

Spring 2013

Child Pornography and the Restitution Revolution

Cortney E. Lollar

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343 (2013).
<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss2/1>

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW

CHILD PORNOGRAPHY AND THE RESTITUTION REVOLUTION

CORTNEY E. LOLLAR*

Victims of child pornography are now successfully seeking restitution from defendants convicted of watching and trading their images. Restitution in child pornography cases, however, represents a dramatic departure from traditional concepts of restitution. This Article offers the first critique of this restitution revolution. Traditional restitution is grounded in notions of unjust enrichment and seeks to restore the economic status quo between parties by requiring disgorgement of ill-gotten gains. The restitution being ordered in increasing numbers of child pornography

* Clinical Faculty Fellow, Washington University School of Law. J.D., New York University; B.A., Brown University. I am deeply grateful to Annette Appell, Susan Frelich Appleton, Adam Badawi, Scott Baker, Joshua Barnette, Deborah Dinner, Katherine Goldwasser, Josh Gupta-Kagan, Carissa Byrne Hessick, Rebecca Hollander-Blumoff, Emily Hughes, John Inazu, Peter Joy, Robert Kuehn, Andrew Kull, Donald J. Lollar, Russell Osgood, Mae Quinn, Neil Richards, Andrea Roth, Nirej Sekhon, Elizabeth Sepper, Brian Tamanaha, Andrew Tuch, Rebecca Wanzo, Melissa Waters, Ronald Wright, and especially Laura Rosenbury for their invaluable insights and thoughtful suggestions. This paper also has benefited tremendously from comments received during the Washington University School of Law Junior Faculty Working Group, the Washington University School of Law Faculty Workshop Series, and the Southeastern Association of Law Schools' New Scholar Workshop, and during presentations to the faculties of the University of Kentucky College of Law, West Virginia University College of Law, Northern Illinois University College of Law, and members of the University of Iowa College of Law. Additional thanks to Kathie Molyneaux, Judy Stark, and Hyla Bondaroff for their research support and assistance, and the editorial staff at the *Journal of Criminal Law and Criminology* for their excellent editorial assistance.

cases does not serve this purpose. Instead, child pornography victims are receiving restitution simply for having their images viewed. This royalty-type approach to restitution amounts to a criminal version of damages for pain and suffering and loss of enjoyment of life. To justify this transformation of restitution, courts have come to rely on several commonly accepted, but flawed, theories about the impact of child pornography. Because these theories are unsupported by social science or law, they divert attention from remedies that could better alleviate the harms of child pornography. Rather than encouraging victims to move forward with their lives, restitution roots them in their abuse experience, potentially causing additional psychological harm. Restitution in its new form also allows the criminal justice system to be a state-sponsored vehicle for personal vengeance. This Article calls for an end to the restitution revolution and proposes several alternative approaches that better identify and address the consequences of child pornography.

TABLE OF CONTENTS

INTRODUCTION.....	345
I. RESTITUTION & NON-CONTACT CHILD PORNOGRAPHY CASES.....	350
A. A Modern History of Restitution	350
B. Restitution in Non-Contact Child Pornography Cases	354
1. Expanding Restitution.....	356
2. The Landscape After <i>Hesketh</i>	359
3. How to Calculate Harm	364
II. MISGUIDED ATTEMPTS TO ALLEVIATE HARM	366
A. Debunking Common Theories of Harm.....	366
1. Viewing Child Pornography as the Primary Harm	368
2. Equating Child Pornography Viewers with Hands-On Child Sex Abusers	369
3. Ignoring the Reality of Sexual Abuse Within Families.....	375
B. Restitution's Potential to Create Harm	377
1. The Harm of Ongoing Commodification	378
2. Criminal Restitution as an End Run Around the Tort System.....	383
3. Restitution and Deterrence	391
III. TAILORING REMEDIES TO HARM	392
A. Rethinking Restitution.....	393
1. Rejecting the Restitution Revolution.....	393
2. Empowering Victims	396
B. Alternative Approaches to Eliminating the Harms of Child Sexual Abuse.....	401
IV. CONCLUSION.....	406

INTRODUCTION

We are witnessing a restitution revolution. Traditionally, restitution has been a legal mechanism used to disgorge a person's ill-gotten gains, thereby preventing the beneficiary's unjust enrichment at another's expense. Until four years ago, restitution was ordered in criminal cases only when a defendant was the direct source of harm to the victim or the victim's property. In the context of child pornography, the only offenders ordered to pay restitution were those who had documented their own sexual abuse of children, thereby creating the pornography. Victims did not seek restitution from viewers and traders of child pornography, who did not participate in the actual abuse and thus did not directly harm the children depicted. Since 2008, however, restitution in the child pornography context has expanded to become the criminal law's version of civil damages, with judges instead of juries imposing what amounts to emotional damages for pain and suffering and hedonic damages for loss of enjoyment of life.

In 2008, James Marsh, representing a nineteen-year-old named Amy,¹ became the first lawyer to seek restitution from a "non-contact" defendant, someone who possessed and distributed child pornography but did not create it. The defendant, Alan Hesketh, downloaded 1,981 images of child pornography from the Internet; four were photographs of Amy. Amy's uncle had sexually abused her from the ages of four to nine, videotaped the abuse, and then provided those images to an acquaintance.² The images of her abuse, known in the world of child pornography as the "Misty" series, have been actively traded on the Internet since 1998, the year Amy's uncle was arrested.³ Amy's uncle pleaded guilty in federal court to one count of sexual exploitation of children and was ordered to pay \$1,125 in restitution to Amy.⁴ Ten years later, Amy sought \$3.4 million in restitution from Hesketh.⁵

¹ Amy is not her real name but the pseudonym she has adopted for court filings and hearings.

² Warren Richey, *A Bold Gambit to Reduce Demand for Child Porn*, CHRISTIAN SCI. MONITOR, Aug. 8, 2009, at 4.

³ John Schwartz, *Court Rejects Restitution for Victim in Porn Case*, N.Y. TIMES, Sept. 9, 2011, at A20.

⁴ Amy was around ten years old at the time, so the court ordered the money to be paid to Amy's family on her behalf. See Judgment and Commitment Order at 4, *United States v. Zebroski*, No. 3:98CR00243 (D.N.J. Sept. 24, 1999) (ordering \$1,125 to the victim's parents).

⁵ Cf. Emily Bazelon, *Money Is No Cure*, N.Y. TIMES MAG., Jan. 27, 2013, at 22, 27; Schwartz, *supra* note 3, at A20; John Schwartz, *Pornography, and an Issue of Restitution at a Price Set by the Victim*, N.Y. TIMES, Feb. 3, 2010, at A19 [hereinafter Schwartz, *Pornography*].

In advocating for Hesketh to pay a far greater amount of restitution than Amy's uncle had, Marsh challenged the generally accepted distinction between a "hands-on" or "contact" offense, such as the sexual exploitation of children, and a non-contact offense, such as the downloading, viewing, or trading of pornography. He asserted that "there is no distinction between . . . what everyone calls a 'hands on crime' and what the defendant has been convicted of and, in fact . . . in many ways the actual propagation, distribution, receipt, trading and profiting off of child pornography is worse than the actual hands on crime."⁶

Since Hesketh's case, Marsh and at least two other attorneys representing other young women have filed hundreds of restitution requests with prosecutors across the country in cases involving the possession and receipt of child pornography.⁷ In contrast, such restitution requests are rarely being made of defendants who sexually abuse children. Courts are divided as to whether restitution is appropriate in non-contact child pornography cases and, if so, how to quantify the harm caused by the defendants. At the heart of this divide lies a fundamental disagreement about the harms caused by viewing and trading child pornography and the functions of restitution.

Restitution is being imposed in the non-contact child pornography context not as disgorgement of unlawful economic gains, but as a punitive mechanism of compensation for emotional, psychological, and hedonic losses in a manner resembling civil damages. Restitution is being used to punish the defendant for the fact that child pornography continues to circulate against the young woman's wishes by requiring him⁸ to

⁶ Transcript of Restitution Hearing at 43, *United States v. Hesketh*, No. 3:08-CR-00165 (D. Conn. May 5, 2009) [hereinafter Transcript of Restitution Hearing, *Hesketh*]. The judge ordered Hesketh to pay \$200,000 in restitution. *Id.* at 47.

⁷ See Al Baker, *In Court, a Victim Gives Voice to Sex Abuse*, N.Y. TIMES, June 10, 2011, at A23; Bazelon, *supra* note 5, at 28; see also *United States v. Breisacher*, No. 11-338(AET), 2012 WL 2789065, at *4 (D.N.J. July 6, 2012) (discussing requests for restitution from counsel for four individuals: Amy, Vicky, Cindy, and L.S).

⁸ Statistically, almost all documented viewers and traders of child pornography are men, and more than half of the individuals depicted in child pornography are girls. See, e.g., RICHARD WORTLEY & STEPHEN SMALLBONE, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, NO. 41, CHILD PORNOGRAPHY ON THE INTERNET 13 (2006) (stating that the average profile of child pornography viewer is white male); Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 43, 44 (2009); Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 362, 381-82 (2006) (explaining that male-perpetrator-female-victim model that informs statutory rape law is historically accurate); Max Taylor et al., *Child Pornography, the Internet and Offending*, ISUMA: CAN. J. POL'Y RES., Summer 2001, at 94, 96. Although exceptions exist and are increasing daily, see *id.*, given the prevalence of male defendants in possession, receipt, and distribution of child pornography cases, and girls depicted in child pornography, this Article will refer to child pornography viewers and defendants as male

compensate the victim for a lifetime of pain and suffering and loss of enjoyment of life. The criminal justice system is aimed at punishing and deterring conduct deemed threatening to society as a whole. Yet this method of imposing restitution in non-contact child pornography cases has begun to transform criminal law into a tool aimed at using punishment to vindicate individual emotional and psychological losses. Instead of focusing on conduct affecting society at large, the restitution imposed in this context punishes those who emotionally injure victims by obtaining, viewing, and sharing child pornography images. Allowing personal vindication to be a goal of restitution undermines the traditional distinction between civil and criminal law, positioning the criminal justice system as a tool for personal retribution rather than societal protection.

Asserting that it should be used only to counter unjust enrichment, this Article argues that restitution is inappropriate in non-contact child pornography cases and that it has the potential to harm the victims it is intended to serve. In so doing, it challenges the generally accepted theories of the ongoing harms caused by child pornography and the role that restitution currently plays in addressing those harms. In making restitution awards, courts tend to conflate a defendant's interest in child pornography with a desire to sexually abuse children. Such assumptions are inconsistent with recent social science literature, which indicates the consumption of child pornography in and of itself is not a risk factor for committing hands-on sexual abuse of children. Rather, the average child pornography viewer is educated, employed, prominent in his community, and has no criminal record. Among those who have been convicted of possessing and trading child pornography are an Air Force captain, the head enforcement officer for Immigration and Customs Enforcement, a law professor, and a judge.⁹

By equating child sexual abuse with the viewing of child pornography, Congress and courts have shifted the legal and public focus toward voyeurs, who generally do not participate in the sexual abuse of children, and away from family members and family friends, who are the most common child sex abusers. This misdirected focus is revealed by the fact that punishments for child pornography offenders are often far greater than those for sexual abusers, and restitution is rarely sought from those who sexually abuse children. Imposing restitution on individuals unknown to the child contributes to the perpetuation of the "stranger-danger" myth by focusing on unfamiliar individuals who view child pornography rather than those intimate members of the child's inner circle who create it.

As a result of a faulty perception of child pornography's harms and the

and child victims as female.

⁹ See *infra* Part II.A.2.

inventive (mis)use of criminal restitution aimed at meeting those misidentified harms, restitution imposed in the child pornography context not only fails to alleviate the harms attributed to non-contact offenders, it also may be detrimental to the young women depicted therein. The methods courts use for calculating restitution run the gamut and often are based on a court's conclusory judgment that the amount imposed is "reasonable." As a result, restitution orders rarely correlate to a specific, proven monetary loss. Instead, judges in essence are reflexively compensating the young women for their lost innocence, thereby further commodifying the sexual acts in which they involuntarily participated. Courts aim to make the young women whole by ordering defendants to pay them for those sexual acts. Restitution in the child pornography context has come to resemble a royalty-based compensation scheme for victims.

Restitution, as revealed in the child pornography context, also represents an end run around the tort process by conflating civil tort damages with criminal restitution. Instead of using restitution to rectify unjust enrichment, courts imposing restitution in non-contact child pornography cases are using it as a de facto retributive mechanism.¹⁰ Judges order reimbursement for future psychological treatment and future lost wages based on predictions about a person's predicted future emotional state, without any clear correlation between the amount of restitution imposed and the costs purportedly being reimbursed. Although receiving damages through the criminal justice process may provide an appealing alternative to actually having to file a civil action, allowing such untethered restitution to be ordered as part of a criminal case creates the potential for misuse of criminal law.

Few contemporary scholars have considered restitution and its proper role in modern criminal law. Over the past few years, several writers have explored the role of restitution in the non-contact child pornography context, but most have limited their analyses to the issue of proximate cause and a discussion of which legal mechanism is the most appropriate vehicle through which to compensate child pornography victims.¹¹ None

¹⁰ To be clear, the restitution being requested and ordered is technically for future therapy and mental health treatment and sometimes future lost wages, but this Article asserts that, in practice, judges are ordering restitution for purposes that go beyond compensation for specific ascertainable losses.

¹¹ See, e.g., Ashleigh B. Boe, Note, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims*, 86 N.D. L. REV. 205 (2010); Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 CARDOZO L. REV. 297 (2011); Katherine M. Giblin, Comment, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV.

have sought to reexamine the harms attributed to child pornography and the extent to which restitution does or does not address those harms.¹²

In an effort to fill this gap, this Article reexamines the role of restitution in child pornography cases and argues that allowing damages to become interchangeable with restitution encourages restitution to become a vehicle for retribution, personal vindication, and revenge rather than reparation. This misuse of restitution, in turn, contributes to an inaccurate perception of the harms of child pornography, creating circular, self-perpetuating justifications for utilizing restitution in non-contact child pornography cases. Therefore, courts should not compensate crime victims for what amounts to emotional damages for future speculative losses.

Part I begins with an examination of the modern history of restitution, focusing on the past forty years, since restitution became a regular and requisite part of criminal cases. Revealing a restitution revolution that has fundamentally changed restitution's structure and purpose, Part I looks closely at the requests made for restitution in non-contact child pornography cases, analyzing and critiquing how courts have considered this issue over the past several years. Part II takes a fresh look at courts'

1109 (2011); Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167 (2011); Steven Joffe, Note, *Avenging "Amy": Compensating Victims of Child Pornography Through 18 U.S.C. § 2259*, 10 WHITTIER J. CHILD & FAM. ADVOC. 201 (2011); Michael A. Kaplan, Note, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531 (2011); Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327 (2011); Tyler Morris, Note, *Perverted Justice: Why Courts Are Ruling Against Restitution in Child Pornography Possession Cases, and How a Victim Compensation Fund Can Fix the Broken Restitution Framework*, 57 VILL. L. REV. 391 (2012); Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333 (2011); see also James R. Marsh, *Masha's Law: A Federal Civil Remedy for Child Pornography Victims*, 61 SYRACUSE L. REV. 459 (2011).

¹² Several articles have challenged some of the underlying assumptions made by courts in child pornography cases, particularly in the context of sentencing hearings, but none of those authors has discussed the role that restitution plays, or should play, in child pornography cases. See Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679 (2012) [hereinafter Hamilton, *The Child Pornography Crusade*]; Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545 (2011) [hereinafter Hamilton, *The Efficacy of Severe Child Pornography Sentencing*]; Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853 (2011); J.J. Prescott, *Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite*, 24 FED. SENT'G REP. 93 (2011); SpearIt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT'G REP. 102 (2011); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010).

underlying assumptions in their consideration of restitution in possession, receipt, and distribution of child pornography cases. Part II then analyzes the harms attributed to child pornography viewers and proposes that a flawed perception of those harms has contributed to an ineffective response to the harms experienced by the young women depicted in the child pornography. Against the backdrop of the restitution revolution, Part II also identifies additional harms created by utilizing this new form of restitution as a remedy in non-contact child pornography cases. Part III proposes several reforms to restitution that would help it better meet the harms identified, as well as other reforms aimed at assisting Congress and courts in responding more precisely to the harms associated with child pornography and child sexual abuse.

I. RESTITUTION & NON-CONTACT CHILD PORNOGRAPHY CASES

The last forty years have brought significant changes to the treatment of restitution in the criminal context, changes that have laid the groundwork for restitution's recent expansion into the sphere of non-contact child pornography cases. Criminal restitution has been utilized to compensate for an ever-increasing number of emotional and psychological harms, causing it to go beyond the reimbursement of specific losses and begin to resemble civil damages. Taking advantage of this broadening scope, several child pornography victims began to seek restitution for future therapy and lost wages from individuals whom they had never met, but who had viewed and possessed pornographic images depicting them. As a result of these restitution requests, courts have been forced to consider how restitution might apply in a non-contact child pornography case.

A. A MODERN HISTORY OF RESTITUTION

Traditionally, in both the civil and criminal contexts, restitution has been used to require one party to disgorge its ill-gotten gains, thereby preventing the beneficiary's unjust enrichment at another party's expense.¹³ Distinct from damages, criminal restitution aimed to compensate for actual documented losses, such as repaying the value of a stolen car or returning the profits obtained during a burglary.¹⁴ Most restitution schemes required

¹³ See, e.g., Elmar Weitekamp, *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 81, 82 (Heinz Messmer & Hans-Uwe Otto eds., 1992) [hereinafter RESTORATIVE JUSTICE ON TRIAL].

¹⁴ Note, *Restitution and the Criminal Law*, 39 COLUM. L. REV. 1185, 1195 (1939) (citing statutes from D.C., Maryland, and Pennsylvania). Other states had more elaborate procedures for reparations, requiring an application to the court prior to an order for restitution being entered. *Id.* at 1195–96 (citing statutes from Kentucky, Alabama,

victims to offer proof of the losses prior to receiving reimbursement. Restitution was used only rarely in criminal sentencing until the later portion of the twentieth century.

With the advocacy of the growing crime victims' rights movement of the 1960s and '70s, a broader conception of restitution became a standard part of state and federal criminal justice responses.¹⁵ Many crime victims felt the criminal justice system was not responsive to their needs, and compensation through restitution was one in a series of proposals aimed at including victims in the criminal justice process.¹⁶

The new era for restitution began in 1982, with the passage of the federal Victim and Witness Protection Act (VWPA).¹⁷ Under the VWPA,

Nebraska, Arkansas, and Delaware); see also Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 152, 155 (1970); Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 229 (1965).

¹⁵ Lynne Henderson, Commentary, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581 (1998). Prior to passage of the Victim and Witness Protection Act (VWPA) in 1982, restitution appeared infrequently in the criminal context. As of 1925, federal judges were authorized to order restitution only as a condition of probation and only for the amount of the victim's actual loss of property or its equivalent value. Woody R. Clermont, *It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution*, 35 NOVA L. REV. 363, 373 (2011); see also, e.g., *United States v. Boswell*, 605 F.2d 171, 175 (5th Cir. 1979); *United States v. Wilson*, 469 F.2d 368, 369–70 (2d Cir. 1972); *United States v. Taylor*, 321 F.2d 339, 341–42 (4th Cir. 1963); cf. *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–42 (1970). Under this system, an order for restitution was dependent on the judicial officer's determination of a defendant's ability to pay. *Id.* By 1939, a few states also had provisions for restitution in their criminal codes. Note, *supra* note 14, at 1195.

¹⁶ This author's position on the changes to criminal restitution that arose out of the victims' rights movement is not intended to reflect a view on any of the other proposals advocated for and adopted as part of the broader victims' rights movement. This Article does not address the merits of any other proposals adopted as part of that movement.

¹⁷ Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009). In 1982, President Reagan's Task Force on Victims of Crime published its final report, which encouraged judges to order restitution in "all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 78–79 (1982). In response to the Task Force's Final Report, Congress passed the VWPA, which codified numerous recommendations made in the report. Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2722 (2005); Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 685, 694 (1984); see also Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, sec. 5(a), §§ 3579–80, 96 Stat. 1248, 1253–55 (codified at 18 U.S.C. §§ 3579–80 (1982)).

Some states had enacted legislation authorizing, and even mandating, restitution prior

criminal restitution was no longer limited to repaying the victim the value of money, goods, or services taken from her; “restitution” could now be ordered as compensation for physical injuries and, as time went on, for mental injuries and emotional losses.¹⁸ For the first time, under the VWPA, if the victim suffered bodily injury, the court could order a defendant to pay for medical, psychiatric, or psychological treatment, as well as to reimburse the victim for wages lost prior to sentencing.¹⁹ In essence, “restitution” became the criminal version of damages, an equitable mechanism aimed at compensating victims of all types of crimes for a broad class of losses.

In 1994, the Violence Against Women Act (VAWA) became the first federal statute to mandate criminal restitution. This was a change from the VWPA, which allowed a court to decline ordering restitution based on a defendant’s indigency.²⁰ VAWA required convicted defendants to compensate victims for physical and psychological injuries inflicted as a result of sex-related and domestic violence crimes, regardless of the defendant’s financial means.²¹ Two years later, Congress extended

to 1982. Joe Hudson & Burt Galaway, *Introduction to RESTITUTION IN CRIMINAL JUSTICE* 1, 2–4 (Joe Hudson & Burt Galaway eds., 1975). Those states included Colorado, Iowa, and Minnesota. *Id.* In 1976, the Law Enforcement Assistance Administration launched pilot restitution programs in California, Colorado, Oregon, Georgia, Maine, Massachusetts, and Connecticut. *Id.* at 4.

¹⁸ Neither pain and suffering nor lost wages were compensated under the VWPA. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 940 (1984) (“[M]ost courts limit the award to actual damages directly caused by the crime. Pain and suffering, loss of earning capacity, and other unliquidated damages that are particularly susceptible to arbitrary determination are usually not included in a restitution order.”); *see also* United States v. Hicks, 997 F.2d 594, 600 (9th Cir. 1993); United States v. Husky, 924 F.2d 223, 225–27 (11th Cir. 1991), *cert. denied*, 502 U.S. 833 (1991).

¹⁹ 18 U.S.C. § 3579(b)(2), (3) (1982). Future lost wages still were not compensable. Kelly, *supra* note 17, at 698 (citing 128 CONG. REC. H8207 (daily ed. Sept. 30, 1982) (statement of Rep. McCollum) (remarking that this would be a “logical limitation on awarding restitution”)).

In addition to importing civil damages into the scope of losses compensable by criminal restitution, Congress sought to make it easier for victims to prove civil damages in civil lawsuits based on the same criminal acts for which a defendant already had been punished. An additional provision of the VWPA prevented the defendant from “denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding brought . . . by the victim.” 18 U.S.C. § 3580(e) (1982). Congress’s aim was to keep a person from having to prove a defendant’s liability a second time as part of a civil tort suit. S. REP. NO. 97-532, at 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516. If a victim received compensation in a civil case, restitution payments could be offset against the damages ordered. 18 U.S.C. § 3579(e)(2) (1982); Kelly, *supra* note 17, at 698.

²⁰ 18 U.S.C. § 3579(a)(2) (1982).

²¹ Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, sec. 40113(a)(1), § 2248, 108 Stat. 1902, 1904 (codified at 18 U.S.C. § 2248 (2006)).

mandatory restitution to all “identifiable” victims who have “suffered a physical injury or pecuniary loss” as a result of a convicted defendant’s crimes.²² Those crimes now included crimes of violence, property crimes, crimes of fraud or deceit, product tampering, and crimes in which a “victim or victims has suffered a physical injury or pecuniary loss,” as well as sex-related and domestic violence crimes.²³ In 2000, certain drug crimes were added to the list.²⁴

The choice of the term “restitution” to describe the broader system of what is actually victim compensation led to what has become an insoluble confusion between two distinct remedial theories²⁵: the traditional view of restitution requires a defendant to surrender an unjust gain, whereas the view of restitution that arose during the victims’ rights movement attempts to make an injured party whole, generally expanding the scope of what is compensable. Because these two theories had been previously distinct, many questioned whether the restitution contemplated by these federal statutes and ordered for victims of an ever-growing list of crimes, including violent crimes, sex crimes, and drug crimes, could still be considered restitution.

There remain two opposing schools of thought. One holds that two distinct types of “restitution” exist and should continue to be considered distinct from one another: the traditional concept of restitution as countering unjust enrichment,²⁶ which is now applied almost exclusively in the civil context, and a separate “restitution” measured by a victim’s tangible and intangible losses, which compensates for a broader category of harms and is solely applicable in the criminal context. Proponents of this view tend to believe that these distinct concepts of civil and criminal

²² Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, sec. 204, § 3663A(c)(1)(B), 110 Stat. 1214, 1229 (codified at 18 U.S.C. § 3663A(c)(1)(B)). See generally secs. 202, 204 & 205, 110 Stat. at 1227–32 (codified as amended at 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3556, 3663, 3663A).

²³ Pub. L. No. 104-132, secs. 204–05, §§ 3663 & 3663A, 110 Stat. at 1227–32.

²⁴ See Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106-310, sec. 3613, § 3663A, 114 Stat. 1227, 1229–30 (codified at 18 U.S.C. § 3663A(c)(1)(A)(ii)). If a person leases or rents property for the purpose of manufacturing, distributing, or using drugs or makes property available for any of those purposes, she can be required to reimburse the owner of the property for any damage to the property or lost value of the property caused by the making or selling of drugs there. See *id.*; 21 U.S.C. § 856 (2006).

²⁵ See Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1195 (1995); Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 977–80 (2011) (discussing confusion over what is meant by the term “restitution”).

²⁶ See Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 504 (1980) (stating that restitution prevents unjust enrichment, while torts repair wrongfully inflicted damage).

restitution appropriately coexist and the designated categories should both be maintained.

The other approach views restitution as a mechanism to counter unjust enrichment, believing that it should be treated equivalently in both the civil and criminal spheres. This perspective asserts that the more recently created “victim restitution” applied in the criminal context is not true restitution but a broader theory of compensation more akin to the awarding of civil damages.²⁷ As such, this school of thought considers the current manifestation of criminal “restitution” a misnomer, preferring the term “victim compensation” as a more accurate description of what legislatures and courts are calling criminal restitution.

Both of these approaches to restitution continue to have strong advocates. This Article embraces the latter view, which draws a fundamental distinction between traditional restitution, which is, at its essence, disgorgement of an unjust enrichment, and victim compensation, which aims to “make [a victim] whole” by trying to determine losses in a manner more akin to civil tort damages.²⁸ However, the former approach, delineating a distinct type of criminal “restitution,” continues to predominate in the legislature and courts, paving the way for Marsh and Amy to request compensation for future emotional harm in non-contact child pornography cases. In light of restitution’s ever-widening scope, this groundbreaking request for reimbursement for future emotional and hedonic losses no longer seems novel.

B. RESTITUTION IN NON-CONTACT CHILD PORNOGRAPHY CASES

Taking advantage of the opportunity presented by the restitution revolution for his client’s benefit, in 2008, attorney James Marsh took the novel step of seeking compensation from a defendant who did not create or instigate the creation of child pornography in a criminal context. Marsh began by representing Amy in civil tort suits, but until Alan Hesketh’s case,

²⁷ See Rendleman, *supra* note 25, at 977.

²⁸ A similar conversation has taken place in the context of reparations for victims of international human rights violations, specifically victims of sexual and reproductive violence. Leading scholars have criticized the traditional approach to harm taken by national governments and international bodies. Reparations naturally contemplate the notion of harm in consideration of how to provide adequate redress to victims. However, recent scholars have discouraged trying to measure harm in order to try to compensate it proportionally and have suggested using harm as an important first step in determining the appropriate remedy. See, e.g., Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in *THE HANDBOOK OF REPARATIONS* 623, 639–41 (Pablo de Greiff ed., 2006). For a more general discussion of the challenges associated with compensating for intangible harms, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* 184–205 (1996).

as far as this author has found, neither he nor any other attorney or victim had sought compensation in the form of restitution from a criminal defendant who had never met the youth depicted in the child pornography, never participated in the sexual abuse of her, and, but for the images, had no idea who she was. Nor had any court awarded restitution in a case where the defendant did not participate in the actual physical sexual exploitation of the child.²⁹ In fact, restitution was rarely imposed even in cases of direct sexual abuse.

Although restitution had been expanded to apply in the context of an ever-increasing number of crimes, Marsh was the first to seek restitution in a case where the harms to the victim were more abstract than the emotional responses of victims to being physically attacked or raped. Until 2008, restitution in the criminal context still was ordered primarily in burglary, robbery, embezzlement, fraud, and arson cases.³⁰ Restitution's relatively

²⁹ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 23, 39; Tasha Kates, *Restitution Sought in Child Porn Cases*, DAILY PROGRESS (Charlottesville, Va.), June 1, 2010, at A1; Tim McGlone, *Victim of Child Porn Wants Viewers to Pay*, VIRGINIAN-PILOT (Norfolk), Oct. 25, 2009, at A6. According to Marsh, his decision to seek restitution in the criminal case was due to the fact that Hesketh was not a U.S. citizen: "We had information that most of his assets were overseas. We knew a civil case would take two to three years, so by the time the court would levy any sort of judgment on him, his assets would be out of our reach." Kates, *supra*, at A9; *see also* Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 19 (reporting the prosecutor noting her understanding that "it is easier to collect assets that are based outside of the U.S. through the criminal process than the civil process").

³⁰ U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (1996), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1996/TAB-15.pdf; U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (1997), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1997/TABLE15.pdf; U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (1998), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1998/table15.pdf; U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (1999), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1999/table15.pdf; U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2000), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2000/table-15.pdf; U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2001), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2001/table15.pdf; U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2002), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2002/table15.pdf; U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2003), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2003/table15.pdf; U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2004), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2004/table15pre.pdf; U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING

infrequent application in cases of violent crime relied on a clear linkage between the crime itself—an assault committed by a particular defendant, for example—and the physical and emotional damage caused by that defendant as a result of their commission of the assault. Seeking restitution from a defendant who did not actually cause the physical harm or the direct emotional harm associated with, say, an attempted assault was an entirely new phenomenon. Even now, restitution is rarely sought from defendants convicted of sexual abuse or rape.

1. *Expanding Restitution*

In support of his novel request, Marsh relied on VAWA’s language requiring federal judges to order, and defendants to pay, restitution to any victim of a sex or domestic violence offense.³¹ The losses outlined in the statute include costs incurred for medical and mental health services, physical and occupational therapy, transportation, other costs related to the investigation or prosecution of the case, lost income, attorneys’ fees, other fees related to seeking a civil protection order, and “any other losses

STATISTICS § 2, tbl.15 (2005), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2005/table15_pre.pdf (containing information through January 11, 2005, prior to the U.S. Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005)); U.S. SENTENCING COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS § 3, tbl.15 (2005), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2005/table15_post.pdf (containing post-*Booker* information); U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2006), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/table15.pdf; U.S. SENTENCING COMM’N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2007), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2007/Table15.pdf; U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2008), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/Table15.pdf.

In fiscal year 2010, the categories changed from grouping pornography and prostitution together—for purposes of considering the percentage of offenders receiving restitution—to placing child pornography in its own category. The percentage of offenders sentenced for pornography- and prostitution-related offenses who received a restitution order in 2009 was 2.9%; in 2010, those convicted of child pornography offenses received restitution orders 8.3% of the time. *See* U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf; U.S. SENTENCING COMM’N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2009), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table15.pdf.

³¹ VAWA, Pub. L. No. 103-322, sec. 40113, §§ 2248, 2259, 108 Stat. 1902, 1904, 1907 (1994) (codified at 18 U.S.C. §§ 2248, 2259 (2006)). 18 U.S.C. §§ 2248(b)(4)(A) and 18 U.S.C. § 2259(b)(4)(A) both state, “The issuance of a restitution order under this section is mandatory.”

suffered by the victim as a proximate result of the offense.”³²

The poor wording of the statute left open the question as to whether the defendant must have proximately caused *all* losses claimed or just the unenumerated “losses suffered by the victim as a proximate result of the offense” covered by the catchall provision. Marsh relied on a literal reading of the statute that did not require all losses to be proximately caused by the defendant. Only by reading the proximate cause requirement out of the statute was Marsh able to take this initial and creative step of arguing that a non-contact child pornography case required restitution.

In the restitution request Marsh submitted to the United States Attorney’s Office, which took no official position on it,³³ he requested restitution for “lost future income, future wages, future benefits, future counseling and treatment costs, a reduction in the ‘value of life’ and . . . attorney’s fees.”³⁴ According to Marsh, the VAWA provisions require each defendant to pay Amy the full amount of her losses, regardless of how those losses are categorized.³⁵ By Marsh’s reading, “losses” now included pain and suffering and hedonic damages, including the “full amount” of losses that might occur at any point in the future, so long as they could be somehow tied back to the trauma from the offense. Amy’s losses, as calculated by Marsh’s experts, totaled approximately \$3.4 million.³⁶ This amount included \$2,855,173 for Amy’s future lost wages,³⁷ approximately

³² 18 U.S.C. §§ 2248(b)(3), 2259(b)(3). The law also allows for any amount paid to the victim to be set off against any amount later recovered as compensatory damages from the defendant in a civil proceeding. *Id.* § 3664(j)(2).

³³ Despite its purportedly neutral stance, the Government presented a lengthy memorandum explaining why restitution would be applicable in a case where the defendant had, as the judge said, “really no contact, and no real knowledge of who the [victims] were, but was using his thumb drive and his computer” to view images of them. Transcript of Sentencing Hearing at 11, *United States v. Hesketh*, No. 3:08-CR-00165 (WWE) (D. Conn. Dec. 7, 2008); Government’s Memorandum Regarding Restitution at 2, *United States v. Hesketh*, No. 3:08CR165(WWE) (D. Conn. Jan. 5, 2009) [hereinafter Government’s Memorandum Regarding Restitution, *Hesketh*]. Included in the Government’s memorandum was a more detailed argument that § 2259, the provision of VAWA on which Marsh relied, did not include a proximate cause requirement and thus restitution could be ordered in any case where a defendant was convicted of “offenses relating to material involving the sexual exploitation of minors and child pornography.” Government’s Memorandum Regarding Restitution, *Hesketh*, *supra*, at 8–9.

³⁴ Defendant Alan Hesketh’s Memorandum in Opposition to Restitution at 1, *United States v. Hesketh*, No. 3:08-cr-165 (WWE) (D. Conn. Oct. 13, 2008).

³⁵ Schwartz, *Pornography*, *supra* note 5, at A19.

³⁶ Bazelon, *supra* note 5, at 26.

³⁷ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 25 (discussing request for future lost wages generally); *see also, e.g.*, *United States v. McGarity*, 669 F.3d 1218, 1265 (11th Cir. 2012) (indicating that economic experts calculated Amy’s future lost wages at \$2,855,173); *United States v. Olivieri*, No. 09-743 (WHW), 2012 WL 1118763, at *2

\$500,000 for the cost of future treatment and counseling,³⁸ \$15,550 in expert witness fees, and \$25,000 for attorneys' fees³⁹ According to Marsh's reading of VAWA, the defendant did not have to proximately cause the harm for Amy to recover restitution.⁴⁰

Revealing how quickly restitution and damages are exchanged for one another, the court calculated the restitution in Hesketh's case by relying on the value of damages required by Congress in a parallel civil provision, 18 U.S.C. § 2255. Masha's Law grants damages to people, primarily children, who suffer from "personal injury" based on sexual exploitation or abuse.⁴¹ Under the civil statute, the injured party can recover the "actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee," with the required minimum value of recovery set at \$150,000.⁴² The court found "the civil is a very good guide for the criminal," and ordered Hesketh to pay Amy compensation in the amount of \$200,000: \$150,000 "in the damage area," plus attorneys' and expert witness fees.⁴³ Defense counsel argued that the judge needed to "not just

(D.N.J. Apr. 3, 2012) (same).

³⁸ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 10, 41; *see also McGarity*, 669 F.3d at 1265; *Olivieri*, 2012 WL 1118763, at *2.

³⁹ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 26–27, 47. Although medical or psychological treatment at times is not complete by the time of sentencing, the anticipated future expenses are usually based on a specifically defined course of treatment and limited to, at most, a few years into the future. Even those with extensive emotional trauma do not tend to stay in therapy for more than eight or ten years at most. *Cf.* Jonathan Alpert, *In Therapy Forever? Enough Already*, N.Y. TIMES, Apr. 22, 2012, at SR5. Yet Marsh was requesting payment for sixty-two years of psychological treatment. Additionally, even in the civil context, the granting of future lost wages to someone who has never worked is a highly speculative and controversial inquiry. Given that the young women were in their late teens/early twenties at the time their requests were filed, the speculative nature of what each would have done with her life but for her abuse, combined with the request for payment based on that speculation for forty-plus years of future lost work, raises further concerns about how far we are willing to continue to extend restitution.

⁴⁰ 18 U.S.C. §§ 2259, 3663 (2006); *see also* Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 45–46; Government's Memorandum Regarding Restitution, *Hesketh*, *supra* note 33, at 8–9.

⁴¹ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 25; Government's Memorandum Regarding Restitution, *Hesketh*, *supra* note 33, at 11.

⁴² 18 U.S.C. § 2255(a). Prior to 2006, the minimum amount of damages authorized by the statute was \$50,000; as of 2006, Congress raised it to \$150,000. *See id.* § 2255; Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 25; Government's Memorandum Regarding Restitution, *Hesketh*, *supra* note 33, at 11.

⁴³ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 26–28, 47. Marsh concurred with the judge, observing that, in his view, "if you look at restitution and the way that restitution is viewed around the country, courts do regard it somewhat as a parallel to a civil suit." *Id.* at 41.

After the restitution hearing concluded, but before the court had issued an order

arbitrarily pick[] a figure,” but “must look at how the victim was hurt,” and “equate[] it to actual loss.”⁴⁴ The judge maintained his order.⁴⁵

2. *The Landscape After Hesketh*

Hundreds of requests for restitution in non-contact child pornography cases have been submitted since Hesketh’s case. As of February 2010, Marsh had automated the process of filing such requests and emailed assistant United States Attorneys in almost 700 cases.⁴⁶ Occasionally, a prosecutor has declined to file one of these requests for restitution, but most of them do not.⁴⁷ As of January 2013, Amy had received approximately \$1.5 million in restitution payments.⁴⁸ At least three district courts granted her restitution in the full \$3,000,000-plus amount she requested, although the court of appeals later vacated one of those orders.⁴⁹ Several other lawyers have joined Marsh in his pursuit for restitution. The other young woman regularly seeking restitution has been identified as the girl depicted in the “Vicky” series.⁵⁰ Like Amy, Vicky was abused by a family member, her father, when she was a young child.⁵¹ In cases where her image is

pertaining to the restitution, Mr. Hesketh entered into a settlement agreement involving a cash payment to Amy in the amount of \$130,000. Richey, *supra* note 2, at 5. As a result, Amy withdrew her request for restitution in the criminal case and the order was never entered. See *Objection to Government’s Motion for Entry of Amended Judgment* at 1, 3, *United States v. Hesketh*, No. 3:08cr165 (WWE) (D. Conn. Dec. 14, 2009); see also *Government’s Motion for Entry of Amended Judgment to Reflect Restitution* at 2, *United States v. Hesketh*, No. 3:08CR165(WWE) (D. Conn. Dec. 11, 2009) (indicating that Hesketh and Amy reached a settlement agreement, and noting that the court had not yet entered a restitution order in the case).

⁴⁴ Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 29, 30.

⁴⁵ *Id.* at 47.

⁴⁶ See Schwartz, *supra* note 3, at A20; Schwartz, *Pornography*, *supra* note 5, at A19; see also Stephanie Barry, *Man Gets Prison for Child Porn*, REPUBLICAN (Springfield, Mass.), May 27, 2011, at C1; Kates, *supra* note 29, at A9.

⁴⁷ Schwartz, *Pornography*, *supra* note 5, at A19.

⁴⁸ Michael Kunzelman, *Court: Child Porn Victims Can Get Restitution*, BOSTON.COM (Oct. 1, 2012), <http://www.boston.com/news/nation/2012/10/01/court-child-porn-victims-can-get-restitution/exXeGax7fjOis59exlGQZP/story.html>.

⁴⁹ *United States v. McGarity*, 669 F.3d 1218, 1270–71 (11th Cir. 2012) (vacating district judge’s restitution order of \$3,263,758); *Restitution Order* at 6, *United States v. Staples*, No. 09-14017-CR (S.D. Fla. Sept. 2, 2009), 2009 WL 2827204 (ordering defendant to pay restitution in full \$3,680,153 amount); see also Mark Reagan, *Hedrick’s Sentence: 30 Years in Prison*, BROWNSVILLE HERALD (Dec. 20, 2012, 10:43 AM), http://www.brownsvilleherald.com/news/local/article_63e7ea3a-4a5c-11e2-8370-001a4bcf6878.html (discussing Southern District of Texas’s imposition of \$3,388,417 order in Amy’s favor in the case of *United States v. Hedrick*).

⁵⁰ McGlone, *supra* note 29, at A6.

⁵¹ Op-Ed, *More Perverts Face Justice Because of 2 Local Heroes*, TRI-CITY HERALD (Kennewick, Wash.), Apr. 8, 2009, at A8.

found, Vicky has sought upwards of one million dollars for counseling, lost wages, “educational costs,” and evidence gathering.⁵² At least one district judge has awarded restitution to her in the requested amount of \$1,010,814.⁵³ As of June 2011, her lawyer, Carol Hepburn, had filed for restitution on Vicky’s behalf in more than 200 federal criminal cases.⁵⁴ Vicky has recovered more than \$271,000.⁵⁵ At least one other girl identified in child pornography images, L.S., has also sought and received restitution.⁵⁶

As a result of the number of requests, federal courts across the country have had the opportunity to consider the issue of restitution for offenders convicted of possession, receipt, or distribution of child pornography. Initially, the critical points of contention among the courts to consider the issues were two-fold: (1) whether the statute requires the government to prove the defendant proximately caused the harm to the victim and (2) whether someone who possesses, receives, or distributes child pornography has caused, either generally, if the judge reads no proximate cause requirement into the statute, or proximately, the harm experienced by Amy, Vicky, or any other individual who is seeking restitution. A clearer consensus has developed on the first issue,⁵⁷ but trial and appellate courts across the country remain split on the second.

Most federal courts have agreed,⁵⁸ and the government has

⁵² Baker, *supra* note 7, at A23.

⁵³ Petitioner Vicky’s Brief in Defense of the Judgment Below at 10, *United States v. Crawford*, No. 11-5544 (6th Cir. Nov. 29, 2011), 2011 WL 6018374 [hereinafter *Petitioner Vicky’s Brief*].

⁵⁴ Baker, *supra* note 7, at A23.

⁵⁵ Brief of Appellant at 4, *United States v. Fast*, No. 11-3455 (8th Cir. Dec. 13, 2011), 2011 WL 6779164.

⁵⁶ See *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at *2, *4 (E.D. Cal. Dec. 10, 2010) (referring to restitution request of “L.S.”). As with Amy, L.S. is also seeking restitution in an amount of more than \$3 million. *Id.* at *4. There are hundreds of other victims who are notified when child pornography images of them are seized but, to this author’s knowledge, only four of those victims are consistently seeking restitution.

⁵⁷ *But see In re Amy Unknown*, 697 F.3d 306 (5th Cir. 2012) (en banc).

⁵⁸ In fact, with the exception of the Fifth Circuit, every circuit court to consider the issue has found that 18 U.S.C. § 2259 requires a showing of proximate cause. See *United States v. Benoit*, No. 12-5013, 2013 WL 1298154, at *13–15 (10th Cir. Apr. 2, 2013); *United States v. Laraneta*, 700 F.3d 983, 989–91 (7th Cir. 2012); *United States v. Burgess*, 684 F.3d 445, 459 (4th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 96–100 (1st Cir. 2012); *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535–36 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999). *But see In re Amy Unknown*, 697 F.3d at 318–29 (holding that the statute only requires a victim’s injuries to have been the “proximate result” of the defendant’s

conceded,⁵⁹ that, despite the lack of wording explicitly requiring a showing that the defendant proximately caused the harm to a person depicted in the images of child pornography, such a showing is required under VAWA's § 2259.⁶⁰ Courts have held that the last phrase of § 2259(b)(3), which reads "for purposes of this subsection, the term 'full amount of the victim's losses' includes any costs incurred by the victim for [particular enumerated losses] and any other losses suffered by the victim as a proximate result of the offense," to apply to all the types of losses encompassed by § 2259(b)(3).⁶¹

Despite an emerging consensus regarding VAWA's § 2259 proximate cause requirement, there remains a significant split on the issue of whether someone who possesses, trades, or distributes child pornography images, having had nothing to do with their initial creation or the original abuse of the child depicted therein, actually has proximately caused the harm for which the "victim" is seeking restitution.⁶² Not surprisingly, courts take

actions).

⁵⁹ Brief for the United States in Opposition at 8–11, *Amy v. Monzel*, 132 S. Ct. 756 (2011) (No. 11-85), 2011 WL 4963245.

⁶⁰ *Aumais*, 656 F.3d at 153–54; *Kennedy*, 643 F.3d at 1260–62 (noting binding precedent of *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (holding that § 2259 "incorporates a requirement of proximate causation")); *McDaniel*, 631 F.3d at 1209; *Monzel*, 641 F.3d at 535–36 (citing traditional principles of tort and criminal law, and concluding that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause"); *Crandon*, 173 F.3d at 125.

Those courts that find proximate cause is required are split on who is harmed by the defendant's conduct: the child sexual abuse victim depicted in the child pornography images or society as a whole. See *McLeod*, *supra* note 11, at 1350–51. Compare *United States v. Sherman*, 268 F.3d 539, 547–48 (7th Cir. 2001) (child depicted in pornography is victim), *United States v. Tillmon*, 195 F.3d 640, 645 (11th Cir. 1999), *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998), *United States v. Norris*, 159 F.3d 926, 930–34 (5th Cir. 1998), *United States v. Boos*, 127 F.3d 1207, 1213 (9th Cir. 1997), *United States v. Ketcham*, 80 F.3d 789, 793 (3d Cir. 1996), and *United States v. Rugh*, 968 F.2d 750, 756 (8th Cir. 1992), with *Sherman*, 268 F.3d at 550–52 (Posner, J., dissenting); *United States v. Toler*, 901 F.2d 399, 403 (4th Cir. 1990) (society is victim).

⁶¹ See *Aumais*, 656 F.3d at 152.

⁶² At the District Court level, see, e.g., *United States v. Brannon*, No. 4:09-CR-38-RLV-WEJ, 2011 WL 2912862 (N.D. Ga. May 26, 2011) (proximate cause required and found, and \$3,500 restitution to Vicky ordered); *United States v. Lindauer*, No. 3:10-cr-00023, 2011 WL 1225992 (W.D. Va. Mar. 30, 2011) (proximate cause required and found, and \$5,448.75 ordered in restitution to Vicky); *United States v. Covert*, No. 09-332, 2011 WL 134060 (W.D. Pa. Jan. 14, 2011) (proximate cause required but no causal link established as to this defendant, and Amy's request for restitution denied); *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 WL 5173029 (E.D. Cal. Dec. 10, 2010) (proximate cause required and found in the amount of \$3,000 per victim); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433 (W.D.N.C. Jan. 12, 2010) (proximate cause required and found, \$1,500 restitution ordered to Vicky; \$6,000 to Amy); *United States v. Scheidt*, No. 1:07-CR-

different approaches to what is required to establish proximate cause. In the Third Circuit, some district courts have found that the defendant must be a “substantial factor” in the victim’s losses.⁶³ Other jurisdictions have employed a test of whether the harm was “generally” or “reasonably foreseeable” to the defendant.⁶⁴

In a 2011 case, the Eleventh Circuit found that possession or distribution of images of child pornography creates a sufficient causal link to support orders of restitution against defendants in such cases.⁶⁵ Embracing a view of restitution as victim compensation, a panel of that circuit found that a defendant “harm[s]” the person depicted in the pornographic images under § 2259 “by possessing images of her sexual abuse as a minor.”⁶⁶ Citing the Supreme Court case *New York v. Ferber*,⁶⁷ a case decided in 1982, the same year as the VWPA became law, the panel concluded that “like the producers and distributors of child pornography, the possessors of child pornography victimize the children depicted within” by “enabl[ing] and support[ing] the continued production of child pornography,” “provid[ing] the economic incentive for the creation and distribution of the pornography,” and “violat[ing] the child’s privacy by

00293 AWI, 2010 WL 144837 (E.D. Cal. Jan. 8, 2010) (proximate cause required but none found as to Amy or Vicky based on defendant’s actions, but \$3,000 restitution ordered as to each defendant); *United States v. Hardy*, 707 F. Supp. 2d 597 (W.D. Pa. 2010) (proximate cause required and found); *United States v. Faxon*, 689 F. Supp. 2d 1344 (S.D. Fla. 2010) (proximate cause required but not found as to Vicky or Amy); *United States v. Woods*, 689 F. Supp. 2d 1102 (N.D. Iowa 2010) (proximate cause required but not established); *United States v. Berk*, 666 F. Supp. 2d 182 (D. Me. 2009) (proximate cause required but not found as to defendant in relation to Amy or Vicky); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050 (N.D. Ga. Dec. 17, 2009) (proximate cause required but no evidence of proximate causation found, so requests for restitution to Amy and Vicky denied); *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (proximate cause required but none found as to Amy); *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260 (E.D. Va. Nov. 24, 2009) (“tort-like” proximate cause required and found, and \$3,525 restitution to Vicky ordered); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009) (causation presumed by possessor of child pornography and restitution ordered to Amy in amount of \$3,680,153); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102 (E.D. Cal. Aug. 18, 2009) (proximate cause required but insufficient causation established to award restitution to Vicky); *United States v. Simon*, No. CR-08-0907 DLJ, 2009 WL 2424673 (N.D. Cal. Aug. 7, 2009) (proximate cause required but no harm caused by defendant, so no restitution ordered to Amy).

⁶³ *United States v. Hardy*, 707 F. Supp. 2d 597, 605–14 (W.D. Pa. 2010).

⁶⁴ *United States v. Evers*, 669 F.3d 645, 659 (6th Cir. 2012); *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010); *United States v. Hagerman*, 827 F. Supp. 2d 102, 119 (N.D.N.Y. 2011).

⁶⁵ *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011). *But see* *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012).

⁶⁶ *McDaniel*, 631 F.3d at 1208.

⁶⁷ 458 U.S. 747, 759 (1982).

possessing the image.”⁶⁸ A later panel of the same circuit, not disputing the harms of child pornography articulated by the first panel, reached a different conclusion, determining there was not a sufficient causal link between the defendant and the harms experienced by Amy to grant the request for restitution.⁶⁹

Likewise, the Second and Ninth Circuits, also adopting a view of restitution as compensation for harm, have determined there is not a sufficient link between a person’s possession and distribution of child pornography and the specific harm to a particular individual depicted in those images to order restitution.⁷⁰ These circuits have found that “the government must establish a causal connection between the defendant’s offense and the harm to the victim.”⁷¹ The Ninth Circuit further clarified:

There may be multiple links in the causal chain, but the chain may not extend so far, in terms of the facts or the time span, as to become unreasonable. . . . [I]t must be a material and proximate cause, and any subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant’s conduct.⁷²

These circuits have identified several ways in which the circulation and viewing of child pornography images harms the individual depicted therein, consistent with the view of criminal restitution as compensation for losses, but have denied restitution to Amy and Vicky because “[the government] has not introduced *any* evidence establishing a causal chain between [the defendant’s] conduct and the specific losses incurred by Amy and Vicky.”⁷³ According to these two circuits, and a more recent Eleventh Circuit panel,⁷⁴ the Government did not show that the particular defendant’s actions “in transporting the images caused Amy’s lost income and loss of enjoyment of life or Amy and Vicky’s future counseling costs,” nor did it show that “Amy and Vicky could have avoided certain losses had [the defendant] not transported the images. Indeed, the Government introduced no evidence that Amy and Vicky were even aware of [the defendant’s] conduct.”⁷⁵ Rather, the courts reasoned, the evidence showed

⁶⁸ *McDaniel*, 631 F.3d at 1208.

⁶⁹ This Eleventh Circuit panel found that “not one of the witnesses was capable of testifying as to the harm caused Amy by Freeman’s possession of pornographic images memorializing her,” and vacated the restitution order imposed by the district court. *McGarity*, 669 F.3d at 1269; *see also* *United States v. Aumais*, 656 F.3d 147, 155–56 (2d Cir. 2011).

⁷⁰ *United States v. Kennedy*, 643 F.3d 1251, 1261–63 (9th Cir. 2011); *see also Aumais*, 656 F.3d at 155–56 (holding arguably limited to the facts of this specific case).

⁷¹ *Kennedy*, 643 F.3d at 1260.

⁷² *Id.* at 1262–63 (citations omitted) (internal quotation marks omitted).

⁷³ *Id.* at 1263.

⁷⁴ *United States v. McGarity*, 669 F.3d 1218, 1269 (11th Cir. 2012).

⁷⁵ *Kennedy*, 643 F.3d at 1263.

“only that [the defendant] participated in the audience of persons who viewed the images of Amy and Vicky,” which was only sufficient to establish that his actions were “one cause of the *generalized harm* Amy and Vicky suffered.”⁷⁶

3. How to Calculate Harm

Most judges who have awarded “restitution” in possession and distribution of child pornography cases have authorized amounts ranging from \$1,000 to \$3,000, usually based on less-than-precise judicial calculations as to the harm a particular defendant has caused, and will cause, by his possession or distribution of the images.⁷⁷ Several courts have taken a similar approach to the judge in *Hesketh*, looking to the parallel civil provision and using the \$150,000 minimum figure as a starting point for calculating restitution. Using this figure, one court in California has consistently determined that each defendant has been the proximate cause of roughly 2% of Amy’s harm, and ordered restitution in the amount of \$3,000.⁷⁸ Another court calculated that “approximately 146 defendants, including this Defendant, have been successfully prosecuted for unlawfully possessing or receiving the ‘Vicky’ series.”⁷⁹ Therefore, using simple division, the court quantified that defendant as having caused .68% of all the harm to Vicky, and ordered \$6,636.24 in restitution.⁸⁰

Still another court reached \$3,000 because the amount was “more than fair and reasonable” as compensation for eighteen therapy sessions, or one session a month for one and a half years.⁸¹ The court did not indicate why

⁷⁶ *Id.* at 1264 (emphasis added); *Aumais*, 656 F.3d at 155.

⁷⁷ McGlone, *supra* note 29, at A6.

⁷⁸ *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at *5 (E.D. Cal. Dec. 10, 2010); *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at *4–5 (E.D. Cal. Aug. 19, 2009). Several other courts have found that “at least fifty defendants will be subject to restitution for possessing each victim’s images,” and, consequently, divided the requested restitution amount by fifty when awarding restitution. *United States v. Olivieri*, No. 09-743 (WHW), 2012 WL 1118763, at *11–12 (D.N.J. Apr. 3, 2012); *see also United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at *6 (E.D. Va. Nov. 24, 2009).

⁷⁹ *United States v. Hagerman*, 827 F. Supp. 2d 102, 124 (N.D.N.Y. 2011), *rev’d in part*, No. 11-3421-cr, 2012 WL 6621311, at *4 (2d Cir. Dec. 20, 2012) (using an approach to determining a victim’s losses that the appellate court found “reasonable,” despite the fact that its calculations were overruled); *cf. United States v. Tallent*, 872 F. Supp. 2d 679, 694 (E.D. Tenn. 2012) (overruling parties’ agreement to take this approach to restitution); *United States v. Veazie*, No. 2:11-cr-00202-GZS, 2012 WL 1430540, at *6 (D. Me. Apr. 25, 2012) (rejecting this approach, despite prosecutor’s request to use this method for determining restitution).

⁸⁰ *Hagerman*, 827 F. Supp. 2d at 124.

⁸¹ *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010).

this particular defendant should be held responsible for that particular number of therapy sessions. Other courts also have applied a general rule of “reasonableness,” and ordered amounts ranging from \$3,000 to \$6,000.⁸² At least two courts have ordered a “nominal” award, one court calling its \$5,000 amount “nominal damages,”⁸³ and the other calling \$100 a “nominal figure of restitution.”⁸⁴ Tellingly, several courts use the terms “restitution” and “damages” interchangeably.⁸⁵

After reviewing the decisions of courts in jurisdictions across the country, it becomes clear that there is little common logic, method, or analysis used to calculate restitution in non-contact child pornography cases.⁸⁶ Rather, the opinions suggest that courts are imposing some nominal compensation in an attempt to remedy the ongoing harms to the young women depicted in child pornography, harms that the courts attribute to non-contact defendants.

Yet the harms ascribed to non-contact defendants are inaccurately attributed, and restitution is not the appropriate remedy for child pornography’s harms. Restitution’s increasing expansion has unmoored it from its doctrinal roots. No longer is restitution a disgorgement of profits wrongfully taken. Instead, restitution has become a broadly applied, ill-defined mechanism of compensation for losses both tangible and

⁸² *United States v. Brannon*, 476 F. App’x 386, 389 (11th Cir. 2012) (finding, on average, Vicky had been awarded \$2,799.41 per case, and child pornography victims \$4,321 per case, and using that as a basis for \$3,500 restitution order in this case); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433, at *4 (W.D.N.C. Jan. 12, 2010) (finding that defendant was just a small contributor to the overall loss amount); *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at *4–6 (E.D. Va. Nov. 24, 2009) (finding \$3,000 to be just).

⁸³ *United States v. Klein*, 829 F. Supp. 2d 597, 607 (S.D. Ohio 2011) (declining to award restitution because the Government did not establish this defendant was proximate cause of Amy’s harm, but finding the mandatory nature of 18 U.S.C. § 2259 required the payment of nominal damages).

⁸⁴ *United States v. Church*, 701 F. Supp. 2d 814, 834–35 (W.D. Va. 2010). The court stated that it was ordering a “nominal figure of restitution in the amount of one hundred dollars,” but in support of its order, it stated that “the award of one hundred dollars in restitution comports with the definition and purposes underlying ‘nominal damages’ in the context of restitution payments.” *Id.* at 835 n.10.

⁸⁵ *Klein*, 829 F. Supp. 2d at 607–09; *United States v. Hardy*, 707 F. Supp. 2d 597, 614 (W.D. Pa. 2010).

⁸⁶ The examples listed in the previous two paragraphs reflect the four most common approaches to imposing restitution in non-contact child pornography cases: (1) using the civil remedy from Masha’s Law as a starting point for calculating restitution; (2) imposing an amount deemed by the court to be “reasonable”; (3) picking some portion of the restitution sought, such as eighteen therapy sessions, and ordering a particular defendant to pay that amount without explaining why the defendant would be responsible for that amount; and (4) dividing the restitution request by the number of defendants convicted of viewing and trading a particular victim’s image at the time of the sentencing.

intangible. Non-contact child pornography cases reveal not only how far removed the current form of restitution is from its conceptual grounding, but also the harms that can occur when restitution goes beyond its intended scope.

II. MISGUIDED ATTEMPTS TO ALLEVIATE HARM

Restitution is being ordered in non-contact child pornography cases based on a flawed perception of the harms of child pornography. Almost every court summarily concludes, without critical examination, that a defendant's possession or distribution of child pornography images causes at least a generalized harm to the individuals depicted in these images. Courts rejecting restitution then typically go on to say that the government has failed to link up the particular defendant to a specific harm or loss experienced by the victim; courts granting restitution find that defendants, as viewers of child pornography, are the proximate cause of the articulated harms. But no court has undertaken the work of examining whether, and to what extent, the viewing of child pornography actually causes the generalized harms presumed by the court and whether restitution is the appropriate mechanism to address those harms.⁸⁷ In order to respond accurately to child pornography's harms, courts need to reexamine the assumptions they, and the public in general, are making about the harms of child pornography.

A. DEBUNKING COMMON THEORIES OF HARM

The harms courts attribute to child pornography are rooted in several unacknowledged and unchallenged assumptions, all of which were first articulated in the 1982 Supreme Court case *New York v. Ferber*.⁸⁸ *Ferber* was the first case in which the Court addressed the constitutionality of a statute "directed at and limited to depictions of sexual activity involving children."⁸⁹ At issue in *Ferber* was the constitutionality of a New York

⁸⁷ As indicated earlier, it is also this author's view that restitution is being ordered in a manner inconsistent with its purpose as a legal tool to force the disgorgement of unlawful profits or gains. See *supra* Part I.A. Thus, not only are courts relying on a flawed perception of the harms of child pornography, they are also relying on a flawed methodology to justify the compensation of child pornography victims. See *infra* Parts II.A & II.B.

⁸⁸ 458 U.S. 747 (1982).

⁸⁹ *Id.* at 753. The production of child pornography only became a federal crime in 1977, with the passage of the Protection of Children Against Sexual Exploitation Act of 1977. See WORTLEY & SMALLBONE, *supra* note 8, at 4 (although the authors refer to the act as the "Sexual Exploitation of Children Act," it ultimately came into law as the Protection of Children Against Sexual Exploitation Act); Hamilton, *The Efficacy of Severe Child Pornography Sentencing*, *supra* note 12, at 549.

statute prohibiting a person from knowingly promoting a sexual performance by someone under the age of sixteen by distributing material that contained such a performance.⁹⁰ The defendant, Ferber, was a bookstore owner who was convicted at trial of selling films of boys masturbating.⁹¹ On appeal, he challenged the constitutionality of the statute on First Amendment grounds.⁹² The Court found that the statute “easily passes [constitutional] muster,” as a state’s interest in “safeguarding the physical and psychological well-being of a minor is compelling,” and child pornography is a “category of material outside the protection of the First Amendment.”⁹³

In reaching this conclusion, the Court made several assumptions that lower courts have used to anchor their rulings in the Amy and Vicky litigations. The most widely cited is the Court’s assertion that because the materials produced are a “permanent record of the children’s participation,” “pornography poses an even greater threat to the child victim than does sexual abuse or prostitution.”⁹⁴ The Court also invoked tort law, noting that “[w]hen such performances are recorded and distributed, the child’s privacy interests are also invaded.”⁹⁵ Finally, the Court concluded that outlawing child pornography is the only way to “halt the exploitation of children” and effectively control the “market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”⁹⁶

At the time the *Ferber* opinion was written, child pornography was a relatively new concept and, thus, a new research subject.⁹⁷ As a result,

⁹⁰ *Ferber*, 458 U.S. at 749.

⁹¹ *Id.* at 751–52. The individuals depicted in the films were underage boys in this case. Although, as indicated earlier, the majority of victims depicted in child pornography are girls, there are increasing numbers of boys depicted as well. Taylor et al., *supra* note 8, at 96.

⁹² *Ferber*, 458 U.S. at 752–53.

⁹³ *Id.* at 756–57, 763.

⁹⁴ *Id.* at 759 & n.10 (citations omitted).

⁹⁵ *Id.* at 758 n.9 (citations omitted).

⁹⁶ *Id.* at 759–60.

⁹⁷ See Dennis Howitt, *Pornography and the Paedophile: Is It Criminogenic?*, 68 BRIT. J. MED. PSYCHOL. 15, 16 (1995). Production of child pornography only became a federal crime five years before the *Ferber* opinion was issued. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210–11 (2001). In the initial federal statute, a minor was defined as sixteen or under. Pub. L. No. 95-225, 92 Stat. 7, 8 (1978) (codified at 18 U.S.C. § 2251(c) (2006)). Concern regarding the sexual exploitation of children became an increasing public concern only in the 1970s. See Hamilton, *The Efficacy of Child Pornography Sentencing*, *supra* note 12, at 549. One prominent study indicative of the state of research at the time was the final report issued by the Attorney General’s Commission on Pornography, a commission established by President Ronald

very few studies had been conducted to test the assertions made by the *Ferber* Court. Subsequent research challenges the Court's assumptions, yet courts and Congress have continued to presume that *Ferber's* assertions reflect the reality of child pornography viewers and victims. Few courts are undertaking the work of examining the conclusions reached by the *Ferber* Court.⁹⁸

In particular, courts ordering compensation to child pornography victims have embraced the *Ferber* Court's assertions. Questioning those assertions therefore casts doubts on the wisdom of ordering restitution. Most importantly, examining social science research concerning the links among child sexual abuse, child pornography, and harm reveals that courts' approaches to restitution have been misguided in many respects.

1. *Viewing Child Pornography as the Primary Harm*

Courts ordering restitution continue to accept and rely on the narrative that the circulation of child pornography images, rather than the initial abuse itself, is the chief harm of child pornography. In fact, this narrative is at the core of victims' requests for restitution. As Marsh stated in a newspaper interview:

“[T]his is an ongoing crime, an ongoing harm, that will never end There is nothing that [Amy] can do, or I can do, or the US attorney can do, or anyone in the world can do to stop this crime All she wants is for people to stop looking at her and exploiting her over and over again.”⁹⁹

Concentrating on the “permanent record” of abuse, courts conclude that the possession and sharing of child pornography causes the individual depicted therein to be revictimized on a daily basis, which is even more damaging to her than the initial abuse.

Social science challenges this view. It is undisputable that there is some ongoing emotional harm to individuals depicted in child pornography images, given that their images are being circulated in the public sphere,

Reagan in 1985. The 1986 report contains “no references to research on the effects [of child pornography] on children or society,” relying instead on personal opinions of the committee members. *Id.* at 574–75; *see also* U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY: FINAL REPORT 417–18 (1986) (“None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society”). Researchers challenged the social science data and conclusions reached by the committee almost as soon as the report was made available. In fact, two of the researchers whose work the committee cited throughout its report in support of its conclusions objected that the committee’s conclusions did not follow from the data. Hamilton, *The Efficacy of Severe Child Pornography Sentencing*, *supra* note 12, at 576.

⁹⁸ District Court Judge Jack Weinstein is one exception. *See United States v. C.R.*, 792 F. Supp. 2d 343, 348 (E.D.N.Y. 2011).

⁹⁹ Richey, *supra* note 2, at 1.

where they have no ability to control the dissemination of the images. However, there is a substantial difference between acknowledging some degree of harm from the circulation of those images and concluding that the circulation of those images is more damaging than the actual abuse that led to the creation of the pornography. The harm of possessing child pornography is derivative of the harm associated with the child sex abuse that led to the creation of that pornography.¹⁰⁰ Without the initial abuse, the circulation of pornographic images would not be so damaging to the person depicted in those images.¹⁰¹

A social science approach emphasizes that the best way to address the harm of child pornography is by treating, and ultimately preventing, the initial sexual abuse that is filmed. One legal scholar has concluded, “[T]he principal harm associated with possession of child pornography *is* the child sex abuse involved in the creation of the pornographic images.”¹⁰² Yet courts ordering restitution continue to assume otherwise based on *Ferber’s* assertions.

2. Equating Child Pornography Viewers with Hands-On Child Sex Abusers

Courts ordering restitution in non-contact child pornography cases also embrace the related assumption that child pornography viewers cause as much harm as child sex abusers. By focusing attention and judicial resources on the viewers and traders of child pornography, rather than on the individuals who commit the initial sexual abuse, record it, and then disseminate the recordings, these courts are contributing to the commonly held but statistically unfounded fear that the viewers of child pornography are lurking child sexual predators. This misplaced focus diverts resources and attention from individuals who pose a greater risk of harming children. At the heart of this fear is the belief that child pornography viewers are, in fact, child molesters who use child pornography as a way to whet their appetites for child sex as they wait for the right opportunity to seduce the next child who comes along. Moreover, there is fear that such viewers will use child pornography as a tool in that seduction.

Relying on *Ferber*, the Supreme Court has continued to explicitly embrace this conflation of child pornography viewing and child sexual abuse. The Court stated in *Free Speech Coalition* that “[p]edophiles might use the materials to encourage children to participate in sexual activity. A child who is reluctant to engage in sexual activity with an adult, or to pose

¹⁰⁰ Hessick, *supra* note 12, at 869.

¹⁰¹ The Supreme Court has implicitly recognized this position in the context of virtual child pornography. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249–51 (2002).

¹⁰² Hessick, *supra* note 12, at 867 (emphasis added).

for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children ‘having fun’ participating in such activity.”¹⁰³ The Court went on to suggest that “pedophiles might ‘whet their own sexual appetites’ with the pornographic images, ‘thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children.’”¹⁰⁴

Although the equating of child pornography with the desire to sexually abuse children is pervasive throughout the legal system and the public dialogue, many recent studies have confirmed that the consumption of child pornography in and of itself is not a risk factor for committing hands-on sex offenses.¹⁰⁵ One psychologist noted that “[t]he harm thesis is usually expressed in extremely simplistic terms in which it is seen as common sense that exposure to pornography makes men commit sex crimes.”¹⁰⁶ Yet viewers of child pornography comprise a small percentage of sex offenders,¹⁰⁷ and several reports suggest that people who have an interest in

¹⁰³ *Free Speech Coalition*, 535 U.S. at 241 (citations omitted) (internal quotation marks omitted).

¹⁰⁴ *Id.* at 241 (citations omitted).

¹⁰⁵ David Middleton, *Linkages Between Viewing Indecent Images of Children and Contact Sexual Abuse: Issues from Research*, in RESEARCH FINDINGS ON CHILD ABUSE IMAGES AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 22, 25 (2009); Andrew Bates & Caroline Metcalf, *A Psychometric Comparison of Internet and Non-Internet Sex Offenders from a Community Treatment Sample*, 13 J. SEXUAL AGGRESSION 11, 17 (2007); Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 SEXUAL ABUSE 76, 87–88 (2009); Endrass et al., *supra* note 8, at 43; Andreas Frei et al., *Pedophilia on the Internet—A Study of 33 Convicted Offenders in the Canton of Lucerne*, 135 SWISS MED. WKLY. 488, 488, 493 (2005); Jennifer A. McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders*, 16 J. SEXUAL AGGRESSION 181, 193 (2010); David L. Riegel, Letter to the Editor, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 ARCHIVES OF SEXUAL BEHAV. 321, 322 (2004); Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201, 208 (2005); L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEXUAL ABUSE 449, 450 (2007); Michael C. Seto, *Assessing the Risk Posed by Child Pornography Offenders 2* (Mar. 9, 2009) (paper prepared for G8 Global Symposium, Univ. of North Carolina at Chapel Hill, Apr. 6–7, 2009).

¹⁰⁶ Howitt, *supra* note 97, at 16.

¹⁰⁷ John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 569 (2006); see also Benjamin Apfelberg et al., *A Psychiatric Study of 250 Sex Offenders*, 100 AM. J. PSYCHIATRY 762, 762 (1944) (noting also the pervasiveness of this conflation of pornography viewing with hands-on sex offenses: “This attitude has unfortunately extended to all types of sex offenders, even when little or no injury has been caused to society”); Endrass et al., *supra* note 8, at 43; David Finkelhor, *The Prevention of Childhood Sexual Abuse*, 19 FUTURE CHILD. 169, 171–72 (2009); Hamilton, *The Efficacy of Severe Child Pornography Sentencing*, *supra* note 12, at 580–81.

actual sexual contact with children are not interested in child pornography.¹⁰⁸ Even studies conducted by the Department of Justice reluctantly have acknowledged government and law enforcement's failure to find a connection between those accused of non-contact child pornography offenses and actual child abuse.¹⁰⁹

Instead, one of the primary risk factors for committing a hands-on sex offense is a characteristic shared with some other individuals regularly involved in the criminal justice system: antisocial orientation.¹¹⁰ Individuals with antisocial orientations exhibit several common characteristics, including impulsivity, a history of violating rules, a history of substance abuse, and unemployment.¹¹¹ The other primary risk factor for hands-on abuse is a heightened, intense, and recurrent sexual interest in children, known as "pedophilic interest."¹¹² These two risk factors are independent of one another but, when found in conjunction with each other, are strongly suggestive of the potential for actual child sexual abuse.¹¹³ These two factors are more important determinants of sexual abuse than child pornography even in the relatively rare scenarios when an interest in child pornography can be linked to child molestation.

¹⁰⁸ Howitt, *supra* note 97, at 24; Berl Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. SOC. ISSUES 163, 177 (1973); *see also* Adler, *supra* note 97, at 259 & n.281; McCarthy, *supra* note 105, at 191; Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 137, 151 (2008).

¹⁰⁹ *See, e.g.*, DAVID FINKELHOR & RICHARD ORMROD, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY: PATTERNS FROM NIBRS 6-7 (2004), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf>; WORTLEY & SMALLBONE, *supra* note 8, at 13; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1722-23.

¹¹⁰ ROBERT A. PRENTKY ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH REPORT, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 2-3 (1997); R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 349, 351, 353 (1998); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1158-59 (2005); Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. 275, 277-78, 287 (2000); Stinneford, *supra* note 107, at 571-72; Seto, *supra* note 105.

¹¹¹ PRENTKY ET AL., *supra* note 110, at 3; Stinneford, *supra* note 107, at 571-72; Seto, *supra* note 105, at 3, 7.

¹¹² PRENTKY ET AL., *supra* note 110, at 2; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1715, 1724; Hanson & Bussière, *supra* note 110, at 351; Seto & Eke, *supra* note 105, at 208-09; Stinneford, *supra* note 107, at 571; Seto, *supra* note 105, at 5. *But see* Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1710-14.

¹¹³ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725; Stinneford, *supra* note 107, at 572.

In contrast, most child pornography viewers have little to no prior criminal involvement and low levels of psychopathy.¹¹⁴ Unlike child molesters, child pornography offenders are more empathic, less likely to engage in sexually risky behaviors, and less likely to maintain offense-supportive attitudes and beliefs.¹¹⁵ Child pornography defendants also do not resemble the average criminal defendant. The common consumer of child pornography is white, male, ages 25–50, highly educated, of above-average intelligence, gainfully employed, and often in a relationship.¹¹⁶ The “class of offenders” has included a judge,¹¹⁷ the head law enforcement officer of a federal agency’s regional office,¹¹⁸ military officers,¹¹⁹ a former Belgian diplomat, sheriff’s deputies, executives of major companies, physicians,¹²⁰ lawyers, and law professors.¹²¹

Many child pornography viewers do have tendencies toward compulsion or addictive behaviors, as revealed through an obsession with collecting particular images,¹²² but the motive behind such addictions typically is not a desire to engage in sex with children. Instead, many offenders start viewing child pornography because of curiosity or accidental access,¹²³ as a means to escape into a fantasy world and avoid

¹¹⁴ Seto, *supra* note 105, at 5; *see also* McCarthy, *supra* note 105, at 189.

¹¹⁵ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725–26; Seto, *supra* note 105, at 5.

¹¹⁶ WORTLEY & SMALLBONE, *supra* note 8, at 14; Barry Blundell et al., *Child Pornography and the Internet: Accessibility and Policing*, 56 AUSTL. POLICE J. 59, 63 (2002); Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCHIATRY PSYCHOL. & L. 79, 81 (2002); Endrass et al., *supra* note 8, at 44, 47; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1726. It is unclear what role socioeconomic factors play in the identification of the typical child pornography consumer, as many of the individuals falling into this profile may have better access to technology. ETHEL QUAYLE ET AL., ECPAT INT’L, CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 8 (2008).

¹¹⁷ *See* Monte Morin & Jack Leonard, *O.C. Judge Is Charged with Possessing Child Porn*, L.A. TIMES, Nov. 10, 2001, at B8.

¹¹⁸ Ildelfonso Ortiz, *Agent Arrested: Border Patrol Official Faces Child Pornography Charges*, BROWNSVILLE HERALD, Oct. 23, 2010, at A1.

¹¹⁹ *United States v. Baird*, 580 F. Supp. 2d 889, 893 (D. Neb. 2008); *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996).

¹²⁰ *United States v. Johnson*, 588 F. Supp. 2d 997, 999 (S.D. Iowa 2008).

¹²¹ WORTLEY & SMALLBONE, *supra* note 8, at 14; Kimberly Young, *Profiling Online Sex Offenders, Cyber-Predators, and Pedophiles*, 5 J. BEHAV. PROFILING 2, 15 (2005); Stacy Albin, *Guilty Plea in Pornography Case*, N.Y. TIMES, Apr. 16, 2003, at D5; Elisabeth Franck, *The Professor and the Porn*, N.Y. MAG., June 23, 2003, at 41.

¹²² Taylor et al., *supra* note 8, at 96, 98; Young, *supra* note 121, at 4.

¹²³ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725 (citing Michael Seto et al., *Explanations Given by Child Pornography Offenders for Their Crimes*, 16 J. SEXUAL AGGRESSION 169, 175 (2010)); Riegel, *supra* note 105, at 322.

real life,¹²⁴ as a way to facilitate social relationships,¹²⁵ or as a substitute for contact offending.¹²⁶ Their risk of recidivism is low and their compliance with postconviction release supervision and treatment is higher than average, making their prospects for postconviction rehabilitation high.¹²⁷

Accordingly, social science studies do not support one of the primary justifications for restitution—that child pornography is regularly used by child molesters, including as a way of enticing children into sexual activity.¹²⁸ Although there is still much research to be done on both consumers of child pornography and child sexual abusers, it is increasingly clear that the assumptions manifested in statutes, case law, and the popular imagination are not based in fact.

The law's misplaced focus on the viewers of child pornography, rather than the producers, as a significant source of harm to young women is manifest not just in the restitution context but throughout the criminal justice system.¹²⁹ Comparing the percentage of prosecutions and the length of sentences imposed on individuals accused and convicted of non-contact child pornography offenses in relation to those accused and convicted of sexual abuse of a child is revealing. The mean sentence imposed by federal judges for offenders convicted of possession, receipt, or distribution of

¹²⁴ Transcript of Sentencing Hearing, *Hesketh*, *supra* note 33, at 51; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725 (citing Brigitta Surjadi et al., *Internet Offending: Sexual and Non-Sexual Functions Within a Dutch Sample*, 16 J. SEXUAL AGGRESSION 47, 54–56 (2010)); Howitt, *supra* note 97, at 15–17; Young, *supra* note 121, at 3–6, 8–10.

There is also evidence that child pornography offenders are more likely to engage in fantasy and identify with fictional characters. Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1726 (citing Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 SEXUAL ABUSE 76, 88 (2009)); Sheldon & Howitt, *supra* note 108, at 152. Social scientists have theorized that there is a correlation between intelligence and engaging in fantasy. *See, e.g.*, Kutchinsky, *supra* note 108, at 177; Sheldon & Howitt, *supra* note 108, at 153 (“[I]t might be suggested that lower education level of contact offenders may mean that [sic] do not have the same ability to fantasize as Internet offenders. It is well-known that educational achievement and intelligence correlate.”).

¹²⁵ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725; Taylor et al., *supra* note 8, at 99.

¹²⁶ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1725; Howitt, *supra* note 97, at 18.

¹²⁷ Endrass et al., *supra* note 8, at 48; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1726; Seto, *supra* note 105, at 2–3.

¹²⁸ Ron Langevin & Suzanne Curnoe, *The Use of Pornography During the Commission of Sexual Offenses*, 48 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 572, 581–83 (2004); Riegel, *supra* note 105, at 322.

¹²⁹ *See, e.g.*, Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 42 (2012) (questioning why society’s acceptance of child prostitution is so much greater than its acceptance of child pornography).

child pornography rose from 21 months in 1997 to 92 months in 2008 and to 118 months in 2010.¹³⁰ Meanwhile, the mean federal sentence in 2010 for contact sexual abuse crimes was only 108 months.¹³¹ As such, the average defendant convicted of possessing child pornography will receive a longer sentence than a defendant who engaged in repeated sex with a twelve-year-old girl and a defendant who paid to have a mother hold down her nine-year-old child while the defendant raped her twice a week for two years.¹³² Indeed, the mean sentence for non-contact child pornography offenses was even greater than that for manslaughter, robbery, arson and drug-trafficking offenses.¹³³ Only murder and kidnapping had greater mean sentences in federal court.¹³⁴ Some of this disparity can be traced to a 2003 federal law subjecting those convicted of receipt or distribution of child pornography to a mandatory minimum sentence of five years.¹³⁵ There is no mandatory minimum for a conviction of sexual abuse of a minor.¹³⁶

State laws similarly treat child pornography possessors more severely than those who sexually abuse children.¹³⁷ Thirty states have increased the penalties for possession of child pornography since criminalizing it.¹³⁸ Twenty-eight of those increases have occurred since 2000, and nineteen since 2005.¹³⁹ A defendant in Arizona was sentenced to 200 years imprisonment for the possession of twenty images of child pornography—a ten-year mandatory minimum sentence for each individual image, run consecutively.¹⁴⁰ In protesting the sentence, the defendant argued that under Arizona law, courts had imposed a fifteen-year sentence on a

¹³⁰ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1686.

¹³¹ *Id.*

¹³² Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines 25–29* (Jan. 1, 2009), *available at* www.fd.org/docs/Select-Topics---sentencing/child-porn-july-revision.pdf (citing facts from *United States v. Kane*, 470 F.3d 1277 (8th Cir. 2006)).

¹³³ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1686–87.

¹³⁴ *Id.* at 1687.

¹³⁵ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2004, Pub. L. 108-21, § 103(b)(1)(C)(i), 117 Stat. 650, 653 (codified at 18 U.S.C. § 2252(b)(1) (2006)); *see also* Hessick, *supra* note 12, at 857.

¹³⁶ 18 U.S.C. § 2243 (sexual abuse of a minor or ward statute). *But see* 18 U.S.C. § 2241(c) (aggravated sexual abuse statute) (providing that if minor is under the age of twelve years old, or if force is used and the person is between the ages of twelve and sixteen, and the defendant is more than four years older than the minor, there is a mandatory minimum sentence of thirty years).

¹³⁷ Hessick, *supra* note 12, at 860–62.

¹³⁸ *Id.* at 857 & n.12.

¹³⁹ *Id.* at 858–59.

¹⁴⁰ *Id.* at 862 (citing *State v. Berger*, 134 P.3d 378 (Ariz. 2006) (en banc)).

defendant who molested a six-year-old girl twice, a twenty-two-month sentence on a priest who molested an altar boy, and a one-year sentence on a man who kidnapped and sexually assaulted a fourteen-year-old girl selling candy door-to-door.¹⁴¹ The court rejected the defendant's analogies.¹⁴²

The allocation of resources by federal and state governments also appears far more focused on stopping the possession and distribution of images than detecting the abuse that led to the creation of those images.¹⁴³ In 2005, the most recent year of a study by the Urban Institute, U.S. Attorney's Offices investigated and closed almost three times as many non-production child pornography cases than all other child sexual crimes—including sexual abuse, prostitution, and child sex trafficking—combined.¹⁴⁴ That same year, almost three-quarters of the federal child exploitation cases filed by U.S. Attorneys concerned non-production child pornography offenses.¹⁴⁵ Correspondingly, in 2010, courts sentenced more than five times the number of federal defendants for non-production child pornography offenses than for child sexual abuse offenses.¹⁴⁶

3. Ignoring the Reality of Sexual Abuse Within Families

Concentrating on the presumptive harms of child pornography, both in the restitution context and in the criminal justice system as a whole, has ramifications that extend beyond the incorrect assumption that child pornography viewers are also child sexual abusers. By focusing on individuals who have a relatively small chance of committing hands-on child sexual abuse, law enforcement officials, judges, and legislators neglect the far more common scenario in which children are sexually abused by people they already know. Indeed, the sexual abuse portrayed in the vast majority of child pornography was committed and filmed by the child's father, uncle, family member, or close family friend, i.e., someone within the child's circle of trust.¹⁴⁷ As one social science study confirmed,

¹⁴¹ *Id.* (citing Supplemental Brief for Appellant, *Berger*, 134 P.3d 378 (No. CR-05-0101), 2006 WL 1002320, at *1–2).

¹⁴² *Berger*, 134 P.3d 378 (finding no Eighth Amendment violation, but failing to explicitly address comparative arguments raised in the defense brief).

¹⁴³ This may be because it is far easier to find and arrest people who are merely viewing images they have downloaded onto a computer than it is to find the individuals who are actually sexually abusing children. Law enforcement officials and prosecutors get more bang for their buck by picking off these easy targets than by expending the resources to undertake the more difficult task of locating people who are actually molesting children.

¹⁴⁴ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1692.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ QUAYLE ET AL., *supra* note 116, at 40; Hamilton, *The Child Pornography Crusade*,

“It is the familial and social circumstances of young children that are the primary factors in their victimization.”¹⁴⁸ Eighty-six percent of child sexual abuse victims are abused by someone they already know.¹⁴⁹ More than 96% of child pornography victims already know the person who is filming and producing the images of their sexual abuse.¹⁵⁰

Instead of addressing the complexities of sexual abuse within families, the existing approaches to child pornography perpetuate an illusion of the typical child sex abuser, a “sexual predator” living completely outside of normal society.¹⁵¹ In fact, the use of sexual predator language has become pervasive throughout the legal system in reference to a wide group of individuals.¹⁵² In 1998, Congress passed a law titled the Protection of Children from Sexual Predators Act, which, among other things, increased punishments for all types of child pornography offenses.¹⁵³ Various states and localities also have developed initiatives targeted at this putative population. In Kansas, the Sexually Violent Predator Act allows for the civil commitment of members of “an extremely dangerous group” who have a “mental abnormality or personality disorder” and “are likely to engage in repeat acts of sexual violence.”¹⁵⁴ The California Department of Justice has a Sexual Predator Apprehension Team, and the Riverside County Sheriff’s Department has its own Sexual Predator Internet Decoy Enforcement team.¹⁵⁵

Courts also employ the term sexual predator with regularity, implicitly keeping the focus on strangers rather than family members. One state court found the prosecution’s references to a defendant as a “predatory monster,” “sexual predator,” “child predator,” and “monster” not objectionable

supra note 12, at 1718.

¹⁴⁸ Dean D. Knudsen, *Child Sexual Abuse and Pornography: Is There a Relationship?*, 3 J. FAM. VIOLENCE 253, 263 (1988).

¹⁴⁹ Finkelhor, *supra* note 107, at 172.

¹⁵⁰ QUAYLE ET AL., *supra* note 116, at 40; Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1718.

¹⁵¹ See, e.g., Kenneth V. Lanning, *Acquaintance Child Molesters: A Behavioral Analysis*, in 2 MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 529, 531–33 (Sharon Cooper et al. eds., 2005).

¹⁵² The increased usage of such language appears to correspond to the airing of NBC’s television show, *To Catch a Predator*. *To Catch a Predator* tracked individuals who used the Internet to communicate with people believed to be underage. At the end of the show, the purported youth and a television crew would show up to record the “catching” of the “sex predator.” See *United States v. Courtright*, 632 F.3d 363, 366 n.1 (7th Cir. 2011).

¹⁵³ Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified in scattered sections of 18, 28, and 42 U.S.C.).

¹⁵⁴ KAN. STAT. ANN. § 59-29a01 (2005); see also *id.* § 59-29a01 *et seq.*

¹⁵⁵ See *People v. Hora*, No. E051527, 2011 WL 5326294, at *1 (Cal. Ct. App. Nov. 4, 2011).

because, according to the court, they represented “reasonable deductions from the evidence” in a case in which the defendant sexually abused his children and their friend.¹⁵⁶ Even the Supreme Court has used the term sexual predators in describing the targets of a group of state sex-offender-related statutes.¹⁵⁷

Although in some cases, the use of such terminology may be apt, legislators, law enforcement officials, and courts use the term to describe a broad range of behaviors. They lump all sex-related crimes together, keeping attention on the highly publicized, but rare, instances of child abduction and stranger rape, as the use of “restitution” reveals. In turn, the much more common instances of child sexual abuse, those perpetrated within families, go undetected. As one former FBI agent explained, “[T]he acquaintance molester, by definition, is one of us. . . . We can not easily distinguish him from us or identify him by physical traits.”¹⁵⁸ Thus, there remains a “fundamental barrier” to confronting child sexual abuse: “the inability to connect a person someone knows and cares for with the stereotype of the ‘predator’ or ‘monster’ who abuses children.”¹⁵⁹

When ordering the possessors of child pornography to compensate child sexual abuse victims, courts reinforce the diversion of attention and resources toward the viewers and traders of child pornography, rather than challenging legislators and the public to address the much more common, but messier and more complicated, issues of sexual abuse within families. Amy’s uncle, who abused her, filmed the abuse, and then disseminated it, is easily forgotten once those who have viewed the images of her abuse are ordered to pay her millions of dollars in “restitution” in highly publicized cases. Through their restitution orders, then, legislators and courts inadvertently contribute to the danger and potential harm young people face by reinforcing a predator myth that obscures the reality of most childhood sexual abuse.

B. RESTITUTION’S POTENTIAL TO CREATE HARM

When imposing restitution in non-contact child pornography cases, the unsupported assumptions about child pornography producers, viewers, and

¹⁵⁶ *Bonner v. State*, No. 10-09-00120-CR, 2010 WL 3503858, at *11 (Tex. App. Sept. 8, 2010) (citing *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977)); *Verde v. State*, No. 05-08-00252-CR, 2009 WL 2396843, at *3 (Tex. App. Aug. 6, 2009).

¹⁵⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 457 (2008) (noting that at least twenty-one states and the District of Columbia permit involuntary commitment of what the Court termed “sexual predators”).

¹⁵⁸ Lanning, *supra* note 151, at 532.

¹⁵⁹ STOP IT NOW!, WHAT DO U.S. ADULTS THINK ABOUT CHILD SEXUAL ABUSE?: MEASURES OF KNOWLEDGE AND ATTITUDES AMONG SIX STATES 9 (2010), available at http://www.stopitnow.org/rdd_survey_report.

victims on which courts rely lead to the risk that they are harming victims in other ways as well. Because of the way restitution is imposed in child pornography cases, courts risk further commodifying child pornography victims through their compensatory awards. The current method of imposing criminal restitution also challenges the fundamental underpinnings of the criminal justice system by conflating the reimbursement of proven losses with the awarding of what amount to civil damages in a criminal case, leading the criminal justice system to resemble a state-sponsored system for personal vengeance.

1. *The Harm of Ongoing Commodification*

Restitution awards may cause harm to the individuals depicted in child pornography by compensating young women for their images. Restitution has long been designed to reimburse specific identifiable losses. In the context of the possession and distribution of child pornography, however, the benefits are intangible, the losses vague, and the future injuries speculative. In fact, future injuries may be caused by restitution rather than alleviated by it.

A closer look at the way victims have sought, and judges have ordered, restitution in non-contact child pornography cases makes this clear. Amy has sought future lost wages to the age of 65, mental health treatment to the age of 81, expert witness fees, and attorneys' fees, for a total request of upwards of \$3 million. Vicky has sought a little over \$1 million in each case to cover tuition payments, lost income for delayed entry into the work force, rehabilitation counseling for education and career planning, future lost earnings, future psychological counseling, and attorneys' fees.¹⁶⁰ Yet, with a few exceptions, judges have not ordered that the viewers and traders of child pornography pay the full amount of restitution requested. As indicated previously, most judges are ordering compensation averaging \$1,000 to \$3,000 for a given defendant.

Judges have not articulated how the amount of restitution ordered is calculated to address the unjust benefit received by the particular viewer of child pornography, as restitution traditionally requires. In fact, courts do not conceptualize their awarding of restitution as disgorgement of a profit or benefit. Rather, courts situate restitution in a modern compensation framework. Even operating within this framework, judges fail to articulate a specific harm caused by a particular defendant requiring compensation. One court awarded \$5,000 as a nominal award despite the Government's failure to submit "any evidence whatsoever" regarding the amount of

¹⁶⁰ Corrected Appendix of Appellant Shawn Crawford vol. 2, at 150–51, *United States v. Crawford*, No. 11-5544 (6th Cir. Aug. 23, 2011).

Amy's losses attributable to that defendant, noting at the same time that it had "no doubt" that the award was "less than the actual harm" the defendant had caused.¹⁶¹ Another court awarded \$3,000 each to Amy and Vicky.¹⁶² The court settled on this amount because "an amount less than \$3,000 [is] inconsistent with Congress's findings on the harm to children victims of child pornography," but "is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns."¹⁶³

Courts consistently fail to articulate any "benefit" improperly received by the defendant. In a simple theft or stealing case, there is an object of a particular value that the victim has lost and the defendant has gained, that value can be ascertained to a fair degree of accuracy, and the defendant can be ordered to disgorge the object or the value of the object. But with the act of viewing or sharing images of sexual abuse, the benefit is intangible, resulting in no clearly identifiable monetary amount to be disgorged.

By ordering restitution without articulating the nature of the benefit derived from viewing child pornography, courts appear to be borrowing from the concept of entertainment royalties, where the presumption is that consumers derive pleasure from listening to music or viewing films and, consequently, should pay for the opportunity to experience that pleasure. With traditional royalties, the author of a particular work can seek payment for each time a copy of that work is downloaded, viewed, heard, or distributed, if she has copyrighted or patented it. Likewise, in many states, people have the right of publicity, also known as the right to one's image, and can seek damages if someone uses their images without permission.¹⁶⁴ Restitution in the child pornography context resembles something of a combination of these two concepts. Courts seem to be ordering defendants to pay a child pornography victim a nominal fee every time her image is viewed based on the pleasure they presumably experience from viewing the image.

This royalties approach does more than commodify victims' images; it also commodifies the victims' lost innocence and virginity. Because they rarely point to an identifiable loss when ordering "restitution," courts appear to be attempting to compensate for the sexual acts in which the young women unwillingly participated. In essence, judges are paying young women for each time their image gets viewed or downloaded—

¹⁶¹ United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011).

¹⁶² United States v. Mather, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at *8 (E.D. Cal. Dec. 13, 2010).

¹⁶³ *Id.*

¹⁶⁴ Stephen R. Barnett, "The Right to One's Own Image": *Publicity and Privacy Rights in the United States and Spain*, 47 AM. J. COMP. L. 555, 556, 559 (1999).

symbolically compensating them for each new “loss of innocence.” In so doing, judges appear to be commodifying the sex acts in which the young women participated by placing a monetary value on that lost innocence. Indeed, it is only by subscribing to a theory that “sex is a commodity, and if sex is a commodity, then taking it is theft,”¹⁶⁵ that restitution makes sense in the context of child sexual abuse.

Beyond failing to conform to traditional principles, this approach to restitution carries the risk of signaling that the value and worth of a young woman is tied to her body and the sexual acts in which she participated. By awarding monetary compensation uncorrelated to any specific unlawful gain or loss, courts continue to send the message to the victim in a child abuse case that she is valued for her participation in sexual acts.¹⁶⁶ Survivors of child sexual abuse respond to their experiences in different ways,¹⁶⁷ but the current approach to restitution seems to assume that every young woman portrayed in child pornography can be made whole by being continually paid for her abuse.¹⁶⁸

Many victims appear to resist this commodification by declining to seek compensation through restitution. Although there are hundreds of thousands of child pornography images in circulation and, in accordance with VAWA, the U.S. Department of Justice notifies hundreds of children portrayed in those images every time pornography depicting them is located, only a very few of the individuals depicted—five, to this author’s knowledge—have come forward to request monetary compensation for their experiences. There are undoubtedly numerous reasons for this decision to forego compensation, but one reason may be that many of these individuals have come to terms with their abuse and are attempting to move on from a world that values them for the sexual acts they unwittingly committed. Many highly functional individuals were abused as children, yet one would never know it from the way they interact in the world.¹⁶⁹

¹⁶⁵ Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 603 (1997).

¹⁶⁶ As Amy noted in a recent interview regarding the more than \$1 million she has already received in restitution, “I didn’t work for this money. . . . But I earned it, kind of.” Bazelon, *supra* note 5, at 47.

¹⁶⁷ Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1602–03 (2000); *Understanding Child Sexual Abuse: Education, Prevention, and Recovery*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pubs/info/brochures/sex-abuse.aspx> (last visited Mar. 13, 2013).

¹⁶⁸ RADIN, *supra* note 28, at 184–205 (discussing conflicting views on the role of compensation as a remedy for personal injuries and other injuries to personhood).

¹⁶⁹ In fact, one 1998 study published by the American Psychological Association found that adults who were molested as children did not display significant emotional differences from adults who had not been abused. See Adler, *supra* note 97, at 228 & n.107; Bruce

Others are indeed so affected by the abuse that they are never fully able to recover. There is not necessarily a norm when it comes to survivor experiences, but the few young women seeking and receiving compensation through criminal restitution may not be representative of survivors as a whole.

Nevertheless, these women, whose experiences of recovery seem to be at one extreme, are defining the current judicial approach to restitution. In fact, the current system seems to be weighted toward individuals who are able to “prove” how much pain they are continually experiencing. The young women seeking restitution must satisfy the court that they have experienced, and are continuing to experience, sufficient pain to justify payment of a lifetime of therapy and lost wages. Only if the women can show they are deeply damaged is restitution granted.

Perversely, such damage may be caused in part by the current state of the law. For example, according to Amy, the main source of her ongoing harm is the fact that she is notified every time someone is arrested and found to be in possession of pornography depicting her. Amy noted in her Victim Impact Statement:

We now have in our house boxes full of victim notifications from cases all around the country involving pornographic images of me. Practically every time I’ve went to get the mail, there have been two or three of these notifications. They are constant reminders of the horrors of my childhood.¹⁷⁰

Dr. Joyanna Silberg, the psychologist who analyzed Amy, testified at a sentencing hearing that after her initial treatment:

[Amy] “function[ed] pretty well normally” until she learned that her image was being traded on the internet, after which she experienced a fear “of being at parties, fear of being in public gatherings,” and had difficulty coping “with her life because of her sense of pervasive helplessness” about the fact that people were viewing her image.¹⁷¹

The other person involved in many restitution requests, Vicky, also links her post-traumatic stress disorder, dissociative disorder, and depression to the notices she began receiving in 2006.¹⁷² Rather than

Rind et al., *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 *PSYCHOL. BULL.* 22, 46 (1998). Rather, family environment played a much bigger role in explaining adjustment problems that developed. Rind et al., *supra*, at 44.

¹⁷⁰ *United States v. Kennedy*, 643 F.3d 1251, 1255 (9th Cir. 2011).

¹⁷¹ *United States v. Aumais*, 656 F.3d 147, 150 (2d Cir. 2011).

¹⁷² Her evaluating psychologist asserts in court filings that Vicky has been “substantially re-traumatized, and further injured by the knowledge of the continuing distribution and viewing of the images of her physical abuse.” Petitioner Vicky’s Brief, *supra* note 53, at 6. Vicky attributes the recent deterioration of her mental and emotional health to her “realization of the widespread proliferation of the images.” *Id.* As a result, Vicky asked

helping with the healing process of girls depicted in child pornography, then, the bombardment of notices may play into their fears that every man around them watches child pornography and might have seen their images.¹⁷³

These women may be the least equipped to handle restitution's ongoing commodification.¹⁷⁴ Money is not going to make the young women depicted in child pornography emotionally whole or restore what was lost. Yet by notifying child pornography victims of all known uses of their images and then ordering compensation, legislators and courts are reinforcing the message that a young woman's worth is in her body and is linked to the sexual acts in which she participates. Given that most of the young women who are seeking compensation are doing so precisely because they have not yet come to terms with their traumatic experiences, it is fair to assume they are the ones who may experience the most damage from this ongoing commodification. Rather than helping child abuse victims recover from their trauma, courts and legislators are inadvertently anchoring them in their abuse experience by keeping their negative sexual experiences constantly at the forefront.¹⁷⁵ Notification and restitution reaffirm the damaging messages the young women learned during their abuse.

that the government notifications go directly to her lawyer. Baker, *supra* note 7, at A23. "We don't receive the notices anymore," her stepfather wrote in his own victim impact statement. *Id.* "The pain and gut-wrenching reminder of receiving enough notices to overflow a 55-gallon drum is more than my family can take." *Id.*

¹⁷³ In fact, both Amy and Vicky have asserted as much in their court filings.

¹⁷⁴ Prior to receiving income from restitution payments, according to journalist Emily Bazelon, Amy "had never been able to earn a steady paycheck, and the money [a \$130,000 check, followed by a \$1.2 million check] was a sudden windfall." Bazelon, *supra* note 5, at 45. Amy spent the money on a house, a new car, her friends and family, and "shopping sprees at the mall." *Id.* at 45. Less is known about Vicky, but she is in her early twenties, has had trouble staying in school, and has struggled with what one court termed "severe behavioral problems." *United States v. McDaniel*, 631 F.3d 1204, 1207 (11th Cir. 2011); *see also* Bazelon, *supra* note 5, at 28, 45–46. Bazelon believes Vicky's "relationship to her restitution money is different [than Amy's], partly because she has received smaller checks." Bazelon, *supra* note 5, at 45–46. Vicky has used the money primarily to pay for her education. *Id.* at 46.

¹⁷⁵ *See, e.g.,* Adler, *supra* note 97, at 265 ("Even when a child is pictured as a sexual victim rather than a sexual siren, the child is still pictured as sexual. Child pornography law becomes a vast realm of discourse in which the image of the child as sexual is not only preserved but multiplied."); Robert Elias, *The Law of Personhood: A Review of Markus Dirk Dubber's Victims in the War on Crime: The Use and Abuse of Victims' Rights*, 52 *BUFF. L. REV.* 225, 244 (2004) (book review) ("The victims' movement thereby helps preserve victimhood, thus undermining the victim's personhood.").

2. Criminal Restitution as an End Run Around the Tort System

Beyond commodifying the young women depicted in child pornography, ordering restitution in the child pornography context allows the criminal justice system to become a vehicle for personal vengeance and retribution. Rather than disgorging financial gains, restitution is being used to compensate child pornography victims for emotional, psychological, and hedonic losses in a manner that closely resembles civil damages. This shifting of civil damages into the criminal system may appear to be a sensitive way to respond to the needs of child pornography victims,¹⁷⁶ but shortcutting the civil system carries systemic consequences that outweigh any benefits to individual victims.

When ordering the viewers of child pornography to pay restitution, courts commonly make analogies to civil causes of action, even though victims of child pornography typically could not prevail in such actions. Courts, for example, have relied on a privacy theory in support of their compensation orders, claiming that the distribution of child pornography is an ongoing violation of the privacy interests of the young women. Yet civil privacy law does not provide a basis for such a remedy.¹⁷⁷ Rather, the privacy tort of public disclosure of private facts requires publicity and the “mass communication” of private, non-newsworthy facts that are highly offensive to a reasonable person.¹⁷⁸ Viewers of child pornography have not typically “made public” the images that they view.¹⁷⁹ More recently, courts

¹⁷⁶ Marsh represented Amy in civil cases seeking compensation from non-contact child pornography cases prior to seeking restitution from Hesketh in the criminal context. Kates, *supra* note 29, at A9. This suggests that, at least for Amy, civil lawsuits were not overly onerous. Several courts have positively noted the grafting on of a civil damages process to criminal sentencing. See, e.g., *United States v. Monzel*, 641 F.3d 528, 535 n.5 (D.C. Cir. 2011); *United States v. Bach*, 172 F.3d 520, 522–23 (7th Cir. 1999).

¹⁷⁷ Most defendants accused of possession, receipt, or distribution of child pornography receive or share the images in a manner that does not constitute a violation of privacy under the tort laws in force in most states. Publicity usually means:

[T]he matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. . . .

[T]hus it is not an invasion of the right of privacy . . . to communicate a fact concerning [a person's] private life to a single person or even to a small group of persons.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

¹⁷⁸ RESTATEMENT (SECOND) OF TORTS § 652D; Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 366 (2011). Likewise, the tort of portraying someone in a false light also requires publicity. See RESTATEMENT (SECOND) OF TORTS § 652E.

¹⁷⁹ Most states have recognized privacy torts, and “the overwhelming majority of courts” have “adopted wholesale” the language outlining these torts from the Restatement and Professor William Prosser’s seminal *Handbook on the Law of Torts*. Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1906 (2010). Using their definition of “publicity,” it is undisputable that whoever initially posted

have made analogies to defamation¹⁸⁰ but it, too, is generally unavailable as a civil remedy. Defamation is the act of harming the reputation of another by making a *false* statement¹⁸¹ to a third party,¹⁸² but child pornography

the images of Amy and Vicky and any of the other girls and boys depicted in child pornography images on the Internet violated their “right to privacy,” as indicated by the Court in *Ferber*. It is equally undisputable that the defendants convicted solely of possessing or receiving child pornography have done nothing to make those images public. As for those individuals found to have traded or shared—“distributed”—the images already posted on the Internet, their liability depends on the manner of the dissemination and the audience it reached. Given that most individuals who are arrested and convicted for distribution of child pornography are either sending an email to a few individual people with images attached or communicating with a few specific individuals in an Internet chat room, Burke et al., *supra* note 116, at 61, it is likely that few of them would be considered to have “giv[en] publicity to” the images contained in the child pornography, as required for a breach of privacy.

The increasing number of defendants who are clicking a mouse once, enabling their computer to become part of a file-sharing network like Limewire or Gnutella, may have a harder battle in countering the publicity prong given that their computers are essentially opened up for other computers to “see” and access. However, a file-sharing defendant still might have a solid argument that at this point, the images of Amy and Vicky are already “matters of public record.” Because these images have been circulating on the World Wide Web for thirteen years now and have been found in the possession of thousands of people, what once was private has long since ceased to be so. *See, e.g., Doe v. Peterson*, 784 F. Supp. 2d 831, 841–42 (E.D. Mich. 2011); Richards & Solove, *supra*, at 1920 (citing DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 162–70 (2007), and Gill v. Hearst Publ’g Co., 253 P.2d 441 (Cal. 1953)). As Amy herself acknowledges in her victim impact statement, “My abuse is a public fact.”

¹⁸⁰ In *Ashcroft v. Free Speech Coalition*, the Court abandoned the privacy argument in favor of a new theory: the “continued circulation [of this permanent record of a child’s abuse] itself would harm the child who had participated” because, “[l]ike a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.” 535 U.S. 234, 249 (2002). Although the Court suggested it was relying on *Ferber* for its theory, nothing in the referenced footnote alludes to a defamation theory.

¹⁸¹ Although some might argue that a defamation action could be brought for false portrayals made in child pornography, such as a child acting as though she is enjoying the sexual acts when, in fact, she is not, there is little precedent to support such an argument. The law governing defamation and invasion of privacy is often confused, however, *see* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1134 (7th Cir. 1985); *Braun v. Flynt*, 726 F.2d 245, 250–52 (5th Cir. 1984), *cert. denied sub nom. Chic Magazine, Inc. v. Braun*, 469 U.S. 883 (1984); RESTATEMENT (SECOND) OF TORTS § 652E cmts. b, e, and a strong argument can be made that the depictions of youth in child pornography place them in a false light, an element of the tort of invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652E. *But cf. Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1006–07 (5th Cir. 1986) (holding that publication of nude photographs of minors did not constitute invasion of privacy as portrayal in false light). However, the invasion of privacy tort of placing someone in a false light still requires publicity, RESTATEMENT (SECOND) OF TORTS § 652E & Reporter’s Note, subjecting such an action to a similar weakness as other invasion of privacy torts.

¹⁸² RESTATEMENT (SECOND) OF TORTS §§ 558, 577. Most states follow the single

generally does not contain false statements or information. Rather, it is a sad but true documentation of extraordinarily painful and real events.

In fact, the only civil remedy available to most child pornography victims is a federal civil provision that was created precisely for such victims.¹⁸³ Masha's Law, which many judges use as a starting point for calculating criminal restitution in child pornography cases, was created with the intention of allowing victims to recover damages from individuals who commit federal child sex offenses, including non-contact child pornography offenses. Masha's Law provides that if, as a minor, someone received a "personal injury" as a result of a federal child sex offense, that victim can sue in a civil action to recover actual damages and the cost of the lawsuit, including "reasonable" attorneys' fees, with the minimum amount of recovery set at \$150,000.¹⁸⁴ Yet victims do not seem to be using Masha's Law or any other civil provision to pursue civil remedies.¹⁸⁵

publication rule set forth in Restatement § 577A(3), which states, "Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication." Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639, 642 (2003) (quoting RESTATEMENT (SECOND) OF TORTS § 577A(3)).

¹⁸³ See 18 U.S.C. § 2255 (2006).

¹⁸⁴ *Id.* It is worth noting that Masha's Law assumes factual scenarios parallel to those experienced by Amy, Vicky, and other victims of child pornography and child sex offenses. Yet Congress perceived the harm in these and other sexual abuse cases as being compensable in the hundreds of thousands of dollars, not in the millions. It is hard to imagine that Congress would set a statutory recovery amount upward of \$1 million for every sexual abuse case. In non-contact child pornography cases, civil damage awards of \$1 to \$3.3 million dollars would seem rather disproportionate to the identifiable actual damages proximately incurred as a result of the actions of viewers and traders.

By way of comparison, the Supreme Court has found that in order to be constitutional, civil punitive damage awards must be proportional to the actual losses sustained by a plaintiff. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (declining to impose a bright-line ratio that a punitive damages award cannot exceed, but noting that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581–82 (1996) (suggesting that the relevant ratio between punitive damages and actual damages should not exceed more than 10 to 1); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991) (noting that a punitive damages award of more than four times the amount of compensatory damages might be close to the line of unconstitutionality).

Likewise, even in the context of defamation suits, which involve harms that arguably are more similar to those suffered by the victims in possession and distribution of child pornography cases, courts have held punitive damages must be proportional to actual damages. See, e.g., *In re Perry*, 423 B.R. 215, 277 (Bankr. S.D. Tex. 2010) (stating that "exemplary damages must be reasonably proportioned to actual damages in order to be recovered").

¹⁸⁵ *But cf.* *Doe v. Boland*, 698 F.3d 877, 885 (6th Cir. 2012) (finding that defense lawyer who placed photos of minors' heads on adult pornographic images created child pornography, allowing parents of the minors to sue the attorney under Masha's Law).

Instead, they appear to be relying on criminal restitution as an easier way to obtain similar relief.

Consistent with the notion that a victim's losses must be proven up front, Masha's Law only permits victims to claim actual damages, not nominal damages, damages for pain and suffering, or hedonic damages. The statute also includes a six-year statute of limitations. Thus, victims like Amy and Vicky not only would be prevented from recovering anything beyond the reimbursement of actual losses, but also would be barred from recovery by the passage of time.

A search of federal case law reveals few published federal cases in which a non-contact child pornography victim has pursued a lawsuit under this statutory provision.¹⁸⁶ Although it is possible that the absence of such cases suggests they were settled out of court, it seems equally likely that victims are not bringing such suits, for several reasons. As an initial matter, the statute provides for a fairly limited avenue of recovery, both in the relatively short statute of limitations and the narrow scope of damages. When coupled with the fact that victims are currently receiving far greater compensation by seeking restitution through criminal cases than they would under Masha's Law, the civil statute does not provide any motivation to seek compensation through it. Indeed, given the current use of restitution as a mechanism to obtain broad compensation for losses that amount to pain and suffering and loss of enjoyment of life, there is little reason for victims to rely on civil causes of action to obtain the relief they are seeking.

Permitting what amounts to a civil claim to be made within the boundaries of a criminal case has some attraction.¹⁸⁷ First, combining the

¹⁸⁶ It appears that several lawsuits were brought under a precursor to Masha's Law, the Child Abuse Victims' Rights Act of 1986, *see* Marsh, *supra* note 11, at 474–87, but this author knows of only one case brought under either law addressing the non-contact child pornography context addressed here, which appears to have settled. *Id.* at 485–87. A search of PACER and the national federal electronic case filing system was unavailing. *But see* Boland, 698 F.3d at 880.

¹⁸⁷ The advantages and disadvantages of the increasingly blurry distinction between civil and criminal law has been discussed at length. *See, e.g.,* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) [hereinafter Coffee, *Paradigms Lost*]; Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079 (1989); Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557 (2008); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996); Jennifer Wriggins,

two is more efficient; in the words of Judge Richard Posner, it is “a welcome streamlining of the cumbersome processes of our law.”¹⁸⁸ Rather than utilizing court resources for both a criminal prosecution and a civil suit, this “procedural innovation”¹⁸⁹ is a more efficient use of the court system.¹⁹⁰ Second, and relatedly, using a criminal process to attain civil remedies saves victims from the harms of multiple court proceedings. Victims need participate in only one proceeding, the criminal prosecution, minimizing the potential trauma of reliving abuse experiences repeatedly throughout several court cases.

Yet despite these appeals, the conflation of criminal and civil remedies also carries significant, negative ramifications for the criminal justice system as a whole. Restitution and civil damages have been designed to achieve fundamentally different purposes.¹⁹¹ Restitution was designed to disgorge unlawful benefits; damages were designed to compensate tangible and intangible losses. Restitution and damages are two sides of the same coin, but they serve distinct, independent goals. As currently employed, however, restitution is used to compensate highly emotional losses. Allowing damages to become interchangeable with restitution encourages restitution to become a vehicle for moral retribution rather than reparation.

As indicated previously, restitution’s traditional purpose is to disgorge ill-gotten gains solely in the context of monetary value; it is an equitable mechanism “concerned only with profitable wrongs.”¹⁹² In contrast, although some damages in civil cases operate as the converse to traditional restitution, reimbursing specific and tangible economic losses, most categories of damages have gone further, compensating a broader range of harms. Courts in civil cases have long permitted the awarding of indeterminate damages, which are not susceptible to pecuniary measurement; nominal damages, which “are designed to vindicate legal

Domestic Violence Torts, 75 S. CAL. L. REV. 121 (2001); Grant R. Mainland, Note, *A Civil Jury in Criminal Sentencing: Blakely, Financial Penalties, and the Public Rights Exception to the Seventh Amendment*, 106 COLUM. L. REV. 1330 (2006); Note, *supra* note 14.

¹⁸⁸ *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999).

¹⁸⁹ *Id.*

¹⁹⁰ Whether this perception of “efficiency” is accurate is not entirely clear. When restitution was imposed historically, the amount of loss was relatively clear or easily ascertainable and could be quickly determined by a judge at sentencing. Now, however, specific detailed judgments have to be made about the quantity of harm attributable to a particular defendant in scenarios where the mechanism for determining harm is not entirely clear. The resulting hearings become protracted events, typically requiring numerous experts and fact witnesses and resembling trials. There is a strong argument that rather than increasing efficiency, this system actually slows down the efficient administration of justice.

¹⁹¹ *United States v. Barnette*, 10 F.3d 1553, 1556 (11th Cir. 1994).

¹⁹² RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, ch. 5, intro. note (2011).

rights ‘without proof of actual injury’¹⁹³; pain and suffering damages, which compensate for “physical discomfort, and the emotional response to the sensation of pain caused by the injury itself”; mental anguish damages, which compensate for “shock, fright, emotional upset, and/or humiliation”; and hedonic damages to compensate for “limitations on the injured person’s ability to participate in and derive pleasure from the normal activities of daily life, or the individual’s inability to pursue his talents, recreational interests, hobbies, or avocations.”¹⁹⁴ Civil damages, therefore, have always gone beyond restoration of financial losses to achieve multiple forms of vindication.

Criminal law has distanced itself from such forms of personal vindication and vengeance. Unlike the tort system, which aims to address personal wrongs, the criminal justice system is aimed at punishing and deterring conduct deemed morally threatening to society as a whole.¹⁹⁵ Allowing personal vindication to be a goal of restitution undermines this distinction, positioning the criminal justice system as a tool for personal retribution.¹⁹⁶ Identifying that danger, one commentator observed:

The concept of justice as retribution is simply too costly to allow it to be a prevalent response. We encounter injustices daily, in our homes, our places of work, and in the affairs of nations. We can ill afford to respond to the grievances, large and small, in ways that are likely to prolong and escalate conflict, perpetuate cycles of violence. . . . Limiting justice to retribution turns interpersonal disputes into tit-for-tat feuds and border skirmishes into full-fledged wars.¹⁹⁷

And until recently, criminal restitution had indeed managed to maintain its restorative character while staying away from the realm of vengeance and retribution.¹⁹⁸

¹⁹³ 25 C.J.S. Damages § 14 (2011); *see also* Doe v. Chao, 306 F.3d 170, 181 (4th Cir. 2002) (citing *Carey v. Phipus*, 435 U.S. 247, 266 (1978)).

¹⁹⁴ Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748 (2007).

¹⁹⁵ *See, e.g.*, Coffee, *Paradigms Lost*, *supra* note 187, at 1878; Mann, *supra* note 187, at 1799; Robinson, *supra* note 187, at 205–07.

¹⁹⁶ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 42, 51 (2011) (stating that a restitutionary recovery should not have a punitive effect); *id.* § 51 cmt. k (stating that “disgorgement of wrongful gain is not a punitive remedy”); Rendleman, *supra* note 25, at 998–1005.

¹⁹⁷ Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, in RESTORATIVE JUSTICE ON TRIAL, *supra* note 13, at 551, 556.

¹⁹⁸ Supreme Court precedent offers conflicting perspectives as to whether restitution should be viewed as primarily a restorative or punitive device. *Compare* Dolan v. United States, 130 S. Ct. 2533, 2539–40 (2010) (“[T]he statute [18 U.S.C. § 3664] seeks primarily to assure that victims of a crime receive full restitution.”), *and* Hughey v. United States, 495 U.S. 411, 415–16 (1990) (highlighting VWPA 18 U.S.C. § 3579’s goal of “restoring someone to a position he occupied before a particular event”), *with* Pasquantino v. United

In the context of morally and emotionally laden child pornography cases, however, restitution has become inappropriately intertwined with retribution, moral vindication, and revenge. If, like civil damages, restitution is permitted to encompass emotional, psychological, and hedonic losses, as victims' lawyers seek and many courts have allowed, the resulting restitution ceases to be a mechanism aimed at financially restoring child pornography victims. Using restitution to achieve civil damages more easily punishes the defendant for the fact that child pornography continues to circulate against the young woman's wishes. Restitution therefore achieves retribution and punishment, transforming criminal law into a tool of personal vengeance.

Courts ordering victim compensation reinforce restitution's punitive aspects by engaging in what may be an unconscious redistribution of wealth. Such redistribution is correlated to race and class, although in a very different way than usual in the criminal justice system. Unlike the average criminal defendant¹⁹⁹ and the average child sex abuser,²⁰⁰ non-contact child pornography defendants tend to be educated and employed white men of above-average intelligence with some financial assets. Hesketh, for example, was a British national and an executive at a major drug corporation.²⁰¹ Part of Marsh's admitted motivation for seeking

States, 544 U.S. 349, 365 (2005) (stating that the purpose of restitution is to "mete out appropriate criminal punishment"), and *Kelly v. Robinson*, 479 U.S. 36, 58 (1986) (stating that restitution orders are imposed "for the benefit of the State," specifically the state's interests in rehabilitation and punishment).

Federal appellate courts also reflect this inconsistency. Compare *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) (restitution is criminal penalty), *United States v. Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006), *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000) (restitution part of criminal sentence), *United States v. Siegel*, 153 F.3d 1256, 1259–61 (11th Cir. 1998) (restitution part of criminal sentence), *United States v. Ramilo*, 986 F.2d 333, 336 (9th Cir. 1993) (restitution part of criminal sentence), *United States v. Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988) (restitution is criminal penalty), *United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987) (same), and *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987) (restitution fundamentally penal in nature), with *United States v. Serawop*, 505 F.3d 1112, 1122–23 (10th Cir. 2007) (restitution not punishment), *United States v. Carruth*, 418 F.3d 900, 903 (8th Cir. 2005) (restitution designed to make victims whole, not to punish), and *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (restitution not punishment).

¹⁹⁹ Researchers estimate that 80%–90% of defendants are indigent. *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Robert C. "Bobby" Scott, Chairman of the Subcomm. on Crime, Terrorism, & Homeland Sec.).

²⁰⁰ See, e.g., Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1717–22.

²⁰¹ Prior to his arrest, Hesketh was vice president and general patent advisor for the international drug company Pfizer. Defendant Alan Hesketh's Memorandum in Aid of Sentencing, *United States v. Hesketh*, No. 3:08-cr-165 (WWE) (D. Conn. Oct. 13, 2008).

criminal restitution from Hesketh was his known assets.²⁰² Because child pornography viewers generally have deeper pockets than most offenders, courts may view restitution as a way of equitably balancing the scales of justice: restitution punishes the offender for engaging in wrongful pleasure and compensates the victim for her abuse, even if it was not at the hands of the defendant. As one scholar noted, “[W]e punish harm not only in order to express something to the offender and about the offender, but also to express something to the victim and about the victim to others.”²⁰³ Thus, this expansion of restitution may be a method of trying to show young women the criminal justice system is helping restore the balance between the offender and the crime victim.

Because restitution is being interpreted most broadly in cases involving child pornography viewers, it appears that economically advantaged white men are bearing the brunt of restitution’s increasingly expanded scope in a way that is not doctrinally grounded. Although this may be a facially appealing turn of events for those who are wary of seeing poor men of color targeted by the criminal justice system,²⁰⁴ race and class should not play a role in the meting out of justice, regardless of who the defendant is. Moreover, the beneficiaries of the restitution revolution are primarily young white women,²⁰⁵ even though the majority of all crime victims come from communities of color.²⁰⁶ Given that violence against

²⁰² Transcript of Restitution Hearing, *Hesketh*, *supra* note 6, at 19; Kates, *supra* note 29, at A9. As Marsh told a reporter, “[M]ost of his assets were overseas. We knew a civil case would take two to three years, so by the time the court would levy any sort of judgment on him, his assets would be out of our reach.” Kates, *supra* note 29, at A9.

²⁰³ Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 733 (2008).

²⁰⁴ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

²⁰⁵ The majority of young people depicted in child pornography images are white, westernized females between the ages of eight and twelve. Ethel Quayle, *Abuse Images of Children: Identifying Gaps in Our Knowledge* 13 (April 2009) (paper prepared for G8 Symposium, Univ. of North Carolina at Chapel Hill, Apr. 6–7, 2009). Asian children were a distant second, and there were very few images of African, African-American, Latino, or biracial children. Taylor et al., *supra* note 8, at 96; Quayle, *supra*, at 13–14.

²⁰⁶ See, e.g., JENNIFER L. TRUMAN & MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2009*, at 4–5 (2010) (revealing that black males are victimized at higher rates than whites and other races, and bi- and multiracial individuals have the highest victimization rates); Maureen Outlaw et al., *Repeat and Multiple Victimizations: The Role of Individual and Contextual Factors*, 17 VIOLENCE & VICTIMS 187, 189 (2002); Scott Duke Harris, *In Search of Elusive Justice*, L.A. TIMES, Oct. 24, 2004, at 18; Sara B. Miller, *Shootings Shake a Community, and Fear Becomes an Accomplice*, CHRISTIAN SCI. MONITOR, Nov. 30, 2004, at 1 (confirming that the majority of crime victims come from the same communities as perpetrators). A woman’s chances of being raped are greater if she is a woman of color or

people of color remains regularly marginalized,²⁰⁷ it is unlikely that any perceived advantages of the restitution revolution will be extended beyond the context of compensating young “innocent” white girls. Instead, the new hybrid civil–criminal system of restitution essentially requires middle- and upper-class white child pornography viewers to disgorge intangible benefits by paying young white girls for equally intangible losses.

3. Restitution and Deterrence

Beyond transforming the criminal law into a tool of personal vindication and vengeance, orders of restitution divert the criminal law from one of its original and primary purposes: the deterrence of child sexual abuse, the necessary precursor to child pornography. Compensating victims through restitution is an easy method of allowing legislators and judges to feel as though they are doing something useful for the young women who have suffered abuse: it is a remedy for which victims’ rights advocates have advocated; it produces a tangible, visible benefit; and it provides an additional punishment against the general class of “bad actors” who have some connection to child pornography. Yet by suggesting that the viewers of child pornography can make victims “whole,” judges and legislators advocating compensation through restitution shift the focus away from the perpetrators of the underlying harm to those who can most easily provide compensation for that harm. The criminal justice system therefore becomes an efficient purveyor of individual damages but does relatively little to deter the child sexual abuse depicted in child pornography.

Courts commonly assert that restitution serves as deterrence by eliminating the market for child pornography.²⁰⁸ Although it is too soon to say whether restitution deters, removing individual child pornography viewers from the community through the imposition of increasingly harsh punishments has not led to the elimination or even diminishment of the child pornography market. Studies have shown that enforcement efforts aimed at arresting individuals who access but do not manufacture pornography only target a “small fraction” of actual offenders.²⁰⁹ Despite the ever-increasing punishments for child pornography offenses, there is

lives in a large city. Kim Lane Scheppelle & Pauline B. Bart, *Through Women’s Eyes: Defining Danger in the Wake of Sexual Assault*, 39 J. SOC. ISSUES 63, 65 (1983).

²⁰⁷ Henderson, *supra* note 15, at 585.

²⁰⁸ See *supra* Part II.A.

²⁰⁹ Daniel P. Mears et al., *Sex Crimes, Children, and Pornography: Public Views and Public Policy*, 54 CRIME & DELINQ. 532, 536 (2008); cf. WORTLEY & SMALLBONE, *supra* note 8, at 10 (discussing increasingly sophisticated measures child pornography distributors are taking in order to elude detection).

“little or no evidence that this [child-pornography-centered] approach has yielded the expected deterrence value or has succeeded in protecting children.”²¹⁰

Punitive approaches, such as the imposition of restitution, remain unlikely to have much impact, given that they do not get at the underlying sexual abuse that leads to the creation of the pornography.²¹¹ Intrafamily sexual abuse occurs without regard to the market.²¹² If deterrence is the goal, child sexual abuse, rather than child pornography, should be the focus of law enforcement efforts, as it is the primary source of harm to the young women involved. Restitution provides individual damages but not systemic deterrence.

III. TAILORING REMEDIES TO HARM

The theories of harm attributed to child pornography by the courts and public at large remain rooted in faulty assumptions. By misidentifying the harms, courts have misidentified the remedies that will best alleviate, or at least lessen the impact of, the actual harms. The law’s focus should be on trying to eliminate instances of child sexual abuse, given that it is the primary source of harm and a necessary precursor to the production of child pornography. Advocating the elimination of mandatory restitution, Part III argues that restitution should only rarely play a role in child pornography cases because it detracts from identifying and deterring the more pressing harms of child sexual abuse. Instead, Part III.A suggests that restitution in child sexual abuse cases be imposed based on an approach grounded in a theory of unjust enrichment. This Subpart provides concrete suggestions courts might consider in determining whether restitution is appropriate in a particular case and, if so, how much to impose. This framework for restitution would eliminate, or at least lessen, the harms identified in Part II and better address the underlying harms of sexual abuse. Part III.B then

²¹⁰ Hamilton, *The Child Pornography Crusade*, *supra* note 12, at 1726; *see also* Finkelhor, *supra* note 107, at 169–77 (noting that, generally, offenders are deterred more by an increase in the risk of getting caught than by an increase in the severity of likely punishment).

²¹¹ Hamilton, *The Efficacy of Severe Child Pornography Sentencing*, *supra* note 12, at 571; *cf.* *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1103 (N.D. Iowa 2009). In fact, Professor Amy Adler argues that the “dramatic expansion of child pornography law may have unwittingly heightened pedophilic desire,” as the “growth of child pornography law has opened up a whole arena for the elaborate exploration of children as sexual creatures.” Adler, *supra* note 97, at 212, 213.

²¹² Many child pornography producers create the images for their own pleasure and not for profit or distribution, meaning that third-party demand does not typically affect the rate of production. *See, e.g.*, Tess Lopez et al., *Trends and Practice Tips for Representing Child Pornography Offenders at Sentencing*, 27 CRIM. JUSTICE 29, 31–32 (2012).

proposes reshaping the current law so that it targets those individuals who are more likely to abuse children. In support of this approach, this Subpart highlights potential changes to statutes and sentencing guidelines that might help achieve the goal of deterring child sexual abuse and, consequently, child pornography.

A. RETHINKING RESTITUTION

In light of the potential harms from broadly compensating young women for the sexual acts they unwillingly committed, restitution is only appropriate in cases where a defendant has unjustly received a quantifiable financial benefit from his actions. Under this approach, wrongful pleasure is not a sufficient “benefit” to justify the disgorgement of some “reasonable” amount of money. Only when specifically quantified benefits and harms are identified should the defendant be required to disgorge the profits and pay restitution to the victim. If restitution can be applied in a manner consistent with its doctrinal roots, many of the issues arising from the recent approach to restitution—the misplaced focus on child pornography instead of sexual abuse, the potential commodification of young women, and the conflation of restitution and civil damages—could be eliminated. This Subpart proposes several changes to the current restitution framework aimed at empowering victims in a more substantive way.

1. *Rejecting the Restitution Revolution*

This Article advocates the elimination of mandatory restitution and the end of criminal restitution as a method of compensating noneconomic harms. In order to avoid the concerns raised by the current method of compensating victims, courts should use criminal restitution only to force the disgorgement of a defendant’s unlawful economic gain, not as a mechanism for ordering damages for difficult-to-quantify injuries. Likewise, restitution also should not require the payment of an ungrounded monetary penalty for the illicit pleasure a defendant received while viewing a child pornography image. Only by applying restitution in a manner that requires disgorgement of actual economic gain can courts and legislators eliminate the potential for restitution to commodify victims and secure some assurance that criminal law will not become enmeshed in the meting out of personal vengeance.

To this end, this Subpart suggests a framework courts could utilize that would avoid the harms laid out in Part II. Rather than always imposing some type of compensation, as a system with mandatory restitution arguably might require, judges could make a case-by-case determination. When considering whether to impose restitution in a sex-related case, a

court first might evaluate whether the offense conduct resulted in an unjust enrichment to one party based on an economic loss to another. If a court determined the unlawful benefit conferred was economic in nature, the court then could consider employing restitution as a sentencing option. To determine the appropriate amount of restitution to impose, courts might require victims to provide proof of financial losses incurred, and draw a line at reimbursing speculative future losses.

Restitution would still remain appropriate in some distribution of child pornography cases and in numerous other child sexual abuse scenarios where the defendant has received an economic unjust enrichment appropriate for disgorgement under the framework proposed. For example, if an individual made a financial profit from the sale of child pornography, an order requiring him to pay restitution in the amount of the profits received would be an appropriate remedy because the seller made a concrete and identifiable economic gain from the sale of child pornography images. In this scenario, the seller would have to give any profits made from the sale of images back to the victims whose images were sold, as those profits were unlawfully obtained at the victims' expense.²¹³

Likewise, when an individual is directing the actions of an underage prostitute and then taking the profits, such a scenario might present another example of when the disgorgement of that profit to a child sexual abuse victim would balance the financial scales. In a relatively recent federal case out of the Northern District of Georgia, a defendant was convicted of crossing interstate lines with a female under the age of eighteen for purposes of engaging her in prostitution.²¹⁴ At sentencing, the Government requested, and the judge agreed to order, restitution in the amount of the prostitution services rendered, since the payments had gone to the defendant instead of the girl being prostituted.²¹⁵ The prosecutor calculated how much, on average, the defendant had charged for the girl's sexual

²¹³ Arguably, this approach could be extended to computer servers or file-sharing networks hosting websites containing child pornography. In fact, targeting the individuals behind these profit-generating networks and requiring them to disgorge the profits made from providing child pornography to paid subscribers, for example, could be much more effective in shutting down the transmission of child pornography over the Internet.

²¹⁴ Government's Sentencing Memorandum, *United States v. Robinson*, No. 1:10-CR-129 (N.D. Ga. Nov. 30, 2011) [hereinafter Government's Sentencing Memorandum, *Robinson*]. The basis for this request is a statutory provision related to human trafficking and slavery. *See also* 18 U.S.C. § 1593(a) (2006). The victim of sex trafficking is to be paid not only the "full amount of [her] losses" but also the greater of the value of the victim's services or minimum wage under the Fair Labor Standards Act. *Id.* § 1593(b)(3).

²¹⁵ Government's Sentencing Memorandum, *Robinson*, *supra* note 214, at 7–8; *see also* Sentencing Hearing, *United States v. Homer*, No. 1:10-cr-00300-ODE-AJB (N.D. Ga. Aug. 16, 2011).

services, multiplied that by the number of hours and days she had worked, and reached a monetary figure. The court reasoned that this amount would restore the young woman financially because it equaled the amount she would have received for her sexual services in the absence of the defendant's role. Although this approach to restitution ignores the fact that the young woman likely would not have engaged in prostitution but for the defendant's coercion, it disgorges from the offender the profits that rightfully belong to the girl. In other words, it restores the financial balance between the two parties in a way consistent with restitution's purpose, without engaging in speculative compensation for emotional harms of pain and suffering or loss of enjoyment of life.

The unjust enrichment in these examples is not emotional or psychological pleasure; it is actual economic profit. When actual economic profit is at play, restitution is an appropriate remedy. Although it does not eliminate all of the commodification issues discussed earlier, because it still compensates young women for the sex acts they committed, this scheme does eliminate the suggestion of compensation for lost innocence and the appearance of awarding royalties-type civil damages in a criminal case. Employing this approach likely would mean that restitution is rarely imposed in non-contact child pornography cases, as economic benefits do not often accrue to the defendant in most possession and receipt cases.

Judges using this system would have a much easier time determining the amount of restitution to impose. After making an initial determination that the benefit conferred is economic in nature, judges could rely on a concrete and consistent method for determining the amount owed, such as that used to determine loss amounts in the Federal Sentencing Guidelines.²¹⁶

The Sixth Amendment provides another possible method for determining the amount of economic loss a particular defendant must reimburse to a victim. Under the Supreme Court's recent opinion in *Southern Union Company v. United States*,²¹⁷ a strong argument could be made that the Constitution requires a jury to determine the amount of restitution to be imposed in a given case.²¹⁸ In light of courts' treatment of

²¹⁶ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) cmt. n.3 (2012).

²¹⁷ 132 S. Ct. 2344, 2357 (2012) (holding *Apprendi* applies to criminal fines).

²¹⁸ Although this Article clearly takes the position that restitution is, and should remain, a restorative rather than a punitive mechanism, courts are regularly treating restitution as a punitive device in the child pornography context. See *supra* Part II.B.2. As such, restitution appears as though it is being used as a version of the criminal fine—but with the money going to the victim rather than the state. Unlike a fine, however, criminal restitution is not subject to the protections of the Sixth Amendment, as articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

criminal restitution as a punitive rather than a restorative mechanism, especially given the current manner of imposing restitution unlinked to any specific, identified gain, there is certainly an argument that restitution should be subject to the strictures of the Sixth Amendment and *Apprendi v. New Jersey*.²¹⁹ Those defendants who have been ordered to pay upwards of \$3,000,000 in restitution would undoubtedly consider the restitution to be an additional punishment. As such, juries could be presented with the evidence of economic gain or loss and asked to determine, beyond a reasonable doubt, what amount of restitution should be disgorged to the child pornography victim as a result of a particular defendant's crime.

Whatever methodology courts decide to employ, it should be consistent and reliable, with no guessing or speculation. Using the existing federal sentencing guidelines with regard to loss amount or requiring a jury to ascertain the amount of restitution required are but two possible approaches to calculating restitution in a manner that reimburses concrete economic losses and stays away from the problems associated with our current system of awarding restitution.

Employing these two steps would eliminate many of the concerns about the current restitution system identified throughout this Article. This taxonomy would ensure that restitution is only employed when an unjust financial benefit is conferred, thereby eliminating the potential harms of awarding untethered restitution. Courts would no longer be required to guess the value of the harm experienced by a particular child pornography victim. Instead, restitution would be imposed in a much more limited class of cases, opening the way for legislators and courts to create better, more effective methods of detecting, punishing, and deterring child sexual abuse.

2. *Empowering Victims*

Rethinking the current approach to restitution requires a shift in focus from the misguided harms attributed to child pornography toward a better methodology for detecting, punishing, and deterring child sexual abuse. Recalibrating how the law addresses restitution does not mean losing sight of the primary reason mandatory restitution first became required: giving victims a greater voice and role in the criminal justice process. In fact, one of the allures of the current "restitution" scheme is it appears to empower victims. However, despite its intentions, the present system is set up in a manner that often prevents victims from receiving satisfaction. To the extent that victim satisfaction should be taken into account by the criminal justice system—an assertion that certainly is open to debate—the two proposals articulated below seek to improve the role of victims by

²¹⁹ 530 U.S. 466 (2000).

increasing their approval of the criminal justice process and ensuring that the money awarded by the courts goes to them, rather than their lawyers or experts. These proposals aim to reduce the possibility that child sexual abuse victims will be further commodified by challenging the implicit assumption that viewing child pornography is a greater harm than the abuse that led to its creation and to highlight the harms that need addressing, namely those created by child sexual abuse.

The first proposal would allow a court to consider a defendant's financial resources prior to imposing restitution. Continuing with the previous framework, after a judge has determined that the loss is of an economic nature and calculated the maximum possible restitution according to whatever methodology courts have chosen, a final step before imposing restitution could be reviewing a defendant's ability to pay. Although this proposal may seem unrelated to victim satisfaction, allowing judges to consider a defendant's financial capabilities in making a restitution decision likely would increase not only offender compliance,²²⁰ an indisputable goal of the criminal justice system, but also victim satisfaction.²²¹

²²⁰ BARBARA E. SMITH ET AL., IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION, EXECUTIVE SUMMARY: A STUDY OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE VICTIM WITNESS PROJECT 3–4 (1989).

²²¹ Restitution in its modern guise does not seem to have met one of the primary goals identified by Congress in passing the legislative reforms of the 1980s and '90s: increasing victim satisfaction with the criminal justice system. Rather, the restitution regime may be creating unrealistic expectations about what restitution can do for crime victims. See Carol Shapiro, *Is Restitution Legislation the Chameleon of the Victims' Movement?*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 73, 76 (Burt Galaway & Joe Hudson eds., 1990). Many believe restitution will help them regain a sense of control over their lives, see Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9 JUST. Q. 393, 394 (1992), when in fact it often does not. See also Henderson, *supra* note 15, at 591–92. When restitution orders are imposed, many victims receive false hope that they will receive the full amount of restitution ordered. R. BARRY RUBACK ET AL., CRIME, LAW, AND JUSTICE PROGRAM, PENN STATE UNIV., EVALUATION OF BEST PRACTICES IN RESTITUTION AND VICTIM COMPENSATION ORDERS AND PAYMENTS 123 (2006); Dickman, *supra* note 17, at 1698–99. As the cases of Amy and Vicky make abundantly clear, this is far from the reality.

Statistics bear this out. Since the passage of the MVRA, the outstanding federal criminal debt, which consists of unpaid fines, federal restitution, and nonfederal restitution—restitution owed to victims of crime other than the federal government, but for which the government maintains collection responsibility—has grown from \$6 billion to more than \$64 billion, as of 2010. *Criminal Restitution Improvement Act of 2006: Hearing Before the H. Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Rep. Coble, Chairman of the Subcomm. on Crime, Terrorism, & Homeland Sec.); U.S. GEN. ACCOUNTING OFFICE, GAO-04-388, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 7 (2004); U.S. GEN. ACCOUNTING OFFICE, GAO-01-664, CRIMINAL

Prior to VAWA's imposition of a mandatory restitution requirement, judges were able to take a defendant's ability to pay into consideration before determining how much restitution to order, and both offender compliance and victim satisfaction with restitution were higher than they are now. The requirement that restitution be mandatory and ordered in "the full amount" has had a negative impact across the board. The amount of restitution ordered in many cases exceeds the defendant's financial capabilities, leaving many defendants with no ability to pay and "no reasonable prospect of paying."²²² In fact, restitution collection rates have dropped precipitously since restitution became mandatory.²²³

When "full restitution" is ordered but not received, the experience can lead to unmet expectations, which often exacerbate a victim's feelings of

DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 8 (2001); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at tbl.8c (2010) [hereinafter U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT] (reporting \$64,450,675,679.11 in outstanding criminal debt at the end of fiscal year 2010); U.S. GEN. ACCOUNTING OFFICE, GAO-04-388, *supra*, at 1; Dickman, *supra* note 17, at 1692. Of that \$64 billion in unpaid restitution and fines, close to \$51.5 billion, or approximately 80%, is from unpaid restitution to nongovernment victims. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT, *supra*, at tbl.8b (reporting a principal balance of \$51,554,408,626.74 in nonfederal restitution at the end of fiscal year 2010); U.S. GEN. ACCOUNTING OFFICE, GAO-04-388, *supra*, at 2-3 (revealing that, as of 2002, nonfederal restitution accounted for 70% of federal criminal debt).

²²² *People v. Kay*, 111 Cal. Rptr. 894, 896 (1973); Dickman, *supra* note 17, at 1704-05.

²²³ Prior to VAWA, debt collection rates from defendants ordered to pay restitution ranged from 13.3% to 34% and 54%. The 13.3% figure is the rate of collection in the federal system for fiscal year 1992, based on the collection amount divided by the total debt owed. U.S. ATTORNEYS' STATISTICAL REPORT: FISCAL YEAR 1992, at tbl.12 (1992). The 34%-54% figure comes from state restitution programs, many of which considered an offender's ability to pay before ordering restitution. *See* Dickman, *supra* note 17, at 1694 & n.53. Unsurprisingly, the rate of debt collection has dropped to a collection rate of 5% of restitution owed to nongovernment victims as of fiscal year 2011. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2011, at tbl.8 (2011) (derived by dividing restitution payments received by total amount owed to third parties in restitution). The Department of Justice has repeatedly acknowledged that the reason for this decline is "the lack of relationship between the amount ordered and its corresponding collectability," attributable to VAWA and the MVRA's requirement that judges not consider the financial means of the offender when imposing restitution. Dickman, *supra* note 17, at 1694 (citing Letter from Mary Beth Buchanan, Dir. Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. and Assurance, U.S. Gov't Accountability Office (Jan. 13, 2005), in U.S. GOV. ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 21 (2005)). The result of so much unpaid restitution is that many victims end up feeling more disempowered and disillusioned with the criminal justice system than they would if they were given a realistic sense of how restitution works in practice. *See* RUBACK ET AL., *supra* note 221, at 123; Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 751-54 (1992).

pain, anger, and resentment toward both the defendant and the criminal justice system generally.²²⁴ Unfulfilled expectations and further disappointment, rather than alleviation of pain and suffering, are the result. Rather than helping victims to feel as though the criminal justice system has heard them and been responsive to their needs, the imposition of unpaid restitution often results in their feeling unsatisfied, frustrated, and let down by the system yet again.

Improving offender compliance and victim satisfaction can be accomplished simultaneously. Social science studies have shown that mandatory restitution in the “full amount” of the victim’s losses is not essential to victim satisfaction.²²⁵ The percentage of a restitution award paid by the defendant, regardless of the size of the award, leads to the greatest victim satisfaction.²²⁶ The greater the percentage of the award paid, the greater the satisfaction, regardless of whether restitution has been awarded in full.²²⁷

This perspective challenges the current approach to restitution, which presumes that receiving the maximum possible amount of compensation will go the furthest toward helping victims recover from their abuse experience. The present system continues to embrace the view that money will help victims heal, which, taken to its extreme, has led to the existing potential for commodification and the requirement that a victim prove the depth of her pain in order to justify receiving a greater monetary award. Likewise, the hyperfocus on being monetarily rewarded for her abuse experience continues to send a strong message that the young woman’s worth is in her body and the sexual acts in which she participated.

The subtle shift away from a strategy that emphasizes maximum compensation and toward an approach that underscores greater compliance in disgorging some portion of a defendant’s profits requires a significant alteration in mindset. This move from a royalties-type approach to one that acknowledges the deeper harms caused by the sexual abuse itself is important, however, because it recognizes that the primary harm of child pornography comes from the initial sexual abuse, without which child

²²⁴ Dickman, *supra* note 17, at 1698–99; Shapiro, *supra* note 221, at 76; Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora’s Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 *FORDHAM L. REV.* 507, 573 (1984); *see also* Erez & Tontodonato, *supra* note 221, at 410–11 (stating that unfulfilled expectations with regard to victim impact statements compound victim pain and anger and resentment toward criminal justice experience).

²²⁵ Dickman, *supra* note 17, at 1697–98; Erez & Tontodonato, *supra* note 221, at 395, 407–10.

²²⁶ Davis et al., *supra* note 223, at 753–54; Dickman, *supra* note 17, at 1698.

²²⁷ Dickman, *supra* note 17, at 1698.

pornography would not exist.

A second proposal involves creating a crime victim compensation fund for child pornography victims. Criminal defendants convicted of any type of child pornography offense could be required to pay a set amount into a crime victim fund from which victims could then seek compensation for losses incurred as a result of the offense. Allowing reimbursement through a non-restitution system would allow for victim compensation in a manner that does not involve guesstimating harm, thus eliminating one of the primary sources of commodification.

Under a crime victim compensation fund system, as with the aforementioned restitution framework, courts could require proof of losses incurred in the form of receipts, pay stubs, and other documentation prior to reimbursement. This would ensure that the victim already has incurred the costs, and it would eliminate any uncertainty as to the amount to be reimbursed.

Creating a victim compensation fund would also eliminate the need for victims to hire attorneys, thereby further empowering victims. A review of the restitution requests made on Amy and Vicky's behalf reveals a substantial amount of money being awarded to the lawyers in these cases. In one recent case epitomizing this pattern, over half of the restitution awarded went to Vicky's attorney for lawyer's fees.²²⁸ If the goal of the

²²⁸ Opening Brief of Appellant, *United States v. Benoit*, No. 12-5013 (10th Cir. 2012), 2012 WL 1899100, at *47–48. Cause lawyering often raises an issue of whether the lawyer is representing the cause in which she believes at the expense, both literal and figurative, of her client, or zealously advocating what her client wants. *See, e.g.*, Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1196–97 (2005). The amount of money the lawyers receive in each case through their representation of child pornography victims certainly raises questions about who is choosing the course of action for these two young women, and whether the lawyers are truly representing their clients' wishes. This is especially worrisome in light of the two young women's repeated complaints about being notified every time their images are located. *See, e.g.*, *United States v. Olivieri*, No. 09-743 (WHW), 2012 WL 1118763, at *4 (D.N.J. Apr. 3, 2012) (quoting Vicky's psychologist regarding "the distinct emotional trauma that arises from each notification of possession of images of her abuse," which she describes as a "slow acid drip"); *United States v. Lundquist*, 847 F. Supp. 2d 364, 373 (N.D.N.Y. 2011) (noting that, according to Amy's psychologist, "it was primarily the fact that she received legal notifications of the widespread presence of pornographic images of her . . . that caused her to regress"). As the young women themselves have expressed both to their psychologists and in their requests for restitution, receiving these notices anchors them in their abuse experiences. *Id.*

Although law enforcement provides a mechanism to opt out of receiving notices, *see* FED. BUREAU OF INVESTIGATION, OFFICE FOR VICTIM ASSISTANCE, CHILD PORNOGRAPHY VICTIMS ASSISTANCE (CPVA): A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS, *available at* www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf (last visited June 11, 2013), none of the young women seeking restitution have elected to take this route, despite the trauma they experience from receiving such notices,

current restitution system is for victims to be compensated for the harms courts attribute to these defendants, giving more than half of the restitution award to lawyers appears inconsistent with achieving this goal. A crime victim compensation program would eliminate that issue.

Creating an alternate system of compensation allows for victims to be reimbursed for losses they are incurring as a result of the emotional trauma they have experienced both from the initial sexual abuse and the continued circulation of their images, while also eliminating the problems created by using the restitution system as the vehicle for compensation. It would also mirror the conceptual shift away from seeking the maximum amount of compensation toward an approach that recognizes the child sexual abuse behind the pornography as the true harm and focuses instead on the victims, their desires, and the complexities of recovering from sexual abuse.

B. ALTERNATIVE APPROACHES TO ELIMINATING THE HARMS OF CHILD SEXUAL ABUSE

By rejecting the restitution revolution and narrowing its scope, restitution ceases to be a diversion that prevents law enforcement, legislators, and courts from turning their efforts to more effective methods of identifying, punishing, and deterring the child sexual abuse that is behind every child pornography image. The previous Subpart suggests changes to the current method of imposing restitution that may better serve to identify and address the underlying harms of child sexual abuse. This next Subpart moves beyond restitution and recommends modifications to statutes and sentencing guidelines, with the goal of targeting child sexual abuse and reducing the harms identified in Part II.

As indicated previously, courts commonly refer to eliminating the market for child pornography images as a primary goal of imposing restitution.²²⁹ Although it is appealing to believe that removing individual child pornography viewers from the community through the imposition of increasingly harsh punishments will lead to the elimination of the child pornography market, such punitive approaches are unlikely to have much

likely because those notifications are now linked to a major source of income for a few of them. If Amy or Vicky do not receive the notifications, they cannot file restitution requests that may continue to result in orders for hundreds of millions of dollars to be paid to them directly. In fact, fairly recently, Vicky's lawyer indicated that due to a glitch in the system, she had not been receiving these notices; they have now fixed the problem and for some period of time, she and her staff were working through a backlog of notices as they sought to determine in which cases to seek restitution. Corrected Appendix of Appellant Shawn Crawford vol. 2, at 143–44, *United States v. Crawford*, No. 11-5544 (6th Cir. Aug. 23, 2011).

²²⁹ See *supra* Part II.A.

impact, as this country's experience with the drug war has shown.²³⁰ As one judge opined, "I wish it were that simple."²³¹ Instead, more concrete approaches focusing on the detection and prevention of child sexual abuse can begin to pave the way toward eliminating the harms caused by imposing restitution on non-contact child pornography offenders.

A necessary first step in reducing the child pornography market is to focus on detection of and increased punishments for individuals who engage in the actual hands-on sexual abuse of children, which means entering the uncomfortable realm of family dysfunction. Although there has been an increased public focus on incest and intrafamilial sexual violence over the past thirty years, the reluctance to get involved in private "family matters" lingers. Despite the best of intentions, the public and law enforcement remain reluctant to confront child sexual abuse, especially when the abuse is occurring within the family and even when the abuse is "definite."²³² The legal system's treatment of child sexual abuse reflects this hesitance.

Yet if we truly want to eliminate the market for child pornography, the importance of intervening in family affairs cannot be overestimated, especially since more than 96% of child pornography victims already know the individual producing the pornography. Public health officials have engaged in efforts aimed at preventing child sexual abuse before it happens and have identified three primary targets: the victim, the offender, and bystanders.²³³ Victim-focused strategies try to equip the potential victim

²³⁰ United States v. Beiermann, 599 F. Supp. 2d 1087, 1103 (N.D. Iowa 2009); Hamilton, *The Efficacy of Severe Child Pornography Sentencing*, *supra* note 12, at 571.

²³¹ *Beiermann*, 599 F. Supp. 2d at 1103.

²³² Critics have long noted a reluctance on the part of individuals and the legal system to get involved in family dynamics. See, e.g., David Finkelhor & Patricia Y. Hashima, *The Victimization of Children and Youth: A Comprehensive Overview*, in HANDBOOK OF YOUTH AND JUSTICE 49, 71–72 (Susan O. White ed., 2001); Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CALIF. L. REV. 521, 523 (1987) (citing Roger McIntire, *Parenthood Training or Mandatory Birth Control: Take Your Choice*, PSYCHOL. TODAY, Oct. 1973, at 36). The primary reason cited is a belief in family privacy. Zimring, *supra*, at 523. A recent study confirmed a general reluctance to get involved in a case of clear child abuse. Although the vast majority of people interviewed (91%) declared they would intervene in a child sexual abuse situation if the abuse was "definite," of those participants who already had been confronted with a believed case of abuse, far fewer actually intervened. STOP IT NOW!, *supra* note 159, at 8. Sixty-five percent intervened—37% called the police, 18% confronted the adult or child. *Id.* A fairly large percentage (22%) did nothing. *Id.*

The number of people willing to report or confront abuse when it was only "suspected" was even lower. *Id.* If abuse was suspected outside the family, the percentage of people who stated they would call law enforcement was 50%, with half as many indicating they would confront the suspected abuser. *Id.* If abuse was suspected within the family, only a relatively small percentage indicated a willingness to get involved. *Id.*

²³³ *Sexual Violence: Prevention Strategies*, CTRS. FOR DISEASE CONTROL AND

with knowledge, awareness, and self-defense skills in order to reduce risk.²³⁴ Offender-based approaches aim to reduce risk factors that might encourage an individual to sexually offend.²³⁵ Bystander prevention strategies target social norms supporting sexual violence and seek to empower people to intervene with peers to prevent assaults from occurring.²³⁶

Although these strategies are important in helping to identify instances of child sexual abuse, the law also has a significant role to play in deterring and preventing further abuse. In order to complement the public health and social science strategies currently in place, this Article recommends a tiered system of punishments in child sexual abuse cases, with increased punishments for those who commit hands-on sexual offenses involving children and decreased punishments for those who commit non-contact child pornography offenses. As already indicated, one of the harms of the existing approach to child pornography is its diversion of resources and attention away from those who have a greater risk of harming children to those who are relatively low risk. In order to fundamentally recalibrate the system and debunk the stranger-danger myth, the balance between sexual abuse and viewing pornography must be shifted. Treating the two types of offenses as equivalent does not go far enough. If legislators and courts continue to misdirect resources toward the relatively low-risk child pornography viewers, child sexual abuse and the production of new child pornography images will continue unabated. Only by redirecting the current focus on child pornography toward the elimination of child sexual abuse can we begin to reduce the market for child pornography.

As an initial matter, one straightforward way to combat child sexual abuse is to increase the punishments for such abusers. As discussed previously, the disparity between the punishments for those convicted of non-contact child pornography offenses and those convicted of molesting and raping children is significant at both the federal and state levels.²³⁷ Upwardly adjusting the punishments for child sexual abuse to reflect the relative seriousness of those offenses would be a good starting point. In addition, creating greater sanctions for intrafamilial child sexual abuse based on the abuse of trust involved, especially in the event of “extreme

PREVENTION, www.cdc.gov/ViolencePrevention/sexualviolence/prevention.html (last visited Mar. 12, 2013) [hereinafter *Sexual Violence*].

²³⁴ *Id.*; Sandy K. Wurtele, *Behavioral Approaches to Educating Young Children and Their Parents About Child Sexual Abuse Prevention*, 1 J. BEHAV. ANALYSIS OFFENDER & VICTIM TREATMENT & PREVENTION 1, 52, 54, 59 (2008).

²³⁵ *Sexual Violence*, *supra* note 233.

²³⁶ *Id.*

²³⁷ *See supra* Part II.A.2.

and repetitive” abuse, also would serve to reorder the current system.²³⁸

Amending the Federal Sentencing Guidelines and state sentencing schemes to reflect the greater harms of child sexual abuse also would be an effective deterrent. Sentencing guidelines could be amended to allow for an enhancement in the case of incest or in a case of “extreme and repetitive” abuse. Sentencing guideline ranges could be recalculated to increase the range of punishments applicable to child sexual abusers and decrease those applicable to viewers and traders of child pornography. These changes would reflect the seriousness of the danger and harm child sexual abuse causes.

At the same time, a reduction in the more politically popular but less empirically sound practices currently in vogue, such as mandatory minimum prison sentences in child pornography cases, would signal that sexual abuse is a greater harm than viewing pornographic images. Numerous voices already have come out in favor of eliminating the imbalance between contact and non-contact offenses and, specifically, of reducing punishments for non-contact child pornography offenses. In fact, several federal judges have expressed discomfort with what they perceive to be unreasonably excessive penalties in child pornography cases.²³⁹

In light of these criticisms, the United States Sentencing Commission recently submitted a lengthy report to Congress urging reconsideration of the statutory and guideline sentencing options for non-production child pornography cases.²⁴⁰ Among the recommendations it makes in the report,

²³⁸ Zimring, *supra* note 232, at 533.

²³⁹ See, e.g., *United States v. Dorvee*, 616 F.3d 174, 182–89 (2d Cir. 2010); *United States v. Grober*, 624 F.3d 592, 603–10 (3d Cir. 2010); *United States v. Paull*, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting), *cert. denied*, 130 S. Ct. 187 (2009); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 703 (S.D. W. Va. 2009); Sentencing Memorandum at 17, *United States v. Lung*, No. 1:09-CR-182-JEC (N.D. Ga. May 19, 2010) [hereinafter Sentencing Memorandum, *Lung*].

One district judge specifically noted the “irrationality of a [sentencing] scheme that would send somebody to jail for a longer period of time for just looking at something than somebody who actually crossed state lines and actually wanted to harm a child. That is not terribly rational under any scheme.” Sentencing Memorandum, *Lung*, *supra*, at 17. Likewise, a survey of district judges across the country in 2010 revealed that 69% believe the recommended sentencing guideline range for receipt of child pornography is too high, and 70% find the same with regard to possession of child pornography. U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 TO MARCH 2010, at tbl.8 (2010).

²⁴⁰ U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES 325–30 (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf (recommending that Congress reconsider the disparate treatment between possession and receipt of child pornography, and lower the mandatory minimum for such offenses in the event Congress decides to keep a mandatory

the Sentencing Commission suggests amending the applicable guideline range for offenders with a history of hands-on sexual offenses,²⁴¹ considering the possibility of eliminating the mandatory minimum sentence in possession and receipt of child pornography cases,²⁴² and reconsidering the use of some of the heartland sentencing enhancements for child pornography offenses, such as viewing the images on a computer or using a file-sharing network to distribute images.²⁴³

These voices advocate a step in the right direction, but they do not go far enough. Rather, a system that reflects the relative severity of child sexual abuse requires the maximum sentence and applicable guideline range for an offender convicted of a hands-on sexual offense involving a child to be significantly greater than that of an offender convicted of a non-contact child pornography offense.²⁴⁴ This means not only eliminating both mandatory minimums in non-contact child pornography offenses and some of the heartland sentencing enhancements for child pornography offenses, but also recalibrating the maximum sentences in child sexual abuse and non-contact cases to reflect the greater harms of hands-on offenses; adjusting offense levels so that sentencing guideline ranges reflect the relative harms of the two types of offenses; and adding enhancements to the child sexual abuse guidelines for incest or repeated and extreme abuse.

Congress, the Commission, and courts, as they create, interpret, and apply laws addressing sex offenses, also should ensure they avoid falling prey to the sex-predator narrative. This narrative does not mirror the reality of child sex offenders and serves only to divert attention and resources from strategies that accurately identify those individuals who pose a threat to children. Although shifting the language may be a challenge because it means acknowledging that perpetrators of child sexual abuse may be people who are friends and family, the only way child sexual abuse will be diminished is if the legal system accurately identifies the threat and focuses resources and laws on diminishing that threat.

The way the law is currently structured suggests that viewing pornography is a greater harm than the underlying abuse. That construction

minimum at all, and recommending that Congress revise the penalty structure to differentiate “distribution” using file sharing networks from more traditional conceptions of “distribution” not involving such technologies).

²⁴¹ *Id.* at 320, 324–25.

²⁴² *Id.* at 326–29.

²⁴³ *Id.* at 313, 323–24, 329.

²⁴⁴ *Cf.* Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 *FED. SENT’G REP.* 108, 109–10, 129 (2011) (discussing district court dissatisfaction with guideline sentencing options for child pornography offenses, especially when compared with sentences for contact offenses).

distracts us from the fact that if there is no initial abuse, there is no continued harm. Instead, it keeps the focus on child pornography rather than the child sexual abuse that necessarily precedes the creation of pornography. Amending the law on restitution, child abuse offenses, and child pornography offenses is a necessary step toward moving the focus toward the child sexual abuse that is the most significant harm of child pornography.

IV. CONCLUSION

Restitution has long been used to balance the scales after an inequitable shifting of financial benefits from one party to another. Although it is tempting to want to expand this equitable remedy to more broadly defined categories of benefits and losses, restitution as it is being applied in the non-contact child pornography context has gone too far. As several commentators have noted, “In the last few decades, Congress has embraced a political culture of fear that is increasingly intent on throwing the book at child pornography offenders.”²⁴⁵ Instead of being used to restore an unjustified economic gain, restitution is being used as a mechanism that encourages courts to punish defendants for actions they find morally offensive.

The desire to make things right for the young women depicted in child pornography by compensating them for the pain they have experienced is understandable, and, from the perspective of the young woman, money can be a way to make her feel better and more in control of her world. However, restitution is not the answer. Restitution does not address the harms to the young women depicted in the child pornography images and, instead, can serve to exacerbate those harms. In fact, employing restitution in this manner has diverted us from the more significant problem of child sexual abuse and allowed us to avoid the discomfort associated with confronting incest and intrafamilial sexual abuse. As a result, legislators and courts have created a system that is less about deterrence and punishment of those at a high risk of sexually abusing children and more about our uneasiness with family dysfunction. A nuanced and carefully calibrated approach to child pornography cases is needed in order to reduce occurrences of child sexual abuse and the child pornography that results from the recording of such abuse.

²⁴⁵ *E.g.*, SpearIt, *supra* note 12, at 102; Stabenow, *supra* note 132, at 29.