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Continued on page 8

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Update

Assessing Current Restitution Law to Effectively Serve Victims in Child Abuse Imagery Cases¹

by Angela Downes, Meg Garvin, Wanda Lucibello,
Alison Wilkinson, Terry Campos, and Hon. Paul Cassell²

Amy was only four years old when her uncle sexually assaulted her and documented that assault through photographs. Although the assault took place in 1993, now nearly 20 years later those photographs continue to circulate on the Internet and are among the most actively traded child abuse images known to law enforcement. These horrific images continue to haunt Amy; in her own words:

There is a lot I don't remember [about the abuse], but now I can't forget, because the disgusting images of what he did to me are still out there on the Internet. Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again.³

What Amy so powerfully conveys is what nearly every victim of this type of abuse suffers; they live in constant fear that even as they make a quick run to the grocery store, as they step into a job interview, or as they walk down the street, someone will recognize them from the horrific images in circulation. Unlike the physical abuse, this fear never stops. As Amy has said to courts nationwide, "[i]t's like I'm being abused over and over and over again."⁴

The images at issue are often labeled "child pornography." While this term is widely accepted it dilutes the graphic content of the images—

sexual and physical assaults on a child. Consequently, a more apt term is “child abuse imagery.” Legislators and courts have long recognized that children depicted in such images are harmed not only by the sexual exploitation involved in creating the images, but also by the distribution, possession, and viewing of their sexual abuse.⁵ This recognition is supported by social science research.⁶ Legislators and courts have similarly recognized the importance of awarding restitution to victims who are harmed by crime to help make them whole, and to aid their recovery.⁷ Thus, it seems reasonable that children depicted in child abuse images should be awarded restitution from their offender(s), including offenders who possess and view images of their abuse.

Despite the logic, justness, and legality of affording restitution to these victims,⁸ over the last several years the right of these victims to full restitution has become a contested issue in the federal district courts.⁹ Some courts refuse to afford any restitution, others award de minimus restitution, and another awarded the full amount of requested restitution in excess of \$3,000,000.¹⁰ The different outcomes can be attributed in significant part to varied legal interpretations of the governing statute, 18 U.S.C. § 2259, and causation.

While Amy and other similarly situated victims can never be brought back to the lives they lived before their abuse, or before the images of their abuse became a staple of the online industry, attorneys can nonetheless go a long way in helping them by securing adequate restitution for them in the courts. To help practitioners aid victim recovery, this article provides a brief overview of the current state of the law, identifies key issues at play in the courts, and suggests some practices to employ in representation of these victims.

The Scope of the Definition of “Victim” for Restitution Purposes Under Section 2259

18 U.S.C. § 2259(a) governs restitution for offenses involving sexual exploitation and other abuse of

children, including possession of covered images. Section 2259 provides that a district court “shall order restitution for any offense under this chapter.” 18 U.S.C. § 2259(a).¹¹ According to Section 2259, a restitution order must be for “the full amount of the victim’s losses as determined by the court.” 18 U.S.C. § 2259(b)(1). Notably, Section 2259 broadly defines the victim, providing that a “victim” is an “individual harmed as a result

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of a commission of a crime under [the statutes regarding child abuse imagery] . . .” 18 U.S.C. § 2259(c). This broad definition of “victim” contrasts with many other federal definitions of “victim” in which Congress has used a narrower definition. *See, e.g.*, 18 U.S.C. § 3663(a)(2) (defining “victim” to be a “person directly and proximately harmed as a result of the commission of an offense.”) 18 U.S.C. § 3663A(a)(2) (same). Unlike these other statutes, § 2259 does not explicitly require a “direct” or “proximate” harm to the individual for that individual to qualify for restitution; rather, according to the statute’s plain language, any harm resulting from a qualifying offense is sufficient.

Findings cited during passage of two recent federal laws confirm that Congress understood that a child depicted in child abuse images is the primary victim of child exploitation crimes—including possession. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div.

A, tit. I, § 121, subsec. 1(2), 110 Stat. 3009–26 (Sept. 30, 1996) (“Where children are used in its production, child pornography permanently records the victim’s abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years.”); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 501(1)(A), 2(D), 120 Stat. 587, 623–24 (July 27, 2006) (“[T]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography. . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”).

Courts have similarly determined that an offender’s possession of child abuse images causes harm to the depicted children. The United States Supreme Court first acknowledged such harm in 1982 in *New York v. Ferber*, 4589 U.S. 747 (1982). In *Ferber*, the Court upheld a New York law that criminalized the promotion of child abuse images, finding that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”¹² In reaching its decision, the Court noted

[b]ecause the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.¹³

The Court reaffirmed this truism in *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (“[A]s a permanent record of a child’s abuse, the continued circulation itself would harm the child who had participated.”). Likewise, lower federal courts have routinely found that a child portrayed in child

abuse images is a legal victim under § 2259.¹⁴

Based on a plain reading of § 2259, and clear findings by the courts and Congress, children depicted in child abuse images qualify as “victims” harmed under Section 2259 and are entitled to mandatory full restitution from their offender(s), including those offenders who possess and view their abuse.

So what is the dispute about? The Causation Required under § 2259

Over the past several years numerous federal courts¹⁵ have grappled with whether restitution is owed to victims depicted in child abuse images when the crime at issue is possession. As noted above, the courts have routinely found the victim depicted was harmed by the offender’s possession of the images depicting their abuse.¹⁶

Despite the consistency among the courts in finding harm to the victims, the courts have split on whether, and how much restitution to award the victims depicted in the imagery; amounts vary between full restitution,¹⁷ *de minimus* restitution,¹⁸ and no restitution.¹⁹ The difference in outcome turns on the courts’ causation analyses—meaning whether a causal connection between the defendant’s offense and the victim’s harm must be demonstrated, and, if so, by what showing.²⁰

When interpreting a statute, one must start with the language of the statute.²¹ §2259 requires that a victim be compensated for the “full amount of the victim’s losses,” for the following:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys’ fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.²⁰

As the statute’s plain language makes clear, five of the six categories of losses contain no proximate cause requirement, whereas the sixth “catchall” category contains such a requirement.

Another key to interpreting a statute is that when Congress includes language in one section of a statute but omits it in another section of the same law, it is presumed that Congress intentionally excluded the language.²³ The presumptively intentional omission of “proximate result” from the first five subsections suggests that Congress did not want to burden victims of child abuse images with a requirement that they show a proximate cause for these losses. Avoiding imposing such burden is in line with public policy and congressional intent.²⁴

Even assuming, contrary to the plain language, congressional intent, and good public policy, that the statute imposes a general proximate cause requirement on all six categories of claims, victims in child abuse imagery possession cases should easily meet such proximate cause requirement. Under general tort law,²⁵ there is universal agreement that proximate causation is that which is foreseeable and “what is required to be foreseeable is only the general character or general type of the event or harm and not its precise nature, details, or above all manner of occurrence.”²⁶ Thus, the test of foreseeability “is whether the defendant reasonably should have anticipated any injury” resulting from his crime.²⁷

In the context of § 2259, no court has found that “mathematical precision” is required in determining the causal connection between the offense of conviction and the victim’s harm.²⁸ Rather, in determining causation, a “rule of reasonableness is applied.”²⁹ “Reasonableness” is shown if it is demonstrated that the defendant’s actions were a “substantial factor” in causing the victim’s harm.³⁰ Some jurisdictions have found that simply possessing child pornography is sufficient to establish a substantial factor.³¹ Other courts, while not finding an automatic connection between defendant’s acts and the victim’s harm,

have nonetheless found that defendant’s possession or distribution was a substantial factor in causing the victim’s harm.³² To be a “substantial factor” in causing the victim’s harm, the defendant need not be the only source of injury.³³ Nor must the victim know of the defendant’s identity.³⁴ It is sufficient to establish that: (1) the victim is a victim of child abuse images; (2) the victim suffered harm as a result of the possession of those images; and (3) defendant was one such individual in possession (or conspired to be in possession) of those images.

Consequently, regardless of the analysis engaged, victims whose child abuse images are possessed are entitled to restitution from the possessor.³⁵

What can a Practitioner Do? Independent Participation in the

Criminal Case. The Crime Victims’ Rights Act of 2004, 18 U.S.C. § 3771, affords victims of crime eight enumerated rights as well as explicit trial-level standing to assert those rights and

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appellate-standing to seek expedited, mandatory review if those rights are denied. Among the rights codified is the right to restitution.³⁶ While the United States Attorneys’ offices have an independent obligation and burden to seek restitution on behalf of the victim, and the court

has an independent obligation to ensure CVRA rights are afforded, under the CVRA a victim's attorney can independently file a restitution memorandum seeking restitution. An effective restitution memorandum that includes affidavits, calculations, and seeks mental health³⁷ and future lost income³⁸ can go a long way to securing restitution, which can aid the victim on the path to healing.³⁹

Conclusion

Children who suffered unimaginable violations at the hands of their abusers are now, due largely due to the explosion of online technology, suffering violations daily as new offenders view the images of their abuse and use those images to groom other children for future harm. There is consensus among the courts and Congress that these victims are harmed by the possession of these images. There is, however, confusion among the courts regarding when and how much restitution to afford these victims when the only crime at issue is possession. These victims have started recoveries and have submitted evidence of harm, restitution will help their recovery. Although the analysis presented in this article regarding restitution in child abuse image possession seems a straightforward proposition, courts nationwide continue to splinter. Consequently, it is very likely that this issue will only be resolved in the coming years through a decision by United States Supreme Court. Practitioners nationwide can help victims and courts by briefing the issue.

¹ "Child pornography" is often used for images that show the scene of the crime of a child being sexually abused. While the term is commonly accepted, its use dilutes what the image is and the immense harm it causes the child depicted. Consequently, throughout this article the term "child abuse image" will be used whenever possible.

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³ Transcript of Restitution Hearing Proceedings, June 22, 2009.

⁴ *Id.* at R837:19-20.

⁵ See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 624 (2006) ("Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."); *United States v. Norris*, 159 F.3d 926, 929-30 (5th Cir. 1998) (noting that the harm caused by receipt of child abuse images occurs because the crime "perpetuates the abuse initiated by the producer of the material"; 2) "represents an invasion of the privacy of the child depicted" and; 3) "instigates the original production of child pornography by providing an economic motive for creating and distributing the materials."); *New York v. Ferber*, 458 U.S. 747, 759 & n.10 (1982) (noting that distribution of child abuse imagery exacerbates harm to the child. . . . "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.") (citation omitted).

⁶ David P. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981) quoted in *Ferber*, 458 U.S. at 759 n.10 (1982) See also Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 Pace L. Rev. 847, 853 (2008) (noting victims of child abuse images "may suffer psychological injuries including depression, anger, withdrawal, low self-esteem and feelings of worthlessness") (citing Eva J. Klain, et al., *Child Pornography: The Criminal Justice System Response*, Nat'l Ctr. for Missing & Exploited Children, March 2001, at 10.

⁷ See S.Rep. No. 104-179, at 12 (1996), as reprinted in 1996 U.S.C.A.N. 924, 925 (noting that purpose of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A (b)(2)(C) was "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due" because "[i]t is necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."); *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006) ("[I]t can fairly be said that the 'primary and overarching' purpose of the MVRA 'is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original well-being.'") (citation omitted); *Hughey v. United States*, 495 U.S. 411, 416 (1990) ("[T]he ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event . . ."). See also Sheldon, Kerry; Dennis Howitt, *Sex Offenders and the Internet 9* (John Wiley and Sons) (2007).

⁸ This article addresses only the issue of awarding restitution to those victims who have been identified; not the larger issue of how to help those thousands or tens of thousands of children who

have not yet been identified. The National Center for Missing and Exploited Children (NCMEC) is the organization that maintains the national identification database for children, and is diligently working to identify more and more of the victims in pornographic material defendants possess.

⁹ As of the writing of this article, the one federal circuit court that dealt with the issue resolved the issue on standard of review grounds rather than engaging the merits of the arguments. See *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

¹⁰ See *United States v. VanBrackle*, 2009 WL 4928050 (N.D.Ga.). Past Victims of child sexual abuse that appeared in images found in defendant's possession were not entitled to restitution . . . where the victims failed to establish the amount of harm resulting from defendant's acts. The victims provided sufficient evidence regarding the total amount of harm resulting from the abuse suffered, but failed to establish the amount of harm proximately caused by defendant's acts. See also Pornography, and the Issue of Restitution at a Price Set by the Victim by John Schwartz, *New York Times*, February 3, 2010.

¹¹ Possession of material involving the sexual exploitation of children is a covered crime. See 18 U.S.C. § 2252. The use of the word "shall" makes awarding of restitution under § 2259 mandatory. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) ("As used in statutes . . . this word [shall] is general ly imperative or mandatory") (citation omitted).

¹² *Id.* at 757.

¹³ *Id.* at 759 n.10 (quoting Shoulvin, 17 Wake Forest L. Rev. at 545).

¹⁴ See, e.g., *United States v. Tillmon*, 195 F.3d 640, 644 (11th Cir. 1999) (finding that children depicted in child abuse images remain victims not only when the pictures are taken or purchased, but also when they are transported or distributed, and stating that the distribution of these images "exacerbates" harm by "constituting a continuing invasion of privacy" and "by providing the very market that led to the creation of the images in the first place"); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, *3 (S.D. Fla. Sept. 2, 2009) (finding Amy to be a victim under § 2259 due to the harm she "suffered and continues to suffer as a result of defendant's possession of images depicting her sexual abuse as a child."); *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (finding it "scarcely debatable that children depicted" in child abuse images were victims in this case trying defendant of conspiracy to distribute or receive child pornography and distribution of child pornography); *Norris*, 159 F.3d at 929-30 (stating, in receipt of child pornography case, that the victimization of the children depicted in child abuse images "does not end when the pornographer's camera is put away" but rather "[t]he pornography's continued existence causes the child victims [of sexual abuse] continuing harm by haunting the children for years to come.") (citation omitted); *United States v. Goff*, 501 F.3d 250, 259 (3rd Cir. 2007) (stating, in possession case, "[h]aving paid others to 'act out' for him, the victims are no less damaged for his having remained safely at home, and his voyeurism has actively contributed to a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms."); *United States v. Hardy*, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010) (finding Amy to be a statutory victim under § 2259 in a case in which defendant was convicted of receipt, possession, and distribution of pornographic images of her).

¹⁵ At the writing of this article, an eleventh District Court is in the midst of the issue. See *United States v. Buchanan*, Case No. 09-CR-0045, 2010 U.S. Dist. LEXIS 165, at *3 (D.Minn. Jan. 4, 2010) (noting that "the Court will no longer accept silence from the government when an identified victim of a child-pornography offense seeks restitution" and ordering the government to file a memorandum explaining why the identified victim is not entitled to restitution).

¹⁶ See, e.g., *United States v. Paroline*, 672 F. Supp. 2d 781, 787 (E.D. Tex. 2009), *aff'd*, *In re Amy*, 591 F.3d 792; *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050, at *3 (N.D. Ga. Dec. 17, 2009); *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at *3 (E.D.Va. Nov. 24, 2009); *United States v. Berk*, 666 F. Supp. 2d 182, 191 (D. Me. 2009); *Staples*, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009); *United States v. Ferenci*, No. 1:08-CR-0414, 2009 WL 2579102, at *4 (E.D. Cal. Aug. 19, 2009); *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *4 (E.D. Cal. Aug. 19, 2009); *United States v. Zane*, No. 1:08-CR-0369, 2009 WL 2567832, at *4 (E.D. Cal. Aug. 18, 2009); *United States v. Monk*, No. 1:08-CR-0365, 2009 WL 2567831, at *4 (E.D. Cal. Aug. 18, 2009). But see *United States v. Simon*, No. CR-08-0907, 2009 WL 2424673, at *7 (N.D. Cal. Aug. 7, 2009) (concluding that victim had been harmed by others but not specifying whether harm was from possession, and refusing to award restitution because insufficient evidence of harm to victim from defendant's possession conduct).

¹⁷ See *Staples*, 2009 WL 2827204, at *3 (S.D. Fla. Sept. 2, 2009) (awarding \$3,680,153.00 in restitution to the victim "Amy").

¹⁸ See, e.g., *Hicks*, 2009 WL 4110260, at *3 (awarding \$3,525.00 in restitution to the victim "Vicky"); *Ferenci*, 2009 WL 2579102, at *4 (awarding \$3,000.00 in restitution to victim "Vicky"); *Renga*, 2009 WL 2579103, at *4 (awarding \$3,000.00 in restitution to victim "Vicky"); *Zane*, 2009 WL 2567832, at *4 (awarding \$3,000.00 in restitution to each victim, "Vicky" and "Amy"); and *Monk*, 2009 WL 2567831, at *4 (awarding \$3,000.00 in restitution to each victim, "Vicky" and "Amy").

¹⁹ See, e.g., *Paroline*, 672 F. Supp. 2d at 793 (E.D. Tex. 2009), *aff'd*, *In re Amy*, 591 F.3d 792; *Van Brackle*, 2009 WL 4928050, at *5; *Berk*, 666 F. Supp. 2d at 191; *Simon*, 2009 WL 2424673, at *7.

²⁰ A review of the 2009 cases reveals that a court awarding full restitution—*United States v. Staples*—does not include an explicit causation analysis; courts that have awarded *de minimus* restitution each determined that a causal connection must be shown, but then, without detailing the analysis, these courts looked to the minimum civil recovery in 18 U.S.C. § 2255 (i.e., \$150,000), and, through a less than clear discount calculation, each came to a *de minimus* restitution award; and the courts that declined awarding restitution each required a causal connection and then determined the government and victim failed in their burden to prove what portion of the victim's harm was caused by the defendant's specific possession or viewing.

²¹ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985).

²² 18 U.S.C. §§ 2259(3)(A)-(F).

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

²⁴ In context other than child abuse imagery restitution, a number of courts have found § 2259 incorporates a causation requirement. See, e.g., *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (holding that section 2259 "incorporates a requirement of proximate causation").

²⁵ There are a variety of causation analyses that can be used—each

of which applies to particular circumstances. This article is using the causation analysis from tort to exemplify how even under this analysis the courts are going astray.

²⁶ See *Prosser and Keeton on the Law of Torts* § 43, at 299 (5th ed. 1984); 4 *Harper, James and Gray on Torts* § 20.5(6), at 203 (3d ed. 2007) (“Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen.”).

²⁷ *Elliot v. Turner Constr. Co.*, 381 F.3d 995, 1006 (10th Cir. 2004).

²⁸ See *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at *3 (W.D.N.C. Jan. 12, 2010) (“[N]o circuit to address the issue [of causal harm] has ‘imposed a requirement of causation approaching mathematical precision’ when determining the amount of restitution that is appropriate.”) (citing *United States v. Doe*, 488 F.3d 1154, 1159–60 (9th Cir. 2007)). See also *United States v. Aumais*, No. 08–CR–711, 2010 WL 3033821, at *2 (N.D.N.Y. Jan. 13, 2010) (Homer, Mag.) (finding the causal requirement of § 2259 “does not require proof ‘approaching mathematical precision’”) (citing *Doe*, 488 F.3d at 1160) (adopted by *United States v. Aumais*, No. 8:08–CR–711, 2010 WL 3034730 (N.D.N.Y. Aug. 3, 2010)

²⁹ *Doe*, 488 F.3d at 1160.

³⁰ See, e.g., *United States v. Crandon*, 173 F.3d 122, 126 (3rd Cir. 1999) (holding district court did not abuse its discretion in finding proximate causation between defendant’s receipt of child pornography and victim’s hospitalization, and thus awarding restitution, because “it was entirely reasonable for the District Court to conclude that the additional strain or trauma stemming from [defendant’s] actions was a substantial factor in causing the ultimate loss.”); *Hardy*, 707 F. Supp. 2d at 614, (finding proximate causation requirement satisfied by showing defendant’s distribution, receipt, and possession was a “substantial factor in [Amy’s] psychological harm and economic losses”); *Aumais*, 2010 WL 3033821, at *5 (“Proximate causation does not require proof that the conduct in question was the sole cause of harm or even the greatest cause as long as the conduct was a substantial factor in causing the harm.”).

³¹ See, e.g., *Goff*, 501 F.3d at 259 (stating that “[t]he simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials[,]” which “directly contribute[s] to this continuing victimization[,]” and continuing “the victims are no less damaged for his having remained safely at home”); *Norris*, 159 F.3d at 930 (“[T]he victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing pornography.”); *Brunner*, 2010 WL 148433, at *2 (finding defendant’s possession was a proximate cause of injury, stating “[i]n receiving and possessing the pornographic images of [the victims] taken while they were children, Defendant participated in an ongoing cycle of abuse and thereby contributed to the victims’ mental and emotional trauma.”).

³² See, e.g., *Hardy*, 707 F. Supp. 2d at 614 (finding defendant convicted of distributing, receiving, and possessing child pornography was a “substantial factor in [Amy’s] psychological harm and economic losses” because the defendant’s conduct aided in the circulation of the images, and the circulation caused harm to the victim); *Aumais*, 2010 WL 3033821, at *6 (finding defendant convicted of transportation and possession

was a substantial factor in causing Amy’s harm because “the government ha[d] established . . . that [the victim] was depicted in child pornography, [that] those who possessed . . . the images of [her] exacerbated the harm to her . . . by creating a market for the transfer of the images and . . . expanding the humiliation and degradation which Amy experiences from the existence of the images, and that [defendant] was one such possessor . . . of [the] images.”); *Hicks*, 2009 WL 4110260, *4 (finding “ample evidence that when [defendant] sought to receive the pornographic images depicting [the victim’s] abuse, his actions presented a sufficiently proximate tie to her ongoing injuries to justify an award of restitution under § 2259”). See generally *Zane*, 2009 WL 2567832, *4 (finding the government met its burden of showing that a defendant possessing pornographic images of Amy and another victim caused harm to them); *Monk*, 2009 WL 2567831, at *4 (same); *Renga*, 2009 WL 2579103, *4 (same); *Ferenci*, 2009 WL 2579102, at *4 (same) *United States v. Scheidt*, 1:07–CR–00293 AWI, 2010 WL 144837, *4 (E.D. Cal. Jan. 11, 2010) (same).

³³ See *Aumais*, 2010 WL 3033821 at *5–6 (“The question of the substantiality, importance, and significance of the harm caused concerns the extent of that harm and not the comparative responsibility for the harm. . . . That harm is not obviated or diminished by the fact that others also possessed the images. Rather, it exacerbates the harm by confirming how expansive has become the number of individuals exploiting Amy’s images.”). See also *Hardy*, 707 F. Supp. 2d at 614 (finding defendant to be a proximate cause of Amy’s harm even though her images would be circulating on the internet if it were not for defendant).

³⁴ See, e.g., *Staples*, 2009 WL 2827204, at *3 (“The fact that the victim, ‘Amy,’ did not have personal knowledge of this defendant’s activities at the time she was evaluated by [the expert] does not negate the harm that ‘Amy’ suffered and continues to suffer as a result of this defendant’s possession of images depicting her sexual abuse as a child.”); *Aumais*, 2010 WL 3033821 at *6 (“Actual knowledge by Amy that [defendant] possessed and used her images is not required to establish causation.”).

³⁵ While a thorough discussion is beyond the scope of this article, it should be noted that several courts have addressed whether finding a possessing defendant liable for the full amount of damages violates the excessive fines provision of the Eighth Amendment; if, however, a court finds proximate causation has been established, then there is no Eighth Amendment issue. See *Hardy*, 707 F. Supp. 2d at 616 (noting that since it found that defendant was a proximate cause of Amy’s harm, “an award of restitution that approximates those harms will satisfy the Eighth Amendment”).

³⁶ 18 U.S.C. § 3771 (providing that victims have the right to “restitution as provided by law”).

³⁷ Numerous courts have found that future counseling expenses are appropriate under § 2259 (awarding \$475,800 for future treatment and counseling costs to Amy under § 2259); *Aumais*, 2010 WL 3033821, at *9 (awarding \$48,483 to Amy under § 2259 for future counseling services); *Brunner*, 2010 WL 148433, at *4 (awarding \$5000 to Amy under § 2259 for future counseling services); *United States v. Julian*, 242 F.3d 1245, 1248 (10th Cir. 2001) (finding it was appropriate to order future counseling costs under § 2259); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (“In light of Congress’s intent to

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make whole those victims of sexual exploitation, we find that section 2259 allows for restitutionary damages for the future costs of therapy.”); *Laney*, 189 F.3d at 966 (“The language of the relevant statutes shows that Congress intended to allow district courts to include future counseling expenses in the amount of restitution under section 2259.”).

³⁸ Numerous courts have found that future lost wages are appropriate under either § 2259 or the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A is incorporated by reference in § 2259). *See, e.g., Staples*, 2009 WL 2827204, at *4 (awarding \$3.2 million for future lost wages and employee benefits to Amy); *Brunner*, 2010 WL 148433, at *4 (awarding \$1000 to Amy for future lost earnings); *United States v. Serawop*, 409 F.Supp.2d 1356, 1358 (D. Utah 2006), *aff'd*, 505 F.3d 1112 (10th Cir. 2007) (awarding future lost income under the MVRA); *United States v. Cienfuegos*, 462 F.3d 1160, 1169 (9th Cir. 2006) (finding it was error for district court to deny future lost income under the MVRA); *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) (finding an award of future lost income to be appropriate under the MVRA). *See generally Koile v. State*, 934 So.2d 1226, 1234 (Fla. 2006) (finding the restitution statute authorized a restitution award to the estate of murder victim in an amount consisting of victim’s future lost income).

³⁹ Attorneys who want assistance with such pleading can contact the National Crime Victim Law Institute, www.ncvli.org, The National Alliance of Victims’ Rights Attorneys, www.navra.org, or the National District Attorneys Association at www.ndaa.org to obtain technical assistance and sample pleadings.