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The Proper Remedy for Possession of Child Pornography: Shifting from Restitution to a Victims Compensation Program

57 N.Y.L. SCH. L. REV. 941 (2012–2013)

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THE PROPER REMEDY FOR POSSESSION OF CHILD PORNOGRAPHY

I. INTRODUCTION

Although child pornography is not a new phenomenon, the Internet has given it new life.¹ Throughout most of the twentieth century, law enforcement agencies have had considerable success in thwarting the trafficking of hard copy forms of child pornography.² With the introduction of the Internet, however, the scale, reach, and nature of child pornography has dramatically changed.³ The Internet has escalated the problem of child pornography by allowing convenient, anonymous, and inexpensive access to a vast quantity of pornographic images from around the globe.⁴ Further, the Internet facilitates peer-to-peer communication and provides a variety of formats, including pictures, videos, sound, and real-time interactive experiences, which have even allowed for live broadcasts of children being sexually abused.⁵ Essentially, the Internet has created an international playground for those who produce, purchase, and distribute child pornography.⁶ Greater access to child pornography has created a greater demand and, in turn, a booming industry at the expense of innocent children.⁷

The growing Internet market for child pornography has led to a multi-faceted response to the mere possession of child pornography.⁸ State and federal legislation has criminalized this conduct and possessors of child pornography have been actively prosecuted for their role in this unfortunate business.⁹ Recently, victims of child pornography have taken a new stand against the possessors of their images by

1. See RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET 5 (2012).
2. See *id.*
3. *Id.*
4. *Id.* at 9.
5. *Id.* at 11–12.
6. See Adam D. Lewis, *Dollars and Sense: Restitution Orders for Possession of Child Pornography Under 18 U.S.C. § 2259*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 415 (2011) (“The internet has also allowed child predators to network, more easily groom potential victims, cyber-stalk, contact child prostitutes, and engage in child trafficking.”).
7. See *In re Amy Unknown*, 701 F.3d 749, 773 (5th Cir. 2012) (“By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images.”); Lewis, *supra* note 6, at 415 (“Even with state and federal law enforcement targeting child pornographers, approximately 20,000 new images of child pornography are uploaded to the internet each week. As such, child pornography remains a multi-billion dollar market.”).
8. See Lewis, *supra* note 6, at 423 (“Congress continues to funnel resources to federal and state law enforcement . . . [while] [t]he Supreme Court recognized that only the elimination of child pornography networks can truly rid society of child pornography.”).
9. 18 U.S.C. § 2252A(a)(2) (2006) (prohibiting the receipt and possession of child pornography); *Ohio v. Osborne*, 495 U.S. 103 (1990) (upholding an Ohio criminal statute prohibiting the mere possession of child pornography because of the gravity of the state’s interests). The U.S. Department of Justice established the Child Exploitation and Obscenity Section within its Criminal Division to handle crimes relating to the sexual exploitation of children, including the possession of child pornography. See *Child Exploitation and Obscenity Section Mission*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/ceos/mission/mission.html> (last visited Mar. 1, 2013).

requesting restitution.¹⁰ Victims of child pornography can suffer psychological and emotional harm each time an image of their abuse is viewed.¹¹ Restitution allows a victim to request a court to order a defendant to pay the victim, as part of the defendant's criminal sentence, for the extent of the victim's losses.¹² Therefore, as a part of sentencing proceedings, victims who experience this harm are now requesting defendants reimburse them for the harm caused by the mere viewing and possessing of their images.¹³

While "[i]t has long been uncontroversial to order restitution when the defendant is convicted of actual physical abuse of a child or of producing images constituting child pornography,"¹⁴ ordering restitution from these "end-users"¹⁵ of child pornography has provoked debate.¹⁶ The main issue involves the abstract, and at times controversial, notion that simply possessing images can cause a victim harm; to some, the connection often feels too attenuated to justify the liability assigned through criminal restitution.¹⁷ Apart from this debate, this note contends that there are additional problems in the current restitution framework that demonstrate why it is wrongly applied in possession cases. Particularly, restitution is inconsistently

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

11. *See, e.g.*, *United States v. Hardy*, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010).

The simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. Consumers such as [defendant] who "merely" or "passively" receive or possess child pornography directly contribute to this continuing victimization. Having paid others to "act out" for him, the victims are no less damaged for his having remained safely at home[.]

Id.; *Osborne*, 495 U.S. at 111 ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."); *United States v. Kennedy*, 643 F.3d 1251, 1260 (9th Cir. 2011) (finding that individuals depicted in images of child pornography experience "the emotional and psychic pain of knowing that the images are being viewed").

12. *See Note*, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984) ("A restitution order requires the criminal offender to pay money or to render services to his victim in order to redress the loss he has inflicted."); *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006) (holding that restitution is penal in nature and part of a defendant's sentence).

13. Lewis, *supra* note 6, at 413 ("Victims have begun seeking compensation from anyone in possession of the images, not just the person responsible for producing the pornography.").

14. *United States v. Berk*, 666 F. Supp. 2d 182, 190 (D. Me. 2009).

15. "End-users" are those who merely possess and collect child pornography and benefit from the images produced and distributed by others; but they are not themselves involved in production or distribution.

16. *See Berk*, 666 F. Supp. 2d at 190 ("A review of the cases decided thus far shows that victims' success in obtaining restitution has varied significantly in district courts across the country."); *infra* note 73 and accompanying text.

17. *See Schwartz, supra* note 10 (highlighting a George Washington University Law professor's argument that the application of restitution in this context "stretches personal accountability to the breaking point"); Dina McLeod, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1330 (2011) (explaining that the hesitancy of some judges to award restitution in possession cases is based on questions about the casual link between the victim's harm and the defendant's conduct and whether that link is too tenuous).

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administered, results in both disproportionate punishments and liability, and fails to adequately meet victims' needs. In response, this note proposes that, instead of relying on courts to order restitution in possession cases, Congress should establish a victim compensation fund that would uniformly reimburse victims for the harm caused by possessors.

Part II of this note will survey the U.S. Supreme Court jurisprudence addressing not only the production and distribution of child pornography, but also the mere possession of child pornography. This section will also provide an overview of the Mandatory Victims Restitution Act (MVRA), which governs the application of restitution to the crime of child pornography possession. Part III will then offer a brief investigation into the major problems caused by applying the current restitution framework to possession cases. First, courts have split on the application of the MVRA to the crime of possession, which has created inconsistencies that are detrimental to both defendants and victims.¹⁸ Second, restitution amounts can be disproportionate to the offense, which risks violating the Eighth Amendment's prohibition against excessive fines and minimizes the liability placed on producers.¹⁹ Finally, the current framework does not adequately meet the needs of victims;²⁰ specifically, they are left unsatisfied with unpaid restitution orders and revictimized through offender notifications.²¹ Still other victims, who are not identified until after the defendant's conviction, are unable to petition for restitution from that defendant at all.²²

In light of these problems, Part IV will explain this note's proposal for congressional action. Specifically, Congress should remove the crime of child pornography possession from the scope of the MVRA, which would prohibit courts

18. See Robert William Jacques, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1173, 1181–82 (2011) (arguing that the split among courts on the interpretation of the MVRA calls for congressional action).

19. See McLeod, *supra* note 17, at 1334, 1344.

20. See Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1689–90 (2009) (arguing against the MVRA framework and proving guidance for a return to restorative justice).

21. Victims are notified each time another individual has been arrested for possessing their image. This is accomplished through the Victim Notification System (VNS), which is authorized under 18 U.S.C.A. § 3771 (West 2009). VNS is a network of federal law enforcement agencies that provides victims with information about any case that involves them. *The Department of Justice Victim Notification System*, U.S. DEP'T OF JUSTICE, <https://www.notify.usdoj.gov/index.jsp> (last visited Mar. 1, 2013).

VNS is a cooperative effort between the Federal Bureau of Investigation (FBI), the United States Postal Inspection Service (USPIS), the United States Attorneys' offices, and the Federal Bureau of Prisons (BOP). This free, computer-based system provides important information to victims. In many cases you will receive letters generated through VNS containing information about the events pertaining to your case and/or any defendants in the case.

Id.; see also *United States v. Woods*, 689 F. Supp. 2d 1102, 1105 (N.D. Iowa 2010) (focusing on a victim's painful reaction to offender notifications).

22. Jacques, *supra* note 18, at 1194 (finding that the Internet's anonymity makes identifying victims more difficult).

from ordering restitution from possessors.²³ However, victims should not be deprived of the opportunity for adequate compensation. Therefore, Congress should establish a federal victim compensation system, where a defendant, as part of his sentence, would pay into a special fund instead of directly paying the victim.²⁴ The funds would then be dispersed to eligible victims of child pornography.²⁵ Congress should adopt a model based on the International Terrorism Victim Expense Reimbursement Fund (ITVERP), which provides compensation to victims of international terrorism.²⁶ A compensation program modeled after ITVERP would solve the problems associated with the current restitution model, as applied to the crime of possession, by providing a uniform approach that would create consistency for both victims and offenders, avoid disproportionate punishments and liability for end-users, and, overall, better satisfy victims' needs.

II. THE INTERPLAY BETWEEN POSSESSION OF CHILD PORNOGRAPHY AND RESTITUTION

A. Supreme Court Jurisprudence Prohibiting Possession of Child Pornography

Both the U.S. Supreme Court and Congress have addressed the issue of child pornography as it has grown and developed.²⁷ Rooted in the notion that “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens,”²⁸ the Court has permitted state legislatures and Congress to place more and more restraints on production, distribution, and, finally, possession.²⁹ In 1982, the year of the seminal Supreme Court case *New York v. Ferber*, the vast majority of states and Congress had passed statutes prohibiting the production and distribution of child pornography.³⁰ Recognizing the extensive state legislative findings and acknowledging psychological research that focused on penalizing distribution as the most effective way to combat the problem,³¹ the Court in *Ferber* held that child pornography was outside the protection of the First Amendment and upheld a New York statute that prohibited a

23. See McLeod, *supra* note 17, at 1342–45 (explaining the serious policy concerns associated with holding possessors liable under § 2259).

24. See *United States v. Paroline*, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009) (suggesting a statutory provision requiring fines for child pornography be paid into a victim compensation fund), *vacated*, *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012).

25. See *Paroline*, 672 F. Supp. 2d at 793 n.12.

26. 42 U.S.C.A. § 10603c (West 2008).

27. See Lewis, *supra* note 6, at 416.

28. *New York v. Ferber*, 458 U.S. 747, 757 (1982) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

29. *Id.* at 760; *Ohio v. Osborne*, 495 U.S. 103, 103 (1990).

30. *Ferber*, 458 U.S. at 749. By 1982, forty-seven states had outlawed the production and distribution of child pornography. *Id.*

31. *Id.* at 758 n.9, 760.

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person from knowingly promoting sexual performances by children by disseminating materials depicting these performances.³²

In *Ferber*, the Court acknowledged the grave consequences of the child pornography industry and declared that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”³³ In upholding the the New York statute, the Court found these pornographic materials “bear[] so heavily and pervasively on the welfare of children engaged in its production . . . that it is permissible to consider these materials without the protection of the First Amendment.”³⁴ Further, the Court suggested a solution: “[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”³⁵

Less than ten years later, in 1990, nineteen states had statutes prohibiting simple possession, the first of which was enacted in 1987—a short time after the birth of the Internet.³⁶ Accordingly, in its *Ohio v. Osborne* decision, the Court furthered this trend of state legislatures and upheld an Ohio statute criminalizing the possession child pornography.³⁷ The Court explained:

Given the importance of the State’s interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; *as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.*³⁸

32. *Id.* at 774. The relevant part of the New York statute is as follows:

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such a child, he consents to the participation by such child in a sexual performance.

N.Y. PENAL LAW § 263.05 (McKinney 1980).

33. *Ferber*, 458 U.S. at 757.

34. *Id.* at 764. More specifically, the Court in *Ferber* found child pornography was unprotected under the First Amendment regardless of whether the materials were “obscene,” which is a separate area of unprotected speech. *Id.* at 755–57.

35. *Id.* at 760.

36. *Ohio v. Osborne*, 495 U.S. 103, 110–11 n.6 (1990).

37. *Id.* at 103.

38. *Id.* at 110 (emphasis added) (footnotes omitted) (citations omitted). The relevant part of the Ohio statute is as follows:

(A) No person shall do any of the following:

...

(3) Possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic,

The Court also identified an additional interest in upholding the Ohio law, stressing that child pornography is a permanent record of a victim's abuse that "causes the child victims continuing harm by haunting the children in years to come."³⁹ The state's ban on mere possession, therefore, would motivate possessors to destroy the materials, which, in time, would help to end the cycle of distribution and, in turn, end a victim's continuing harm.⁴⁰ In the end, by depriving the possession of child pornography of any constitutional protection, the Court approved the climate of intolerance created by state legislatures.⁴¹

B. Congress's Introduction of the Criminal Restitution Framework

Beginning in the late 1970s, a victims' rights movement had emerged, arguing that the criminal justice system had become overly offender-focused and lacked sensitivity to victim needs.⁴² In response to the movement and rising crime rates, President Ronald Reagan commissioned the Task Force on Victims of Crime, which conducted studies and made policy suggestions to improve the position of victims in the criminal justice system.⁴³ A central focus of the task force and movement was the importance of a victim's right to receive restitution from their perpetrator.⁴⁴ Shortly thereafter, in 1982, Congress introduced restitution into the federal sentencing guidelines with the Victim and Witness Protection Act (VWPA).⁴⁵

medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

OHIO REV. CODE ANN. § 2907.323 (West 2012).

39. *Osborne*, 495 U.S. at 111.

40. *Id.*

41. *See id.*

42. Dickman, *supra* note 20, at 1687; see Katherine Giblin, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109, 1115 (2011) (suggesting the existence of proximate cause between possession and victim injuries and proposing congressional action to set monetary boundaries for judges in setting restitution amounts).

43. *See* U.S. DEP'T OF JUSTICE, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982) [hereinafter PRESIDENT'S TASK FORCE].

44. Giblin, *supra* note 42, at 1116; PRESIDENT'S TASK FORCE, *supra* note 43, at 33 ("Legislation should be proposed and enacted that would . . . [r]equire restitution in all cases, unless the court provides specific reasons for failing to require it.").

45. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. § 3664 (2006)).

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Prior to the VWPA, courts rarely ordered or enforced restitution, granting it only as a condition of probation.⁴⁶ But because of the movement, and at the request of the president's task force, Congress dramatically altered the federal restitution framework by encouraging courts to impose restitution with the VWPA. Specifically, the VWPA granted courts discretion to order restitution independent of probation and "in conjunction with imprisonment, fine, suspended sentence, or other sentence imposed by the court."⁴⁷ This discretion, however, was limited, requiring courts to consider "the financial resources and other assets of the defendant . . . projected earnings and other income of the defendant and any financial obligations of the defendant including obligations to dependents."⁴⁸ Essentially, this limitation all but guaranteed that restitution awards did not exceed a perpetrator's ability to pay.

Although the VWPA broadened the availability of restitution, Congress determined that federal judges were still not ordering restitution frequently enough to satisfy the objectives of the victims' rights movement or the president's task force,⁴⁹ and limiting courts' discretion based on the offender's circumstances continued to place victims' needs second.⁵⁰ In response, Congress amended the VWPA with the Mandatory Victims Restitution Act in 1996.⁵¹ The MVRA, which instituted *mandatory* restitution for certain crimes, was constructed to "reflect a fundamental shift in the purpose of restitution . . . to an attempt to provide those who suffer the consequences of crime with some means of recouping their personal and financial losses."⁵² Congress acknowledged the problem of offender indigence in requiring mandatory restitution, yet yielded to the needs of victims who, it suggested, could benefit from even nominal awards or be compensated if their perpetrator eventually obtained monetary resources

46. Dickman, *supra* note 20, at 1688. In other words, judges were limited to ordering restitution only as a part of a probationary sentence. S. REP. NO. 97-532, at 30 (1982). "As a matter of practice, even that discretionary grant of authority [was] infrequently used and indifferently enforced. In this respect, federal criminal courts [went] the way of their state counterparts, reducing restitution from being an inevitable if not exclusive sanction to being an occasional afterthought." *Id.*

47. S. REP. NO. 97-532, at 32.

48. 18 U.S.C. § 3664(f)(2) (2006).

49. See S. REP. NO. 104-179, at 13 (1995). "Unfortunately, however, while significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution." *Id.* In 1994, according to the U.S. Sentencing Commission's Annual Report, federal courts ordered restitution in only 20.2% of criminal cases. *Id.*

50. See 141 CONG. REC. H1302 (daily ed. Feb. 7, 1995) (statement of Rep. Henry Hyde).

51. 18 U.S.C. §§ 3556, 3663-64 (2006); see Dickman, *supra* note 20, at 1689 ("Congress's primary motivation in enacting the MVRA was the belief that the VWPA's restitution framework had not adequately compensated crime victims . . . Congress aspired to ensure that victims receive the restitution that they are due.").

52. Beth Bates Holliday, *Who Is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A)*, 26 A.L.R. FED.2d 283 (2008) (analyzing cases defining who is a "victim" for purposes of the MVRA).

that would allow for payment.⁵³ Essentially, Congress created the MVRA to make the victim the “primary consideration in the sentencing process.”⁵⁴

Accordingly, Congress enumerated certain offenses under the MVRA that require a restitution order upon conviction.⁵⁵ Offenses of sexual exploitation against children, including the possession of child pornography, are crimes subject to the MVRA.⁵⁶ The MVRA mandates restitution be paid to the victim for “the full amount of the victim’s losses,”⁵⁷ which are defined as:

[C]osts 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.⁵⁸

The statute has been the subject of debate and varying interpretations.⁵⁹ As a result, courts have disagreed on the proper application of the MVRA to the crime of possession.⁶⁰

III. RESTITUTION IS NOT THE PROPER REMEDY FOR POSSESSION OF CHILD PORNOGRAPHY

Both courts and commentators have requested that Congress provide guidance on the application of the MVRA to crimes of possession.⁶¹ A brief investigation into the current restitution framework as it is applied to possession cases demonstrates why

53. S. REP. NO. 104-179, at 18 (1995).

54. 141 CONG. REC. H1302 (daily ed. Feb. 7, 1995) (statement of Rep. Henry Hyde). For a more detailed discussion of the statutory history of criminal restitution and its evolution as applied to sex crimes, see generally Bradley P. Reiss, *Restitution Devolution?*, 85 ST. JOHN’S L. REV. 1621, 1627–30 (2011) (arguing for a shift from restitution to a victim compensation fund).

55. 18 U.S.C. § 2259(a) (2006). “[I]n addition to any other civil or criminal penalty authorized by law, the court shall order restitution for *any offense under this chapter*.” *Id.* (emphasis added).

56. 18 U.S.C.A. § 2252A(a)(2)(A) (West 2009). Section 2252A, which is the provision prohibiting the possession of child pornography, is an offense listed under the same chapter as § 2259. Therefore, mandatory restitution applies to the crime of possession. *Id.* § 2259(a).

57. *Id.* § 2259(b)(1).

58. *Id.* § 2259(3).

59. See, e.g., Jacques, *supra* note 18, at 1181–82 (arguing that the plain language of the statute is not clear).

60. E.g., *id.* at 1184 (acknowledging the disagreement among courts); see *infra* notes 68, 73 and accompanying text.

61. See, e.g., Reiss, *supra* note 54, at 1650 (citing *United States v. Solsbury*, 727 F. Supp. 2d 789, 796–97 (D.N.D. 2010)).

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Congress needs to take action to develop a new framework for compensating victims. First, the current framework creates inconsistencies for both victims and offenders because courts can either apply restitution—and do so in a wide range of amounts—or decide against a restitution order completely. Second, restitution orders can often result in disproportionate punishments that risk violating the Eighth Amendment and curtail the accountability of producers. Third, restitution often fails to adequately restore victims because victims are rarely able to collect awards from their defendants and the total amount of restitution awarded regularly fails to reflect the actual rate at which the crime of possession is committed against a single victim. Moreover, the procedural steps to obtain restitution can be detrimental to victims, while other victims are often left empty-handed because they are not identified prior to prosecution.

A. Application of Restitution in Possession Cases Has Created Harmful Inconsistencies

The majority of courts have interpreted the MVRA to require a finding of proximate cause between the crime and the victim's harm before ordering restitution in the full amount of the victim's losses.⁶² Proximate cause limits the legal responsibility of an individual and demands a "direct relation between the injury asserted and the injurious conduct alleged."⁶³ Therefore, in possession cases, the question is whether a defendant, by viewing images of the victim, caused her harm in the form of emotional and psychological suffering.

Finding a direct relationship between mere possession and the harm suffered by the child is an abstract idea, which can involve "connect[ing] the dots" of causation in a very attenuated manner.⁶⁴ This notion, that a person who possesses child pornography directly harms the child victim, often draws criticism because it "stretches personal accountability to the breaking point" and feels as though "forcing payment from people who do not produce such images but only possess them goes too far."⁶⁵ In other words, there is question as to how an individual can be required to pay a specific victim when they did not physically touch, let alone personally harm, that victim.⁶⁶ Yet, on the other hand, victims are considered personally harmed by an end-user because the victim's knowledge of an individual viewing a record of his or

62. *See, e.g.*, *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012); *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011); *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999). *But see In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012); *United States v. Christy*, No. 10-cr-1534, 2012 WL 3255107 (D.N.M. Aug. 2, 2012).

63. *Aumais*, 656 F.3d at 154 (quoting *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

64. *See* John Schwartz, *Court Rejects Restitution for Victim in Porn Case*, N.Y. TIMES, Sept. 9, 2011, at A20.

65. Schwartz, *supra* note 10.

66. *See id.* (noting a sex crime expert's view that the harm caused by possessors is less direct than the harm caused by abusers).

her abuse exacerbates the harm stemming from the original abuse.⁶⁷ In turn, courts, even within the same circuit, have reached no consensus on whether, and when, the possession of child pornography is the proximate cause of a victim's harm.⁶⁸ This disagreement has created inconsistencies not only for the criminal justice system, but also for both victims and offenders.

First, this discrepancy creates inconsistencies that are problematic for both defendants and victims because possession of an image in one jurisdiction may result in a restitution order to the victim, but possession of the same image in another jurisdiction may result in no restitution order.⁶⁹ This fails to put a defendant on notice of the potential punishment, which minimizes any deterrent effect restitution might have.⁷⁰ Further, victims end up gambling with their time and energy by petitioning for restitution in jurisdictions that have found proximate cause in some cases, but not in others.⁷¹ With only the mere possibility of restitution, a victim may not only expend time, but also money on legal fees and costs, and suffer trauma from testifying or making statements regarding the harm suffered.⁷²

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67. See *New York v. Ferber*, 458 U.S. 747, 759 (1982) (stating that “harm to child is exacerbated by [image] circulation”); *United States v. Hardy*, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010) (“Having paid others to ‘act out’ for him, the victims are no less damaged for his having remained safely at home.”); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at *2 (W.D.N.C. Jan. 12, 2010) (“The victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.”).
68. Compare *United States v. Evers*, 669 F.3d 645, 659 (6th Cir. 2012) (finding proximate cause between the victim’s harm and the possessor’s conduct), *United States v. Burgess*, 684 F.3d 445, 459–60 (4th Cir. 2012) (same), *United States v. Kearney*, 672 F.3d 81, 99–100 (1st Cir. 2012) (same), *United States v. McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011) (same), *United States v. Monzel*, 641 F.3d 528, 540 (D.C. Cir. 2011) (same), *United States v. Tallent*, 872 F. Supp. 2d 679, 690 (E.D. Tenn. 2012) (same), *United States v. Lundquist*, 847 F. Supp. 2d 364, 370 (N.D.N.Y. 2011) (same), *United States v. Stowers*, No. cr-10-74, 2011 WL 3022188, at *3 (E.D. Okla. July 22, 2011), *Hardy*, 707 F. Supp. 2d at 613–14 (same), *Brunner*, 2010 WL 148433, at *4 (same), and *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *4 (E.D. Cal. Aug. 19, 2009) (same), with *United States v. McGarity*, 669 F.3d 1218, 1269 (11th Cir. 2012) (finding a lack of proximate cause between the victim’s harm and the possessor’s conduct), *Aumais*, 656 F.3d at 154 (same), *United States v. Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011) (same), *United States v. Martin*, No. 2:10-cr-95, 2012 WL 3597436, at *4 (E.D. Tenn. Aug. 20, 2012) (same), *United States v. Simon*, No. CR-08-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (same), and *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009).
69. Jacques, *supra* note 18, at 1189 (“[T]here are two unfortunate, polar consequences: some courts bar recovery for victims while others force offenders to pay large amounts that have attenuated connection to the harm actually caused.”).
70. See Dennis F. DiBari, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 *CARDOZO L. REV.* 297, 310 (“Restitution’s ability to closely track the harm caused by the crime functions as a powerful deterrent, since it warns potential offenders that they will be responsible for every penny of harm they cause.”); *In re Silverman*, 616 F.3d 1001, 1009 (9th Cir. 2010) (“[R]estitution furthers the traditional sentencing goals of rehabilitation and deterrence, by forcing defendants to directly witness the effects of their crimes.”).
71. See cases cited *supra* note 68. For example, the Second Circuit found a lack of probable cause in *Aumais*, but subsequently, a court in the Northern District of New York found the presence of proximate cause in *Lundquist*.
72. See *infra* notes 175–76 and accompanying text.

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Among the courts that have found the presence of proximate cause in possession cases, there is further disagreement on the proper way to calculate the amount of a restitution order.⁷³ Upon a finding of proximate causation, a court must calculate how much restitution is warranted by estimating the specific losses caused by the defendant.⁷⁴ However, a court is left with a “legal quandary” because the MVRA does not provide a specific calculation method.⁷⁵ Without a designated method, judges have full reign in determining their own.⁷⁶ Not surprisingly, this has resulted in a wide range of calculation methods and varying restitution amounts. Some courts have adopted a set amount for each defendant convicted of possession.⁷⁷ This amount is based on a very small percentage of the civil remedy available to victims of child pornography under 18 U.S.C. § 2255, which typically is around \$3000 and equals two percent of the \$150,000 available under the civil statute.⁷⁸ Other courts have permitted the government and the defendant to stipulate to a restitution amount.⁷⁹ One court granted restitution in the full amount of the victim’s losses, which totaled a little over \$3.5 million.⁸⁰

This discrepancy in restitution awards also fails to put defendants on notice and therefore reduces any deterrent effect restitution might have on possessors. Further, victims are again placed in a risky position when petitioning for assistance. Therefore, a more dependable and consistent system of compensation would not only benefit victims, but also provide potential possessors with explicit notice of the potential punishment upon conviction.

Not only does the application of restitution to possession cases create huge discrepancies in award amounts, but it also places too much discretion in the hands of the judiciary, which is inconsistent with the language and intent behind the MVRA.⁸¹ The lack of both guidance on proximate cause and a standard calculation method

73. *McGarity*, 669 F.3d at 1270 (“[W]e note that disparate decisions by district courts across the nation demonstrate that there is no universal means for determining a proper restitution amount.”). The great disparity among courts on these issues has sparked several in-depth analyses of case law nationwide. For a detailed look into these discrepancies and the cases mentioned in this note, see Reiss, *supra* note 54, at 1633–36; Giblin, *supra* note 42, at 1121–29; Jacques, *supra* note 18, at 1185–87.

74. *United States v. Staples*, No. 09-14017, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009) (“[Defendant] is required to pay [the victim] the full amount of losses as a result of the harm she suffered.”).

75. *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *4 (E.D. Cal. Aug. 19, 2009).

76. *See id.*

77. *See id.* at *6; *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010); *United States v. Ferenci*, No. 1:08-CR-0414, 2009 WL 2579102, at *5 (E.D. Cal. Aug. 19, 2009); *United States v. Monk*, No. 1:08-CR-0365, 2009 WL 2567831, at *5 (E.D. Cal. Aug. 18, 2009).

78. *Renga*, 2009 WL 2579103, at *6; 18 U.S.C. § 2255(a) (2006).

79. *See, e.g., United States v. Granato*, No. 2:08-cr-198 (D. Nev. filed Aug. 28, 2009).

80. *United States v. Staples*, No. 09-14017, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009). The court calculated the full amount of the victim’s losses by adding the loss of future wages and employee benefits through the age of sixty-seven with the future treatment and counseling costs through the age of eighty-one, which totaled \$3,680,153. *Id.*

81. *See Lewis*, *supra* note 6, at 419–20.

permits one judge to order a huge restitution sum, while another judge can decline restitution altogether and, in effect, ignore the mandate of the MVRA, which states that “the court *shall* order restitution for any offense under this chapter.”⁸² This discretion does not comport with the plain language of the MVRA, nor is it consistent with Congress’s intent, which was to make victims the primary consideration in sentencing and restore them financially.⁸³ Section 2259 applies to all offenses listed under the chapter—which includes possession of child pornography—and explicitly states that “[t]he issuance of a restitution order under this section is *mandatory*.”⁸⁴ Clearly, “[t]hrough the enactment of the MVRA, Congress essentially decided that defendants found guilty of crimes involving child pornography should never be able to avoid an order of restitution and deny a victim monetary recourse for the harm caused by being victimized through child pornography.”⁸⁵ Therefore, whether restitution should be granted is not a decision that Congress placed with the courts; the legislature stripped the judiciary of this discretion by making restitution mandatory.⁸⁶ This discretion, created from a lack of guidance, diverges from the spirit of the MVRA and allows courts to overstep their authority.⁸⁷

B. Restitution Orders Are Disproportionate to the Offense of Possession

The application of restitution to cases of possession also creates problems of proportionality in punishment and liability. First, issuing restitution orders to possessors lends itself to the risk of violating the Eighth Amendment’s prohibition against excessive fines.⁸⁸ Second, applying restitution to cases of possession can skew the assignment of liability by disproportionately placing it on possessors rather than on those who actually abused the children.⁸⁹

Under the Eighth Amendment, a fine is deemed excessive when the payment is disproportionate to the gravity of the offense.⁹⁰ A restitution order for \$3.5 million, like the one in *United States v. Staples*, could be viewed as disproportionate to the gravity of possession.⁹¹ Requiring a huge sum from an individual who did not physically

82. 18 U.S.C. § 2259(a) (2006) (emphasis added).

83. *See id.* (emphasis added); 141 CONG. REC. H1302 (daily ed. Feb. 7, 1995) (statement of Rep. Henry Hyde).

84. 18 U.S.C. § 2259(b)(4)(A) (2006) (emphasis added).

85. Lewis, *supra* note 6, at 421–22; *accord* *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (“Section 2259 is phrased in generous terms in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.”).

86. 18 U.S.C. § 2259(b)(4)(A) (2006).

87. Lewis, *supra* note 6, at 421–22.

88. *See* McLeod, *supra* note 17, at 1334.

89. *Id.* at 1344.

90. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (“The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”).

91. No. 09-14017-CR, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009).

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abuse the victim or produce the image feels inherently unbalanced. Additionally, even in the absence of a huge restitution amount, a restitution order can be disproportional when there is no direct proof that the defendant's conduct caused the specific losses.⁹² For instance, in *United States v. Brunner*, the court found that the victim impact statements and psychological reports supported a finding of proximate cause, even though neither document named the defendant personally.⁹³ Findings such as these may violate the Eighth Amendment because, when causation is not proven, a possessor could be required to pay the victim for losses caused by other individuals.⁹⁴ Any restitution amount paid, therefore, would not be proportionate to the defendant's offense.⁹⁵

Additionally, ordering restitution from possessors can distort the assignment of liability by failing to hold producers and distributors accountable.⁹⁶ Beyond victim restoration, traditional goals of restitution include deterrence and rehabilitation, both of which can be satisfied in individual cases of possession "by forcing defendants to directly witness the effects of their crime[]." ⁹⁷ However, on a global scale, issuing

92. See *United States v. Paroline*, 672 F. Supp. 2d 781, 789 (E.D. Tex. 2009) ("This Court is of the opinion that a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment."), *vacated*, *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012).

93. No. 5:08cr16, 2010 WL 148433, at *2 (W.D.N.C. Jan. 12, 2010).

94. McLeod, *supra* note 17, at 1334. In *In re Amy Unknown*, the Fifth Circuit rejected the notion that a restitution order in the absence of proximate cause violated the Eighth Amendment. 701 F.3d at 752. Specifically, the court found no Eighth Amendment concerns "[i]n light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664." *Id.* at 772. Although case law has offered little guidance on whether the Eighth Amendment prohibition on excessive fines applies to restitution orders, the Ninth and Eleventh Circuits have held that the Eighth Amendment applies to restitution orders so long as it is not "grossly disproportional to the defendant's culpability." *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *3 (N.D. Ga. Dec. 17, 2009) (citing *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) (affirming MVRA restitution awards in the amount of \$121,403.10 and \$4,510.00 for bank robbery and holding restitution does not violate the Eighth Amendment's prohibition against excessive fines, both facially and as applied)); *United States v. Seigel*, 153 F.3d 1256, 1259, 1264 (11th Cir. 1998) (citing *Dubose* approvingly). Additionally, whether possession defendants are subject to joint and several liability under § 3664, forcing them to pay for others' harms, is also unclear in the case law. See, e.g., *United States v. Veazie*, No. 2:11-cr-00202, 2012 WL 1430540, at *4 n.7 (D. Me. Apr. 25, 2012) (citing *United States v. Monzel*, 641 F.3d 528, 539 (D.C. Cir. 2011)). However, several courts have held that joint and several liability is inappropriate where the defendant did not proximately cause all of the victim's injuries and where they would have to pay for the losses caused by defendants in separate cases, including losses attributable to the initial abuse. *Monzel*, 641 F.3d at 538; *Veazie*, 2012 WL 1430540, at *4 n.7; *United States v. Olivieri*, No. 09-cr-743, 2012 WL 1118763, at *10-11 (D.N.J. Apr. 3, 2012). Accordingly, despite the Fifth Circuit's recent findings, restitution orders in these cases may still raise Eighth Amendment concerns.

95. See *Dubose*, 146 F.3d at 1145 (finding that restitution orders under the MVRA must not be grossly disproportional to the crime committed to pass muster under the Eighth Amendment); *Olivieri*, 2012 WL 1118763, at *10; *United States v. Berk*, 666 F. Supp. 2d 188 n.5 (D. Me. 2009).

96. See McLeod, *supra* note 17, at 1344.

97. *In re Silverman*, 616 F.3d 1001, 1009 (9th Cir. 2010); accord *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) ("Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.").

restitution orders to possessors can actually “underdeter those who cause the greatest harms”—the producers.⁹⁸ Consider the example of “Amy,” who as a child was featured in a widely viewed series of pornographic images:

[Her] uncle, her original abuser, paid only \$6,000 in restitution. Yet, in the first year alone, Amy received \$170,000 in restitution from child pornography possession defendants. She now seeks a total of \$3.4 million from those who possess her images. *No matter how generously one “slices the pie” of fault, one cannot imagine that the amount paid by the original abuse is a proportional representation of his contribution to the harm.*⁹⁹

The disproportionate assignment of liability on possessors minimizes the extent to which producers are responsible for a victim’s harm and for the child pornography industry in general.¹⁰⁰ In order to avoid these problems, Congress needs to create a system that punishes possessors proportionately to the crime.

C. Restitution Fails to Restore Victims of Possession

One of the main purposes of restitution is to make the victim of a crime “whole” again, or, in other words, “to restore someone to the position she occupied before a particular event.”¹⁰¹ In this vein, the MVRA was established to “move ‘toward a more victim-centered justice system,’ which would help transform a criminal justice system that Congress believed was ignoring the plight of victims.”¹⁰² The use of restitution in possession cases, however, often fails to adequately restore victims; specifically, victims rarely collect money from an order and the total amount of restitution awarded per victim does not accurately reflect the actual number of individuals who view their images. Further, the process for obtaining restitution is in fact detrimental to many victims, while other victims, who are not identified before prosecution, are left empty-handed. Each of these issues is addressed in turn below.

First, the collection rate of restitution judgments is alarmingly low.¹⁰³ Defendants often lack the ability “to pay restitution because of incarceration, indigency, or

98. McLeod, *supra* note 17, at 1344.

99. *Id.* (emphasis added) (citations omitted).

100. *See id.* Notably, the Fifth Circuit, in *In re Amy Unknown*, addressed the “concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim’s images” and found that this concern does not implicate an absurd result. 701 F.3d 749, 772 (5th Cir. 2012). However, this concern is different from the one suggested by this note; specifically, that possessors will bear a greater burden of the restitutionary burden than those causing greater harm to the victims, the abusers and producers.

101. *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *5 (E.D. Cal. Aug. 19, 2009) (citing *Hughey v. United States*, 495 U.S. 411, 416 (1990)); *accord* *United States v. Hardy*, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010) (“Courts have found that restitution is not only a means of making a victims whole, but also serves punitive and rehabilitative purposes.”).

102. Dickman, *supra* note 20, at 1689 (quoting S. REP. No. 104-179, at 13 (1995)).

103. *See, e.g.*, OFFICE FOR VICTIMS OF CRIME, RESTITUTION: MAKING IT WORK 1 (Nov. 2002), *available at* https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin5/ncj189193.pdf. Although there is limited data on the collection of restitution on a national level, a recent study of restitution in Colorado

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unemployment.”¹⁰⁴ Therefore, victims who risk the time and emotional energy to request restitution from possessors may wait indefinitely to see any portion of their judgment. Further, if a victim does in fact receive her full award, she will have to pay a large portion—in most cases one-third of her judgment—to her attorney in fees and costs.¹⁰⁵ The false hope created by an order can only compound the existing mental and emotional pain experienced by victims of child pornography.¹⁰⁶ This limited recovery of money may force victims, and the community, to lose respect for and satisfaction in the criminal justice system.¹⁰⁷ Also, from a financial cost-benefit analysis standpoint, staffing and running programs to collect restitution often cost more than the amount of money requested in the order.¹⁰⁸ This suggests that an alternative to restitution could provide a more beneficial use of state resources—for instance, by placing these additional funds into a compensation fund for victims.¹⁰⁹

The staggering amount of end-users and the consistent circulation of images also demonstrate why restitution can be improper for possession cases.¹¹⁰ The rate at which

can provide insight. *See id.* at 1, 4. In 1996, offenders in Colorado were ordered to pay their victims \$26 million, but as of 2002 they still owed more than \$20 million. *Id.* at 1; *see also* Jacques, *supra* note 18, at 1195 (“Getting a judge’s order is one matter; a convict’s payment is another.”).

104. Jacques, *supra* note 18, at 1195.

Over 85 percent of federal criminal defendants are indigent at the time of their arrest, and nearly half of offenders made less than \$600 during the month prior to their offense. Moreover, the government often seizes the assets an offender may accumulate from his or her illegal activity prior to conviction, making these assets unavailable for the satisfaction of restitution judgments. Exacerbating the problem is the fact that the economic situation of most inmates does not improve upon release. The average inmate has little in the way of education or marketable job skills, and job opportunities tend to be limited in the communities to which prisoners return. Moreover, a criminal conviction frequently acts as a major impediment to employment.

Dickman, *supra* note 20, 1695 (citations omitted).

105. Reiss, *supra* note 54, at 1641. In 2010, one victim had been awarded \$40,000 in restitution, yet received only \$10,000, while the rest went towards attorney’s fees and advanced costs. *Id.* (citing *United States v. Faxon*, 689 F. Supp. 2d 1344, 1351 (S.D. Fla. 2010)).

106. Dickman, *supra* note 20, at 1689–99. “Supporting this notion is the fact that probation officers and prosecutors report having to help victims who are granted a restitution order to see it as a ‘symbolic victory,’ so that victims are not significantly let down when they do not ultimately receive restitution from the offender.” *Id.* (citations omitted).

107. *Id.* at 1700–01.

108. *Id.* at 1708–09 (“[F]or many restitution judgments, the government is spending considerably more than the offender can be expected to pay or the victim can be expected to receive.”); Reiss, *supra* note 54, at 1639–40 (noting that awarding restitution involves “use of expert testimony, additional evidentiary hearings, further briefing, appeals, and added procedural technicalities if the victim is a minor,” which drive up administrative costs).

109. Dickman, *supra* note 20, at 1708 (“The reason that such programs often do not withstand economic scrutiny is that when the sole aim is to reimburse victims, the cost of staffing and running programs relative to the funds collected might suggest that public monies would better be provided directly to crime victims through crime victim compensation programs.”) (citation omitted).

110. McLeod, *supra* note 17, at 1342.

individuals view and receive child pornography, even with respect to one specific image or victim, is much higher than the rate at which those offenders are apprehended and convicted.¹¹¹ Consequently, victims are never fully restored and made whole. For instance, consider again “Amy,” who is the principle victim in one of the most commonly circulated collections of child pornography, the “Misty” series.¹¹² Research conducted by the National Center for Missing and Exploited Children (NCMEC) has uncovered a total of 35,750 images associated with the Misty series and, in 2009 alone, found 8860 images associated with the same series.¹¹³ Next, consider the federal prosecution rate of child pornography crimes, which in 2006 was a mere 1203 cases.¹¹⁴ Comparing these numbers demonstrates how a victim, such as “Amy,” whose original harm is exacerbated with each viewing, can never actually recover the full amount of restitution theoretically owed to her; the number of images available increases the number of possessors, the majority of which will never be prosecuted based on the current statistics.¹¹⁵ Under the “restorative view” of criminal justice—which serves as the premise of the MVRA—a crime is a violation of a victim’s right and provides a benefit to the offender, which creates an imbalance between them.¹¹⁶ Restitution, in turn, should strive to rectify this imbalance.¹¹⁷ In cases of possession, however, this imbalance cannot be fully cured when any amount a victim receives will be so disproportionate to the actual number of offenders viewing the images; a victim under this framework cannot be made whole.

Additionally, the process by which victims petition for restitution under the current framework contains several prerequisites that are counterintuitive to the victim-centered goals of restitution. First, victims are notified each time an offender has been arrested for possessing the victim’s image.¹¹⁸ In order to receive restitution, a victim must then send a request to the prosecutor, who will present the claim to the court at sentencing.¹¹⁹ Therefore, these notifications are essential in providing victims with opportunity for restitution. As one can imagine, however, these notifications add to the lasting psychological harm of the victim.¹²⁰ A victim named “Vicky,” who is the subject of a widespread series of images, explained this as follows:

111. Dickman, *supra* note 20, at 1702.

112. Giblin, *supra* note 42, at 1111.

113. *Id.* at 1110 n.8.

114. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE; BJS Bull. No. NCJ 219412, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006 2 (2007). This statistic does not specify the prosecution rate for the individual crimes of possession, distribution, and production, but encompasses all child pornography related crimes.

115. *See* Dickman, *supra* note 20, at 1702.

116. *See* Giblin, *supra* note 42, at 1116–17.

117. *Id.*

118. *See* sources cited *supra* note 21.

119. McLeod, *supra* note 17, at 1331.

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

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I learn about each [defendant] because of the Victim Notices. I have a right to know who has the pictures of me. The Notice puts [a] name on the fear that I already had and also adds to it. When I learn about one defendant having downloaded the pictures of me, it adds to my paranoia, it makes me feel again like I was being abused by another man who had been leering at pictures of my naked body being tortured, it gives me chills to think about it. I live in fear that any of them[] may try to find me and contact me and do something to me.¹²¹

Although victim notifications were implemented to aid victims, the effects of the notifications can clearly be detrimental to victims.¹²² Under the current framework, however, these notifications are an unavoidable evil if victims want to receive restitution.

Next, the current restitution framework relies on victim identification.¹²³ Offenders cannot be ordered to pay restitution unless there is an identified victim; yet law enforcement consistently has difficulty identifying victims because of the Internet's anonymity.¹²⁴ Further, the efforts in locating victims are also frustrated because a large percentage of child pornography is produced in foreign countries.¹²⁵ The distance and "insufficient political will" of some foreign countries can hinder overseas efforts,¹²⁶ complicating an already difficult task that requires the cooperation of both domestic and foreign law enforcement agencies.¹²⁷ Consequently, an operation to locate victims abroad, if successful, can take a significant amount of time. Therefore, victims who may be identified after a prosecution are not able to recover restitution from that possessor, yet at the same time guilty offenders are freed from

121. *Id.*

122. *E.g., id.*

123. *See* Jacques, *supra* note 18, at 1194.

124. *Id.*; Chelsea McLean, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 237 n.149 (2007) (noting that the "only records of online pornography trading are logs" that "are often discarded"); U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: REPORT TO CONGRESS 3 (2010) [hereinafter NATIONAL STRATEGY]. Federal law enforcement agencies have specific agencies dedicated to combating child pornography, such as the Federal Bureau of Investigation's Innocent Images National Initiative, the Department of Justice's Child and Exploitation and Obscenity Section, and U.S. Immigration and Customs Enforcement's (ICE) Cyber Crimes Center. Alongside state taskforces, these federal agencies work together to keep each other informed on the identities of both offenders and victims. *See* Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J. L. 1, 38-39 (2011) (providing an overview of federal law enforcement agencies and their tactics in fighting child pornography). Most importantly, these agencies utilize NCMEC, which is a non-profit organization that runs a national tip-line and Child Victim Identification Program (CVIP). *Id.* The CVIP is the central repository for information regarding identified children of child pornography images. *Id.*

125. *See* Jacques, *supra* note 18, 1194.

126. ECPAT INT'L, *Global Monitoring: Status of Action Against Commercial Sexual Exploitation of Children* 19 (2012), http://www.ecpat.net/EI/Pdf/A4A_II/A4A_V2_AM_USA.pdf.

127. *See* U.S. DEP'T OF JUSTICE, *supra* note 124, at 57. The International Criminal Police Organization (INTERPOL) in Washinton, D.C. works with ICE, the Federal Bureau of Investigations (FBI), and NCMEC, along with domestic and foreign law enforcement agencies, to locate unidentified and missing victims of child exploitation. *Id.*

the responsibility of paying for a victim's losses.¹²⁸ This result is unfair and undermines the fundamental premise of restitution: to restore victims.¹²⁹

IV. CONGRESS SHOULD IMPLEMENT A VICTIMS COMPENSATION PROGRAM

Guidance from Congress on the proper application of the MVRA in cases of child possession would not eliminate the problems with the current restitution framework. Therefore, instead, Congress should remove the crime of possession from the MVRA's mandatory restitution.¹³⁰ Simultaneously, Congress should create a national crime victims compensation program specifically designed to allow victims of child pornography to claim compensation for the harm caused by possessors.¹³¹ This new system, funded by fines paid by offenders, will provide consistency to victims and offenders, lessen the possibility of disproportionate punishments and unbalanced liability, and satisfy victim needs.

Abandoning the current criminal restitution framework in exchange for a compensation program for victims of possession was first suggested in *United States v. Paroline*. Judge Leonard Davis explained in a footnote:

While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely unworkable in the context of criminal restitution. 18 U.S.C. § 2255, however, does provide a civil remedy for those victims able to obtain counsel to pursue it. There is a great need for counseling and medical care for victims of child pornography. Perhaps a *statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography* would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.¹³²

In recognizing the current framework as “unworkable,” Judge Davis recommended a transition to an independent system to adequately compensate victims.¹³³ Crime victim compensation programs are consistently praised for providing victims with the monetary funds necessary to recover from their victimization.¹³⁴ These programs

128. See Jacques, *supra* note 18, at 1194.

129. See *United States v. Hardy*, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010); *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *5 (E.D. Cal. Aug. 19, 2009).

130. See generally McLeod, *supra* note 17, at 1342–45 (explaining the serious policy concerns associated with holding possessors liable under § 2259).

131. See *United States v. Paroline*, 672 F. Supp. 2d 781, 793 n.12 (E.D. Tex. 2009), *vacated*, *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012).

132. *Id.* (emphasis added).

133. See *id.*

134. E.g., Frédéric Mégret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT'L L. 123, 131 (2010) (finding that the emergence of compensation programs “ranks as one of the most significant criminological developments in the Western world and beyond of the last four decades”); Benedict J. Monachino, *Enhancing Victims' Rights:*

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have been used to provide organized relief to victims in a variety of contexts. For instance, funds have been established in mass tort class action lawsuits, including the asbestos and Diethylstilbestrol (DES) cases, and also in emergency situations for victims of crime or national disasters, most notably the 9/11 Victim Compensation Fund, the Hokie Spirit Memorial Fund, and the BP Oil Spill Liability Trust Fund.¹³⁵ The most common funds, however, are state-level compensation programs, which provide assistance to victims of both federal and state crimes.¹³⁶

In creating a new system, Congress should use the International Terrorism Victim Expense Reimbursement Program (ITVERP) as a model.¹³⁷ ITVERP is the only federally administered compensation program designed to assist victims of a specific crime.¹³⁸ The program was created under the Victims of Crime Act (VOCA) and allows eligible victims of international terrorism to claim compensation for their victimization directly from a designated federal fund.¹³⁹ Adopting a program similar to ITVERP, with some modifications, would eliminate the problems presented by the current restitution framework as applied to the crime of possession.

A. ITVERP Background

ITVERP was created in part to resolve a discrepancy in victim compensation.¹⁴⁰ Currently, victims of both federal and state crimes are primarily compensated through state programs, which each have their own policies for awarding compensation.¹⁴¹ As a result, victims of the same act of terrorism were receiving different amounts of

Crime Victims Compensation, 80 N.Y. Sr. B.J. 36, 41 (Mar./Apr. 2008) (“[C]rime victims compensation has become a vibrant force in advancing the rights of victims. Each time compensation benefits are expanded, crime victims are another step closer to restoring balance to the criminal justice system.”).

135. See Reiss, *supra* note 54, at 1644–45; see also Guidelines for the Anti-Terrorism and Emergency Assistance Program for Terrorism and Mass Violence Crimes, 67 Fed. Reg. 4822, 4825 (Jan. 31, 2002) (“[The Office for Victims of Crime]’s mission is to enhance the nation’s capacity to assist victims of crime and . . . to promote justice and healing for all victims” by, in addition to other programs, establishing a compensation program for victims of international terrorism).

136. See *infra* note 141.

137. See 42 U.S.C. § 10603c (2006).

138. See source cited *infra* note 142; see also 42 U.S.C. § 10603c(3)(A) (2006).

139. See 42 U.S.C. § 10601(d)(5)(B) (2006) (granting the Office of Victims of Crime power to use federal funds for ITVERP); *id.* § 10603c(b) (establishing an award of compensation to victims of international terrorism from the federal Crime Victims Fund).

140. International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94).

141. 42 U.S.C. § 10602(b)(5) (2006). The federal Crime Victims Fund allocates monies to eligible state crime victim compensation programs. *Id.* § 10601(d)(4)(A). State crime victim compensation programs are only eligible for funding if they “provide compensation to victims of Federal crimes occurring within the State on the same basis that such program provides compensation to victims of State crimes.” *Id.* § 10602(b)(5).

compensation.¹⁴² In response, Congress stripped states of their obligation to compensate victims of international terrorism and created ITVERP as an independent, federal program.¹⁴³

Under ITVERP, the federal government is required to “ensure[] that victims from all 50 states, including the U.S. territories and United States employees in foreign countries, will receive fair and equitable reimbursement for comparable expenses.”¹⁴⁴ Specifically, ITVERP allows claimants to seek reimbursement for the following: (1) medical expenses up to \$50,000; (2) mental health care costs not to exceed \$5000; (3) property loss, repair, or replacement costs not to exceed \$10,000; (4) funeral and burial costs not to exceed \$25,000; and (5) miscellaneous expenses (such as lodging, emergency travel, local transportation, and telephone costs) not to exceed \$15,000.¹⁴⁵

Eligible claimants under ITVERP include U.S. nationals and U.S. government officers and employees who have “suffered direct physical or emotional injury or death as a result of international terrorism on or after October 23, 1983, with respect to which an investigation of civil or criminal prosecution was ongoing after April 24, 1996.”¹⁴⁶ Unlike state compensation programs, which either promote or require victim cooperation with law enforcement, ITVERP does not require similar participation;¹⁴⁷ it simply requires that there be an investigation of, or prosecution related to, the act of terrorism.¹⁴⁸ This framework allows victims to claim compensation without suffering through the hardships attached to testifying or participating in the criminal justice process.¹⁴⁹

142. OFFICE FOR VICTIMS OF CRIME, INTERNATIONAL TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM: REPORT TO CONGRESS 3 (2008) [hereinafter ITVERP REPORT].

Each state determines the level of compensation and assistance for crime victims via state legislation. Prior to ITVERP, a victim’s only recourse was compensation through state programs. This was problematic because survivors of the same act of terrorism outside the United States, who are residents of different states, may conceivably receive different levels of compensation for similar injuries from their state programs.

Id.

143. International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94). “Partially in recognition of this disparity in treatment, VOCA was amended so that states shall no longer be required to compensate victims of international terrorism occurring outside the United States, and the federal government shall oversee an expense reimbursement program for these victims.” *Id.*; see Victims of Trafficking Violence Protection Act, Pub. L. 106386, § 2003(c)(1), 114 Stat. 1464, 1544–46 (2000).

144. ITVERP REPORT, *supra* note 142, at 1.

145. *Id.* at 5.

146. 42 U.S.C. § 10603c(a)(3)(A)(i) (2006).

147. *See id.* § 10603c(a)–(c).

148. *Id.*

149. As a child victim of sexual exploitation, one can experience increased levels of shame by retelling their story during the course of the criminal justice system proceedings. *See* William Wesley Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Proceedings Lens: How Attorneys’ Ethical Duties Exacerbate Children’s Psychopathology*, 16 WIDENER L. REV. 369, 376–77 (2010). Additionally, “[t]he process of testifying and of being cross-examined is obviously contraindicated with psychiatric

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ITVERP is supported by the Crime Victims Fund, which was established by VOCA, and is primarily funded by criminal fines, fees, penalty assessments, and forfeitures paid by federal offenders.¹⁵⁰ The Crime Victims Fund is typically delegated to state victim compensation programs; however, a portion of the fund is reserved for ITVERP. As a result, states are stripped of their obligation to compensate victims of international terrorism and, instead, these victims collect compensation solely through ITVERP.¹⁵¹

B. ITVERP Is the Most Appropriate Model for the Fund

1. ITVERP Model Would Create Consistency for Possession Victims

Similarly to ITVERP, which was established on a federal level to eliminate the inconsistencies in state compensation programs, Congress needs to create a new federal system for restoring victims of child pornography and avoiding the inconsistencies created by the current restitution system.

Using ITVERP as a model, the new program for victims of child pornography should disperse funds to victims equally and consistently. However, Congress would not reimburse victims for the same expenses as victims of international terrorism.¹⁵² Instead, the new program should compensate victims only for their mental and psychological suffering arising from the possession of their images.¹⁵³ As a result, the new program would be less complicated and more predictable than ITVERP.

Additionally, this new program should issue a single, standard dollar amount to eligible victim-claimants, regardless of the number of images of them available or the number of known possessors.¹⁵⁴ Unlike ITVERP, which calculates reimbursement on an individual basis, each victim of child pornography should receive the same amount of compensation in order to cover the mental health expenses related to

procedures aimed at helping abused children regain emotional health.” *Id.* at 375. For instance, while mental health professionals attempt to provide patients with a safe and nonjudgmental environment for disclosure, testifying in a courtroom full of strangers fails to provide that recommended environment. *See id.* Further, traveling to participate in the criminal justice process can also put an additional financial burden on victims.

150. International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518, 49518 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94).

151. *Id.*

152. *See supra* note 145 and accompanying text.

153. *See United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at *2 (W.D.N.C. Jan. 12, 2010) (quoting *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982)) (“The victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.”). Victims of child pornography can also pursue remedies through civil tort actions against their producers, distributors, and possessors. 18 U.S.C. § 2255 (2006). This new system would provide victims with an opportunity to easily and efficiently obtain compensation for only the mental health expenses related to the possession of their images.

154. *See Reiss, supra* note 54, at 1643–48 (arguing for the implementation of a compensation program for child pornography victims and asserting that a standard award amount would benefit victims and create equality).

recovering from the effects of possessors viewing his or her images. Undeniably, each victim's experience is unique and each recovery will vary in cost. Accordingly, this standard amount will likely be subject to criticism for failing to consider the individual characteristics of each victim's situation, such as the number of images in circulation and the exacerbated effect on a victim.¹⁵⁵ Yet, providing a standard compensation amount would eliminate judicial discretion, create consistency, and would be easier to administer than restitution. The question of proximate cause, moreover, which has split courts and as a result created a huge disparity among restitution awards for victims, would be inapposite because nationwide victims would receive equal compensation for their suffering without having to prove that their harm directly resulted from an offender possessing their image.

On the other side of the equation, under this proposed model, Congress will also need to require a standard fine from those convicted of possessing child pornography.¹⁵⁶ This standard fine will create a proportional penalty for possessors that adheres to the traditional punitive motives behind restitution. A standard fine will also provide notice to offenders, in contrast to the current framework, whereby an offender could be ordered to pay millions of dollars or nothing at all. Convicted possessors will pay their fine directly to the Crime Victims Fund and, similar to ITVERP, Congress would funnel these monies directly into a trust within the Crime Victims Fund specifically designated for this program. In addition, Congress will need to forgive states of their obligation to compensate victims of the crime of possession, if their program typically compensated for the crime of possession.¹⁵⁷

2. *ITVERP Model Provides for Proportional Punishment*

The standard fine required from possessors should be proportional to the crime while also recognizing the seriousness of the harm created.¹⁵⁸ Determining the amount of this fine will require complex policy and economic considerations. Several factors, however, should be thoroughly reviewed in making this determination. The

155. *See Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986).

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

Id.

156. *See Jacques*, *supra* note 18, at 1196.

157. State compensation programs are eligible to receive support from the Crime Victims Fund if they compensate victims of criminal "violence." 42 U.S.C. § 10602(b)(1) (2006). State legislatures define those acts that constitute "violence" and therefore may or may not compensate victims for the possession of child pornography, which is not inherently a violent act.

158. *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

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first consideration should be the high rate of indigence among criminal defendants.¹⁵⁹ Although the amount needs to be large enough to help support the fund and reflect the seriousness of the crime, the fine must be practical and manageable for offenders with little means.¹⁶⁰ Issuing an extremely high fine would only perpetuate the problems with collection under the current restitution framework.

Second, the proportion of liability imposed on possessors, as compared to producers and distributors, should be considered in setting the standard amount issued to victims. The existence of proximate cause between a producer or abuser's actions and a victim's harm has not been contested.¹⁶¹ When courts have applied the MVRA to crimes of production and distribution, the issue of proximate cause has not precluded restitution awards, nor has it provoked extensive statutory interpretation.¹⁶² The MVRA works effectively in these cases and therefore should remain unchanged in its application to production and distribution of child pornography.¹⁶³ Thus, in some cases, a victim eligible under the new program may have already received or will receive restitution from the producer or a distributor when he or she applies for compensation. Policymakers, in turn, should consider the possibility of this additional award and ensure that the standard amount provided to victims of possession globally reflects the portion of harm caused by possessors in the circle of abuse that also includes producers, distributors, and countless other end-users.¹⁶⁴

159. *See supra* note 104 and accompanying text.

160. *See supra* note 104 and accompanying text.

161. *See* United States v. Berk, 666 F. Supp. 2d 182, 190–91 (D. Me. 2009) (“It has long been uncontroversial to order restitution when the defendant is convicted of actual physical abuse of a child or of producing images constituting child pornography.”).

162. United States v. Doe, 488 F.3d 1154, 1159–60 (9th Cir. 2007) (upholding restitution award under the MVRA in production and abuse case); United States v. Julian, 242 F.3d 1245, 1246–48 (10th Cir. 2001) (same). Typically, when a defendant is convicted of distribution they are also convicted of production and/or possession. At this point, there are no cases applying the MVRA solely to the crime of distribution. Accordingly, it is an assumption to say that the crime of distribution does not create the same questions regarding proximate cause as the crime of possession.

163. Undoubtedly, some of the problems present in possession cases can also be found in production and distribution cases when the MVRA is applied. Specifically, low collection rates and issues with victim notifications and identification also exist in those cases. Overall, however, the lack of problems relating to consistency and proportionality in production and distribution cases has made the application of restitution uncontroversial. *See Berk*, 666 F. Supp. 2d at 189–92. In determining the scope of the victim compensation program, policymakers should consider imposing fines on offenders who have distributed child pornography including images of unidentified victims, which may provide an additional level of punishment and deterrence, while also funding the program.

164. United States v. Veazie, No. 2:11-cr-00202, 2012 WL 1430540, at *5 (D. Me. Apr. 25, 2012).

The various defendants who have caused [a victim] harm—through creation, distribution, and possession of child pornography depicting her abuse—have caused harm in substantively different ways and, presumably, in differing amounts. A defendant found guilty of distributing child pornography has committed a substantively different offense than a defendant found guilty of possession of child pornography and, presumably, the

A starting point for the determination of a standard amount may be an examination of the civil remedy statute available for victims of child pornography, 18 U.S.C. § 2255(a), which has served as the basis of several courts' restitution calculations.¹⁶⁵ This statute provides that any victim who, as a child, suffered personal injury as a result of sexual exploitation "shall be deemed to have sustained damages of no less than \$150,000 in value."¹⁶⁶ By establishing a high dollar amount for damages for these crimes, Congress was cognizant of the great harm caused by child pornography.¹⁶⁷ However, requiring a fine near \$150,000 would fail to consider the proportionality of the crime of possession to the crime of production or abuse.¹⁶⁸ Therefore, by spreading the \$150,000 of damages across possessors and requiring a percentage of that sum as a fine, the amount paid by possessors would be more proportional to their actual crimes.¹⁶⁹ This would eliminate the Eighth Amendment concerns presented by the current restitution framework.

3. *ITVERP Model Restores Victims*

A victim-centered fund, modeled after ITVERP, would eliminate the problems created by the current restitution framework that regularly leave victims unsatisfied. Like ITVERP, compensation under the new program should be made available to all eligible victims of child pornography, regardless of their participation in the criminal prosecution of their offender.¹⁷⁰ Congress should not require victims of child pornography to participate in law enforcement efforts in order to receive compensation. Instead, Congress should simply require victims to prove that they are a child pornography victim and that their images are in or have been in circulation on the Internet. Both evidence of a prosecution or investigation of an offender, including police and prosecutor records, or verification from NCMEC's Child Victim Identification program could

level of harm attributable to one who distributes and possesses child pornography differs from the level of harm attributable to one guilty of possessing images of child pornography.

Id.

165. *See supra* note 78 and accompanying text.

166. 18 U.S.C. § 2255(a) (2006). The statute applies to "[a]ny person, who while a minor, was a victim of a violation of section . . . 2252A . . . and who suffers personal injury as a result of such injury." *Id.* Section 2252A is the federal criminal statute prohibiting the possession of child pornography. *Id.* § 2252A.

167. Section 2255 originally provided damages for no less than \$50,000. However, the text of the statute was changed to \$150,000 as an amendment under the Adam Walsh Child Protection and Safety Act of 2006 "to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." Pub. L. No. 109-248, § 707, 120 Stat. 587 (2006).

168. *See United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *5-6 (E.D. Cal. Aug. 19, 2009) (holding that comparing possession of images to direct abuse or production supports the finding that simple receipt causes less than \$150,000 in harm).

169. Jacques, *supra* note 18, at 1196 ("[S]preading of funds required for victims across every offender should make the amount paid more proportional to the crime committed, while also preventing excessive order amounts on individual defendants.").

170. *See* 42 U.S.C.A. § 10603c(3)(A)(i) (West 2008).

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prove an individual's status as a child pornography victim.¹⁷¹ Further like ITVERP, victims will also have to show that they have suffered "emotional injury" as a result.¹⁷²

By providing compensation without requiring victims' law enforcement participation, Congress will eliminate the victim-related problems in applying restitution to cases of possession. First and foremost, requiring all possessors to pay into the fund, regardless of whether a victim is identified or is participating in the prosecution, will provide compensation to those victims whose possessors are not yet apprehended or convicted.¹⁷³ This will eliminate the injustices created by the current restitution framework when possessors are able to avoid paying restitution because the victims cannot be identified in images and when victims are prohibited from petitioning for assistance because their possessors have not been apprehended.¹⁷⁴ Victims would also avoid waiting indefinitely to receive compensation from their offenders and would avoid receiving regular notifications reminding them of their victimization. As a result, the suggested fund will give life to the victim-centered objectives of restitution.

Further, victim participation in the investigation or prosecution of a perpetrator may cause additional trauma and frustrate the healing process, especially for children.¹⁷⁵ The current framework requires victims to prove that they were harmed by the possessor through victim impact statements, expert evaluations, and testimony, which may not only traumatize victims, but may make them feel as though they themselves are on trial.¹⁷⁶ Instead of slowing the healing process, the new program

171. *See supra* note 124.

172. *See* 42 U.S.C. § 10603c(3)(A)(i) (2006).

173. Jacques, *supra* note 18, at 1194–95 ("If courts imposed mandatory fines on all child pornography offenders, wrongdoers could not escape the duty Congress created to compensate their victims, and the overall amount of resources available to victims should increase.").

174. *See id.* at 1194.

175. *See* Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 445–46 (1994).

The impact of the emotional distress involved in court testimony can stay with a child into adulthood. The child is likely to develop at a slower rate than his or her peers because trauma during childhood can delay normal cognitive and emotional development. In a comparison of effects of the legal process on child victims who had testified in court and others who had not testified, those children who testified were shown to have notably greater distress both seven months after testifying and after the conclusion of the legal process. Evidence of this increased distress was in the form of depression, anxiety, and some psychosomatic symptoms. Due to the interruption in childhood development, the negative consequences of involvement in the legal process can be more momentous for a child than it would be for an adult.

Id.

176. *See id.* at 441–42.

Research indicates that the more interviews a child is subjected to, the more harmful the process is to the child. The number of times a child must repeat her story is one of the strongest predictors of trauma. Multiple exposures to stressful events can reduce the child's resilience and make the child more susceptible to distress.

Id.

will promote a victim's healing process by validating them and lessening their emotional suffering through a non-confrontational and direct compensation process. On the other hand, this new compensation program may be subject to criticism for failing to provide the benefits of individual retribution as between a victim and his or her offender.¹⁷⁷ Yet, given the problems with the current framework, the consistency and redress created by this program will most likely outweigh retribution.

A compensation program will also provide additional benefits to victims and the criminal justice system and promote the traditional values behind restitution. Providing a guaranteed sum of money, rather than a substantial, but potentially uncollectable, restitution sum will likely draw greater victim satisfaction than the current framework, especially because "victim satisfaction is best achieved when collection rates are high, even when increasing compliance comes at the expense of reducing the amount of the restitution judgment."¹⁷⁸ Furthermore, shifting away from the criminal system will save administrative costs associated with restitution.¹⁷⁹ Additionally, possessor's fines, paid into the victim fund, may advance the traditional objectives of restitution, despite not providing money directly to an individual victim.¹⁸⁰ Requiring possessors to pay a fine, in addition to any other prescribed consequence, can act as both a deterrent and a punishment while also restoring victims.¹⁸¹

4. *How to Create the Fund*

To start, Congress would first have to amend 18 U.S.C. § 2252A—which is the federal statute prohibiting the possession or receipt of child pornography—and require a standard fine for those convicted under the statute.¹⁸² Congress would also need to eliminate the crime of child pornography possession from the list of enumerated offenses triggering mandatory restitution under the MVRA.¹⁸³ After these changes, in order to create this new federal compensation program, Congress would need to amend VOCA in the same way it did for ITVERP.

VOCA instituted the Crime Victims Fund¹⁸⁴ with the purpose of "financ[ing] payments to State and Federal victims compensation and assistance programs."¹⁸⁵ In 1988, Congress formally established the Office for Victims of Crime (OVC) with a

177. *See id.* at 440–41 (noting the legal process can be beneficial to victims, but most often when the children have additional familial support).

178. Dickman, *supra* note 20, at 1699.

179. For example, court costs in determining the amount of victims' losses and paying both prosecutors and defense attorneys in restitution proceedings. *Id.* at 1709.

180. *See United States v. Hardy*, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010) ("Courts have found that restitution is not only a means of making a victim whole, but also serves punitive and rehabilitative purposes.").

181. *See Note, supra* note 12, at 938 ("Like a fine, restitution can also be an effective deterrent.").

182. *See* 18 U.S.C. § 2252A (2006).

183. *Id.* § 2259(a).

184. 42 U.S.C. § 10601 (2006).

185. *United States v. Simpson*, 885 F.2d 36, 41 (3d Cir. 1989) (citing S. REP. NO. 98-497, at 4–5 (1984)).

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mission “to enhance the nation’s capacity to assist victims of crime and to provide leadership in changing attitudes, policies, and practices to promote justice and healing for all victims of crime.”¹⁸⁶ Most importantly, OVC’s main role is to administer the Crime Victims Fund.¹⁸⁷ Additionally, the OVC is authorized to set aside \$50 million from the Crime Victims Fund to support an Anti-Terrorism Emergency Reserve.¹⁸⁸ This reserve provides supplemental funds to state compensation programs for emergency relief in the aftermath of acts of terrorism or mass violence.¹⁸⁹

A 2000 VOCA amendment authorized the director of the OVC to establish ITVERP, which would “reimburse eligible direct victims of acts of international terrorism that occurred outside the United States for expenses associated with that victimization.”¹⁹⁰ The OVC director was also authorized to use the Anti-Terrorism Emergency Reserve to fund ITVERP.¹⁹¹ As stated above, the program placed the burden of compensating victims of international terrorism on the federal government.¹⁹²

In order to create a new federal compensation system, Congress would need to again amend VOCA, this time to authorize the OVC with the power to create and oversee the new program¹⁹³ and carve out funds from the Crime Victims Fund to support the new program. However, unlike ITVERP, which is funded through the Anti-Terrorism Emergency Reserve, Congress would need to designate a specific amount of financial assets from the Crime Victims Fund to support this program.¹⁹⁴ Congress would then set up a separate trust within the Crime Victims Fund to hold all convicted possessor fines. Accordingly, Congress would be carving out only the second federal program to directly compensate victims outside of emergency situations.¹⁹⁵

V. CONCLUSION

In *New York v. Ferber*, the Supreme Court suggested the most efficient way to destroy the child pornography industry would be “to dry up the market for this

186. Guidelines for the Anti-Terrorism and Emergency Assistance Program for Terrorism and Mass Violence Crimes, 67 Fed. Reg. 4822, 4825 (Jan. 31, 2002). *Accord* 42 U.S.C. § 10601 (2006).

187. 42 U.S.C. § 10601(c)(1) (2006).

188. *Id.* § 10601(d)(5)(A).

189. *Id.* §§ 10601(d)(5)(B), 10603b(b).

190. International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94) (internal quotation marks omitted); *see* 42 U.S.C. § 10603c(b) (2006).

191. 42 U.S.C. § 10603c(b) (2006).

192. International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518, 49519 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94).

193. *See* 42 U.S.C. § 10603c(b) (2006).

194. *See id.* §§ 10601(d)(5)(B), 10603c(b).

195. *See* International Terrorism Victim Expense Reimbursement Program, 70 Fed. Reg. 49518, 49519 (proposed Aug. 24, 2005) (codified at 28 C.F.R. pt. 94). Currently, ITVERP is the only existing federal program to provide direct financial assistance to victims, outside of emergency assistance funds. ITVERP REPORT, *supra* note 142, at 19.

material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”¹⁹⁶ Unfortunately, the sheer scope of this business and its use of advanced technology decrease the likelihood that the market will dry up anytime soon.¹⁹⁷ Therefore, alongside continued law enforcement efforts, we must adequately redress the harms caused by this heinous crime. This includes remedying the detrimental effects of mere possession on victims and ensuring that victims are made whole.

As this note has explained, the current approach to restitution is not a suitable solution for the crime of possession. While restitution is supposed to both restore a victim and punish a defendant, neither objective is met in cases of possession. Further, restitution as applied to possession creates inconsistencies and risks violating the Eighth Amendment. Shifting to a victim compensation program would alleviate these problems and properly address the “seemingly unworkable criminal restitution” framework.¹⁹⁸ Furthermore, modeling the program after ITVERP, with appropriate modifications, would provide additional advantages. For instance, victims would avoid the inconsistencies created by state programs and obtain compensation regardless of their participation in the prosecution of their offenders. This new program is the proper remedy for the crime of possession and, more importantly, provides the most competent framework to compensate victims for the “slow acid drip” of trauma caused by the mere possession of child pornography.¹⁹⁹

196. 458 U.S. 747, 760 (1982).

197. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 234 (2001).

New technologies have changed the methods of distribution and production. Though new laws proliferate to combat the new technology . . . , law enforcement officials still expect that child pornography is going to rapidly explode as a cottage industry. Despite all our efforts, we are now in the golden age of child pornography.

Id. (citations omitted) (internal quotation marks omitted).

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

199. See *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011) (citations omitted) (internal quotation marks omitted).