v. Cienfuegos*, 462 F.3d 1160, 1164 (9th Cir. 2006) (stating “[t]he plain language of the MVRA contemplates an award of restitution to the victim’s estate for future lost income and certainly does not expressly exclude such an award.”); *see also* *United States v. Futrell*, 209 F.3d 1286, 1291-92 (11th Cir. 2000) (holding an estimate of loss relating to income and earning potential is sufficient for a restitution order, where exact loss is impossible to determine); *United States v. Ferranti*, 928 F. Supp. 206, 224 (E.D.N.Y. 1996) (awarding future lost income under the VWPA to a fire department in an arson-homicide case); *United States v. Razo-Leora*, 961 F.2d 1140, 1146

that restitution can be awarded for past and future lost income, provided the monetary figure is not speculative and the costs are ascertainable at the time of sentencing.<sup>93</sup>

#### 5. *Attorney's Fees, As Well As Other Costs Incurred*

A victim can be compensated for attorney's fees as well as other costs incurred under § 2259.<sup>94</sup> If a court finds that a victim was harmed as a result of the defendant's conduct and is entitled to restitution, the court will likely award attorney's fees to the victim.<sup>95</sup> The United States District Court for the Eastern District of Virginia, in *United States v. Hicks*,<sup>96</sup> recently awarded attorney's fees as part of a restitution award to a child pornography victim reasoning that § 2259 requires the victim to be compensated for the "full amount of their losses."<sup>97</sup> Thus, courts must order attorney's fees to the victims to fully compensate them for their losses.<sup>98</sup>

#### 6. *Any Other Losses Suffered by the Victim as a Proximate Result of the Offense*

Section 2259 contains a "catch-all" provision stating the victim can be compensated for any other losses incurred by the victim as a proximate result of the offense not specifically listed in the statute.<sup>99</sup> The phrase "any other losses" could potentially include claims for pain and suffering or loss of enjoyment of life, the claims typically awarded in the context of civil cases.<sup>100</sup> However, courts generally do not include pain and suffering or

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(5th Cir. 1992) (affirming an order granting victim's widow \$100,000 in restitution under the VWPA, based on lost income).

93. See *United States v. Laney*, 189 F.3d 954, 967 n.14 (9th Cir. 1999) (noting "an order of restitution for future losses may be inappropriate because the amount of loss is too difficult to confirm or calculate").

94. 18 U.S.C. § 2259(b)(3)(E) (2010).

95. See *United States v. Estep*, 378 F. Supp. 2d 763, 774 (E.D. Ky. 2005) (holding attorney's fees could be included in a restitution award where, even though the attorney was also representing the victims in a civil case, the costs were clearly on behalf of the victims).

96. No. 1:09-CR-150, 2009 WL 4110260 (E.D. Va. Nov. 29, 2009).

97. *Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at \*5; see § 2259(b)(1).

98. § 2259(b)(3).

99. § 2259(b)(3)(F).

100. See *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008) ("While the availability of a civil remedy is relevant in determining who is an MVRA victim, the amount of restitution that may be awarded is limited to the victim's provable actual loss, even if more punitive remedies would be available in a civil action."); *United States v. Serawop*, 505 F.3d 1112, 1128 (10th Cir. 2007) (concluding the district court did not abuse its discretion by treating a restitution analysis in a criminal case differently than an award of damages in a civil case); *United States v. Scott*, 405 F.3d 615, 618-19 (7th Cir. 2005) (noting restitution "is less generous than common law damages . . . . This distinction is consistent with the historic distinction between restitution and damages, the former originally referring to the restoration of something that the defendant had taken from the plaintiff"); *United States v. Havens*, 424 F.3d 535, 538 (7th Cir. 2005) ("A civil

loss of enjoyment of life awards in restitution orders because such damages are not based on “actual loss.”<sup>101</sup> In *United States v. Petruk*,<sup>102</sup> the Eighth Circuit Court of Appeals looked to congressional intent when it held restitution was a compensatory remedy and victims should be limited to compensation for their actual losses.<sup>103</sup> Other circuits have also held the victim’s losses must be actual and not consequential or incidental.<sup>104</sup> Thus, because courts are not inclined to order restitution when the victim’s losses are too speculative, it is unlikely this “catch-all” category will often be utilized for seeking restitution for other losses, such as pain and suffering or loss of enjoyment of life.<sup>105</sup> Congress included this sixth category of loss to keep restitution broad under § 2259; as a result, courts have discretion to order restitution for other losses not specifically listed in the statute if the defendant’s conduct was a proximate cause of the victim’s loss.<sup>106</sup>

### III. WHO IS ENTITLED TO RESTITUTION UNDER 18 U.S.C. § 2259?

Until recently, prosecutors had not sought restitution in criminal cases where a defendant was convicted of possessing child pornography images.<sup>107</sup> Previously, the offenders who were ordered to pay restitution under § 2259 were those offenders who had produced pornographic images of children.<sup>108</sup> Now, victims are asking courts to require defendants who

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judgment award by itself, however, is insufficient to support an order of restitution because some damages and costs recoverable in a civil action, such as treble damages, consequential damages, and attorneys’ fees spent in pursuing litigation against the wrongdoer, do not qualify as losses under the MVRA.”).

101. *Serawop*, 505 F.3d at 1124 (stating “the MVRA does not provide incidental, consequential, or pain and suffering awards.”).

102. 484 F.3d 1035 (8th Cir. 2007).

103. *Petruk*, 484 F.3d at 1038.

104. *See* *United States v. Rhodes*, 330 F.3d 949, 953 (7th Cir. 2003) (noting that under the MVRA, “the statute implicitly requires that the restitution award be based on the amount of loss *actually caused* by the defendant’s offense”); *United States v. Barton*, 366 F.3d 1160, 1167 (10th Cir. 2004) (providing “there is general agreement that a restitution order under the MVRA cannot encompass consequential damages resulting from the defendant’s conduct.”); *United States v. Seward*, 272 F.3d 831, 839 (7th Cir. 2001) (holding restitution is based on the amount of actual loss caused by the offense, and excludes consequential or incidental damages).

105. *See* discussion *supra* Part II.B.4 (discussing how courts are reluctant to order restitution when the monetary figure is speculative or too difficult to ascertain).

106. *See supra* note 48 and accompanying text (discussing Congress’ intent to include broad restitution under the Sexual Exploitation and Other Abuse of Children Act); *see also* 18 U.S.C. § 2259(b)(3)(F) (2010).

107. *See* *United States v. Paroline*, 672 F. Supp. 2d 781, 790 (E.D. Tex. Dec. 7, 2009) (providing “[r]estitution in possession cases is an issue of first impression in district courts around the nation as the Government has only recently begun seeking restitution from possessors of child pornography on behalf of victims.”); *see also* *United States v. Hesketh*, No. 3:08-cr-00165-WWE (D. Conn. Feb. 23, 2009) (being one of the first district courts to hold that a defendant convicted of possessing, but not creating, illegal images of child pornography, pay restitution to a victim).

108. *Paroline*, No. 6:08-CR-61, 2009 WL 4572786, at \*7.

possess pornographic images of the victims to pay restitution.<sup>109</sup> This development has presented difficult questions to courts. How is “victim” defined under § 2259? If a child pornography victim is a victim under the statute, is the victim harmed as a result of the defendant’s possession of the victim’s images? Furthermore, if the victim is harmed, is the harm compensable under § 2259? Courts are divided on how to answer these questions. Part A of this section defines the term “victim” under § 2259, Part B examines whether the statute imposes a proximate cause requirement, and Part C analyzes whether a child pornography victim is harmed when a defendant possesses pornographic images of the victim. Part C also addresses whether, if the victim is harmed, the harm is compensable under § 2259.

#### A. DEFINING “VICTIM”: THE CAUSATION CONTROVERSY

Section 2259 broadly defines “victim” as an “*individual harmed as a result of a commission of a crime under this chapter.*”<sup>110</sup> Congress defined “harm” liberally in § 2259 in order to protect children victimized by child pornography.<sup>111</sup> Significantly, Congress has used a much narrower definition of victim in other crime victim restitution statutes, for example, that the “victim” be a “person *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered . . . .”<sup>112</sup> The words “directly and proximately” do not appear in § 2259, indicating the harm a person must suffer to be a victim of a child pornography offense need not be “direct” nor “proximate” in order to qualify for victim status.<sup>113</sup> Thus, the plain language of the statute indicates that *any* kind of “harm” is sufficient to create victim status for purposes of § 2259.<sup>114</sup> Despite the plain language of the statute, not all courts agree a victim of an offender who possesses pornographic images of the victim is a victim entitled to

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109. *Id.*

110. § 2259(c) (emphasis added); *see supra* note 48 (discussing the crimes listed under chapter 110, specifically including crimes related to child pornography).

111. *Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (statement of Sen. Biden, Member, S. Comm. on the Judiciary) (“Protecting our children from abuse and exploitation at the hands of a stranger or a neighbor or a trusted adult, or some cases a family member, is one of the most important duties of our criminal justice system.”).

112. § 3663(a)(2) (emphasis added); *accord* § 3663A(a)(2) (using identical language).

113. *See* § 2259(c) (interpreting the plain language of the statute).

114. Brief of the National Crime Victim Law Institute et al. as Amici Curiae In Support of Restitution for Amy and Other Victims of Child Pornography at 4, *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009).

restitution under § 2259.<sup>115</sup> Some courts have held there is a proximate cause requirement between the victim's losses and the particular defendant's conduct.<sup>116</sup>

#### B. DOES THE STATUTE IMPOSE A PROXIMATE CAUSE REQUIREMENT?

Section 2259 provides that restitution is available for the “full amount of the victim's losses.”<sup>117</sup> For five of the six categories of losses recognized in § 2259, there is no proximate cause requirement. For the sixth “catch-all” category, a proximate cause requirement exists. Section 2259 promises victims of child pornography offenses that the court “shall direct the defendant to pay the victim [through the appropriate court mechanism] the full amount of the victim's losses . . . .”<sup>118</sup> The statute goes on to provide six categories of damages, only one of which contains a proximate cause requirement:

(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>119</sup>

As the plain language of the statute indicates, a victim need only show various losses were the “proximate result” of the offense when seeking restitution under subsection (b)(3)(F).<sup>120</sup> There is no language regarding a “proximate” connection under the first five categories of losses.<sup>121</sup> Accordingly, it can be presumed Congress acted intentionally and purposely in the

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115. *See, e.g.*, United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 498050, at \*5 (N.D. Ga. Dec. 17, 2009) (denying restitution to child pornography victim).

116. *Id.*; *see also* discussion *infra* Part III.B.

117. § 2259(b)(1).

118. *Id.*

119. § 2259(b)(3) (emphasis added); *see* discussion *supra* Parts II.B.1-6 (discussing the six categories of damages and the amount of restitution the victim is entitled to under each category).

120. § 2259(b)(3)(F).

121. § 2259(b)(3)(A)-(E).

disparate inclusion or exclusion of the proximate result language.<sup>122</sup> However, many courts that have analyzed restitution claims under § 2259 have concluded the United States must show the victim was harmed as a proximate cause of the offense of the conviction.<sup>123</sup>

The Fifth Circuit Court of Appeals, in *United States v. Paroline*,<sup>124</sup> declined to order restitution pursuant to § 2259 because the government failed to show the victim's losses were proximately caused by the defendant's possession of the victim's images.<sup>125</sup> The *Paroline* court upheld the district court's interpretation of § 2259 as including a proximate cause requirement for each category of loss under the statute.<sup>126</sup> The district court reasoned the United States Supreme Court has held "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."<sup>127</sup> Based on this authority, the court held the phrase "as a proximate result of the offense" would apply equally to all the loss categories in § 2259.<sup>128</sup> To construe the statute otherwise, the court reasoned, would likely violate the Eighth Amendment.<sup>129</sup> The court

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122. See *Russello v. United States*, 464 U.S. 16, 23 (1983).

123. See *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (holding § 2259 incorporates a requirement of proximate causation); see, e.g., *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802 (N.D. Iowa Oct. 9, 2007); *United States v. Crandon*, 173 F.3d 122, 126 (10th Cir. 1999). This interpretation is consistent with the United States Supreme Court's interpretation of a pre-MVRA statute, which permitted the district courts to order restitution "in the case of an offense resulting in [harm]" to the victim—language similar to 18 U.S.C. § 2259(c). *Hughey v. United States*, 495 U.S. 411, 418-20 n.3 (1990) (citation omitted). In *Hughey*, the court confirmed the necessity of a causal nexus between the offense and the harm to the victim and held that "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." *Id.* at 420. However, when the offense of conviction is scheme or conspiracy, the victim is entitled to restitution resulting from harms caused by the defendant's individual actions, as well as harms caused by others involved in the scheme or conspiracy. *Laney*, 189 F.3d at 965; *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004); *United States v. Theodore*, 354 F.3d 1, 8 (1st Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Ross*, 210 F.3d 916, 924 (8th Cir. 2000); *United States v. Jackson*, 155 F.3d 942, 949 (8th Cir. 1998); *United States v. Brewer*, 983 F.2d 181, 185 (10th Cir. 1993).

124. 672 F. Supp. 2d 781 (E.D. Tex. 2009).

125. *Paroline*, 672 F. Supp. 2d at 793.

126. *Id.* at 791.

127. *Id.* at 788 (citing *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

128. *Id.*; see also *United States v. Berk*, No. 08-CR-212-P-S, 2009 WL 3451085, at \*5 (D.Me. Oct. 29, 2009) (stating "the natural construction of [§ 2259] demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statute.").

129. *Id.* at 789 (holding a restitution award not limited to losses proximately caused by the defendant's conduct would most likely violate the Eighth Amendment's protection against excessive fines).

noted, however, that determining a restitution award under § 2259 is an “inexact science” not requiring mathematical precision.<sup>130</sup>

Recently, in *United States v. Hardy*,<sup>131</sup> the District Court for the Western District of Pennsylvania held that § 2259 imposes a proximate cause requirement in a case where the defendant was convicted and ordered to pay restitution for possessing child pornography images.<sup>132</sup> Both the government and the defendant in *Hardy* agreed there was a proximate cause requirement; however, each would have had the court apply the proximate cause requirement differently.<sup>133</sup> Courts are simply unclear on how to interpret the plain language of the statute and, as a result, are either awarding smaller restitution awards than mandated by the statute or no restitution awards at all.<sup>134</sup>

When courts hold restitution cannot be awarded to victims of defendants who possess pornographic images of the victims, courts are ignoring both the plain language of the mandatory restitution statute and the congressional intent behind it.<sup>135</sup> To hold that a defendant who possessed pornographic images of a child did not harm the child constitutes “clear and indisputable error.”<sup>136</sup> Congress mandated broad restitution for a minor victim following an offender’s conviction of federal child sexual exploitation offenses.<sup>137</sup>

Courts are needlessly opining as to the correct causation standard under the statute.<sup>138</sup> The plain language of the statute dictates mandatory restitution to “any individual harmed as a result [of a child pornography

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130. *Id.* at 791-92; see *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007); see also *United States v. Danser*, 270 F.3d 451, 455-56 (7th Cir. 2001) (holding that mathematical precision is not required in the causal analysis upholding a restitution award of \$304, 200); *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (holding that in contexts involving awards to child victims of sexual exploitation, a district court has significant discretion to make a reasonable estimate of an amount that reflects the full loss to the victim); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (upholding a restitution award under § 2259 calculated by the district court using “reasonable certainty”).

131. No. 09-151, 2010 WL 1543844 (W.D. Pa. Apr. 19, 2010).

132. *Hardy*, No. 09-151, 2010 WL 1543844, at \*7.

133. *Id.*

134. See *id.* at \*8 (stating “[i]n context, the phrases ‘as a result of’ and ‘as a proximate result of’ are unclear.”). “The boundaries of proximate cause are murky.” *Id.* at \*13.

135. *United States v. Paroline*, 672 F. Supp. 2d 781, 788 (E.D. Tex. 2009) (Dennis, J., dissenting).

136. *Id.*

137. *Id.*

138. *Id.*

crime].”<sup>139</sup> As explained below, when a defendant possesses pornographic images of a child, the defendant is clearly causing the victim harm.<sup>140</sup>

### C. HOW VICTIMS OF CHILD PORNOGRAPHY POSSESSION CASES ARE HARMED BY DEFENDANTS’ CRIMES

More than twenty-seven years ago, in *New York v. Ferber*,<sup>141</sup> the United States Supreme Court noted that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”<sup>142</sup> Specifically, sexually exploited children have difficulty developing healthy relationships later in life and are more likely to become sexual abusers as adults.<sup>143</sup> When the abuse is recorded and distributed, the child’s privacy interests are invaded as well.<sup>144</sup> The *Ferber* court also observed that the “materials produced are a permanent record of the children’s participation and the harm to the child is *exacerbated* by their circulation.”<sup>145</sup> The court continued:

[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 him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . [I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.<sup>146</sup>

In *Ferber*, the United States Supreme Court clearly illustrated that defendants who possess pornographic images continually harm the child victim by viewing and keeping the images in circulation.<sup>147</sup>

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139. 18 U.S.C. § 2259(c) (2010).

140. See discussion *infra* Part III.C (explaining how victims of child pornography are harmed by the defendants’ crimes).

141. 458 U.S. 747 (1982).

142. *Ferber*, 458 U.S. at 758.

143. *Id.* at 758 n.9.

144. *Id.*

145. *Id.* at 759 (emphasis added).

146. *Id.* at 759 n.10 (citing David P. Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)); Christopher T. Donnelly, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301(1979); see also *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) (reaffirming the *Ferber* holding in a case involving possession of child pornography).

147. *Ferber*, 458 U.S. at 759.

Twenty-three years later, the Supreme Court again acknowledged the harm to victims depicted in child pornography, and observed that a new harm was caused each time the images were shared with someone different.<sup>148</sup> The appellate courts have held in numerous cases that the children depicted in pornographic materials are victims harmed by the possession, receipt, distribution, and production of their images.<sup>149</sup> The Fifth Circuit Court of Appeals, in *United States v. Norris*,<sup>150</sup> rejected the defendant's argument that receiving child pornography was a victimless crime, and that the children depicted in child pornography could only be victims in an indirect sense.<sup>151</sup> The *Norris* court noted that the "victimization of the children involved does not end when the pornographer's camera is put away."<sup>152</sup> The consumers, or end recipients, of pornographic material cause the children depicted in those materials to suffer as a result of their actions in at least three ways:

*First*, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. [T]he materials produced are a permanent record of the children's participation and the *harm to the child is exacerbated by their circulation*. The consumer who "merely" or "passively" receives or possesses child pornography directly contributes to this continuing victimization.

*Second*, the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are directly harmed by this despicable intrusion on the lives of the young and the innocent. The recipient of child pornography obviously perpetuates the existence

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148. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2005) (noting "as a permanent record of a child's abuse, the continued *circulation itself* would harm the child who had participated. Like a defamatory statement, *each new publication of the speech would cause new injury* to the child's reputation and emotional well-being." (emphasis added)).

149. See cases cited *supra* note 123 (providing examples of cases where courts of appeals have held that victims are harmed by the defendant's possession of pornographic images); see also *United States v. Freeman*, Case No. 3:08-CR-22-002 (N.D. Fla. July 9, 2009); *United States v. Staples*, Case No. 2:09-CR-14017 (S.D. Fla. Aug. 10, 2009). In reaching its decision that a conviction for possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a crime involving moral turpitude, the Ninth Circuit found that child pornography causes continuing "injury to a child's reputation and well-being." *United States v. Santacruz*, 563 F.3d 894, 897 (9th Cir. 2009) ("Because possession of child pornography offends conventional morality and *visits continuing injury on children*, it is vile, base or depraved and . . . violates societal moral standards." (citation omitted, emphasis added)).

150. 159 F.3d 926 (5th Cir. 1998).

151. *Norris*, 159 F.3d at 929.

152. *Id.*

of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children.

*Third*, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials . . . . [T]here is no sense in distinguishing, as Norris has done, between the producers and the consumers of child pornography. Neither could exist without the other. The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects.<sup>153</sup>

Congress has also long recognized the harm inflicted on victims of child pornography.<sup>154</sup> In the legislative history of the Child Pornography Prevention Act of 1996, Congress noted that the physiological, emotional, and mental health of a child who was used as the subject of pornographic material was harmed.<sup>155</sup> More recently, Congress again addressed the impact of child pornography in the legislative history behind the Adam Walsh Child Protection and Safety Act of 2006.<sup>156</sup> Congress found that:

[T]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in section 2256(8) of title 18, United States Code . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole . . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.<sup>157</sup>

In addition to the courts' and Congress' recognition of the long-term harms associated with child pornography, the National Center for Missing and Exploited Children sponsored a study that looked into arrested offenders who possessed child pornography.<sup>158</sup> The study revealed individuals

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153. *Id.* at 929-30 (quotations omitted).

154. S. Rep. No. 104-358, at 14 (1996) (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

155. *Id.*

156. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (2006).

157. *Id.*

158. 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).

possessing child pornography images added to the lasting burden of child victims.<sup>159</sup> The victims know their pictures are circulating on the Internet and are perpetually victimized by the continued circulation and possession of their images.<sup>160</sup> For the foregoing reasons, victims are clearly harmed as a result of the defendant's possession of their images. Therefore, courts need to order restitution to these victims. The plain language of the statute and congressional intent mandates restitution to child pornography victims.<sup>161</sup> The next section illustrates a proposed amendment to the mandatory restitution statute that would eliminate controversy surrounding the causation requirement of the statute.

#### IV. ELIMINATING THE CAUSATION CONTROVERSY: A PROPOSED AMENDMENT TO § 2259

Federal courts around the nation are being called on to consider restitution awards under § 2259, and the courts are disagreeing as to the causation requirement under the statute.<sup>162</sup> An amendment to § 2259 would likely eliminate controversy regarding the causation language in the statute.<sup>163</sup> Some courts have held that § 2259 requires the victims' harm be a "proximate cause" of the defendant's possession of their pornographic images.<sup>164</sup> Some courts have not addressed the causation issue at all,<sup>165</sup> while others have found § 2259 requires that the victim's harm lie somewhere in between "proximate cause" and general harm to the victim by the defendant's possession of the victim's images.<sup>166</sup>

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159. *Id.*

160. *Id.* at 7.

161. See discussion *supra* Part III.B (analyzing the proximate cause requirement of § 2259).

162. See *infra* notes 163-167 and accompanying text.

163. See *United States v. Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at \*3 (E.D. Va. Nov. 24, 2009) ("In surveying those of our sister districts which have grappled with requests for restitution in similar cases, it is apparent that the issue of causation remains the most contested point."); see also *Garvin*, *supra* note 9, at 1 (suggesting a court-based or legislative solution is needed in order to eliminate the varied interpretations of § 2259 and to avoid further harming child victims).

164. See *supra* text accompanying note 123; see also *United States v. Simon*, 2009 WL 2424673, at \*7 (N.D. Cal. Aug. 7, 2009) (stating "a restitution order in [an end-user possession] case must be based upon the identification of a specific injury to the victim that was caused by the specific conduct of the defendant.").

165. See *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*3-4 (S.D. Fla. Sept. 2, 2009) (ordering a possessor criminal defendant to pay \$3,680,153 in restitution to a victim without addressing the proximate causation issue).

166. See *Hicks*, No. 1:09-CR-150, 2009 WL 4110260, at \*4 (E.D. Va. Nov. 24, 2009) (holding a restitution award was proper because the defendant's actions presented a sufficiently "proximate tie" to the victims injuries). The court also held § 2259 does not clearly demand a "proximate cause" standard. *Id.* at \*3.

If Congress eliminated the “proximate result” language from category (F) of the statute, some courts would have a much weaker argument that categories (A) through (E) also require a proximate causation requirement.<sup>167</sup> Courts continue to opine as to whether category (F) alone imposes the proximate causation language, or if the language is applicable to all the categories.<sup>168</sup> Eliminating the language would force courts to look at the real issue in these cases: defendants who possess pornographic images of children are harming the victims, and the victims deserve restitution.<sup>169</sup> If the “proximate result” language did not exist in category (F), courts would have to define “victim” using the plain language of the statute, and “the term ‘victim’ would mean the individual harmed as a result of a commission of a crime under this chapter.”<sup>170</sup>

Alternatively, Congress could amend the statute to include language indicating that for all the categories, the victim’s harms must be a proximate cause of the defendant’s conduct; language could also be added mandating this causal relationship be established upon a showing that the statutory definition of “victim” is met.<sup>171</sup> In summary, because child pornography victims are harmed as a result of the defendant’s possession of their images, a restitution award is proper under the statute.<sup>172</sup> Courts need to enforce the mandatory language of the statute and order restitution in all cases where victims can be identified.<sup>173</sup> The specific process for amending the language of the statute is beyond the scope of this article, but it is important to note how a change would impact federal courts’ restitution holdings. Congress intended for the language of the statute to be broad in order to fully compensate child pornography victims for their losses.<sup>174</sup> The impact of § 2259 is far-reaching, and the next section describes the statute’s impact on the North Dakota federal court system.

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167. See *United States v. Paroline*, No. 6:08-CR-61, 2009 WL 4572786, at \*5 (E.D. Tex. Dec. 7, 2009) (holding that the phrase “as a proximate result of the offense” would apply equally to all the loss categories in § 2259(b)(3) because the language is included in category (F)).

168. *Id.*

169. See discussion *supra* Part III.C (explaining how victims of child pornography are harmed by the defendants’ crimes).

170. 18 U.S.C. § 2259(c) (2010).

171. See Garvin, *supra* note 9, at 23 (“A proper reading of Section 2259, together with prior court and Congressional findings on the harms that stem from possession, mandates that this causal relationship is sufficiently established upon a showing that the statutory definition of “victim” is met.”).

172. See discussion *supra* Part III.C (explaining how victims of child pornography are harmed by the defendants’ crimes).

173. See Jennifer Gerarda Brown, *Robbing the Rich to Feed the Poor?*, 3 BUFF. CRIM. L. REV. 261, 263 (1999) (stating courts should identify victims even when they are numerous and calculate harm even when such an analysis is complex).

174. See discussion *supra* Part II.A.2 (considering the purposes of federal restitution law).

## V. IMPACT ON THE NORTH DAKOTA FEDERAL COURT SYSTEM

Although the mandatory restitution for sexual exploitation crimes of children was enacted in 1994, cases seeking a restitution order under this statute rarely appear in federal district courts.<sup>175</sup> The reason is not that prosecution of child pornography offenders had decreased.<sup>176</sup> In fact, prosecutions of child pornography cases have increased.<sup>177</sup> So, why are restitution orders under § 2259 not increasing as well? Simply put, prosecutors are not seeking the restitution orders.<sup>178</sup>

Recently, a federal district court judge in St. Paul, Minnesota, issued an order demanding to know why restitution was not even requested by the United States Attorney's Office in the case of a Minnesota man who pleaded guilty to possession of child pornography.<sup>179</sup> Judge Schilz stated restitution for child pornography victims must be considered and "[t]he Court will no longer accept silence."<sup>180</sup> The Department of Justice responded by stating "[t]his is an emerging issue and one we are looking at very closely. We will seek restitution in those cases where we believe it is appropriate and authorized by law."<sup>181</sup>

The United States Attorney's Office for the District of North Dakota has responded in a similar way and agrees that seeking a restitution order under § 2259 for an offender who possesses pornographic images of children is an emerging issue for North Dakota and all federal district courts.<sup>182</sup> Assistant United States Attorney and Civil Chief Shon Hastings agrees that a restitution award under this section is proper where the defendant possessed pornographic images of a victim who is identifiable.<sup>183</sup> The United States' Attorney's Office for the District of North Dakota will begin seeking restitution awards under § 2259 in cases where the defendant

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175. See Walsh, *supra* note 1 (stating federal district court Judge Schiltz indicated the local U.S. attorney's office has been mute on the issue of restitution in child pornography cases).

176. See U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Federal Prosecution of Child Sex Exploitation Offenders* (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf> (providing sex offenses were among the fastest growing crimes handled by the federal justice system, and child pornography matters accounted for eighty-two percent of the growth in sex exploitation matters referred to U.S. attorneys from 1994 to 2006).

177. *Id.*

178. See *supra* note 107 and accompanying text.

179. Walsh, *supra* note 1.

180. See *id.* (stating the U.S. attorney must submit a memorandum by Jan. 29, 2010, explaining why the victim is not entitled to restitution).

181. *Id.*

182. Telephone Interview with Shon Hastings, Civil Chief, U.S. Attorney's Office, District of North Dakota (Jan. 22, 2010).

183. *Id.*

has possessed pornographic images of children.<sup>184</sup> The Department of Justice's position is that restitution should be awarded where the victims are identifiable, and the victims should be compensated for the "full amount of [their] losses" in accordance with the statute.<sup>185</sup> Restitution in child pornography cases is an issue that United States Attorney's Offices around the nation are currently facing and will be facing more readily in the near future.<sup>186</sup>

## VI. CONCLUSION

Child pornography victims not only deserve to be awarded restitution for the full amount of their losses, but federal law mandates this result.<sup>187</sup> Prosecutors need to seek restitution in all cases where child pornography victims are identifiable, and courts need to uphold the restitution awards sought by the government.<sup>188</sup> Victims of child pornography face an uphill battle in life, and receiving restitution for their losses is one step in the healing process for them.<sup>189</sup> Federal courts need to consider the victims and order defendants who possess child pornography images to pay restitution to the victims for the "full amount of the victim's losses."<sup>190</sup>

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184. *Id.* The first motion for restitution order under § 2259 was filed in the United States District Court for the District of North Dakota on February 19, 2010. Motion for Restitution Order, *United States v. Scheiring*, No. 3:09-CR-56 (D.N.D. 2010).

185. Telephone Interview with Shon Hastings, *supra* note 182.

186. *Id.*

187. 18 U.S.C. § 2259(b)(1) (2010).

188. *See* Walsh, *supra* note 1 ("The Court will no longer accept silence [ordering prosecutors to seek restitution for child pornography crimes].").

189. *See* discussion *supra* Part III.C (explaining how victims of child pornography are harmed by the defendants' crimes).

190. § 2259(3).

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