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NOTE

AN ARGUMENT FOR CHILD PORNOGRAPHY VICTIM RESTITUTION IN THE NINTH CIRCUIT: *UNITED STATES v. KENNEDY*

AMBER PRUITT*

INTRODUCTION

The production of child pornography is big business.¹ Internationally, the creation and distribution of child pornography results in more than three billion dollars per year in revenue.² Moreover, approximately two thirds of arrests for Internet-related sex crimes in the United States are for the production and possession of child pornography.³ These statistics attest to the fact that child pornography continues to be a serious problem.⁴ The frequency with which people

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¹ Robert D. Richards & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry's Efforts To Protect Minors*, 44 CAL. W. L. REV. 511, 513 (2008).

² *Id.*

³ See JANIS WOLAK, KIMBERLY MITCHELL, & DAVID FINKELHOR, INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT 17 (2003), available at www.unh.edu/ccrc/pdf/CV70.pdf.

⁴ *Id.*

continue to view child pornography is disturbing because this thriving industry is built on the exploitation of children.⁵ Victims of child pornography are sexually abused,⁶ and this abuse is filmed or photographed.⁷ A single image of child pornography will often be reproduced and shared among offenders, usually online,⁸ so that strangers may constantly view images of the victim's sexual abuse in what amount to crime-scene photos.⁹ Once uploaded, these images can never truly be removed from the Internet.¹⁰ The existence of such images exacerbates the trauma of the original sexual abuse.¹¹ Victims must also deal with the risk that offenders who view the images may seek to contact them¹² or use the images to groom other children for future sexual abuse.¹³ This may sound like a nightmare, but it is a reality for many survivors of abuse.¹⁴

In response to the proliferation of the child pornography industry, possessing child pornography has been criminalized in many countries around the world.¹⁵ This response is not solely due to the commonly accepted fact that child pornography offends traditional ideas regarding sexuality and social norms.¹⁶ The criminalization of child pornography is also a response to the level and persistence of trauma in the children

⁵ See Lina Acca Mathew, *Online Child Safety from Sexual Abuse in India*, 2009 J. INFO., L. & TECH. (May 28, 2009), available at www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_1/mathew.

⁶ See *United States v. Klein*, 829 F. Supp. 2d 597, 603 (S.D. Ohio 2011) (stating that child pornography is by definition a "permanent record" of a child's sexual abuse).

⁷ *Id.*

⁸ Melissa Wells et al., *Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession*, 8 POLICE PRAC. & RES. 269, 271 (2007), available at unh.edu/ccrc/pdf/CV96.pdf.

⁹ See KERRY SHELDON & DENNIS HOWITT, *SEX OFFENDERS AND THE INTERNET* 9 (2007).

¹⁰ *Id.*

¹¹ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) ("Congress finds that . . . where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years . . .").

¹² Lorelei Laird, *Pricing Amy: Should Those Who Download Child Pornography Pay the Victims?*, A.B.A.J. (Sept. 2012), available at www.abajournal.com/magazine/article/pricing_amy_should_those_who_download_child_pornography_pay_the_victims/ (providing an example of a victim who was contacted and stalked by the possessors of her image).

¹³ *Id.*

¹⁴ See, e.g., *United States v. Klein*, 829 F. Supp. 2d 597, 599 (S.D. Ohio 2011).

¹⁵ See YAMAN AKDENIZ, *INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES* 9 (2008).

¹⁶ See Stephen T. Fairchild, Note, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163, 172 ("Congress, recognizing the established norms of the American public, enacted laws relating to child pornography to give meaningful enforcement to morally and empirically based attitudes against the viewing and dissemination of such material and in favor of protecting the children involved in its production.").

who are sexually abused on camera for the purpose of creating the images.¹⁷

Despite such widespread criminalization, there is currently no uniform definition of what constitutes child pornography.¹⁸ Federal laws define child pornography as generally inclusive of images of persons under the age of eighteen engaged in sexually explicit behavior.¹⁹ Sexually explicit behavior can include a range of conduct such as sexual intercourse, sexual touching, bestiality or lascivious exhibition of the genitals or pubic area.²⁰ The term “sexually explicit behavior” has been interpreted broadly such that the definition of child pornography may differ between jurisdictions.²¹ However, the common thread in defining child pornography is that images must depict minor children engaged in sexual activities.²²

The Internet has increased both the amount of child pornography that is created²³ and the amount of trauma that the image may cause in its victim.²⁴ Now that images of child pornography can be uploaded and passed from user to user, victims face the possibility that their images will be viewed by thousands of people over many years.²⁵ Though particular sites can be forced to remove such images through an injunction, files can always be stored and copied for redistribution.²⁶ Individual victims have no power over their own images—once online, the victim cannot force removal.²⁷ This continuous circulation of the images causes many victims to feel as if the abuse is never really over, as their right to privacy is violated again and again.²⁸ These victims are

¹⁷ See *What Are the Effects of Sexual Abuse?*, AM. PSYCHOLOGICAL ASS'N, www.apa.org/releases/sexabuse/effects.html (last visited Jan. 3, 2013); INT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY: MODEL LEGISLATION & GLOBAL REVIEW i (2008), available at www.missingkids.com/en_US/documents/CP_Legislation_Report.pdf.

¹⁸ Wells et al., *supra* note 8, at 271.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET 9 (2006), available at www.cops.usdoj.gov/Publications/e04062000.pdf.

²⁴ See *What Are the Effects of Sexual Abuse?*, AM. PSYCHOLOGICAL ASS'N, www.apa.org/releases/sexabuse/effects.html (last visited Jan. 3, 2013).

²⁵ See Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUSTICE STATISTICS BULLETIN, Dec. 2007, at 2, available at bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf.

²⁶ See WOLAK ET AL., *supra* note 3, at 33.

²⁷ See Jennifer Rothman, Note, *Getting What They Are Owed: Restitution Fees for Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333, 337 (2011).

²⁸ *Id.*

often traumatized and may require tremendous financial resources for the treatment required to overcome the trauma.²⁹ As one victim reported:

I wonder if the people I know have seen these images. I wonder if the men I pass at the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control . . . It feels like I am being raped by each and every one of them.³⁰

In an effort to ensure that victims of child pornography will have access to the resources necessary for appropriate treatment, Congress enacted 18 U.S.C. § 2259 as part of the Violence Against Women Act of 1994.³¹ This section of the Act mandates restitution for all losses suffered by children who have been abused in the creation and distribution of child pornography.³² Though the application of this statute is straightforward when the defendant was a party to the creation

²⁹ See, e.g., *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009).

³⁰ Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1169 (2011) (quoting *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009)).

³¹ 18 U.S.C. § 2259 provides:

- (a) In General.—Notwithstanding section 3663 or 3663A, . . . the court shall order restitution for any offense under this chapter.
- (b) Scope and Nature of Order. —
 - (1) Directions. —The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
 - (2) Enforcement. —An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under 3663A.
 - (3) Definition. —For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—
 - (A) medical services relating to physical, psychiatric, or psychological care;
 - (B) physical and occupational therapy or rehabilitation;
 - (C) necessary transportation, temporary housing, and child care expenses;
 - (D) lost income;
 - (E) attorneys' fees, as well as other costs incurred; and
 - (F) any other losses suffered by the victim as a proximate result of the offense.
 - (4) Order mandatory. —(A) The issuance of a restitution order under this section is mandatory.
 - (B) A court may not decline to issue an order under this section because of—
 - (i) the economic circumstances of the defendant; or
 - (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.
 - (c) Definition. —For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter

18 U.S.C.A. § 2259 (Westlaw 2012).

³² *Id.*

of the images, courts have disagreed on whether the statute also demands that those who later obtain and distribute the pornographic images must also pay restitution.³³

Recently, the Ninth Circuit took up the restitution issue in *United States v. Kennedy*.³⁴ When defendant Kennedy returned from an overseas trip, he passed through the Seattle-Tacoma Airport.³⁵ There, searches of his laptop revealed more than five thousand images of child pornography.³⁶ At trial, Kennedy was convicted of both possession and transportation of the images.³⁷ As part of his sentence, he was ordered to pay restitution to two of the victims who were identified: Amy and Vicky.³⁸ Kennedy appealed the restitution order and the Ninth Circuit held that the lower court had erred in ordering that restitution be paid, for three reasons.³⁹ First, proximate cause was a necessary element to such awards.⁴⁰ Second, proximate cause between the defendant's possession of the images and the victims' injuries was too attenuated to justify restitution.⁴¹ Third, the amount of damages awarded to the victims was arbitrary, in part because proximate cause had not been established.⁴²

This Note argues that the Ninth Circuit erred in *United States v. Kennedy* by vacating restitution damages for the victims to be paid by the possessor of their images, because denying victims such restitution offends traditional understandings of the limits of proximate cause⁴³ and the legislative intent behind § 2259.⁴⁴ There are alternative legal tests currently used by other circuits that establish proximate cause in child-pornography-possessor cases that the Ninth Circuit should have applied in *Kennedy* to ensure that those responsible for harming children would not escape due liability.⁴⁵

³³ See, e.g., *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009); *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103, at *1 (E.D. Cal. Aug. 19, 2009).

³⁴ *United States v. Kennedy*, 643 F.3d 1251, 1265 (9th Cir. 2011).

³⁵ *Id.* at 1252.

³⁶ *Id.* at 1253.

³⁷ *Id.* at 1254.

³⁸ *Id.* at 1256.

³⁹ *Id.* at 1263-64.

⁴⁰ *Id.* at 1263.

⁴¹ *Id.* at 1264.

⁴² *Id.* at 1265.

⁴³ See RESTATEMENT (SECOND) OF TORTS § 315 (1965).

⁴⁴ See, e.g., *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (“[I]t is clear that Congress intended to provide victims of sexual abuse with expansive relief for ‘the full amount of . . . [their] losses’ suffered as a result of abuse.” (quoting 18 U.S.C. § 2259(b)(3)(B), adding emphasis and making alterations)).

⁴⁵ *United States v. Hardy*, 707 F. Supp. 2d 597, 613-14 (W.D. Pa. 2010).

Part I of this Note explains why the possession of child pornography falls within the scope of § 2259, which requires mandatory restitution awards for victims. Part II explains why the majority of courts have found that proximate cause is necessary before such awards can be ordered. Part III explores the existing circuit split regarding whether proximate cause can be established in cases where a defendant is a mere possessor of child pornography and describes the various tests for establishing such cause. Part IV provides the facts and procedural history of *United States v. Kennedy* and explains the reasoning behind the court's decision to overturn the restitution order. Part V argues that the Ninth Circuit erred in its holding in *Kennedy* because proximate cause was established in the case and that the amount of restitution sought was proper under § 2259.

I. CHILD PORNOGRAPHY POSSESSION FALLS WITHIN THE SCOPE OF § 2259

The Mandatory Restitution for Sex Crimes section of the Violence Against Women Act of 1994⁴⁶ requires that all victims of acts of sexual abuse receive restitution.⁴⁷ The term “restitution” refers to monetary compensation paid to the victim of a crime by the person convicted of the crime.⁴⁸ Under federal law, the amount of restitution paid to the victim should cover the full extent of losses suffered by the victim as a result of the crime.⁴⁹

Until recently, the application of this statute suggested that restitution could be ordered only against offenders who had personally recorded or participated in the sexual abuse of children.⁵⁰ This changed when two victims of child pornography, known only by the pseudonyms Amy and Vicky, sought criminal restitution in a series of cases, demanding that courts consider whether such restitution is also appropriate if the defendant was not a part of the original sexual abuse of the victim, but had later possessed or participated in the distribution of images of child pornography.⁵¹ In 2009, Amy was granted her first restitution award from a possessor of an image of her childhood sexual

⁴⁶ Violence Against Women Act of 1994, 18 U.S.C.A. § 2259(a) (Westlaw 2012).

⁴⁷ *Id.*

⁴⁸ 18 U.S.C.A. § 3663A(a)(2) (Westlaw 2012).

⁴⁹ *Hughey v. United States*, 495 U.S. 411, 413 (1990).

⁵⁰ See John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES, Feb. 3, 2010, at A19, available at www.nytimes.com/2010/02/03/us/03offender.html.

⁵¹ *United States v. Woods*, 689 F. Supp. 2d 1102, 1110 (N.D. Iowa 2010).

abuse.⁵² Amy's attorney has brought hundreds of similar cases to nearly every district court in the country, with varying levels of success.⁵³ In *United States v. Kennedy*, both Amy and Vicky requested restitution based on defendant Kennedy's possession of their images.⁵⁴

The language of § 2259 supports the proposition that restitution is mandatory for the possessors of child pornography. The possession of child pornography is a violation of 18 U.S.C. § 2252.⁵⁵ Section 2259 states that it applies to "any offense under this chapter,"⁵⁶ which includes § 2252.⁵⁷ Thus, § 2259 should make restitution mandatory for those who violate § 2252 by possessing images of child pornography. Further, since the offense of possession falls within the scope of § 2259, the defendant is required to pay the "full amount of the victim's losses."⁵⁸

The language of § 2259 also states that restitution must be paid in accordance with the Mandatory Victims Restitution Act of 1996,⁵⁹ the general federal restitution statute that defines the ways in which a federal court may administer an award of restitution.⁶⁰ The Act gives the government the option to seek restitution from a defendant based on a request by the victim.⁶¹ Though the government is not required to seek restitution in every case, the law dictates that if the government seeks restitution, judges have no discretion in the decision of whether to award restitution.⁶² If a defendant is convicted of an applicable offense that has caused some damage to the victim, restitution is mandated.⁶³ Thus, the only issues pertaining to restitution awards are whether a victim can prove that a possessor of their image has actually caused the victim's

⁵² See Rothman, *supra* note 27, at 335 (citing *United States v. Hesketh*, No. 3:08-CR-00165 (D. Conn. Feb. 23, 2009)).

⁵³ See Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1171-72 (2011) (describing the efforts of Amy in collecting restitution from the possessors of her images); Casey Knaupp, *Attorney for Victim Asks for \$3.4 Million*, TYLER MORNING TELEGRAPH, Aug. 21, 2009, at A1, available at uk.legal.narkive.com/hvcrPme5/commercial-child-porn-in-the-usa-mediated-by-the-courts.

⁵⁴ *United States v. Kennedy*, 643 F.3d 1251, 1265 (9th Cir. 2011).

⁵⁵ 18 U.S.C.A. § 2252(a)(4)(B) (Westlaw 2012) (knowingly possessing or knowingly accessing with intent to view child pornography).

⁵⁶ 18 U.S.C.A. § 2259(a) (Westlaw 2012); see 18 U.S.C.A. § 2251 pt. 1, ch. 110 (Westlaw 2012).

⁵⁷ *Id.*

⁵⁸ 18 U.S.C.A. § 2259(b)(3).

⁵⁹ 18 U.S.C.A. § 3664(e) (Westlaw 2012).

⁶⁰ See Jacques, *supra* note 53, at 1183-84 (explaining the purpose behind § 3664 of "harmonizing" federal restitution procedures).

⁶¹ See 18 U.S.C.A. § 3664(d)(1).

⁶² 18 U.S.C.A. § 3664(f)(1).

⁶³ *Id.*

losses, and whether the court can calculate these losses to a reasonable certainty.⁶⁴

II. THE MAJORITY OF COURTS HAVE FOUND THAT § 2259 REQUIRES PROXIMATE CAUSE FOR AN AWARD OF RESTITUTION

Despite evidence that children are irrevocably injured by the distribution of child pornography, some courts have found that because a possessor generally does not take part in the original abuse of the child, he or she can be only tenuously linked to the harm.⁶⁵ Thus, courts attempting to award restitution to victims under § 2259 must determine whether these offenders can be considered to have legally caused the harm suffered.⁶⁶

Generally, there are two types of causation that a court will consider when determining whether an offender has caused the losses of a crime victim. First, the court must determine if the offender's actions were a "but-for" cause of the victim's injuries.⁶⁷ But-for causation exists when, if not for the defendant's actions, the victim would not have been harmed.⁶⁸ One example would be a shooting where the victim dies—but for the defendant shooting the victim, the victim would not have died. Thus, the shooter is the "but-for cause" of the victim's death.

There is also a second type of causation known as proximate cause, when the offender's actions were a substantial cause of the victim's losses, such that the defendant should be held liable to the victim under the law.⁶⁹ The most common test for proximate cause involves foreseeability.⁷⁰ Foreseeability hinges on whether the harm resulting from an action could reasonably be predicted by the one who caused the harm.⁷¹ For instance, it is foreseeable that throwing a baseball at someone could cause him or her a blunt-force injury.

Proximate cause is interrupted if there is a superseding-intervening event between the offender's actions and the victim's losses that breaks the chain of causation.⁷² A superseding-intervening event is a cause of harm that could not have been reasonably predicted by the

⁶⁴ See, e.g., *United States v. Woods*, 689 F. Supp. 2d 1102, 1108 (N.D. Iowa 2010).

⁶⁵ *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Washington & Georgetown R. Co. v. Hickey*, 166 U.S. 521, 525 (1897).

⁶⁸ *Id.*

⁶⁹ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *id.* at 103 (Andrews, J., dissenting).

defendant.⁷³ For instance, suppose the defendant poked an associate in the chest during a friendly discussion around a water cooler, and the associate subsequently jumped out a window. This unusual reaction may be deemed a superseding-intervening event that relieves the defendant of blame for the co-worker's death because there is no way the defendant could reasonably have predicted such a reaction.

Courts deciding whether possessors of child pornography owe restitution to children depicted in the images have differed regarding whether proximate cause is necessary for an award under § 2259.⁷⁴ The majority of courts have held that proximate cause must be found before a victim can collect restitution from an offender.⁷⁵ Courts holding this majority view have cited language under § 2259 that seems to support a requirement of proximate cause for all damages incurred by victims of child pornography.⁷⁶ Such courts also cite to the legislative intent behind the Victim and Witness Protection Act of 1982⁷⁷ and the Mandatory Victims Restitution Act of 1996, both of which clarified the mandatory nature of all federal restitution including the type awarded under § 2259.⁷⁸

In determining that the statutory construction of § 2259 includes a requirement of proximate cause for all types of damages, courts have

⁷³ *Id.* at 99 (majority opinion).

⁷⁴ Compare *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at *3 (E.D. Va. Nov. 24, 2009) (“[Section] 2259 does not clearly demand a ‘proximate cause’ standard.”), with *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009) (“[T]he plain language of [§ 2259] clearly requires that losses—to be recoverable in restitution—must have been proximately caused by the acts which constitute the offense of conviction.”). See also *Jacques*, *supra* note 53, at 1183-84.

⁷⁵ See *Jacques*, *supra* note 53, at 1178 (explaining that although the majority of circuits have found a requirement of proximate cause within § 2259, the Fifth Circuit has rejected both the argument that proximate cause is a requirement for all types of losses defined in § 2259 and the argument that the legislative history behind federal statutes supports the proximate-cause requirement); see also *In re Amy Unknown*, 701 F.3d 749, 768 (5th Cir. 2012) (en banc) (by express terms of § 2259, proximate-cause requirement applies only in determining “any other losses” suffered by victim under § 2259(b)(3)(F), but not for any other losses enumerated in § 2259(b)(3)).

⁷⁶ See, e.g., *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (“Section 2259 . . . incorporates a requirement of proximate causation: It states that the defendant shall pay ‘restitution for any offense’ to the ‘victim’ of the offense. It defines a ‘victim’ as ‘the individual harmed as a result of a commission of a crime under this chapter,’ and states that restitution shall compensate for ‘the full amount of the victim’s losses’” (citing 18 U.S.C. § 2259(b)(1), (c))).

⁷⁷ See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)); S. REP. NO. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516 (explaining that the Victim and Witness Protection Act of 1982 was enacted in part to provide mandatory restitution awards to victims of certain offenses).

⁷⁸ See Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. § 3663A); S. REP. NO. 104-179, at 18 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 931 (explaining congressional “intent that courts order full restitution to all identifiable victims of covered offenses”).

cited to § 2259(b)(3).⁷⁹ This subsection enumerates common types of losses suffered by victims.⁸⁰ This subsection broadens the types of losses subject to restitution by providing that restitution should include “any costs incurred by the victim for . . . any other losses suffered by the victim as a proximate result of the offense.”⁸¹ This language ensures that all losses suffered by victims of exploitation can be compensated by restitution.⁸² It is within this subsection that courts have read a proximate cause requirement for all types of losses under the statute.⁸³

Though the actual words, “proximate cause” in § 2259(b)(3) directly precede only the description of “any other losses,” the concept of *eiusdem generis*⁸⁴ has resolved this issue for some courts.⁸⁵ *Eiusdem generis* is a doctrine of interpretation that provides, “When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.”⁸⁶ Courts reading § 2259 according to the doctrine of *eiusdem generis* have found the proximate cause requirement between the crime and resulting injury is applicable to all types of losses, not just those specifically listed.⁸⁷

Further justification for a proximate cause requirement under § 2259 has been based on an examination of the legislative intent behind federal mandatory restitution laws in general.⁸⁸ The legislative intent behind other mandatory restitution laws is relevant to the debate regarding § 2259 due to Congress’ efforts to create a uniform system of federal restitution law that can be applied consistently to many types of crimes.⁸⁹ To be considered a “victim” under federal mandatory restitution law, one must have been “directly and proximately harmed as a result of the commission of an offense for which restitution may be

⁷⁹ See, e.g., *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999).

⁸⁰ 18 U.S.C.A. § 2259(b)(3)(A-E) (Westlaw 2012).

⁸¹ 18 U.S.C.A. § 2259(b)(3)(F).

⁸² *Id.*

⁸³ See *United States v. McDaniel*, 631 F.3d 1204, 1208 (3d Cir. 2011).

⁸⁴ BLACK’S LAW DICTIONARY 594 (9th ed. 2009). *Eiusdem generis* is used to interpret loosely written statutes. If a law lists specific classes of persons or things and then refers to them in general, the general statements apply only to the same kind of persons or things specifically listed. For example, if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, “vehicles” would not include airplanes, since the list was of land-based transportation.

⁸⁵ *McDaniel*, 631 F.3d at 1208.

⁸⁶ *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345 (1920).

⁸⁷ *McDaniel*, 631 F.3d at 1208; see also *What Are the Effects of Sexual Abuse?*, AM. PSYCHOLOGICAL ASS’N, www.apa.org/releases/sexabuse/effects.html (last visited Jan. 3, 2013) (listing those types of losses enumerated by § 2259(b)(3)).

⁸⁸ *United States v. Hardy*, 707 F. Supp. 2d 597, 609 (W.D. Pa. 2010) (quoting S. REP. NO. 104-179, at 19 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 932).

⁸⁹ *Hardy*, 707 F. Supp. 2d at 609.

ordered.”⁹⁰ Although these laws are similar to § 2259 because they require restitution for crime victims, they cover crimes other than child pornography.⁹¹

By examining both the language of § 2259 and the overarching policies that guide federal restitution law in general, most courts have ruled that § 2259 requires that a victim show proximate cause between an offense and his or her injuries before he or she will be granted restitution from the offender.⁹² However, this is not the only causation requirement at issue in the discussion of whether possessors of child pornography are liable for restitution. Though the issue of whether proximate cause is necessary in these situations has been largely settled, there is still a circuit split as to whether such cause can ever be established in cases where the offender is a mere possessor of child pornography.

III. COURTS DISAGREE AS TO WHETHER A MERE POSSESSOR OF CHILD PORNOGRAPHY CAN BE HELD TO HAVE PROXIMATELY CAUSED A VICTIM’S INJURY UNDER § 2259

Though most courts see proximate cause as a requirement of § 2259, courts are divided on the issue of proximate cause in regard to child-pornography-possessor cases.⁹³ Some courts have ruled that restitution cannot be granted in this type of case because the link between the defendant’s possession of the images and the victim’s injuries is simply too remote.⁹⁴ Other courts have ruled that proximate cause does exist in these cases and that restitution should therefore be granted.⁹⁵

Courts that have ruled in favor of granting restitution in child-pornography-possessor cases emphasize the fact that the language of § 2259 states that all a victim must do is prove that he or she has suffered a harm in order to receive restitution.⁹⁶ Once any harm is established, the

⁹⁰ 18 U.S.C.A. §§ 3663(a)(2), 3663A(a)(2) (Westlaw 2012); *see also Hardy*, 707 F. Supp. 2d at 606.

⁹¹ *Hardy*, 707 F. Supp. 2d at 609.

⁹² *See, e.g., United States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011).

⁹³ *See supra* notes 81–84 and accompanying text.

⁹⁴ *See, e.g., United States v. Kennedy*, 643 F.3d 1251, 1265 (9th Cir. 2011); *United States v. Rowe*, No. 1:09-CR-80, 2010 WL 3522257, at *1-5 (S.D.N.C. Sept. 7, 2010); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050 (N.D. Ga. Dec. 17, 2009).

⁹⁵ *See, e.g., In re Amy Unknown*, 701 F.3d 749, 768 (5th Cir. Nov. 19, 2012) (en banc) (by express terms of § 2259, proximate-cause requirement applies only in determining “any other losses” suffered by victim under § 2259(b)(3)(F), but not for any other losses enumerated in § 2259(b)(3)); *United States v. McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011); *United States v. Baxter*, 394 F. App’x 377, 378 (9th Cir. 2010).

⁹⁶ *See, e.g., In re Amy Unknown*, 701 F.3d at 768; *McDaniel*, 631 F.3d at 1206; *Baxter*, 394 F. App’x at 378.

proximate cause requirement is met and an award of restitution becomes mandatory, regardless of exactly how much of the victim's harm can be attributed directly to the actions of the defendant.⁹⁷

Two explanations have emerged as to why the mere possession of child pornography is a proximate cause of the victims' injuries. The first approach uses the "substantial-factor" test to show that the defendant's conduct was a substantial factor in the victim's overall harm.⁹⁸ The second approach uses the "harm-within-the-risk" test, which focuses on an offender's ability to foresee that his actions are likely to cause a specific harm to the victim.⁹⁹

A. THE SUBSTANTIAL-FACTOR TEST

To establish proximate cause under the substantial-factor test, it must be proven that the defendant's conduct was a "significant contributing factor" to the victim's emotional damage and resulting financial losses.¹⁰⁰ For example, in *United States v. Hardy*, the defendant was convicted of distributing, receiving, and possessing child pornography.¹⁰¹ The defendant took no part in the original abuse of the victim and obtained the images years after their creation.¹⁰² The court found that the child depicted in the pornographic images would still have been harmed whether the defendant had chosen to possess and distribute her images or not.¹⁰³ However, the court also found that the defendant's behavior aided in the circulation of the victim's picture.¹⁰⁴ This circulation harmed the victim psychologically, a harm that could not be separated from the original psychological injury.¹⁰⁵ Though the defendant's actions happened well after the initial injury, they were still found to have proximately caused some portion of the overall injury.¹⁰⁶ Thus, the defendant's actions, though not the only cause, were a substantial factor in the harm.¹⁰⁷

⁹⁷ See, e.g., *In re Amy Unknown*, 701 F.3d at 768; *McDaniel*, 631 F.3d at 1206; *Baxter*, 394 F. App'x at 378.

⁹⁸ *United States v. Hardy*, 707 F. Supp. 2d 597, 614 (W.D. Pa. 2010).

⁹⁹ *United States v. Church*, 701 F. Supp. 2d 814, 830 (W.D. Va. 2010).

¹⁰⁰ *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999).

¹⁰¹ *Hardy*, 707 F. Supp. 2d at 613.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 614.

¹⁰⁷ *Id.* at 613.

B. THE HARM-WITHIN-THE-RISK TEST

The harm-within-the-risk test was established in section 29 of the Third Restatement of Torts.¹⁰⁸ The test asks “whether there is an intuitive relationship between the act(s) alleged and the damages at issue (that is, whether the conduct was wrongful because that type of damage might result).”¹⁰⁹ For example, in *United States v. Monzel*, the court determined that victims of child pornography suffer from additional harm after the fact of their original sexual abuse and that the risk of this harm is inherent within the offense of child pornography possession.¹¹⁰ Courts that apply this test rely on the congressional intent behind § 2259 to compensate victims to justify a more relaxed approach to establishing proximate cause in these cases, making a test based on the reasonable connection between a defendant’s actions and implied harm to the victim appropriate.¹¹¹

IV. *UNITED STATES V. KENNEDY*

A. FACTS AND PROCEDURAL HISTORY

On November 9, 2007, Joshua Osmun Kennedy was arrested at the Seattle-Tacoma Airport when officials found over five thousand images of child pornography on his laptop computer.¹¹² Kennedy was convicted of possessing and distributing images of child pornography in violation of 18 U.S.C. § 2252¹¹³ and sentenced to sixty months in prison followed by a fifteen-year period of supervised, conditional release.¹¹⁴ Further, the court ordered that Kennedy pay restitution under § 2259 to two of the victims whose images had been found on his computer: Amy and Vicky.¹¹⁵ The government sought restitution in the total amount of \$3,000,000 for Amy and \$227,000 for Vicky on a theory of joint and several liability, or, alternatively, one thousand dollars for each image possessed by the defendant.¹¹⁶ The defendant asked that the court not

¹⁰⁸ *United States v. Monzel*, 746 F. Supp. 2d 76, 87 (D.D.C. 2010).

¹⁰⁹ *Id.* (quoting RESTATEMENT (THIRD) OF TORTS § 29 (2010)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *United States v. Kennedy*, 643 F.3d 1251, 1255 (9th Cir. 2011).

¹¹³ *Id.*

¹¹⁴ *Id.* at 1254.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1255.

award restitution to either of the two women, claiming that the government had failed to show that an award of restitution under § 2259 was justified in this case because proximate cause between Kennedy's actions and the injuries of the victims had not been established.¹¹⁷ The trial court found that proximate cause did exist and that one thousand dollars per image was fair.¹¹⁸ The court awarded \$17,000 to Amy and \$48,000 to Vicky—one thousand dollars for each image of each victim.¹¹⁹

Kennedy appealed the trial court's decision to the Ninth Circuit on several grounds.¹²⁰ First, he claimed that the court erred in allowing the testimony of five law enforcement officers involved in the investigation of the original sexual abuse of the underage victims depicted in the images found on Kennedy's computer.¹²¹ Second, Kennedy claimed that the court abused its discretion when it imposed the fifteen-year period of supervised release.¹²² Third, Kennedy appealed the court's restitution order, claiming that the government had failed to prove that restitution was warranted under the statute because the government had not shown any cause between the victims' losses and Kennedy's possession of the pornography.¹²³

B. THE NINTH CIRCUIT'S HOLDING REGARDING THE INVALIDITY OF THE RESTITUTION ORDER

In an opinion written by Judge Sandra Segal Ikuta, the Ninth Circuit affirmed Kennedy's conviction and his sentence, but vacated the restitution order.¹²⁴ The court held that while the inclusion of the testimony of the officers and the imposition of supervised release were both proper exercises of judicial discretion, the restitution order was improper due to the government's failure to establish that Kennedy's mere possession of the images was a proximate cause of Amy and Vicky's suffering.¹²⁵ This section discusses the *Kennedy* court's holding regarding the restitution order, which was based on its finding that the defendant's actions were not a but-for or proximate cause of harm to the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1256.

¹²⁴ *Id.* at 1258, 1261.

¹²⁵ *Id.*

victims and that the amount of restitution damages awarded by the trial court was arbitrary.¹²⁶

1. *The Requirements of the Mandatory Restitution for Sex Crimes Section of the Violence Against Women Act of 1994*

The trial court in *United States v. Kennedy* derived its authority to grant the restitution orders for Amy and Vicky from § 2259.¹²⁷ This section of the Violence Against Women Act of 1994 requires mandatory restitution for victims of sexual abuse.¹²⁸ The Ninth Circuit began its analysis of that authority with a thorough examination of the language of the statute.¹²⁹ The court found that § 2259 makes restitution mandatory in cases involving the sexual abuse and exploitation of children and that such orders must “direct the defendant to pay the victim . . . the full amount of the victim’s losses.”¹³⁰

In defining the term “victim” for the purposes of restitution, the court turned to previous Ninth Circuit rulings regarding the proximate cause requirement under other federal restitution statutes, specifically the Victim and Witness Protection Act of 1982 (VWPA)¹³¹ and the Mandatory Victims Restitution Act of 1996 (MVRA).¹³² The court found it appropriate to analogize § 2259 with these laws because § 2259(b)(2) states that all restitution orders must be “issued and enforced in accordance with” all sections of the VWPA and the MVRA.¹³³ The VWPA and the MVRA define victims as those whose harms are both but-for and proximately caused by a defendant’s actions.¹³⁴ The court adopted this definition of “victim” along with the requirements of both but-for and proximate causation.¹³⁵

Next, the court turned to the issue of how closely connected the harm must be to a defendant’s actions in order to constitute proximate cause for restitution under § 2259.¹³⁶ To determine the scope of the proximate cause requirement, the court once again relied on previous

¹²⁶ *Id.* at 1259.

¹²⁷ *Id.* at 1255.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1260.

¹³⁰ *Id.* at 1255.

¹³¹ 18 U.S.C.A. §§ 1512-1515, 3663-3664 (Westlaw 2012).

¹³² 18 U.S.C.A. § 3663A (Westlaw 2012).

¹³³ *Kennedy*, 643 F.3d at 1258.

¹³⁴ 18 U.S.C.A. §§ 1512-1515, 3663-3664.

¹³⁵ *Kennedy*, 643 F.3d at 1260.

¹³⁶ *Id.* at 1258.

Ninth Circuit case law developed from the VMPA and MVPA.¹³⁷ The court cited a range of its own prior decisions on the issue of how attenuated the harm may be from a defendant's action before proximate cause will be destroyed in criminal cases.¹³⁸ The court found that such decisions must walk a "middle ground."¹³⁹ That is, a loss cannot be too remote from an action if restitution is to be granted, but it may be at least one step removed from the action without destroying proximate cause.¹⁴⁰

The Ninth Circuit then sought to find that middle ground.¹⁴¹ It began by citing *United States v. Keith*.¹⁴² In that case, the court found that an intervening cause between a crime and a harm did not disqualify a victim from being compensated for that loss because the intervening cause was directly related to the offensive conduct.¹⁴³ The court gave the example of such an intervening cause from *United States v. Gamma Tech Industries, Inc.*¹⁴⁴ In that case, a navy contractor took kickbacks in exchange for hiring certain subcontractors.¹⁴⁵ This practice caused contractors not involved in the scheme to lose money, because the subcontractors who did give kickbacks were able to charge inflated prices for the contracts they received.¹⁴⁶ Though the victims' losses had been greatly increased by the inflated charges of the subcontractors and not the offender himself, the contractor was still ordered to pay the victims the full amount of their losses.¹⁴⁷ Since the hiring of subcontractors was directly related to the offense, the court ruled that the defendant was liable for the losses caused by the intervening subcontractor conduct.¹⁴⁸ Though there was more than one cause of the victims' losses in that case, the defendant was still liable because his conduct was considered one of the material and proximate causes of the losses, though it was not the sole or total cause.¹⁴⁹

After its review of cases examining the requirements of restitution in other federal courts and examining its own precedent, the court held that proximate cause is necessary for any and all awards of restitution for

¹³⁷ *Id.* at 1259; *see also* 18 U.S.C.A §§ 1512-1515, 3663A, 3663-3664.

¹³⁸ *Kennedy*, 643 F.3d at 1259.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1262.

¹⁴² *Id.* (citing *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985)).

¹⁴³ *Keith*, 754 F.2d at 1392.

¹⁴⁴ *Kennedy*, 643 F.3d at 1262.

¹⁴⁵ *Id.*

¹⁴⁶ *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 928 (9th Cir. 2001).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

crimes that fall under § 2259, whatever type of losses were incurred.¹⁵⁰ The court stated that proximate cause exists only when there is a causal connection between the conduct of the defendant and the specific losses of a victim.¹⁵¹ Although there may be multiple steps separating the conduct from the loss, the conduct must not be so attenuated from the resulting harm that it would be unreasonable to hold the defendant responsible.¹⁵² Lastly, there must be some degree of certainty about what the victim has lost before she or he can be compensated.¹⁵³ Losses need not be calculated with mathematical precision, but they cannot be arbitrary.¹⁵⁴ The court held that all of these requirements must be met for an award of restitution to be proper under § 2259.¹⁵⁵

2. *The Ninth Circuit Overturned the Restitution Award*

In *Kennedy*, the Ninth Circuit held that before a court can award restitution under § 2259, the victim must show that he or she was truly a victim of the crime, that the offense was indeed a proximate cause of the victim's losses, and that the victim's losses are reasonably certain.¹⁵⁶ On the first element—whether Amy and Vicky were victims of Kennedy's offense—the court determined that they were.¹⁵⁷ The court found that ample evidence had been submitted at trial through victim impact statements to prove that the women had been harmed by Kennedy's possession of their images, even if they never knew that Kennedy in particular had possessed their images.¹⁵⁸

However, the court also found that Kennedy did not proximately cause the injuries suffered by the women.¹⁵⁹ The trial court had found that the victims' knowledge of the existence of the images and their knowledge that unidentified people were viewing them caused the victims severe emotional stress leading to acute psychological problems.¹⁶⁰ These problems and the high costs of treatment were recognized as specific harms to the victims.¹⁶¹ The trial court thus held

¹⁵⁰ *Kennedy*, 643 F.3d at 1263; *see also Gamma Tech*, 265 F.3d at 928.

¹⁵¹ *Kennedy*, 643 F.3d at 1262.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1260.

¹⁵⁵ *Id.* at 1263.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 1256.

¹⁶¹ *See id.* at 1260.

that Kennedy, as one of the many people possessing the images, was both a but-for and proximate cause of this harm because he was part of a larger action that was the cause of a specific harm.¹⁶² The Ninth Circuit, however, found that this evidence did not demonstrate a specific harm caused by Kennedy, but only the larger harm caused by all of the people downloading, possessing, and distributing the images of child pornography.¹⁶³

The *Kennedy* court admitted that it had, in earlier decisions, held that restitution could be awarded when the defendant's offense "was merely one part of a larger problem that caused the victim's losses."¹⁶⁴ However, the court distinguished *Kennedy* by pointing out that earlier cases had strong evidence showing that the defendants' actions had directly contributed to the victims' losses.¹⁶⁵ For instance, in the case of a fraudulent real estate scheme, the court found that the head of the fraudulent endeavor was liable for all the losses suffered due to a high rate of foreclosures, despite the defendant's argument that the foreclosures had been caused by the independent financial circumstances of homebuyers and not his crime.¹⁶⁶ The court held the defendant liable because the crime itself was evidence that his conduct was a direct cause of the losses, though his fraud was not the only cause of the losses.¹⁶⁷ The court found such evidence to be lacking in *Kennedy*.¹⁶⁸ The court held that without proof that Kennedy in particular had caused some separate and discernable harm to Amy and Vicky, he could not be held accountable for any of the harm the women had suffered.¹⁶⁹ Thus, the court rejected the government's theory that Kennedy was the proximate cause of the victims' injuries for the purpose of a restitution award.¹⁷⁰

The court also found that the losses of the victims could not be calculated with reasonable certainty.¹⁷¹ It found no proof that the government's determination that an award of one thousand dollars per image would fairly compensate the victims for the "full amount of [their] losses."¹⁷² The government attempted to address this by asking the court

¹⁶² *Id.*

¹⁶³ *Id.* at 1264.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *United States v. Peterson*, 538 F.3d 1064, 1077 (9th Cir. 2008)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

to award restitution under a theory of joint and several liability.¹⁷³ The court rejected that theory, finding that it did nothing to cure the fact that there was no evidence connecting Kennedy's actions and the victims' specific harms.¹⁷⁴ The court determined that it would be impossible to hold Kennedy responsible for any harm unless there was some evidence that his downloading of the images had caused an injury that was somehow separate and distinct from the rest of the harms suffered due to the creation and distribution of the images.¹⁷⁵ Since they did not see any proof of such harm in this case, the court overturned the trial court's restitution order.¹⁷⁶

V. THE NINTH CIRCUIT ERRED WHEN IT OVERTURNED THE RESTITUTION ORDER, BECAUSE PROXIMATE CAUSE EXISTED, AND THE AWARD WAS APPROPRIATE UNDER § 2259

In the *Kennedy* opinion, the court stated in the final paragraphs:

[W]e suspect that § 2259's proximate cause and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in these sorts of cases. Nevertheless, the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants . . . are held liable for the harms they cause through their participation in the market for child pornography.¹⁷⁷

The reasoning behind the court's reluctance to award restitution in child pornography cases is that there is a proximate cause requirement within § 2259 that precludes victims from collecting damages for any losses that are not directly caused by the offense.¹⁷⁸ The Ninth Circuit found that there is no way to prove that a possessor of child pornography has directly caused the losses of children featured in pornographic images.¹⁷⁹ Further, even if such a thing could be proven, there would still be no way to quantify how much damage each possessor had individually caused.¹⁸⁰ The court found that the inability to separate and determine specific damage caused by an individual defendant is an

¹⁷³ *Id.* at 1265.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1264.

¹⁷⁷ *Id.* at 1266.

¹⁷⁸ *See id.* at 1265.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

insurmountable obstacle to restitution because restitution must be based on a reasonable calculation of a victim's losses.¹⁸¹

The *Kennedy* court's logic is flawed in two important aspects. First, there are tests used by other courts that establish proximate cause in child-pornography-possessor cases that allow specific damages to be determined in situations where multiple offenders contribute to a mass harm.¹⁸² One of these is the substantial-factor test.¹⁸³ The Ninth Circuit has already adopted "substantial factor" into the definition of proximate cause in the torts context and it should have applied this theory to criminal restitution,¹⁸⁴ because criminal restitution is determined by applying torts concepts.¹⁸⁵ There is also the harm-within-the-risk test.¹⁸⁶ The Third Restatement of Torts has recently adopted this test within the proper definition of proximate cause because it reduces confusion in cases involving multiple causes.¹⁸⁷ This test is well-suited for use in child-pornography-possessor cases because it does not require but-for cause, instead apportioning liability based on the reasonable foreseeability of harm.¹⁸⁸

Second, despite the Ninth Circuit's holding, the amount of restitution awarded in *Kennedy* was supported by § 2259 because it was reasonable.¹⁸⁹ Though the nature of psychological damages makes it difficult to assign an exact dollar amount to the victims' losses, it is a proper exercise of judicial discretion under § 2259 to set any dollar amount so long as the amount is reasonable,¹⁹⁰ as it was in this case. Further, nominal damages may be awarded even when there is no way to determine the victims' losses to a reasonable degree of certainty,¹⁹¹ which supports the view that restitution damages are not directly tied to what losses a victim can prove.¹⁹² Under either of these theories of

¹⁸¹ *Id.*

¹⁸² See *United States v. Hardy*, 707 F. Supp. 2d 597, 613-14 (W.D. Pa. 2010); *United States v. Monzel*, 746 F. Supp. 2d 76, 87 (D.D.C. 2010).

¹⁸³ See *Hardy*, 707 F. Supp. 2d at 613.

¹⁸⁴ See, e.g., *Ileto v. Glock*, 349 F.3d 1191, 1206 (9th Cir. 2005).

¹⁸⁵ See Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1015-16 (2001) ("[Criminal restitution] is civil—in compensating victims for their specific losses, it resembles an attenuated tort proceeding held during a pause in a criminal proceeding.").

¹⁸⁶ See *Monzel*, 746 F. Supp. 2d at 87.

¹⁸⁷ RESTATEMENT (THIRD) OF TORTS § 29 (2010).

¹⁸⁸ *Monzel*, 746 F. Supp. 2d at 87.

¹⁸⁹ See *United States v. Hardy*, 707 F. Supp. 2d 597, 614-15 (W.D. Pa. 2010) (discussing the ability of a court to approximate restitution damages based on the defendant's role in the overall harm to the victim).

¹⁹⁰ *Id.* at 613.

¹⁹¹ *United States v. Klein*, 829 F. Supp. 2d 597, 607 (S.D. Ohio 2011).

¹⁹² *Id.*

restitution, the amount awarded to the victims in *Kennedy* was appropriate.¹⁹³

Contrary to the Ninth Circuit's holding, the trial court's restitution order met the test for mandatory restitution because proximate cause existed and because damages were supported by § 2259.¹⁹⁴ Given this, the Ninth Circuit should have upheld the restitution order in *Kennedy*.¹⁹⁵

A. THERE WAS PROXIMATE CAUSE TO SUPPORT THE RESTITUTION ORDER IN *KENNEDY*

The Ninth Circuit held that no proximate cause exists between the possession of child pornography and the injuries suffered by the victims.¹⁹⁶ However, courts in other circuits have developed tests that show proximate cause can be established in child pornography possession cases.¹⁹⁷ One of these tests is the substantial-factor test and another is the harm-within-the-risk test.¹⁹⁸

1. *The Ninth Circuit Should Have Used the Substantial-Factor Test To Find Proximate Cause Between Child Pornography-Possessors and the Harm Suffered by Their Victims*

The substantial-factor test has been adopted by the Ninth Circuit as a relevant test for establishing proximate cause in tort claims.¹⁹⁹ Though legally distinct from tort cases, criminal restitution claims are decided using tort concepts.²⁰⁰ The Ninth Circuit applied the traditional tort concepts of proximate and but-for cause in its analysis of the validity of the restitution order in *Kennedy*,²⁰¹ but dismissed the use of the substantial-factor test in this context without discussion of why it would opt to limit the definition of proximate cause in the specific context of criminal law.²⁰² Without a specific reason for dismissing the use of the previously adopted test, the court should have applied it because it is one

¹⁹³ See *id.*; 18 U.S.C.A. § 2259(4)(A) (Westlaw 2012).

¹⁹⁴ See discussion *infra* Part V.A-B.

¹⁹⁵ *Id.*

¹⁹⁶ See *United States v. Kennedy*, 643 F.3d 1251, 1252 (9th Cir. 2011).

¹⁹⁷ See, e.g., *United States v. Hardy*, 707 F. Supp. 2d 597, 613 (W.D. Pa. 2010).

¹⁹⁸ See discussion *supra* Part III.A-B.

¹⁹⁹ See, e.g., *Ileto v. Glock*, 349 F.3d 1191, 1195 (9th Cir. 2005).

²⁰⁰ See *Hardy*, 707 F. Supp. 2d at 613.

²⁰¹ See *Kennedy*, 643 F.3d at 1261.

²⁰² *Id.* at 1261.

of the traditional methods for establishing proximate cause in cases where there are multiple causes of harm.²⁰³

Other courts have already applied the substantial-factor test in the criminal context.²⁰⁴ Though the Ninth Circuit has generally applied the substantial-factor test only to tort claims, the substantial-factor test has been used in federal district courts within the Third Circuit to establish proximate cause in cases of child pornography possession like in *Kennedy*.²⁰⁵ Under the substantial-factor test, it must be proven by a preponderance of the evidence that the defendant's conduct was a "significant contributing factor" to the victim's emotional injuries.²⁰⁶ For example, in *United States v. Hardy*, the United States District Court for the Western District of Pennsylvania found that while the possession of child pornography is not the only cause of injury to children depicted in the images, it is a substantial factor in their harm.²⁰⁷ Thus, the timing of the initial abuse is not a superseding cause that will protect a child pornography-possessor from liability.²⁰⁸

This test is especially relevant to *Kennedy* because Kennedy's possession of the pictures was so removed in time from the original sexual abuse of the victims.²⁰⁹ In essence, the *Kennedy* court determined that the damage to the victims had already been done by the time Kennedy committed his offense.²¹⁰ The substantial-factor test, as applied to cases such as *Kennedy*, illustrates that the possession of child pornography does not need to be shown to have retroactively caused the original injury.²¹¹ The possession only needs to be shown to have caused a substantial part of the overall harm suffered by the victim.²¹² Child pornography-possessors do cause a substantial portion of the harm

²⁰³ See *Hardy*, 707 F. Supp. 2d at 612 ("[T]he 'substantial factor' test formulation . . . is one means of accounting for the unusual situations where limiting proximate causation to a subset of but for cause is inappropriate to the ends of justice.").

²⁰⁴ *Id.* at 614.

²⁰⁵ *Id.* (explaining that a mere child pornography possessor is a substantial factor in the victim's harm because the possessor aided in the circulation of the images.)

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Jacques, *supra* note 53 at 1171-72 (describing the efforts of Amy in collecting restitution from the possessors of her images); Knaupp, *supra* note 53 (explaining that the pornographic images depicting Amy and Vicky were taken decades ago when the women were young children).

²¹⁰ See *United States v. Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011) (determining that the defendant's participation in the "audience" was not evidence that he had contributed to the losses suffered by the women).

²¹¹ *Hardy*, 707 F. Supp. 2d at 612 (relying on *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999)).

²¹² *Id.*

because the knowledge that the image is being viewed causes fresh psychological pain and prevents a victim from ever truly moving past the abuse.²¹³

In *Kennedy*, the Ninth Circuit acknowledged that the actions of the defendant did cause a portion of the harm suffered by the victims, but held that proximate cause could not be established because the harm was not specific.²¹⁴ This means that the court could not find an injury that was caused by Kennedy alone—an injury that was separate from the injuries caused by all other possessors of the pornography.²¹⁵ The substantial-factor test solves the problem of defining specific harm through a concept known as “concurrent causes.”²¹⁶ Concurrent causes occur when multiple people each do something “which would, on its own, be sufficient to bring about the harm.”²¹⁷ For example, if two people shoot a person at the same time and that person dies, then both of these acts are considered to be the proximate cause of death, despite the fact that the victim would have died of either wound independent of the other.²¹⁸ Accordingly, the *Kennedy* court should have found that the defendant’s possession of child pornography was a concurrent cause of the victims’ harm despite the fact that the victims would have been harmed even if Kennedy had never obtained their images.²¹⁹ By acknowledging that Kennedy caused at least some of the harm to his victims, the court established that Kennedy, like the defendant in *Hardy*, was in fact a proximate cause of the injuries because his offense, though certainly not the entire cause of the harm, was a substantial factor in his victims’ injuries.²²⁰ Thus, under its own definition of proximate cause, the Ninth Circuit should have found proximate cause in this case.²²¹

²¹³ See *id.* at 613; *Kennedy*, 643 F.3d at 1263.

²¹⁴ *Kennedy*, 643 F.3d at 1263.

²¹⁵ *Id.*

²¹⁶ See *Hardy*, 707 F. Supp. 2d at 612.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See *id.*

²²⁰ See *id.* at 613.

²²¹ See, e.g., *Ileto v. Glock*, 349 F.3d 1191, 1195 (9th Cir. 2005) (“The traditional notion of ‘but for’ causation is subsumed within the substantial factor test, whereby defendants’ actions may be the proximate cause of a plaintiff’s injuries if those actions were a substantial factor in bringing them about.”).

2. *The Ninth Circuit Could Have Used the Harm-Within-the-Risk Test To Find Proximate Cause Between the Possession of Child Pornography and the Victims*

Even if the *Kennedy* court determined that the substantial-factor test was inappropriate, it still should have found proximate cause through the harm-within-the-risk test adopted by the Third Restatement of Torts,²²² applied in the criminal context by the United States District Court of the District of Columbia in *United States v. Monzel*,²²³ and approved of in the United States Court of Appeals for the District of Columbia Circuit in a review of that case.²²⁴ Instead of focusing on whether the defendant's actions caused a substantial amount of harm to the victims, this test asks whether the harm to the victim was a result of the risk inherent in the defendant's actions that made those actions illegal in the first place.²²⁵ This test has been used in circuits where the substantial-factor test has fallen into disfavor.²²⁶

Unlike the substantial-factor test, this test states that but-for cause is not a requirement for establishing liability in all cases.²²⁷ In cases where there are "multiple sufficient causes"—in which the victim would have suffered the same harm by others had the defendant not acted—but-for cause is inappropriate because a requirement of this type could absolve all co-defendants of liability for their actions.²²⁸ This would make it impossible for victims to collect restitution from any of those responsible for their injuries. Not providing an avenue toward victim restitution in those circumstances would violate the intent of victim restitution—that it be compensatory for victims as well as punitive to defendants.²²⁹

The United States District Court for the District of Columbia has held that the possession of child pornography does contain an inherent risk of harm to the victims.²³⁰ In *United States v. Monzel*, the defendant-possessor of child pornography was convicted of charges identical to

²²² RESTATEMENT (THIRD) OF TORTS §§ 27, 29 (2010); *United States v. Monzel*, 746 F. Supp. 2d 76, 87 (D.D.C. 2010).

²²³ *Monzel*, 746 F. Supp. 2d at 87; *see also* *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 111 (D.D.C. 2006), *aff'd*, 531 F.3d 884 (D.C. Cir. 2008).

²²⁴ *See* *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011).

²²⁵ *Id.* at 87.

²²⁶ *See id.* at 85.

²²⁷ *Id.* at 87.

²²⁸ *Id.* at 86-87.

²²⁹ *Id.* at 88 (citing S. REP. NO. 104-179, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 925).

²³⁰ *Id.* at 87.

those in *Kennedy*.²³¹ At trial, the defendant argued that there was no but-for causation in the case because the victim would have suffered the same harm whether or not the defendant had possessed the images, based on the fact that countless others had already possessed them.²³² The *Monzel* court agreed with this, but determined that, according to the harm-within-the-risk test, the defendant was still a proximate cause of the victim's injuries, despite the fact that he may not have been a direct cause of the injuries.²³³

The district court also determined that the risk inherent in the mere possession of child pornography is sufficient to establish proximate cause between such conduct and the damage caused to child pornography victims.²³⁴ The court cited to congressional findings noting that a separate injury occurs each time a victim's image is downloaded.²³⁵ The *Monzel* court stated that Congress's awareness that such injuries occur means that there is a risk of injury to victims that exists inherently within the crime of child pornography possession.²³⁶ Thus, when harm does result, offenders must be held liable.²³⁷ As discussed, the fact that many people are committing the same crime does not absolve a defendant from responsibility in cases where a victim has suffered in part due to the defendant's actions.²³⁸ The but-for cause requirement is not meant to be a shield to protect those who commit offenses along with many others.²³⁹ Thus, in special cases like the possession of child pornography, the harm-within-the-risk test provides the best way to assign liability to those who are at fault.²⁴⁰

²³¹ *Id.* at 77.

²³² *Id.* at 86.

²³³ *Id.* at 87.

²³⁴ *Id.* at 88.

²³⁵ *See id.* at 86 ("Although the victims may have been suffering from such fear and anxiety prior to an individual defendant's conduct, each notification of a defendant's conduct perpetuates the trauma, thereby prolonging recovery, and increasing harm to the victim.").

²³⁶ *Id.* at 87.

²³⁷ *See id.* at 88 ("The 'risk' inherent in [defendant's] participation in the child pornography market by receiving and possessing such images therefore includes the risk that the children whose abuse is depicted will suffer as a result.").

²³⁸ *Id.* at 86-87.

²³⁹ *Id.*

²⁴⁰ *Id.*

B. THE AMOUNT OF RESTITUTION GRANTED BY THE TRIAL COURT
IN *KENNEDY* WAS APPROPRIATE UNDER § 2259

The second major issue present within the Ninth Circuit's analysis of the restitution order in *Kennedy* was whether the amount of restitution damages was appropriate under § 2259.²⁴¹ The trial court in *Kennedy* awarded the victims one thousand dollars per image in Kennedy's possession.²⁴² The Ninth Circuit rejected this award amount as arbitrary.²⁴³ However, the court should have found that this amount was reasonably connected to the losses suffered by the victims.

1. *One Thousand Dollars Per Image Was Reasonable
Compensation for the Victims' Losses in Kennedy Because §
2259 Grants Broad Judicial Discretion for Such Awards and the
Amount Was Based on the Actual Damages Suffered*

Although courts have little discretion as to whether restitution should be ordered when a defendant has been convicted of the possession of child pornography, § 2259 defines restitution broadly to ensure that all victims or sexual abuse are generously compensated.²⁴⁴ In *Kennedy*, the entirety of the damages sought was \$3,000,000 for Amy and \$227,000 for Vicky, but the trial court instead awarded one thousand dollars for each image the defendant possessed.²⁴⁵ The trial court made this decision in the interest of reasonableness.²⁴⁶

The language of § 2259 illustrates that the statute is meant to be interpreted broadly, so long as the amount of restitution has some connection to the damages and is not arbitrary.²⁴⁷ Courts are not to consider the financial circumstances of the defendant in determining a reasonable amount of restitution, only the losses of the victims.²⁴⁸ However, the statute also directs the award of restitution "as determined by the court . . . in accordance with section 3664 in the same manner as

²⁴¹ United States v. Kennedy, 643 F.3d 1251, 1264 (9th Cir. 2011).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ United States v. Crandon, 173 F.3d 122 (3d Cir. 1999) ("Congress mandated broad restitution for a minor victim following an offender's conviction of federal child sexual exploitation and abuse offenses."); United States v. Laney, 189 F.3d 954, 966 (9th Cir. 1999) ("Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

²⁴⁵ *Kennedy*, 643 F.3d at 1255.

²⁴⁶ *Id.* at 1256.

²⁴⁷ *Id.* at 1260; *see also* 18 U.S.C.A. § 2259(b)(3)(F) (Westlaw 2012).

²⁴⁸ 18 U.S.C.A. § 2259(b)(4)(B)(i).

an order under section 3663A.”²⁴⁹ Under § 3664, which is the section that determines the amounts for awards of restitution under § 3663A and therefore under § 2259, the circumstances of a defendant matter in cases where there is more than one defendant.²⁵⁰ In such cases, the “court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and [the] economic circumstances of each defendant.”²⁵¹ It is under this framework that the trial court in *Kennedy* chose to limit the award amount to one thousand dollars per image, believing that the full amount of the women’s losses would be unfairly imposed on a defendant who had not caused all the losses since many other people had downloaded pictures of the victims in addition to Kennedy.²⁵²

Further, the amount of one thousand dollars per image was not arbitrary as the Ninth Circuit asserted. Kennedy caused harm each time he downloaded a new image and continued the cycle of exploitation of the victims.²⁵³ Thus, linking the amount of restitution to the number of images he downloaded is reasonable. Further, because his crime is likely to result in additional therapy, lost wages, and medical expenses, one thousand dollars for each image is consistent with the foreseeable expenses of his victims.²⁵⁴ Thus, the award was not arbitrary, and it was directly related to the damage the defendant caused. Since proximate cause is likely to have been established in this case, and since the restitution award amount was reasonable and supported by the intent behind § 2259, the Ninth Circuit erred when it decided that Amy and Vicky were owed no restitution in this case.

2. *The Award Amount in Kennedy Was Also Reasonable Under a Theory of Nominal Damages*

Even if the Ninth Circuit determined that the losses in *Kennedy* could not be reasonably calculated, the victims were still owed nominal

²⁴⁹ 18 U.S.C.A. § 2259(b)(1).

²⁵⁰ 18 U.S.C.A. §§ 3663A, 3664(h) (Westlaw 2012); *see also* United States v. Sensmeier, 361 F.3d 982, 990 (7th Cir. 2004) (“When there is more than one defendant that has contributed to the loss of a victim, district courts enjoy the option of either imposing full liability on each defendant or apportioning the liability among the defendants to reflect the culpability . . . of each.”).

²⁵¹ United States v. Zander, 319 F. App’x 146, 150 n.5 (3d Cir. 2009) (quoting 18 U.S.C. § 3664(h)).

²⁵² United States v. Kennedy, 643 F.3d 1251, 1255-56 (9th Cir. 2011).

²⁵³ *See* United States v. Monzel, 746 F. Supp. 2d 76, 87 (D.D.C. 2010) (explaining the new trauma that occurs with the distribution of child pornography).

²⁵⁴ *See* discussion *supra* Part V.B.1.

damages.²⁵⁵ In another child-pornography-possessor case, the United States District Court of the Southern District of Ohio agreed with the Ninth Circuit that there is a real harm caused to the victims of child pornography.²⁵⁶ However, unlike the Ninth Circuit, the court in *United States v. Klein* found that at least nominal damages are required in such cases, even if the court found that there was not enough evidence to establish the full amount of a victim's losses.²⁵⁷ An award of nominal damages for the victims of child pornography-possessors is supported by the mandatory nature of § 2259, because it allows judges to award damages as required by the statute in cases where multiple offenders make it difficult to determine the exact amount of damages.²⁵⁸ In a civil context, nominal damages are generally a small amount of money awarded to a plaintiff in a lawsuit to show she or he was right but has suffered no significant losses.²⁵⁹ In the child pornography-possessor context, an award of nominal damages is a basis for the judge to assign what he or she feels are reasonable damages under the circumstances.²⁶⁰ In *Klein*, the court found that nominal damages in the amount of five thousand dollars were reasonable restitution paid by a child pornography-possessor to his victim.²⁶¹ The trial court in *Kennedy* assigned a similarly low amount of restitution at one thousand dollars per image.²⁶² The Ninth Circuit should have upheld this restitution award because it was within the trial judge's discretion under the theory of nominal damages and reasonable under the circumstances.²⁶³

CONCLUSION

It is not easy to determine the amount of harm caused to a child each time a person downloads an image of the original abuse.²⁶⁴ The inability to assess how the harm from one offender is unique from the

²⁵⁵ See *United States v. Klein*, 829 F. Supp. 2d 597, 607 (S.D. Ohio 2011) (“[W]here a party ‘establishes a wrong and actual loss therefrom, he or she is entitled to nominal damages at least . . . where the evidence fails to show the extent of the resulting damages.’” (quoting 25 C.J.S. *Damages* § 14 (2009))).

²⁵⁶ *Id.* at 607.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 607-08.

²⁵⁹ BLACK'S LAW DICTIONARY 175 (9th ed. 2009)

²⁶⁰ *Klein*, 829 F. Supp. 2d at 607.

²⁶¹ *Id.*

²⁶² *United States v. Kennedy*, 643 F.3d 1251, 1256 (9th Cir. 2011).

²⁶³ *Klein*, 829 F. Supp. 2d at 607-08.

²⁶⁴ See discussion *supra* Part III.A-B; see also *Kennedy*, 643 F.3d at 1260 (discussing generally the fact that courts have differed about which techniques are appropriate for determining restitution damages).

harm of another offender played a large role in the Ninth Circuit's decision to overturn the restitution award in *Kennedy*.²⁶⁵ However, the Ninth Circuit did find that offenders who collect and view child pornography do contribute to the harm suffered by these victims.²⁶⁶ Thus, under the language of § 2259, it is mandatory that the court quantify this harm in order to compensate the victims who must deal perpetually with the scars of their abuse.²⁶⁷ The Ninth Circuit's decision ignores the mandatory requirement of the statute in favor of an overly strict interpretation of causation requirements that is not supported by Ninth Circuit precedent or by the legislative intent behind § 2259.²⁶⁸

Determining how much harm an offender should be liable for is not impossible under § 2259.²⁶⁹ The Ninth Circuit was correct in its assessment that proximate cause must be established, but incorrect in its limited definition of how that can be achieved.²⁷⁰ The Ninth Circuit has already accepted the use of the substantial-factor test in other contexts.²⁷¹ The court should have applied this test in this case to establish proximate cause in *Kennedy*.²⁷² Other courts have used this test to find proximate cause in child-pornography-possessor cases.²⁷³ Even if the Ninth Circuit determined that the substantial-factor test should not be extended, alternative formulations for determining proximate cause, such as the harm-within-the-risk test, could have been adopted in order to comply with the mandatory nature of restitution.²⁷⁴

The Supreme Court has recently denied certiorari on the issue of proximate cause in child pornography cases.²⁷⁵ This means that *Kennedy* is, at least for the time being, the death knell for child pornography restitution in the Ninth Circuit. Sadly, without such compensation, many victims of child pornography will not have the resources to get the help they need, and they will continue to suffer. If child pornography is ever to be stopped, possessors must be made to take responsibility for their

²⁶⁵ *Kennedy*, 643 F.3d at 1264.

²⁶⁶ *Id.* at 1260.

²⁶⁷ 18 U.S.C.A. § 2259(b)(4)(A) (Westlaw 2012); *see also* *United States v. Hardy*, 707 F. Supp. 2d 597, 613-14 (W.D. Pa. 2010).

²⁶⁸ *See* discussion *supra* Part V.A.

²⁶⁹ *See* discussion *supra* Part III.A-B.

²⁷⁰ *See* discussion *supra* Part III.A-B.

²⁷¹ *See* discussion *supra* Part III.A-B.

²⁷² *See* discussion *supra* Part III.A-B.

²⁷³ *See* discussion *supra* Part III.A-B.

²⁷⁴ *See* discussion *supra* Part III.A-B.

²⁷⁵ Jeffrey Brown, *SCOTUS Denies Cert in Case on CP Victim Restitution*, CYBERCRIME REVIEW (Nov. 29, 2011), www.cybercrimereview.com/2011/11/scotus-denies-cert-in-case-on-cp-victim.html.

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actions. Further, if these victims can ever hope to be made whole, courts must make compensating them a priority. If not, their futures may be very dark indeed.