Criminal Law—First Circuit Upholds Restitution Order Without Requiring Evidence of Defendant's Causal Contribution to Victim's Losses—*United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012)

In criminal cases, restitution for victims is typically limited to the losses that the defendant caused in the commission of the crime.[1] Title 18, section 2259 of the United States Code requires courts to order restitution for victims of sexual crimes against children in "the full amount of the victim's losses."[2] In *United States v. Kearney*,[3] a case of first impression, the United States Court of Appeals for the First Circuit considered whether a person depicted in child pornography was entitled to restitution under § 2259 from someone who had criminally possessed, distributed, and transported that pornography.[4] The First Circuit concluded that the victim's injuries were proximately caused by the defendant's use of the pornography, and upheld the district court's restitution order.[5]

In 2008, Patrick Kearney sent videos and images of child pornography to a fourteen-year-old girl named "Julie" during numerous online conversations.[6] "Julie," however, was an undercover police investigator, and on July 10, 2008 Kearney admitted to downloading and sending child pornography while FBI agents seized the computers on which the pornography was stored from his

1. *See* Hughey v. United States, 495 U.S. 411, 413 (1990) (holding criminal restitution only ordered for losses caused by "specific conduct" of offense); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result.").

2. 18 U.S.C. § 2259(b)(1) (2006) (mandating restitution for victims of crimes under Chapter 110). Section § 2259(b)(3) provides:

> [T]he term "full amount of the victim's losses" includes any costs incurred by the victim for—
> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) necessary transportation, temporary housing, and child care expenses;
> (D) lost income;
> (E) attorney's fees, as well as other costs incurred; and
> (F) any other losses suffered by the victim as a proximate result of the offense.

§ 2259(b)(3).

3. 672 F.3d 81 (1st Cir. 2012).

4. *Id.* at 93 (summarizing restitution issues on appeal).

5. *Id.* at 94, 99-100 (rejecting defendant's challenges to district court's restitution order).

6. *See* United States v. Kearney, No. 08-40022-FDS, 2009 U.S. Dist. LEXIS 110976, at *2-3 (D. Mass. Nov. 30, 2009) (detailing communications leading to police investigation), *aff'd*, 672 F.3d 81 (1st Cir. 2012). Kearney engaged "Julie" in the teen-only chat room "chat-avenue.com" and with Yahoo! messenger using the screen name "padraigh8," identifying himself as a twenty-eight year-old male. *Id.* at *2. Kearney asked "Julie" questions about her dating and sexual habits, and expressed a desire to have sex with her. *Id.* at *3.

home.[7] Kearney was arrested and charged with transportation, distribution, and possession of child pornography in violation of 18 U.S.C. § 2252(a)(1), (a)(2), and (a)(4)(B), respectively.[8]

After Kearney pled guilty to all charges, the government filed a motion requesting restitution under § 2259 for "Vicky," the child subject of one of the pornographic videos Kearney possessed, transported, and distributed.[9] Specifically, the government requested an award of no less than $3800 for Vicky, the average amount of restitution she had received in thirty-three previous child pornography cases.[10] In support of the restitution claim, the government submitted two expert reports detailing the "'significant, permanent psychological damage'" Vicky suffered from knowing that the images of her sexual exploitation continued to be viewed and disseminated on the internet.[11] The expert reports documented the anguish Vicky experienced from her general awareness of the ongoing dissemination and possession of the pornographic materials, but did not identify any particular instance of an individual's possession or distribution of the pornography as causing her additional harm.[12] At Kearney's sentencing hearing, the district court found that he had proximately caused Vicky to incur losses within the meaning of § 2259, and ordered him to pay Vicky the government's proposed restitution figure of $3800.[13] On appeal, the First Circuit upheld the restitution order, reasoning that Vicky's psychological injuries were a reasonably foreseeable result of Kearney's use of the pornographic video, and the district court reasonably

7. *See* United States v. Kearney, No. 08-40022-FDS, 2009 U.S. Dist. LEXIS 110976, at *7-14 (D. Mass. Nov. 30, 2009) (describing execution of search warrant and interrogation of Kearney), *aff'd*, 672 F.3d 81 (1st Cir. 2012). The district court denied Kearney's subsequent motion to suppress, finding that the government's affidavit, based on subpoenaed internet-use information, sufficiently established probable cause. *See* 672 F.3d at 85. On appeal, the First Circuit upheld the denial, reasoning that evidence of Kearney's internet use sufficiently established probable cause, making it unnecessary to consider whether the good-faith exception to the exclusionary rule applied. *Id.* at 91 & n.7.

8. 672 F.3d at 85 (listing government's charges against Kearney). The seventeen-count indictment included eight counts of transportation of child pornography, eight counts of distribution of child pornography, and one count of possession of child pornography. *Id.*; *see also* 18 U.S.C. § 2252(a) (2006) (prohibiting knowing transportation, distribution, and possession of child pornography), *amended by* Child Protection Act of 2012, sec. 2, § 2252(a), Pub. L. No. 112-206, 126 Stat. 1490.

9. *See* 672 F.3d at 85. "Vicky" is a pseudonym courts have used to protect the privacy of this particular female victim. *See* United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *1 n.1 (W.D.N.C. Jan. 12, 2010) (noting use of pseudonyms for known victims), *aff'd*, 393 F. App'x 76 (4th Cir. 2010); *see also* United States v. Faxon, 689 F. Supp. 2d 1344, 1351 (S.D. Fla. 2010) (acknowledging Vicky has sought restitution in approximately two hundred criminal cases), *aff'd*, 404 F. App'x 430 (11th Cir. 2010). Vicky was "a ten- or eleven-year-old child" when the video of her sexual abuse was made and was in her early twenties during Kearney's appeal. 672 F.3d at 85.

10. *See* 672 F.3d at 85 (setting forth government's proposed methodology for calculating restitution). Through her attorney, Vicky requested $226,546.10 in restitution. *See id.* at 86.

11. *Id.* at 85-88 (outlining findings of expert reports).

12. *See id.* at 98 (describing generalized nature of reported psychological injuries).

13. *See id.* at 88.

determined the amount awarded.[14]

Federal courts may only order restitution in a criminal case when Congress has expressly authorized them to do so.[15] Congress first granted courts such power in 1982 when it enacted the Victim Witness Protection Act (VWPA).[16] In 1994, Congress made criminal restitution mandatory for the first time in § 2259, a portion of the Violence Against Women Act (VAWA), mandating that a "court shall order restitution for any offense under [Chapter 110]," which prohibits the sexual exploitation and abuse of children.[17] Two years later, Congress broadened the scope of mandatory criminal restitution with the Mandatory Victim Restitution Act (MVRA), which made restitution mandatory for a wide range of violent crimes and crimes against property, and which amended § 2259 and the VWPA to create a unified criminal restitution scheme.[18]

Since the enactment of § 2259, federal prosecutors have successfully sought restitution from individuals convicted of sexually abusing children in the course of producing child pornography, as every circuit court to address the issue has upheld restitution orders in such cases.[19] Only in recent years have victims and

14. See 672 F.3d at 97, 100-01 (holding proximate causation satisfied and methodology for calculating restitution proper).

15. *See* United States v. Love, 431 F.3d 477, 479 (5th Cir. 2005) (establishing necessity of statutory authorization for restitution order); United States v. Julian, 242 F.3d 1245, 1246 (10th Cir. 2001).

16. *See* United States v. Hardy, 707 F. Supp. 2d 597, 602 (W.D. Pa. 2010) (identifying Violence Against Women Act as first federal statute authorizing restitution for victims of crimes); *see also* 18 U.S.C. § 3663(a)(1)(A) (2006) (authorizing criminal restitution for victims at courts' discretion). Historically, criminal restitution has been imposed on offenders as a means of retribution, rehabilitation, and deterrence. *See* Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victim Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1701 (2009) (asserting rehabilitation as original purpose of criminal restitution, unlike compensation as purpose of civil restitution); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 (1984) (comparing and contrasting utility of restitution in criminal and civil law).

17. 18 U.S.C. § 2259(a); *see also id.* § 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."); *id.* § 3663(a)(1)(A) (stating courts "may order" restitution under VWPA); United States v. Hardy, 707 F. Supp. 2d 597, 602 (W.D. Pa. 2010) (recognizing § 2259 as first federal statute to make criminal restitution mandatory); S. REP. NO. 103-138, at 56 (1993) (explaining courts required to order defendants to pay victims' expenses under § 2259).

18. *See* 18 U.S.C. § 3663A(a)(1) (stating courts "shall order" restitution under MVRA); *see also* United States v. Hardy, 707 F. Supp. 2d 597, 602 (W.D. Pa. 2010) (noting MVRA restructured federal statutory scheme for criminal restitution). The MVRA represented a fundamental shift in the primary purpose of criminal restitution from punishment to compensation. *See* Beth Bates Holliday, Annotation, *Who Is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. FED. 2d 283 § 2 (2008) (asserting MVRA enacted to create "a more victim-centered justice system").

19. *See* United States v. Solsbury, 727 F. Supp. 2d 789, 794 (D.N.D. 2010) ("In production cases there is rarely a question of causation whereas in possession cases the boundaries of proximate cause become far more murky."); United States v. Aumais, No. 08-CR-711 (GLS), 2010 WL 3033821, at *3 (N.D.N.Y. 2010) ("Where a victim under § 2259 had direct contact with the defendant . . . courts have encountered little difficulty finding the requisite causation."), *aff'd in part, rev'd in part*, 656 F.3d 147 (2d Cir. 2011); United States v. Berk, 666 F. Supp. 2d 182, 189-90 (D. Me. 2009) ("It has long been uncontroversial to order restitution [under § 2259] when the defendant is convicted of the actual physical abuse of a child or of producing images constituting child pornography."), *amended by* No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009); *see*

the government begun requesting restitution under § 2259 from individuals convicted for criminal *possession* of child pornography.[20] Courts unanimously agree that persons depicted in child pornography qualify as "victims" of the individuals who possess that pornography within the meaning of § 2259(c).[21] This consensus stems from the Supreme Court's decision in *New York v. Ferber*, which established that individuals depicted in child pornography are harmed by the continued possession and dissemination of pornography containing their image.[22] In addition to requiring proof of victim status, courts also limit recovery under § 2259 to losses proximately caused by a defendant's use of the pornography.[23] Although § 2259 does not expressly limit restitution

also, e.g., United States v. Doe, 488 F.3d 1154, 1160-62 (9th Cir. 2007) (upholding restitution order where defendant pled guilty to producing child pornography); United States v. Julian, 242 F.3d 1245, 1248 (10th Cir. 2001) (upholding restitution and remanding for further calculation where defendant pled guilty to sexually exploiting children); United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999) (upholding restitution order where defendant produced photographs of his direct sexual engagement with victim).

20. *See, e.g.*, United States v. Hardy, 707 F. Supp. 2d 597, 598-99 (W.D. Pa. 2010) (noting novelty of requiring restitution from defendants "not involved with the victim's original abuse"); United States v. Paroline, 672 F. Supp. 2d 781, 790 (E.D. Tex. 2009) ("Restitution in possession cases is an issue of first impression in district courts around the nation . . . ."), *vacated sub nom. In re* Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc) (granting rehearing); United States v. Berk, 666 F. Supp. 2d 182, 184 (D. Me. 2009) (noting issue of restitution in possession cases one of first impression in district), *amended by* No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009). The Crime Victims' Rights Act of 2004, specifically 18 U.S.C. § 3771, is largely responsible for the emergence of this issue, as it reiterates victims' rights to restitution and requires the government to provide victims with "reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime." 18 U.S.C. § 3771(a)(2) (requiring notice to victims); *see also* 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, 302-04 (2011) (analyzing emergence of restitution claims under § 2259 in possession cases). With the notice afforded from the Department of Justice's Victim Notification System (VNS) pursuant to § 3771(c)(1), victims of child pornography have enforced their right to restitution in the prosecution of end-use offenses, of crimes that the victims would likely otherwise be unaware. *See* Dibari, *supra*, at 302.

21. *See, e.g.*, United States v. Aumais, 656 F.3d 147, 152 (2d Cir. 2011) (denying restitution but holding "victim" status under § 2259(c) satisfied); United States v. McDaniel, 631 F.3d 1204, 1208 (11th Cir. 2011) (awarding restitution and holding "victim" status under § 2259(c) satisfied); United States v. Berk, 666 F. Supp. 2d 182, 185-86 (D. Me. 2009) ("[C]ourts have uniformly held that the individuals depicted in child pornography are 'victims' within the meaning of § 2259."), *amended by* No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009); *see also* DiBari, *supra* note 20, at 305-06 (explaining consensus on "victim" status issue in possession cases).

22. New York v. Ferber, 458 U.S. 747, 759 (1982) (establishing child pornography constitutes "permanent record of the children's participation and the harm . . . is exacerbated by [its] circulation"); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002) (reaffirming continued circulation of child pornography harms depicted children); Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."). In order to qualify as a "victim" under § 2259(c), a party need only establish that he or she has been "harmed as a result of a commission of a crime under [Chapter 110]." 18 U.S.C. § 2259(c) (2006). The *Ferber* Court's conclusion that possession of child pornography "harm[s]" those depicted in the images is therefore sufficient to qualify such depicted children as "victims" under § 2259(c). New York v. Ferber, 458 U.S. 747, 758-59 (1982).

23. *See, e.g.*, 672 F.3d at 95-96 (citing circuit decisions holding § 2259 includes proximate causation standard); United States v. Evers, 669 F.3d 645, 658 (6th Cir. 2012) (observing majority of circuits require showing of proximate causation for restitution under § 2259); United States v. Aumais, 656 F.3d 147, 152 (2d

to injuries proximately caused by a defendant's conduct, seven of the eight circuit courts to address the issue have interpreted the statute as including such a limitation.[24]

The circuit courts of appeals are split on whether possession of child pornography alone proximately causes harm to the persons depicted in the pornographic images.[25] The Second and Ninth Circuits have denied restitution in possession cases, reasoning that proximate causation under § 2259 cannot be

Cir. 2011) (noting most circuit courts have interpreted § 2259 as requiring evidence of proximate causation); *see also* United States v. Burgess, 684 F.3d 445, 457-59 (4th Cir. 2012) (holding defendant responsible only for those losses proximately caused to victim); United States v. McDaniel, 631 F.3d 1204, 1208-09 (11th Cir. 2011) (requiring proximate causation); United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999) (requiring proximate causation). *But see In re* Amy Unknown, 701 F.3d 749, 762-63 (5th Cir. 2012) (en banc) (granting rehearing) (holding restitution under § 2259 not limited to losses proximately caused by defendant).

24. *See* United States v. Burgess, 684 F.3d 445, 456 (4th Cir. 2012) (holding § 2259 includes proximate causation limitation and citing concurring decisions from six other circuits). *But see In re* Amy Unknown, 701 F.3d 749, 762, 765 (5th Cir. 2012) (en banc) (granting rehearing) (holding proof of proximate causation only necessary for recovery under § 2259(b)(3)(F)). The Fifth Circuit is the lone U.S. court of appeals to decide § 2259 does not include a general proximate causation, although its approach to § 2259 may be subject to change as the court recently granted rehearing in part of *In re Amy Unknown*. *See In re* Amy Unknown, 701 F.3d 749, 751 (5th Cir. 2012) (en banc) (granting rehearing). The only language in § 2259 that expressly limits a victim's recovery to losses proximately caused by a defendant's conduct is found in subsection (F), the statute's "catch-all" category of compensable harm. 18 U.S.C. § 2259(b)(3)(F) (providing restitution for "any other losses suffered by the victim as a proximate result of the offense"); *see also supra* note 2 (defining compensable losses under § 2259). Despite this notable lack of causation language, courts have read a proximate causation requirement into § 2259, in general, on one of three bases: the principle of statutory construction that a final clause be read as applying to those that precede it demands that the "proximate result" language in § 2259(b)(3)(F) be read as applying to all categories of compensable harm; proximate causation is a fundamental principle of tort and criminal liability; and the word "proximate" is used to define "victim" in sections 3663A and 3664, which are cross-referenced in § 2259(b)(2). *See* United States v. Hagerman, 827 F. Supp. 2d 102, 111 (N.D.N.Y. 2011) (listing justifications for interpreting § 2259 as including proximate causation standard), *rev'd*, No. 11-3421-cr, 2012 WL 6621311 (2d Cir. Dec. 20, 2012); *see also* United States v. Evers, 669 F.3d 645, 659 (6th Cir. 2012) (accepting variety of rationales offered by other circuits for concluding § 2259 includes proximate causation standard); United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011) ("[P]roximate cause is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259."); Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1182-83 (2011) (listing bases for proximate cause requirement interpretation). Federal prosecutors have consistently conceded that § 2259 includes a proximate causation limitation, which further discredits the Fifth Circuit's contrary position. *Compare In re* Amy Unknown, 701 F.3d 749, 761 (5th Cir. 2012) (en banc) (granting rehearing) (noting government's concession restitution limited to losses proximately caused by offense), *with* 672 F.3d at 96 (stating government did not contest application of proximate cause limitation).

25. *See* 672 F.3d at 96 (outlining divergent circuit decisions in possession cases); United States v. Berk, 666 F. Supp. 2d 182, 190 (D. Me. 2009) (noting district courts across country split on awarding restitution in possession cases), *amended by*, No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009); DiBari, *supra* note 20, at 298 ("The issue of causation is the central reason why possession cases are so problematic for many district courts."); Dina McLeod, Note, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1330 (2011) (explaining chief concern of courts in possession cases has been that "the causal link between the victim's harm and the defendant's conduct is too tenuous"); *see also* United States v. Solsbury, 727 F. Supp. 2d 789, 794 (D.N.D. 2010) ("In production cases there is rarely a question of causation whereas in possession cases the boundaries of proximate cause become far more murky.").

established without proof of specific losses to the victim attributable to the defendant's possession.[26] Courts denying restitution emphasize that restitution based on the defendant's use of the pornography cannot be reasonably calculated when there is only evidence of generalized harm to the victim.[27] In contrast, the District of Columbia and Fourth Circuits held that proximate causation was satisfied by a defendant's possession of pornography alone, but remanded the cases for further findings on the amount of harm caused.[28] Courts awarding restitution generally focus on the mandatory nature of § 2259 and infer proximate causation from the defendant's participation in conduct already established as having harmed the victim.[29] After finding proximate causation, awarding courts vary in how they calculate restitution, but agree that "mathematical precision" is not necessary for the award to be proper.[30] The Eleventh Circuit Court of Appeals appears undecided on the level of causation required by § 2259, as it has reached contradictory results in two possession cases on arguably similar facts.[31]

In *United States v. Kearney*, the First Circuit Court of Appeals considered whether the criminal acts of possessing, transporting, and distributing child pornography entitle an individual depicted in the pornography to restitution

26. *See* United States v. Aumais, 656 F.3d 147, 155 (2d Cir. 2011) (denying restitution where Victim Impact Statement filed before victim aware of defendant's possession); United States v. Kennedy, 643 F.3d 1251, 1264-65 (9th Cir. 2011) (denying restitution due to government's failure to establish victim's losses proximately caused by defendant's offense).

27. *See* 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. 1109, 1126 (2011) (explaining reasons courts have denied restitution). Some courts have even found proximate causation satisfied but declined to award restitution on the basis that there is insufficient evidence to reasonably determine the restitution award. *See* United States v. Veazie, 2:11-cr-00202-GZS, 2012 WL 1430540, at *3, *7 (D. Me. Apr. 25, 2012) (finding proximate causation but denying restitution).

28. *See* United States v. Burgess, 684 F.3d 445, 459-60 (4th Cir. 2012) (holding proximate cause established but remanding for determination of restitution award); United States v. Monzel, 641 F.3d 528, 537-40 (D.C. Cir. 2011) (holding proximate causation satisfied but remanding to determine amount of harm caused); *cf.* United States v. Evers, 669 F.3d 645, 659 (6th Cir. 2012) (holding losses of victim's parent proximately caused by defendant's offense).

29. *See* Giblin, *supra* note 27, at 1124-26 (reviewing courts' rationale for awarding restitution); *supra* notes 21-22 (establishing that courts agree that depicted children suffer harm from others' possession of pornography).

30. *See* United States v. McGarity, 669 F.3d 1218, 1270 (11th Cir. 2012) ("[T]here is no universal means for determining a proper restitution amount."); Giblin, *supra* note 27, at 1126 ("[A]warding courts compute restitution in a variety of ways."). At least one district court has awarded the full amount of restitution requested by the victim, holding the defendant jointly and severally liable with future defendants. *See* United States v. Staples, No. 09-14017-CR-MOORE/LYNCH, 2009 U.S. Dist. LEXIS 81648, at *10-11 (S.D. Fla. Sept., 2 2009) (ordering $3,680,153 in restitution for victim). Most awarding courts apportion restitution awards based on the defendant's conduct. *See* United States v. Brunner, No. 5:08cr16, 2010 WL 148433, at *5 (W.D.N.C. Jan. 12, 2010) (awarding portion of restitution requested by victims), *aff'd*, 393 F. App'x 76 (4th Cir. 2010).

31. *Compare* United States v. McGarity, 669 F.3d 1218, 1270 (11th Cir. 2012) (vacating restitution order for lack of causal evidence), *with* United States v. McDaniel, 631 F.3d 1204, 1209 (11th Cir. 2011) (holding district court did not err in finding proximate causation satisfied).

under § 2259.[32] The court maintained the consensus approach to possession cases first by deciding that Vicky was clearly a "victim" of Kearney under § 2259(c) based on *Ferber* and the expert reports documenting her psychological injuries.[33] The court also concurred with the majority of courts by interpreting § 2259 as implicitly requiring proof that Kearney's use of the pornography proximately caused Vicky's injuries.[34]

The First Circuit held that Kearney's possession of the child pornography satisfied § 2259's proximate causation standard because Vicky's injuries were "reasonably foreseeable" at the time of Kearney's conduct.[35] The court offered a novel justification for determining proximate causation was satisfied in a possession case, pointing to the tort principle that when the conduct of multiple actors causes an injury, but each actor's causal contribution would be insufficient by itself to have caused the injury, each actor is nevertheless a cause in fact *and a proximate cause* of the injury.[36] The court also relied heavily on a contextual interpretation of § 2259, arguing § 2259 provides greater protection for victims than do the VWPA or MVRA, and therefore, a narrow interpretation of its proximate causation requirement would be "contrary to the purposes of restitution under § 2259."[37] In direct contradiction

32. 672 F.3d at 93 (considering defendant's challenges to district court's restitution order).

33. *Id.* at 94 (concluding Vicky "plainly a victim" based on *Ferber*); *see also supra* notes 21-22 and accompanying text (discussing agreement among courts on "victim" status issue in possession cases).

34. 672 F.3d at 95-96 (interpreting § 2259 as requiring "some causal link between the losses and the offense"); *see also supra* note 24 and accompanying text (noting consensus § 2259 requires proof of proximate causation and explaining interpretive methods).

35. 672 F.3d at 96-98. The court began its analysis of proximate causation by citing to *Davis v. United States*, a recent ruling by the court in a case in which proximate causation was at issue. *See id.* (citing Davis v. United States, 670 F.3d 48, 52-56 (1st Cir. 2012)). The court later asserted its decision was consistent with *United States v. Vaknin*, another of its seminal rulings on proximate causation. 672 F.3d at 100 n.16 (citing United States v. Vaknin, 112 F.3d 579 (1st Cir. 1997)).

36. *Id.* at 98 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41, at 268 (5th ed. 1984)). Although the principle to which the court cited refers to "but-for," or actual causation, the court held that it was applicable to proximate causation as well. *See id.* (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. g (2010)). The court asserted:

> It is clear that, taken as a whole, the viewers and distributors of the child pornography depicting Vicky caused the losses she has suffered, as outlined in the expert report. Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level.

672 F.3d at 98. Although courts have noted § 2259 functions similarly to a tort statute, despite being a criminal statute, none had expressly employed principles of tort law to interpret § 2259 until the *Kearney* court. *See* United States v. Monzel, 641 F.3d 528, 535 n.5 (D.C. Cir. 2011) (comparing § 2259 to tort statute because it directs courts to "make a victim whole for losses caused by the responsible party"). In *United States v. Burgess*, the Fourth Circuit endorsed the First Circuit's collective causation theory and further widened the circuit split over § 2259. *See* United States v. Burgess, 684 F.3d 445, 459-60 (4th Cir. 2012) (adopting *Kearney*'s rationale).

37. *See* 672 F.3d at 92, 97, 99 (distinguishing § 2259 from VWPA and MVRA); *see also* United States v. Burgess, 684 F.3d 445, 460 (4th Cir. 2012) ("[E]mployment of the concept of aggregate harm in the proximate causation analysis best effectuates the express intent of the restitution statute."). The court's contextual

to the rulings of the Second, Ninth, and Eleventh Circuits, the First Circuit held that proof of specific linkage between a defendant's offense and a victim's harm is unnecessary for finding proximate causation satisfied in possession cases.[38] As for whether the district court properly calculated the restitution awarded to Vicky, the court held that averaging her past restitution awards from similar cases was a "reasonable determination of appropriate restitution" in the case at bar.[39] In doing so, the First Circuit became the first United States court of appeals to expressly hold that not only did a defendant's possession of child pornography proximately cause a victim's injuries, but that the amount of restitution awarded to the victim under § 2259 was proper.[40]

The Court of Appeals for the First Circuit erred in deciding restitution may be awarded under § 2259 in the absence of evidence linking a defendant's possession, distribution, and transportation of child pornography to the specific losses of a victim.[41] The court's holding defies traditional notions of proximate causation and the prevailing weight of authority.[42] Compensating victims for generalized harm arising from their awareness that their image is being widely distributed and viewed, rather than from a particular defendant's viewing, effectively makes § 2259 a strict liability regime.[43] The court's reconceptualization of proximate causation under the tort principle of aggregate causation fails to adequately address the "policy concerns about open-ended liability" that it has stated are central to the concept of proximate causation.[44]

interpretation of § 2259 specifically pointed to the statute's broad coverage of compensable harms, provision of restitution for "*any* offense" under Chapter 110, and mandatory nature. 672 F.3d at 97.

38. 672 F.3d at 98-99 (holding specific causal evidence unnecessary for restitutionary liability); *see supra* notes 26, 31 (discussing other circuit courts' requirement of evidence of specific linkage). The court stated: "We reject the theory that the victim of child pornography could only show causation if she focused on a specific defendant's viewing and redistribution of her images and then attributed specific losses to that defendant's actions." 672 F.3d at 99. The court offered a prudential justification for its stance, asserting that requiring a victim to confront a particular viewer or distributor of the pornography would retraumatize the victim, thereby contradicting the purpose of § 2259. *Id.*

39. 672 F.3d at 100-01 (quoting United States v. Innarelli, 524 F.3d 286, 294 (1st Cir. 2008)).

40. *See id.* at 97, 100-01; *supra* notes 26, 28 and accompanying text (discussing previous circuit courts' decisions in possession cases). Although the Eleventh Circuit Court of Appeals affirmed a restitution order in *McDaniel*, its holding was far weaker than that of the First Circuit's in *Kearney* because it did not address whether the district court's determination of restitution was reasonable. *Compare* 672 F.3d at 100-01 (holding district court's calculation of restitution sufficiently reasonable), *with* United States v. McDaniel, 631 F.3d 1204, 1209 (11th Cir. 2011) (upholding restitution award without discussing reasonableness of restitution calculation).

41. *See* 672 F.3d at 98-99 (upholding restitution award without evidence of defendant's specific causal contribution).

42. *See* Hughey v. United States, 495 U.S. 411, 413 (1990) (requiring evidence of causal connection for proximate causation); *supra* notes 26, 31 and accompanying text (discussing circuit courts' decisions denying restitution for lack of causal evidence).

43. *See* United States v. McGarity, 669 F.3d 1218, 1269 (11th Cir. 2012) (opining courts should avoid "turn[ing] restitution for possession of child pornography into strict liability"); *see also* DiBari, *supra* note 20, at 312 (noting danger of de facto strict liability regime without proximate causation requirement).

44. 672 F.3d at 96 (quoting Davis v. United States, 670 F.3d 48, 56 (1st Cir. 2012)).

If the government cannot prove exactly how an individual defendant contributed to a victim's suffering, then the causal connection between the offense and injury is simply too attenuated to support restitutionary liability under traditional notions of proximate causation.[45]

Even if one accepts the court's argument that proximate causation exists on the "aggregate level," the court's conclusion that restitution may be reasonably calculated absent causal evidence is untenable.[46] When a court finds proximate causation satisfied without proof of the harm specifically caused by the defendant, it is left with no choice but to calculate restitution using a method unrelated to the facts of the case.[47] While the First Circuit deemed such estimation a "reasonable" determination of restitution, the more sound conclusion is that of the Ninth Circuit, which held such awards arbitrary and therefore impermissible under § 2259.[48] One district court within the First Circuit has already struggled to apply the standard set in *Kearney*, as the court in *United States v. Veazie* found proximate causation satisfied, but denied restitution on the basis that it could not calculate an award without being speculative.[49] Such an outcome is inherently contradictory to § 2259's mandate that victims receive restitution in the "full amount" of their losses, and is a result of the First Circuit's strained reasoning that proximate causation may be satisfied without causal evidence.[50]

The circuit courts' disagreement over § 2259 is the result of the statute's own inherent contradiction: Rarely will there be sufficient evidence to prove that an individual's possession of child pornography proximately caused specific harm to a depicted child, yet § 2259 entitles those children, as

45. *See* United States v. Martin, No. 2:10-CR-95, 2012 WL 3597436, at *4 (E.D. Tenn. Aug. 20, 2012) (denying restitution under § 2259 for lack of evidence establishing causal connection); DiBari, *supra* note 20, at 312 (arguing possession too attenuated from victims' injuries to find causation satisfied); McLeod, *supra* note 25, at 1325-55 (asserting traditional proximate cause analysis bars restitution for injuries stemming from pornography use alone).

46. *See* 672 F.3d at 100-01 (upholding restitution award calculated based on past restitution awards); *supra* note 36 (quoting 672 F.3d at 98). *But see* United States v. Kennedy, 643 F.3d 1251, 1264-65 (9th Cir. 2011) (limiting restitution to losses specifically caused by defendant).

47. *See* 672 F.3d at 85 (noting district court calculated restitution by averaging past awards); *see also supra* note 30 (explaining courts employ variety of methods to calculate restitution).

48. *See* 672 F.3d at 100-01 (determining district court's methodology "reasonable"); United States v. Kennedy, 643 F.3d 1251, 1265 (9th Cir. 2011) ("[P]icking a 'reasonable' number without any explanation is precisely the kind of arbitrary calculation we [have] rejected."); *see also* United States v. Berk, 666 F. Supp. 2d 182, 192-93 (D. Me. 2009) (requiring proof of causation before ordering restitution), *amended by* No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009).

49. United States v. Veazie, No. 2:11-cr-00202-GZS, 2012 U.S. Dist. LEXIS 57772, at *12, *26 (D. Me. Apr. 25, 2012) (finding proximate causation under *Kearney* but denying restitution). *But see* United States v. Chiaradio, 684 F.3d 265, 283-84 (1st Cir. 2012) (upholding district court's restitution as proper application of *Kearney*).

50. *See* 18 U.S.C. § 2259(a), (b)(2) (2006) (requiring courts to order restitution for offenses under Chapter 110); *supra* notes 41-45 and accompanying text (criticizing court for holding proximate causation satisfied).

"victims" within the meaning of § 2259(c), to mandatory restitution.[51] The First Circuit correctly noted that a narrow interpretation of § 2259's proximate causation requirement contradicts the statute's apparent purpose of broadly compensating victims of child sex abuse.[52] Rather than bending the concept of proximate causation to resolve this difficulty, the appropriate solution, as the Ninth Circuit has proposed, is for Congress to reform the statute so courts can administer it more effectively.[53] Victims of child pornography undoubtedly deserve compensation for their suffering, but courts must adhere to sound legal principles in ordering restitution.[54]

The United States courts of appeals are divided over whether § 2259 entitles victims of child sex abuse to restitution when there is no evidence that the defendant's conduct caused specific harm to the victim. In *United States v. Kearney*, the First Circuit improperly adopted an expansive interpretation of § 2259's proximate causation requirement, holding restitution may be ordered without evidence of the defendant's precise causal contribution to the victim's psychological injuries. In doing so, the First Circuit not only abandoned traditional notions of proximate causation, but also authorized district courts to order speculative restitution awards. In the absence of statutory reform, courts should adhere to traditional principles of proximate causation and only hold individuals in possession of child pornography responsible for the injuries that the government proves they caused.

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51. *See* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) ("The underlying problem is the structure established by § 2259: it is a poor fit for these types of offenses."); *see also In re* Amy Unknown, 701 F.3d 749, 775 (5th Cir. 2012) (Dennis, J., concurring) (granting rehearing) (noting court confronted "extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system"); United States v. Veazie, No. 2:11-cr-00202-GZS, 2012 U.S. Dist. LEXIS 57772, at *12, *25 (D. Me. Apr. 25, 2012) (noting difficulty of administering § 2259); *supra* note 21 (establishing depicted children as "victims" under § 2259(c)).

52. *See supra* note 37 and accompanying text (explaining court's contextual interpretation of § 2259).

53. *See* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) (suggesting Congress reform § 2259); *see also In re* Amy Unknown, 701 F.3d 749, 780-81 (5th Cir. 2012) (Southwick, J., dissenting) (granting rehearing) (supporting *Kennedy* court's call for congressional reform of § 2259); United States v. Burgess, 684 F.3d 445, 460 (4th Cir. 2012) ("[W]e add our voice to that of the Ninth Circuit in *Kennedy* in requesting that Congress reevaluate the structure of the restitution statute . . . ."). A proposed alternative solution is that Congress implement a set fine for all possession offenses. *See* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) (offering fixed statutory fine as alternative legislative solution); Giblin, *supra* note 27, at 1139 (discussing awarding restitution within set minimum and maximum amounts); Jacques, *supra* note 24, at 1188-91 (advocating for statutory fine). *But see* DiBari, *supra* note 20, at 310 (arguing fine would undermine restitution's retributive qualities).

54. *See* United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir. 2011) (declining to reinterpret causation requirement); United States v. Berk, 666 F. Supp. 2d 182, 192-93 (D. Me. 2009) ("[T]he Court's sympathy does not override the [causation] requirement . . . ."), *amended by* No. 08-CR-212-P-S, 2009 U.S. Dist. LEXIS 103141 (D. Me. Oct. 29, 2009); DiBari, *supra* note 20, at 328 (urging courts to order restitution in principled manner).