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Section 2259 Restitution Claims and Child Pornography Possession

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NOTE

SECTION 2259 RESTITUTION CLAIMS AND CHILD PORNOGRAPHY POSSESSION

Dina McLeod*

In 2009, a child pornography victim brought a criminal restitution claim against a defendant who possessed images of her abuse. The statutory provision authorizing restitution, 18 U.S.C. § 2259, had never before been used to bring a claim against a defendant who had only possessed, rather than produced or distributed, child pornography ("child pornography possession defendants"). The federal courts have not developed a consistent approach to resolving Section 2259 claims involving such defendants.

This Note argues that two conceptions of traditional proximate cause doctrine can provide a framework for analyzing such claims. It examines Section 2259 claims using both a policy-based view of proximate causation and a view based on the relationship between the victim and the defendant. This Note concludes that, using either approach, current Section 2259 claims against child pornography possession defendants fail to prove proximate causation.

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INTRODUCTION

On March 27, 2008, Alan Hesketh was charged with possessing, receiving, and distributing hundreds of images of child pornography. One month later, his prosecution took an unexpected turn. An abuse victim depicted in some of the images possessed by Mr. Hesketh requested restitution from the defendant under a provision in the Violence Against Women Act.

In the restitution hearing, Senior Judge Warren Eginton of the District Court of Connecticut noted, “This is an unusual case.” The court explained:

[I]t does not appear that any court has ever awarded restitution for offenses involving sexual exploitation of children or child pornography, when the defendant did not also participate in this sexual exploitation of the children. On the contrary, in every case in which a court awarded restitution, the defendant also participated in the sexual exploitation that produced the material...

The abuse victim, now in her twenties, identified herself as Amy. Amy claimed that people who viewed images of her abuse were responsible for
her perpetual revictimization. She sought approximately $3.4 million to pay for her therapy costs and to compensate her for any future loss of wages. Judge Eginton agreed that the defendant had caused some compensable harm to the victim and ordered a restitution award of $200,000. The defendant settled with Amy for $130,000. Amy continues, however, to seek restitution from hundreds of defendants in the federal court system. She is one of thousands of identified child pornography victims who may seek restitution under the same provision in the Violence Against Women Act.

This Note addresses the legal question presented by this novel restitution claim: Should child pornography possession defendants be held liable for damages to the individuals depicted in the images they possess? The Violence Against Women Act authorizes restitution for victims of child pornography possession. But until recently, no individuals had pressed such claims against child pornography possession defendants. District court judges have been unable to develop a consistent framework for addressing the underlying issue: whether the link between child pornography possession and the harm to child pornography victims is strong enough to support a claim for damages.

This Note argues that classic proximate causation doctrine, as developed in the seminal Palsgraf decision, does not support the application of 18 U.S.C. § 2259 ("Section 2259") to child pornography possessors. This Note does not dispute that victims of child pornography suffer serious injuries from their abuse, but rather questions the legal sufficiency of the link between the child pornography possessor and the victim. Part I examines the relevant statutory provision and the inconsistency of federal district courts in applying it. Part II introduces the policy-based proximate cause framework.

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9. Transcript of Hesketh Restitution Hearing, supra note 4, at 47.
11. Knaupp, supra note 6. James Marsh, who serves as Amy's counsel, has sent out approximately 250 restitution requests to "probably every district in the country." Id.
12. Id. ("According to national statistics, out of about 26 million images of child pornography, there are more than 2,000 identified victims, with 80 percent of those in the United States.").
13. See generally 18 U.S.C. § 2259 (2006). Section 2259 is titled "Mandatory Restitution," but in this context "restitution" most closely means "damages." The civil understanding of restitution as disgorging the benefits unjustly received by the defendant would have little meaning here. Accordingly, this Note uses the terms "restitution" and "damages" interchangeably. See Alan T. Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. REV. 52, 64 (1982); see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. a (Discussion Draft 2000).
advocated by Judge Andrews’s *Palsgraf* dissent and explores the policy reasons for refusing to extend civil-type liability to child pornography possession defendants. Part III discusses the relational theory of proximate cause developed in Judge Cardozo’s majority opinion in *Palsgraf* and argues that the relationship between a particular child pornography possessor and the particular individual depicted in the illicit image does not support liability for damages. Part III argues that the crime of child pornography possession is analogous to the tort of defamation and concludes that the divergent manner in which these two areas of law treat possession suggests that child pornography possession is criminalized because of a general revulsion and fear of those who possess such images, not because of harms caused to specific victims. Part IV argues that civil tort or restitution claims provide several advantages for child pornography victims seeking civil redress and concludes that such victims should seek a remedy in the civil system.

I. APPLYING SECTION 2259: THE LEGAL QUESTION

Section 2259 requires a judge to order restitution for certain losses suffered by victims of child pornography possession offenses (and a range of other child sexual exploitation offenses). Courts must determine whether the victim was harmed “as a result of” the offense. However, courts have not yet developed a consistent approach to addressing when a victim was harmed “as a result of” the crime, at least when applying Section 2259 to those defendants convicted only of child pornography possession. The hesitancy of some judges in awarding this type of restitution evinces a concern with the potential difficulty in administering such claims, as well as a concern that the causal link between the victim’s harm and the defendant’s conduct is too tenuous.

A. The Statute: Section 2259

Victims may seek restitution pursuant to the Mandatory Restitution for Sex Crimes section of the Violence Against Women Act of 1994, which mandates restitution for certain offenses relating to the sexual exploitation of children. Possession of child pornography is a violation of 18 U.S.C. § 2252(a)(4)(B) (knowingly possessing, or knowingly accessing with intent

19. Id. § 2259(c).
20. For a discussion of this point, see infra Section I.C.
to view, child pornography). This violation falls plainly within the scope of Section 2259, which applies to "any offense under this chapter [18 U.S.C. §§ 2251–2260]."

Section 2259 states that "the court shall order restitution" for any applicable offense and "shall direct the defendant to pay the victim . . . the full amount of the victim's losses." The statute defines a "victim" as "the individual harmed as a result of a commission of a crime under this chapter [18 U.S.C. §§ 2251–2260]." It provides that the "full amount of the victim's losses" include 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.

The statute states that "[t]he issuance of a restitution order under this section is mandatory." It also forbids the court from declining to issue an order due to "(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."

Section 2259 restitution orders are issued pursuant to the procedures outlined in 18 U.S.C. § 3664. It is noteworthy that the government plays a necessary role in requesting restitution. Thus, a victim cannot bring a restitution claim herself. In practice, victims can send their claims to the appropriate U.S. Attorney's office and request that a prosecutor present the claim to the court. For example, Amy's lawyer "has automated the process

22. Id. § 2252(a)(4)(B).
23. Id. § 2259(a).
24. Id. § 2259(a)–(b).
25. Id. § 2259(c).
26. Id. § 2259(b)(3).
27. Id. § 2259(b)(4)(A).
28. Id. § 2259(b)(4)(B)(i)–(ii).
29. Id. § 3664. First, the court orders the probation officer to prepare a presentence report, which includes, "to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant." Id. § 3664(a). Then, at least sixty days prior to the sentencing hearing, the prosecutor provides the probation officer with an itemization of the amounts subject to restitution. Id. § 3664(d)(1). Finally, the probation officer provides notice to all identified victims of, inter alia, the defendant's offense, the restitution amount submitted to the probation officer, and the opportunity for the victim to submit information to the probation officer regarding the amount subject to restitution. Id. § 3664(d)(2)(A)(i)–(vi).
30. See id. § 3664(d)(1).
and e-mailed Amy’s filings to United States Attorneys in 350 cases.31 However, the decision to request restitution rests with the government, and prosecutors may decline to bring the restitution claim.32

B. Applying Section 2259: Inconsistent Results

This seemingly straightforward statutory provision has created serious inconsistencies in the U.S. district courts when applied to child pornography offenses that do not involve direct abuse. At least one court has awarded the full amount of the requested restitution.33 Other courts have declined to award any restitution at all.34 The outcomes can therefore be placed into two broad categories: award of restitution35 and denial of restitution.36 A brief survey of these outcomes will illustrate the difficulty district courts have faced in developing a coherent approach to this issue.

A few notable trends stand out. First, the cases are geographically diverse; the courts that have addressed Section 2259 span the entire country, from Hawaii to Maine.37 Second, while restitution awards tend to be on the

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32. Id.
37. See supra notes 35–36 and accompanying text.
“low” end ($250 to $6,000), at least one federal judge has awarded $3,680,153, the entire amount requested. In addition, some courts impose a standard amount of restitution against each defendant convicted of child pornography possession: “For example, the Central District of California seems to routinely order restitution of $5,000 while the Eastern District of California routinely orders restitution of $3,000.” Third, while the cases where restitution has been awarded outnumber the cases where restitution has been denied, the district courts that have denied restitution represent a substantial minority. Bolstering the minority position is the Fifth Circuit’s recent decision to uphold the denial of restitution to a child pornography victim. The Fifth Circuit—the only court of appeals to release an opinion on a Section 2259 restitution claim relating to child pornography possession—wrote approvingly of the minority position, noting that the district court’s “Memorandum Opinion and Order reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography.” This split of authority, the geographic diversity of claims, and the variance among award amounts, suggest that the legal issue is widespread and unsettled.

Judges who award restitution have offered similar analyses in reaching this result. First, these courts have emphasized the “mandatory” nature of the restitution provision in Section 2259. Second, they have held that the depicted children constitute “victims” within the meaning of the statute. Courts awarding restitution have relied heavily on the Supreme Court’s decision in New York v. Ferber, which held that the “use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.” Third, these judges address the most difficult aspect of the restitution claim: causation. Courts awarding restitution have generally acknowledged that the main problem for the claimants is proving the causal connection between the victim’s harm and the specific defendant’s offense.” Judge Ishii of the Eastern District of California observed

38. See supra note 35 and accompanying text.
40. Berk, 666 F. Supp. 2d at 190.
41. See supra notes 35–36 and accompanying text.
42. In re Amy, 591 F.3d 792, 793 (5th Cir. 2009). The Fifth Circuit denied Amy’s petition for a writ of mandamus to reconsider the denial of restitution in United States v. Paroline, holding that the district court did not abuse its discretion in denying restitution. In re Amy, 591 F.3d at 793.
43. Id. at 795.
45. See, e.g., Brunner, 2010 WL 148433, at *1–2; Scheidt, 2010 WL 144837, at *2–3; Hicks, 2009 WL 4110260, at *2–3.
46. 458 U.S. 747, 758 (1982).
47. See, e.g., United States v. Renga, No. 1:08-CR-0270 AWL, 2009 WL 2579103, at *4 (E.D. Cal. Aug. 19, 2009) (“The problem in this case is with the government’s ability to prove the
that "Section 2259 leaves the court in a legal quandary: The court must award restitution and the government must show the harm caused by [the defendant], but it is difficult to determine the amount of harm caused by [the defendant]." Courts awarding restitution have overcome this problem by arguing that this causal connection is subject only to a "rule of reasonableness" and need not be pinpointed with "mathematical precision."

Judges who deny restitution have diverged at this point in the analysis. They agree that the depicted children are "victims" under the statute. However, these judges do not agree that the claimants have proved that any specific losses were proximately caused by the defendants' conduct. Judge Davis of the Eastern District of Texas pointed out that the "victim" inquiry and the "proximate cause" inquiry are separate:

[T]he Government is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of [the defendant's] conduct. Certainly, Amy was harmed by [the defendant's] possession of Amy's two pornographic images, but this does little to show how much of her harm, or what amount of her losses, was proximately caused by [the defendant's] offense.

Judges who deny restitution have made another key argument: imposition of restitution in the absence of proof that the defendant's conduct caused specific losses would likely violate the Eighth Amendment's prohibition against excessive fines. Judge Davis, who held two hearings on this restitution issue, noted that awarding restitution without proof of specific losses could require the defendant to pay the victim for losses caused by others. He observed that "[t]he losses described in Amy's report are generalized and caused by her initial abuse as well as the general existence and causal connection between Defendant Renga's possession of child pornography and the amount of harm he caused Victim Vicky."); Transcript of Hesketh Restitution Hearing, supra note 4, at 24 ("The proximate cause argument really is a difficult argument to handle in dealing with 2259.").

49. See, e.g., Brunner, 2010 WL 148433, at *3; see also Scheidt, 2010 WL 144837, at *4; Hicks, 2009 WL 4110260, at *4.
50. See, e.g., United States v. Doe, 488 F.3d 1154, 1159-60 (9th Cir. 2007)).
52. See, e.g., Paroline, 672 F. Supp. 2d at 793. This Note agrees with the judges who deny restitution that specific losses caused by the defendant cannot be proved, but disagrees that the crime of child pornography possession is designed to protect individual victims. This argument is addressed in Part III.
53. Paroline, 672 F. Supp. 2d at 791.
54. See Patton, 2010 WL 1006521, at *2; Van Brackle, 2009 WL 4928050, at *3; Paroline, 672 F. Supp. 2d at 789; Berk, 666 F. Supp. 2d at 188 n.5.
55. Paroline, 672 F. Supp. 2d at 791 ("A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct.").
dissemination of her pornographic images. Thus, the split between the two camps hinges on the issue of proving specific losses; judges who award restitution find it reasonable to estimate the specific losses, while those who deny restitution do not.

However, the method of estimating the amount of the specific losses has varied even among those judges who have awarded restitution. Judge Eginton used the minimum damages amount stated in 18 U.S.C. § 2255 ("Section 2255"), which outlines the civil remedy for personal injuries. Section 2255 states that "[a]ny person who, while a minor, was a victim of a violation of section ... 2252 [or] 2252A . . . . shall be deemed to have sustained damages of no less than $150,000 in value." Judge Eginton then added $50,000 on top of the minimum damages under Section 2255 to cover attorneys' fees and experts' fees, resulting in a total award of $200,000.

Judge Ishii also used Section 2255 as a starting point for calculating restitution. However, Judge Ishii declined to award $150,000; rather, he noted that "[r]estitution and the total amount of damages are not always the same thing." The court observed that Section 2255 provides for "deemed damages in the amount of $150,000 for violations ranging from possession of child pornography in violation of Section 2252(a)(4)(B), to selling children for purposes of sexually explicit conduct in violation of Section 2251A, and to sexual abuse in violation of Section 2242 and Section 2243." The fact that child pornography possession lies on the less severe end of this spectrum suggests that "a defendant who possessed child pornography caused the victim less than $150,000 in harm." The court then settled on $3,000 (2 percent of $150,000) as the appropriate amount of restitution, but did not specify why.

Although Judge Voorhees of the Western District of North Carolina used a similar analysis, he discounted the restitution award to account for the losses attributable to the original abuse. The court noted that Amy's loss

56. Id. at 792.
57. Transcript of Hesketh Restitution Hearing, supra note 4, at 25.
59. Transcript of Hesketh Restitution Hearing, supra note 4, at 26–27.
61. Id.
62. Id.
63. Id.
64. See id. The court stated only that:

[The court finds an amount less than $3,000 inconsistent with Congress's findings on the harm to children victims of child pornography. At the same time, the court finds $3,000 is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns.

Id.

of earnings was primarily the result of her decision to drop out of college, which was "triggered by a movie she watched with her psychology class that focused on the plight of abused children." The court found that Amy's "initial abuse would likely have triggered the same response even without the continued possession of her image." Despite the court's detailed calculation of the restitution, it is unclear why the court chose to discount the restitution by any particular amount. In the case of Vicky, the restitution award was discounted by 50 percent, but the court did not specify why such a reduction was appropriate.

Judge O'Grady of the Eastern District of Virginia used the same sort of analysis for Vicky, but offered an additional rationale for the $3,000 award. Because Vicky sought a total restitution amount of approximately $150,000, and because "[t]he Court believe[d] that at least fifty defendants will be successfully prosecuted for unlawfully possessing or receiving the Vicky series," Judge O'Grady reasoned that an award of $3,000 per defendant would compensate Vicky in full.

The examples above demonstrate the inconsistencies that are developing across the district courts over whether courts should award restitution and, if so, what method they should use to calculate the restitution amount. Section I.C will explore why courts struggle to consistently adjudicate Section 2259 restitution claims targeted at child pornography possession defendants.

C. Why Federal Courts Struggle in Applying Section 2259 to Child Pornography Possession Cases

Extending Section 2259 to encompass child pornography possession convictions has troubled district courts for several reasons. These reasons have been summarized by Judge Davis, who invited interested parties to submit briefing to address the following questions:

1. How shall it be determined whether the restitution-claimant is actually a victim and is entitled to restitution under section 2259?
2. How will the amount of restitution to which an identified victim is entitled be determined? Who has the burden of proof and by what standard?
3. Who is going to make this determination? Will it be made in every court or only once? What avenues are available to streamline this procedure to reduce victim expense and conserve judicial resources?

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66. Amy is referred to as "Misty" in Brunner because she is the victim in the "Misty" child pornography series. See United States v. Paroline, 672 F. Supp. 2d 781, 783 n.1 (E.D. Tex. 2009).
67. Id.
68. Id.
69. See id. at *4.
71. Id.
72. Id. at *6.
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4. Is each defendant liable for payment of the full amount of restitution or may the court apportion liability among defendants to reflect the level of contribution to the victim's loss and/or economic circumstances of each defendant?

5. Is there any proximate cause requirement between the victim's losses and the particular defendant's conduct?

6. How should restitution orders and payments be managed when multiple defendants in multiple judicial districts are responsible for restitution to the same victim, or to multiple victims? How is the potential for double recovery to be avoided and what safeguards are available?

These questions reflect two primary concerns. First, the court was concerned with the large number of potential claimants and defendants, and with the logistical complexities that would result from handling all of these claims. These concerns are pragmatic in that they seek to address the practicability of hearing and administering restitution requests and administrative in nature. Second, the court was concerned with the causal link between the victim's harm and the defendant's offense, and the difficulty of finding a causal link between the victim's harm and the defendant's offense that could support awarding a particular monetary amount for the asserted harm. This concern is theoretical because it involves an examination of the nature of the offense, as well as what the law means by "victim," "harm," and "cause."

Parts II and III argue that district courts should use two approaches to proximate causation doctrine to analyze the legal issues stemming from Section 2259 restitution claims and to place appropriate limitations on the application of Section 2259 to child pornography possession defendants.

II. THE PALSGRAF FRAMEWORK: PLACING LIMITS ON THE APPLICATION OF SECTION 2259 THROUGH THE USE OF CLASSIC PROXIMATE CAUSATION DOCTRINE

Traditional proximate causation analysis provides limiting principles for the application of Section 2259 to child pornography possession

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74. These concerns are expressed especially in questions 3, 4, and 6.

75. This concern is expressed especially in questions 1, 2, and 5.

76. It is difficult to precisely define "proximate cause," but Prosser and Keeton provide a helpful explanation of the concept:

"Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of
defendants. Although Section 2259 restitution claims take place in a criminal context, they are more closely related to civil tort proceedings:

Viewed in one light [a criminal restitution statute] is a criminal statute—it is a part of criminal sentencing and is published in the criminal code. But in another light, [a criminal restitution statute] is civil—in compensating victims for their specific losses, it resembles an attenuated tort proceeding held during a pause in a criminal proceeding.7

For purposes of this Note, the more relevant view of a criminal restitution hearing is its resemblance to a civil tort proceeding. The similar causal requirements are particularly noteworthy. One court observed that "a number of courts have determined that Section 2259 contains something akin to a tort-like proximate cause requirement."78

The classic exposition of proximate causation doctrine is framed in the famous case, Palsgraf v. Long Island Railroad.79 In the Palsgraf opinion, Judges Cardozo and Andrews articulated two competing views of proximate causation.80 Cardozo argued that proximate causation reflects the relationship between the tortfeasor and the victim; that is, certain relationships create duties to specific people.81 Andrews posited that proximate cause was not so limited. He argued that one's duty of care is to the entire world,82 and thus proximate causation is a line-drawing exercise that is ultimately decided by public policy considerations.83 This Part uses the Andrews view to examine the application of Section 2259 liability to child pornography possession defendants.

such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.


77. Spohn, supra note 17, at 1016–17.


79. 162 N.E. 99 (N.Y. 1928). The facts of Palsgraf were as follows: A man carrying a package was running to catch a train. As he jumped onto the train, he seemed unsteady, and two railroad employees helped push him onto the train. While the employees were pushing the man onto the train, the package dislodged and fell to the rails. Although the package seemed innocuous, it in fact contained fireworks. The fireworks exploded when they hit the rails, causing scales "many feet away" at the other end of the platform to fall. The plaintiff, Ms. Palsgraf, was injured by these falling scales and sued the railroad for negligence. Id.


81. Id. at 100 (majority opinion).

82. Id. at 103 (Andrews, J., dissenting).

83. Id. at 103–04.
A. Judge Andrews’s Dissent: Proximate Causation as an Expression of Policy Concerns

Judge Andrews’s interpretation of the function of proximate causation has been embraced by modern courts. The Supreme Court, generally, and the Ninth Circuit, in a seminal case on Section 2259, have used the Andrews framework to place appropriate limitations on the scope of tort liability. Andrews’s view of proximate causation emphasized that, as a policy matter, courts must limit liability. ⁴ Often, the point at which a court draws the bounds of liability will be arbitrary. The potentially dramatic expansion of liability that would attend Section 2259 claims against possession defendants suggests that an Andrews-style proximate causation analysis should not generate liability for defendants convicted only of child pornography possession.

The position taken by Judge Andrews presents a view of proximate causation that uses public policy to limit the legal relationship between a wrongdoer and a victim. Andrews’s dissent famously asserted that all individuals owe a duty of care to “the world at large.” ⁵ Andrews rejected the contention that due care is a specific duty that applies only between particular individuals. ⁶ His view maintains that proximate causation is simply a line-drawing exercise that, ultimately, must be grounded in policy concerns. ⁷

Though Cardozo’s opinion has become the conventional view of proximate causation, ⁸ Andrews’s approach to proximate causation has gained considerable traction in recent years. ⁹ The Supreme Court has expressed a view of proximate cause consistent with Andrews’s policy-centric position, holding that proximate cause doctrine is fundamentally a line-drawing process and underscoring the importance of pragmatic considerations in evaluating causal connections. ¹⁰ The Court noted that “here we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the

⁴ See id. at 102-04.
⁵ Id. at 103.
⁶ See id. at 102 (“Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.”).
⁷ See id. at 103-04.
⁸ See Joseph W. Little, Palsgraf Revisited (Again), 6 PIERCE L. REV. 75, 81 (2007) (“Cardozo’s conception of duty swept through the common law world and has yet to be supplanted by the courts.” (footnote omitted)).
⁹ See id. at 84–86 (arguing that the Restatement (Third) of Torts has adopted Andrews’s view of duty). In addition, the Supreme Courts of Wisconsin and New Mexico purport to follow the Andrews doctrine. See id. at 82; Lisa M. Nuttall, Note, TORT LAW—Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients—Lester v. Hall, 30 N.M. L. REV. 351, 354–55 (2000). Decisions of the California Supreme Court indicate it has adopted the Andrews view of proximate causation. See Robin Meadow & Jennifer L. King, Proximate Cause: A Question of Fact or Policy?, ABTL REP., Feb. 2000, at 5, 5.
notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'

This view of proximate cause as a judicial tool essentially adopts Andrews's position on proximate cause.

The current appellate case law on Section 2259, though limited, also tracks the Andrews-style approach to proximate causation. The Ninth Circuit's opinion in United States v. Laney is one of the few federal appellate decisions that grapples with Section 2259 as applied to a defendant who did not directly abuse the victim seeking restitution. The Laney opinion demonstrates the court's attempt to establish parameters around a nebulous harm. In Laney, the defendant and several other men met in an internet chat room to discuss and share child pornography. Laney made a sexually explicit videotape of himself abusing two minor girls ("Jane Does Two and Three") and shared the videotape with a man from the chat room. Laney also advised another man on how to molest a certain child ("Jane Doe One"). The district court ordered Laney to pay restitution to Jane Doe One.

The Ninth Circuit upheld the restitution order and held the defendant liable even though he did not directly abuse the compensated victim. Yet the court's opinion did not clearly explain where liability begins and ends. Though the Ninth Circuit was explicit in holding that Section 2259 "incorporates a requirement of proximate causation," the court did not spell out how this requirement might work in practice. However, the reasoning behind the opinion suggests that the Ninth Circuit employed proximate cause as a judicial tool for cutting off liability at a certain point, simply because infinite liability is not a practical principle for courts to apply.

The Laney court's affirmation of the restitution order exemplifies precisely the sort of line-drawing exercise that Judge Andrews viewed as the core function of proximate causation doctrine. The court held the defendant liable for restitution, despite the lack of direct abuse, because the defendant pled guilty to participating in a conspiracy to sexually exploit children. The court suggested that, but for the application of the Pinkerton Doctrine, the defendant would not be liable.

91. Id.
92. 189 F.3d 954 (9th Cir. 1999).
93. Laney, 189 F.3d at 957–58.
94. Id. at 957.
95. Id.
96. Id. at 958.
97. Id. at 966.
98. Id. at 965.
99. See id. at 964–66.
100. Id. at 966.
101. See id. at 965 (citing Pinkerton v. United States, 328 U.S. 640 (1946) (imposing vicarious liability on a defendant for reasonably foreseeable crimes committed by a coconspirator in furtherance of the conspiracy)).
there would have been no causal connection between Laney's offense and the victim's harm: "Section 2259 therefore requires a causal connection between the offense of conviction and the victim's harm. When the offense of conviction is conspiracy, however, the harms the offense caused may include not only those resulting from the defendant's individual actions, but also others caused by the conspiracy itself." Thus the Ninth Circuit concluded that a defendant who did not directly abuse the victim could be liable under Section 2259 if he were also convicted of conspiracy. The court implied, however, that a defendant with neither a conspiracy conviction nor a charge of direct abuse would not be liable.

Judge Eginton's comments during the restitution hearing in United States v. Hesketh bolster the Ninth Circuit's position on the limitations on the application of Section 2259. During the hearing, Judge Eginton noted that the Ninth Circuit's interpretation of Section 2259 in Laney would likely foreclose restitution against end users of child pornography: "[A]s the government points out, the strongest argument that Section 2259 does not really impose mandatory restitution against the end users, is based upon interpreting the section to require a causal connection strict enough to foreclose restitution against an end user, and in Laney that's what happened." The facts of the Laney case are not exactly analogous to the typical child pornography possession case, where the defendant is generally not involved at all in the direct abuse of a victim. The harm done to Jane Doe One by defendant Laney certainly seems much closer to direct abuse than a pure possession case. Nevertheless, Laney was ordered to pay restitution to a victim whom he had not directly abused. To extend the Laney facts, we can imagine a scenario in which Laney did not have any contact with the other men in the chat room concerning Jane Doe One, but did possess images of Jane Doe One's abuse (this would make Laney a very close analogue to a typical child pornography defendant). If Laney were convicted of conspiracy—if he, for example, had contact with the other men concerning other victims, but had no contact concerning Jane Doe One—then, presumably, Laney would be liable to Jane Doe One under the Pinkerton Doctrine. However, if Laney were never involved in the chat room activity but possessed the same images of Jane Doe One, it seems likely that the Ninth Circuit would not hold Laney liable. Yet, in both scenarios, Laney's acts had an equal effect on Jane Doe One—in both cases, he possessed

102. Id. (emphasis added).
103. Transcript of Hesketh Restitution Hearing, supra note 4, at 24.
104. See Laney, 189 F.3d at 957–58. The defendant in Laney acted wrongfully beyond merely possessing images of Jane Doe One. Laney provided "suggestions" to the abuser of Jane Doe One about how "best" to teach a child to perform certain sex acts. These acts were videotaped as part of an "on-line molestation" of Jane Doe One, and the videotapes were later sent to the defendant. The defendant did not directly participate in the online molestation.
105. See JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 17 (2005) (finding that in 84 percent of child pornography possession cases "investigators did not detect concurrent child sexual victimization or attempts at child victimization").
images of her abuse.\textsuperscript{106} This outcome suggests that the Ninth Circuit implicitly engaged in the type of policy exercise that Andrews envisioned as the function of proximate cause. A defendant who possesses illicit images and who is convicted of conspiracy will be liable for restitution pursuant to Section 2259. But where a defendant possesses these images and is not convicted of conspiracy, the law "declines to trace [the] series of events beyond a certain point."\textsuperscript{109}

B. Why Exclude Child Pornography Possession Defendants from Section 2259 Liability?

Holding possession defendants liable under the statute presents serious policy concerns. The number of potential victims and defendants is staggering, and the possibility of inconsistent applications of the statute is already apparent.\textsuperscript{108} In Amy's case alone, there are approximately 800 defendants across the country charged with possessing child pornography that includes her images.\textsuperscript{109} Many child pornography possession defendants collect hundreds or thousands of images of child pornography.\textsuperscript{110} Each year, there are approximately 2,000 identified victims of child pornography and 3,000 federal child pornography prosecutions.\textsuperscript{111} The difficulties administering a fair and consistent process for adjudicating restitution claims are obvious and substantial.\textsuperscript{112}

Andrews's public policy view of proximate cause is a sensible approach to limiting the application of Section 2259 to child pornography possession defendants. Andrews recognized that a wrongdoer could cause harm without being the legal cause of harm to that victim: "Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as

\textsuperscript{106} Presumably some form of collaboration would be necessary for a conspiracy conviction, and, arguably, such collaboration (like participating in an internet child pornography chat room) encourages child molestation and child pornography in a way that could make the entire community of conspirators more dangerous to victims. However, we can imagine a situation that could warrant a conspiracy conviction where the participation in the conspiracy was so minimal as to cause essentially the same harm to a victim in the possessed images as a child pornography possessor who did not participate in a conspiracy. Take, for example, a "conspiracy" defendant who registers for a child pornography website and visits the website once a month to download child pornography, but who is only one of thousands of members downloading the material, and who never contacts any other members of the website.


\textsuperscript{108} See supra Sections I.B and I.C.

\textsuperscript{109} Knaupp, supra note 6.

\textsuperscript{110} WOLAK ET AL., supra note 105, at 7 ("Of those arrested for CP [child pornography] possession, law enforcement found about half (48%) had more than 100 graphic still images, and 14% had 1,000 or more graphic images.").

\textsuperscript{111} Knaupp, supra note 6.

\textsuperscript{112} See supra Section I.C.
directly harmed the one as the other." Andrews’s acknowledgement reflects the reality that many wrongful acts have harmful effects that touch the lives of many people and that eventually courts “reach the point where they cannot say the stream comes from any one source.”

The Supreme Court’s opinion in Holmes v. Securities Investor Protection Corp. lends further support to drawing the line at child pornography possession defendants. The Holmes court, using Andrews-style analysis, focused on the exact concerns that have troubled lower courts in applying Section 2259 to child pornography possessors—namely, that the attenuation of the causal relationship leads to serious difficulties administering restitution claims. The court noted three problems that such claims pose: (1) “the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent, factors”; (2) “recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries”; and (3) “the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.”

The same concerns apply to the imposition of Section 2259 liability to child pornography possession defendants. Amy’s case is a helpful example. First, it is difficult to ascertain how to attribute responsibility for her injury among the 800 defendants who possessed her images. Second, the unfettered application of Section 2259 to multiple defendants would force the courts to adopt “complicated rules” to divide damages among claimants and defendants. Third, if Amy has been directly injured, there is no need for her to pursue a difficult-to-administer civil claim that attaches to a criminal sentencing process; she can simply use the tort system to vindicate her rights. The Supreme Court’s analysis leads to the conclusion that the policy considerations arising from such claims can sever the causal chain between victim and defendant.


114. See id. at 104 (“We said the act of the railroad was not the proximate cause of our neighbor’s fire. Cause it surely was. The words we used were simply indicative of our notions of public policy.”).

115. Id.

116. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992). Holmes is a securities case in which the respondent nonprofit corporation argued that it had standing to assert RICO claims on behalf of its member broker-dealers. The Supreme Court interpreted the relevant statute as requiring proximate cause and concluded that the appellants had not proximately caused the respondent’s “injury” pursuant to the statute at issue. Id. at 261–72.

117. Id. at 269–70. Though Holmes deals with indirect harms, and Section 2259 claims purport to deal with direct harms, the concerns voiced here seem equally relevant to the causal issues presented by Section 2259 claims.
In addition, the use of policy to sever liability at child pornography possession defendants aligns with an economic view of tort causation. In a 1965 *Harvard Law Review* article, 118 Professor Guido Calabresi advanced an influential economic view of tort causation, eloquently summarized here by Francesco Parisi and Vincy Fon:

Calabresi notes that, as the current tort system apportions liability based on fault, it only deters those accidents that are caused through fault and ignores the value of deterring accidents that are faultless. Calabresi suggests this could be cured by adopting a system of nonfault liability that assesses the costs of accidents in activities according to the involvement in the activity, irrespective of legal notions of fault. Calabresi further suggests that in part this may be addressed by dividing the costs of an accident pro rata among the sub-activities involved. For example, if a walker, a bicyclist, and an automobile are all involved in an accident, the costs would be divided among these three sub-activities. If this occurred in case after case, the cumulative effect would be to assign greater liability to those activities that are involved in more accidents (both numerically and in terms of expense). 119

If courts allow Section 2259 claims against child pornography possession defendants, the assignment of liability will eventually skew disproportionately toward end consumers. For example, Amy’s uncle, her original abuser, paid only $6,000 in restitution. 120 Yet, in the first year alone, Amy received $170,000 in restitution from child pornography possession defendants. 121 She now seeks a total of $3.4 million from those who possess her images. 122 No matter how generously one “slices the pie” of fault, one cannot imagine that the amount paid by the original abuser is a proportional representation of his contribution to the harm. This suggests that Section 2259 claims will actually underdeter those who cause the greatest harms. It makes sense, then, to correct this disproportionate assignment of liability by severing the chain of causal liability at child pornography possession defendants.

### III. Specific Duties: The Cardozo Framework

The competing approach to proximate causation analysis, Cardozo’s relational duty framework, would likely also limit the restitutionary liability of child pornography possession defendants under Section 2259. The relational duty framework, unlike Andrews’s “duty-to-all” approach, requires a rela-


121. Schwartz, supra note 15.

122. *Id.*
tionship between the specific victim and the defendant that supports a legal duty of care. Section III.A outlines Judge Cardozo’s conceptions of duty and proximate causation. Section III.B analyzes why society has criminalized child pornography possession and whether its criminalization is meant to protect society as a whole, or only particular individuals. Finally, Section III.C examines the legal treatment of the republication of defamatory statements and discusses the possibility of an analogous framework for Section 2259 claims.

A. Relational Duties

Judge Cardozo, writing for the majority in Palsgraf, presented an alternative to Judge Andrews’s “duty-to-all” approach to proximate causation. Cardozo argued that tort liability to another person is grounded in a specific duty to that person or class of persons. He wrote, “What the plaintiff must show is ‘a wrong’ to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.” How does a plaintiff demonstrate a violation of “her own right”? Cardozo argued that this relational aspect is satisfied if the tortious act creates a particular risk, and if the harm that actually occurs realizes that particular risk. This is another way of saying that legal causation is fact-driven. Cardozo famously asserted that there is no “negligence in the air,” meaning that negligence is necessarily contextual and correlative to the risk posed by the circumstances. The nature of the risk posed to the victim must be proved by its foreseeability. In sum, to meet Cardozo’s standard for legal causation, the plaintiff must prove that the defendant owed a duty to her (or a class of persons like her). The plaintiff must prove the existence of this duty by showing that the risk the defendant took in his negligent act was the same risk that was realized by the actual harm, and that this harm would foreseeably hurt the plaintiff or a class of persons like the plaintiff.

In his Palsgraf opinion, Cardozo intended to comment only on duty, not on causation. He specifically attempted to exclude causation from the thrust of the opinion, writing that “[t]he law of causation, remote or proximate, is

124. Id. at 100.
125. Id.; accord Ernest J. Weinrib, Causation and Wrongdoing, 63 CHI-KENT L. REV. 407, 440 (1987) (“A negligent act releases a set of possibilities that due care could have avoided. Cardozo insists that the plaintiff cannot recover unless the injury that occurs actualizes a possibility within this set.”).
127. Id. at 100. Cardozo gives the example of a car recklessly speeding on a crowded city street. He observes that the same act “on a speedway or a race course” would “lose its wrongful quality.” Id.
128. Id.
thus foreign to the case before us.” However, duty and proximate cause are closely related. Duty relates to the foreseeability that the plaintiff, or someone like the plaintiff, would be harmed by the conduct; proximate cause, on the other hand, relates to the foreseeability that the injury realized in the plaintiff’s harm was the same sort of injury risked by the defendant’s conduct. However, the two concepts are used “somewhat interchangeably” by the courts.

Cardozo’s conception of duty has formed the groundwork for the modern conception of proximate cause as relational and determined on the basis of an actor’s ability to anticipate certain consequences of his actions. The next Section will explain how courts might apply Cardozo’s proximate cause framework to limit Section 2259 restitution liability, before exploring the nature of the risks associated with child pornography possession and why society considers this conduct wrongful.

B. Is Child Pornography Possession an Individual or Societal Harm?

Is child pornography possession primarily wrongful because of its threat to societal interests? Or is it wrongful because it harms particular people? Determining whether child pornography possession is criminalized primarily as a result of individual or societal interests will shed light on the causal link between the possession of illicit images and the harm to children depicted in those images.

Cardozo emphasizes that certain behavior may be “wrongful and unsocial,” but if it is not wrongful or unsocial “in relation to” a particular person, then the behavior is not tortious. This remark expresses a fundamental distinction between tort law and criminal law: tortious actions must be directed toward a particular person, while some criminal actions may be wrongful only to society in its entirety. Child pornography possession is criminal, but this says nothing about whether the criminalization of this act is designed to counter individual or societal threats.

The crime of possession in general (e.g., possession of drugs, weapons, stolen property, etc.) has been described as “victimless.” Professor Dubber...
argues that the crime of possession is emblematic of a new criminal law regime—one that protects societal, not individual interests:

[O]ur comprehensive effort to control the dangerous by any means necessary reaches "possessors" along with "distributors," "manufacturers," "importers," and other transgressors caught in an ever wider and ever finer web of state norms designed for one purpose: to police human threats.

Policing human threats is different from punishing persons. A police regime doesn't punish. It seeks to eliminate threats if possible, and to minimize them if necessary.

... Crimes, as serious violations of another's rights, are of incidental significance to a system of threat control. ... Law, as a state run system of interpersonal conflict resolution, is ... irrelevant. Persons matter neither as the source, nor as the target, of threats. Penal police is a matter between the state and threats.136

Professor Dubber's argument does not focus on child pornography possession.137 Is it appropriate to group child pornography possession with other crimes of possession, like drug or gun possession, which seem to respond to general societal threats? If so, then child pornography possessors may not have the sort of legally recognized causal relationship with the children in the images that would justify civil-type liability—though such possessors will certainly be criminally liable. If not, then child pornography possessors may owe a duty to specific victims, which could support civil-type liability.138

Congress and the courts have provided mixed answers when addressing whether the offense of child pornography possession is designed to protect society or individuals. The legislative history concerning the criminalization of child pornography suggests that Congress was responding both to a systemic problem and to individualized harm to victims. Congressional findings state that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society."139 Congress did specifically identify individual harm to victims as a reason for passing § 2252 (the statute criminalizing the distribution, transport, possession, and sale of child pornography),140 finding:

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual

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137. Dubber briefly references "obscene material" and "obscene sexual performances by a child" in a list of possession offenses, but focuses primarily on drug and gun possession. See id. at 857.

138. This liability would perhaps be subject to the constraints of the policy-based analysis discussed in Section II.A.


depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

(2) 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 . . . .

However, Congress also cited numerous broad threats to societal interests as rationales for the statute. Congress found that child pornography is used to seduce other children into performing sexual acts; that it is used by pedophiles to "stimulate and whet their own sexual appetites"; that it "desensitize[s] . . . viewer[s] to the pathology of sexual abuse or exploitation of children"; that it sexualizes children; that it has a "detrimental effect on all children by encouraging a societal perception of children as sexual objects"; and that this sexualization "creates an unwholesome environment" in which to raise children.

In addition, because the jurisdictional hook for § 2252 is the Commerce Clause, the congressional findings emphasized the interstate market in child pornography and the need to stem the demand for these images:

Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such interstate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.

While one of the consequences of a reduction in demand would be fewer victims of child pornography, the justification for reducing demand is primarily grounded in the broad societal interest in shrinking the overall market for child pornography. A reduction in demand for the illicit item is also a key

142. See id. § 121(3)-(4), (11).
143. Id. § 121(4), (11).
144. See Bradley Scott Shannon, The Jurisdictional Limits of Federal Criminal Child Pornography Law, 21 U. Haw. L. Rev. 73, 107 (1999) ("Each of the crimes described in §§ 2252 and 2252A (other than those relating to the reproduction of child pornography) require that the child pornography itself move in interstate or foreign commerce.").
145. See id. at 111-12 ("Congress enacted § 2252 based, in large part, upon its finding that child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale, and that such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through mails and other instrumentalities of interstate or foreign commerce."
(quoting United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998) (internal quotation marks omitted))).
147. See United States v. Sherman, 268 F.3d 539, 546 (7th Cir. 2001) ("The market maker theory provides only an indirect link between a particular child used in the production of pornography and a later purchaser or possessor of that material. . . . Although creating a market for the
rationale for drug possession laws, which target societal harms, not individual harms.149

The courts have also given mixed answers on the question whether child pornography offenses target individual or societal harms.150 The courts of appeals are split on the question whether the primary victim of child pornography is the depicted child or society as a whole.152 The majority of the courts of appeals have held that the depicted children are the primary victims of child pornography.153 These courts, including the Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, were swayed by legislative history that indicated Congress's concern with the severity of the harm to the individual depicted child.154 The Eighth Circuit, in United States v. Rugh, emphasized that, in the context of child pornography offenses, society is merely a "secondary" victim.155 In United States v. Boos, the Ninth Circuit distinguished between so-called "victimless" offenses, like drug and immigration offenses, and child pornography offenses:

Moreover, quite unlike the drug and immigration offenses mentioned in the Note—which are "victimless" crimes in the sense that the harm that they materials certainly victimizes the children involved, we cannot say that the purchaser directly harms the children involved.".


149. See Dubber, supra note 134, at 833.

150. The offenses at issue range from transport to distribution to possession. Although this Note focuses on possession, the reasoning behind the courts' decisions on other child pornography offenses, which, like possession, involve indirect harms to the victims, are salient to this analysis.

151. Courts have addressed this question in the context of sentencing. The Sentencing Guidelines allow the "grouping" of multiple counts if the counts involve the same primary victim. "Therefore, when determining if multiple-count convictions of related offenses should be grouped for sentencing purposes, courts must first identify the primary victim of the particular crime. If the court cannot identify clearly the primary victim of the multiple counts, the primary victim is deemed to be society in general." Elias Manos, Casenote, Who Are the Real Victims of Child Pornography? After United States v. Sherman, the Answer Is Becoming Clear, 10 VILL. SPORTS & ENT. L.J. 327, 327–28 (2003); accord U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2010).

152. See Sherman, 268 F.3d at 547–48 (holding that the depicted child is the primary victim of the possession, receipt, and distribution of child pornography); United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (holding that the depicted child is the primary victim of the transport of child pornography); United States v. Norris, 159 F.3d 926, 930–34 (5th Cir. 1998) (holding that the depicted child is the primary victim of the receipt of child pornography); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (holding that the depicted child is the primary victim of the possession and distribution of child pornography); United States v. Boos, 127 F.3d 1207, 1213 (9th Cir. 1997) (holding that the depicted child is the primary victim of the distribution of child pornography); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (holding that the depicted child is the primary victim of the receipt, transport, distribution, and recording of child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (holding that the depicted child is the primary victim of the receipt of child pornography). But see United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that society in general is the primary victim of the transport of child pornography).

153. See supra note 152 and accompanying text.

154. See Tillmon, 195 F.3d at 643; Norris, 159 F.3d at 930; Hibbler, 159 F.3d at 237; Boos, 127 F.3d at 1213; Ketcham, 80 F.3d at 793; Rugh, 968 F.2d at 755.

155. Rugh, 968 F.2d at 755. The Seventh Circuit also noted that society is a victim of child pornography offenses but is not the primary victim. See Sherman, 268 F.3d at 547.
produce is spread evenly throughout society—the harm caused by the distribution of child pornography is concentrated. It is visited upon a single individual or discrete group of individuals, namely, the child or children used in the production of the pornographic material.156

The most recent opinion on this issue, issued by the Seventh Circuit in United States v. Sherman, concurred with the majority of the courts of appeals.157 The Sherman court, following the rationale of the U.S. Supreme Court in New York v. Ferber,158 explained that the violation of the depicted child's privacy, along with the perpetual nature of the harm, suffices to make the depicted child the primary victim: "The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters." In total, seven of the eight circuits to decide the issue have concluded that individual children are the primary victims of child pornography offenses.

The Fourth Circuit found that the primary victim of child pornography is society generally.160 In United States v. Toler, the Fourth Circuit interpreted the congressional findings as manifesting an intent to protect a broad societal interest in community morality: "An examination of this statute and its legislative history demonstrates that its primary focus . . . is the harm to the moral fabric of society at large."161 The court noted that the Senate Report evinced a concern with a "continuing cycle of child abuse" in which children who are molested later become child molesters themselves.162 For the Fourth Circuit, this cycle of abuse represented a systemic, rather than an individualized, harm.

Judge Posner, vigorously dissenting in Sherman, agreed with the Fourth Circuit that the primary victim of child pornography is society in its entirety. Judge Posner made two main arguments. First, Posner asserted that merely because the depicted children are identifiable does not render them primary

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156. Boos, 127 F.3d at 1210. The "Note" to which the court refers is Application Note 2 to § 3D1.2 of the Sentencing Guidelines, which explains the term "victim":

The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) [of 3D1.2] is the societal interest that is harmed.

U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt.2 (2010).

157. 268 F.3d 539 (7th Cir. 2001).


159. Sherman, 268 F.3d at 547 (citing Ferber, 458 U.S. at 759 n.10).

160. See United States v. Toler, 901 F.2d 399 (4th Cir. 1990); Sherman, 268 F.3d at 547 (Posner, J., dissenting).

161. Toler, 901 F.2d at 403.

victims. He argued that child pornography offenses are more like drug or immigration offenses (harms primarily to society but with secondary victims) than murder or robbery (harms to clearly identifiable primary victims). Posner observed that the drug trade also creates indirect victims, but that Congress’s intent in criminalizing drugs was to protect societal interests, not the interests of these indirect victims:

[T]he children used in the pornography are merely the secondary victims, much like many of the people employed in the drug trade—the “mules” who die when the bags of cocaine that they’ve swallowed burst, the wives and girlfriends who are roped into assisting their husbands or boyfriends in the drug trade, the drug dealers killed in gang wars, and the addicts who turn to selling drugs to support their habit. Nominally, most of these are “consenting adults,” but, realistically, many are coerced or inveigled into criminal participation. Yet the principal concern behind the criminalization of drug dealing is not with any of these unfortunates; it is with the consumption of the drugs and with the entire range of consequences thought to flow from that consumption.

Second, Posner observed that the Child Pornography Prevention Act amended the definition of “child pornography” to include computer-simulated images of child pornography or images of adults made to look like children. Yet the punishment for defendants convicted of child pornography offenses involving real children is no greater than the punishment for defendants convicted of child pornography offenses involving simulated children or adults. Posner pointed out that the Senate Report cited by the government states that “computer-generated child pornography poses the same threat to the well-being of children as photographic child pornography.” Indeed, Posner argued:

This statement would be nonsense if the government’s brief were correct in saying that “the victims” of child pornography are the children used in the making of it... From the parity of concern that the statute and the legislative history express with respect to simulated and actual pornography we can infer that the primary victim is not the child used in the pornography

164. Posner notes that drug and immigration offenses are viewed as “paradigmatic” of “groupable” offenses (i.e., those offenses primarily affecting society at large). Id.
165. Id.
166. Id. Posner noted that the same holds true for immigration offenses:

Similarly, many illegal immigrants are abused, sometimes even enslaved, by employers or by the traffickers in illegal immigrants, but the chief concern behind the restrictions on immigration is not with those unfortunates but with the effect of unrestricted immigration on citizen employment, on crime, and on welfare and other government programs.

167. Id.
168. Id.
169. Id. at 552 (citing S. REP. No. 104-358, at 15 (1996)).
but the child seduced or molested by a pedophile stimulated by such pornography. 70

Judge Posner found that the legislative history clearly indicates that "the principal concern behind criminalizing child pornography is the fear that it incites child molestation." 71

Neither Congress nor the courts have provided a resoundingly clear answer to the question, who is the primary victim of child pornography possession? Congressional findings indicate that Congress had multiple concerns, but it is unclear which concern was foremost. The majority of the courts of appeals have concluded that the depicted children are the primary victims, but the Fourth Circuit and Judge Posner present a compelling argument that society is the primary victim of child pornography. This novel and complex legal issue leaves us in murky water. To provide a framework for this unresolved question, this Note turns to a useful analogy: the legal treatment of the republication of defamatory statements.

C. Defamation Law: A Helpful Analogy

Defamation law provides a useful analogue. The republication of defamatory statements follows the single-publication rule, which holds producers and distributors liable to the defamed person for damages. However, readers of the defamatory statements are not themselves liable. This legal treatment demonstrates that, when dealing with a network of people who pass along material that is harmful to an individual, the law does not see the end consumer as himself harming the individual by possessing the material. Yet child pornography possession is criminalized. 72 This distinction indicates that child pornography possession is not criminalized to prevent harm to any one child, but is criminalized for what it tells us about the possessor of the material—namely, that they are moral bad actors and are potentially dangerous.

Defamation law is a subset of tort law that protects a person’s interest in her own reputation. 73 Defamation is the “act of harming the reputation of another by making a false statement to a third person.” 74 "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." 75

170. Id.
171. Id. Judge Posner acknowledged another background motive for this statute: “[W]e should be realistic and acknowledge that sheer disgust at people who have a sexual interest in prepubescent children is a principal motivation for such legislation.” Id.
173. RESTATEMENT (SECOND) OF TORTS § 559 (1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”).
174. BLACK’S LAW DICTIONARY 479 (9th ed. 2009).
The legal treatment of the republication of defamation has evolved over time. Courts originally adhered to the multiple-publication rule, which states that "each delivery of a libelous statement to a third party constitutes a new publication of the libel, which in turn gives rise to a new cause of action." However, the advent of mass publication made adherence to this rule impracticable for the courts: "[W]ith technological breakthroughs such as the modern printing press, a single libelous statement could now reach millions of readers and lead to a staggering number of lawsuits." These changing circumstances led courts to develop the single-publication rule. This rule states that "[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication." So the publication of a defamatory statement in, for example, "a magazine with a large circulation would count as a single publication and the libeled person would have only one cause of action against the publisher." However, if the defamatory statement were republished, such that it reached a new audience, the libeled person would have a new and separate cause of action against the publisher.

In *Firth v. State of New York*, the leading case on internet publication of defamation, the Court of Appeals of New York applied the single-publication rule to website publication. The *Firth* court remarked that the "policies impelling the original adoption of the single publication rule support its application" to communications over the internet. Noting that communications posted on the internet can be viewed by "thousands if not millions... for an indefinite period of time," the *Firth* court concluded that the single-publication rule would ameliorate the "potential harassment [of defendants] and excessive liability, and draining of judicial resources." The publication chain of defamatory statements is analogous to the production and distribution chain of child pornography. Both deal with wrongs to particular, identifiable individuals. Both result in a perpetually reoccurring harm. Both involve a network of production, distribution, and

177. *Id.* Courts were also "concerned that the statute of limitations would no longer be effective if it were renewed every time a new party saw the libelous statement," which would result in publishers facing "countless lawsuits for an indefinite span of time." *Id.*
178. *Id.*
181. *Id.* at 643. Kumar gives the examples of a morning and afternoon edition of a newspaper (two separate publications), and of a book released in hardback but then later rereleased in paperback (two separate publications). *Id.* at 645-46.
183. *Id.*
184. *Id.* at 465-66.
possession. Both have the potential for mass litigation. And in both cases, the disseminated material is itself the direct cause of harm to the victim, meaning that mere possession of the material (or, in the case of defamation, the reading of the material) harms the depicted child or libeled person. The Supreme Court has made this comparison explicit, noting that "[l]ike a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."\textsuperscript{186}

Yet the single-publication rule does not hold the readers of defamatory statements liable for damages to the defamed person. This aspect of the rule is so apparent that it seems strange to single it out. It would be extremely odd to hold a person who browsed through the \textit{National Enquirer} liable for damages to a celebrity for reading defamatory statements about that celebrity. Yet the reader is precisely the link in the chain that corresponds to a child pornography possessor. Why then is child pornography possession criminalized, but not the possession or reading of defamatory material? Both acts result in harm to the victim.\textsuperscript{187} A person who reads defamatory material harms the libeled person insofar as the reading of the material leads to a reputational loss for that person. The key distinguishing feature seems to be that society believes that possession of child pornography is morally condemnable in a way that possession of defamatory material is not. Possession of child pornography says something about the possessor that deeply disturbs most people—that the possessor is interested in viewing children committing sexual acts and "may" be dangerous. This conclusion squares with the arguments of both Professor Dubber and Judge Posner, who argue, respectively, that crimes of possession are directed at general threats, and that the child pornography possession statute is primarily concerned with the incitation of child molestation.

It can be argued that defamation is unlike child pornography offenses in that child pornography possession facilitates direct harm to other victims.\textsuperscript{188} That is, child pornography possessors may be incited to molest children as a result of viewing images of abuse.\textsuperscript{189} There are two compelling responses to this point.\textsuperscript{190} First, it is not immediately obvious that reading defamatory material does not incite readers to defame others. It is at least plausible that defamatory statements could create a cycle of defamation among readers. Second, although this is an empirical question that cannot be fully explored


\textsuperscript{187} There is a disanalogy here, in the sense that most people reading defamatory material presumably do not realize that they are reading defamatory material. People who view child pornography surely realize what they are viewing. However, it is not clear if this distinction makes an analytical difference. \textit{Possession} of child pornography is what is criminalized. This offense requires no mens rea. See Dubber, supra note 134, at 859. Logically, neither wrong requires intent to cause harm to the particular victim, though both wrongs do, arguably, cause such harm.

\textsuperscript{188} See United States v. Sherman, 268 F.3d 539, 552 (7th Cir. 2001) (Posner, J., dissenting).

\textsuperscript{189} Id.

\textsuperscript{190} Both responses raise empirical questions that are beyond the scope of this Note.
here, at least some data suggest that viewing child pornography may not incite actual abuse. One study indicates that in 84 percent of child pornography possession cases, "investigators did not detect concurrent child sexual victimization or attempts at child victimization." In addition, a 2009 Swiss study, noting the dearth of studies that have "analyzed the association between child pornography consumption and the subsequent perpetration of hands-on sex offenses," concluded that "[t]he consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample—at least not in those subjects without prior convictions for hands-on sex offenses." Finally, the Department of Justice observed:

"[I]n a majority (92 percent) of the child exploitation pornography offenses, police were unable to link the offender with an identifiable victim. This means that in most of the cases in which police were investigating an offender for possession or distribution of child pornography, they were unable to connect the offender to a crime against an actual child." Thus, it may be that the fear of incitation is misplaced.

The analogy suggests that the chain of civil-type liability for Section 2259 claims should include producers ("publishers") and distributors ("re-publishers") of child pornography, but should stop short of liability for the end consumers ("readers") of child pornography. If, as this Note argues, society targets child pornography possession because of a general desire to condemn those whose sexual interests it considers dangerous, then liability of the possessor to the depicted child is not "within the range of apprehension." Therefore, a Cardozo-style analysis would suggest that the child pornography possession defendant owed no foreseeable duty to the individual child.

**IV. SOLUTIONS: HOW CHILD PORNOGRAPHY VICTIMS CAN PURSUE A REMEDY IN CIVIL COURT**

Given the harm suffered by child pornography victims, it is important that the judicial system provide some remedy to these victims. But criminal restitution is not the only option. If courts decline to award restitution, child pornography victims seeking redress can use the civil system to vindicate

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191. Wolak et al., supra note 105, at 17.
193. Id. at 6.
their rights. In cases where district judges reject the restitution claim on proximate causation grounds, a tort or civil restitution claim may provide victims with a better remedy, and a better chance of redress, than that offered by a Section 2259 restitution claim.

A. Tort Claims

Child pornography victims who seek recompense from those convicted of child pornography offenses that do not involve direct abuse would likely bring a claim in tort alleging intentional or negligent infliction of emotional distress. These claims encompass wrongful conduct but do not involve direct contact with the victim.

Though civil tort damages have the same types of proximity and certainty requirements as criminal restitution, a civil tort suit has two key advantages over a criminal restitution hearing, both of which make recovery more likely. First, civil suits allow plaintiffs to present a more complete case. The criminal restitution process is much less rigorous than is a civil trial. Unlike a civil plaintiff, a restitution claimant is not a party to the restitution hearing and thus has only limited control over the outcome. For example, criminal restitution claimants have no opportunity to move for discovery. A claimant "cannot control the presentation of evidence during either the criminal trial or the sentencing hearing and is not even guaranteed the right to testify about the extent of his losses." These procedural distinctions make it difficult for criminal restitution claimants to present sufficient evidence of the link between the injury and the particular defendant. One district judge who denied restitution under Section 2259 stated: "Without more specific evidence, any award in this case would be based on an 'arbitrary calculation.' The Court does not mean to suggest that restitution in a possession case will always be an arbitrary calculation. On the contrary, given more information, a reasonable estimate may be possible."

196. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (intentional infliction of emotional distress); id. § 313 (negligent infliction of emotional distress).
197. See id. §§ 46, 313.
198. For example, "[t]he amount of tort damages for which a negligent party is liable is that which his or her negligence was a substantial factor in causing." 22 AM. JUR. 2d DAMAGES § 325 (2003). Tort recovery will be barred when "resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act described in the complaint or from some other source." Id. § 331. "A tortfeasor is liable only for the damages caused by his or her negligent or intentional act, and not for damages by separate or intervening causes." Id. § 324.
201. Sarabia, supra note 199.
In contrast, the procedural mechanisms of a civil suit will allow plaintiffs to present the information needed to calculate a reasonable estimate of damages.

The second advantage of a civil tort suit is that tort law will allow some measure of damages that would be barred in a criminal restitution claim. Criminal restitution is limited "to the victim's readily identifiable expenses and should not be extended to include damages which are difficult to calculate, such as pain and suffering."204 One district judge who denied a Section 2259 claim emphasized:

Were this a civil tort action, the Victims may have been able to recover for pain and suffering or some other measure of damages for the anguish they experience (each time they are notified that another person has been found in possession of their images). But "[p]ain and suffering . . . and other unliquidated damages that are particularly susceptible to arbitrary determination are usually not included in a restitution order."205

Taken together, these two points demonstrate that a claimant who is unable to prove the certainty and proximity of damages in a criminal restitution claim may be able to present more complete evidence to the factfinder in a civil tort suit and recover damages for emotional distress that are otherwise unrecoverable.

B. Restitution Claims

Alternatively, a certain class of plaintiffs may wish to bring a civil claim in restitution. This class of plaintiffs includes victims who can more easily prove a defendant's gain than the defendant's harm to the plaintiff. Section 2259 claimants would likely bring a claim in restitution under section 44 of the Third Restatement of Restitution and Unjust Enrichment and allege interference with a legally protected interest.06 This section allows recovery from defendants whose tortious conduct resulted in the defendants' unjust enrichment.207


206. See Restatement (Third) of Restitution & Unjust Enrichment § 44 (Tentative Draft No. 4, 2005). A claim under § 44 exists when:

(1) [A] person who obtains a benefit by conscious interference with another's legally protected interests is accountable to the other for the benefit so obtained, unless competing legal objectives make such liability inappropriate.

(2) For purposes of subsection (1), conscious interference with a claimant's legally protected interests may consist of

(a) tortious conduct of which the claimant is the victim, or

(b) a violation of another legal obligation or prohibition, if such violation constitutes an actionable wrong to the claimant under applicable law.

Id.

207. See id.
Section 44 claims provide one significant advantage to child pornography victims who seek to vindicate their rights in civil court. The “proximate causation” requirement that has proved so problematic for Section 2259 claimants does not apply, in the same sense, to civil restitution claims. Professor Thompson notes that “[c]ourts in restitution cases impose policy limits similar to tort ‘proximate cause’ limitations. Courts, however, must resist the temptation to transfer to restitution the substance of proximate cause developed in tort because the policies that underlie the limitations in each area are entirely different.” For example, courts often use proximate cause as a tool to minimize potentially crushing tort liability. However, these policy concerns are not implicated in restitution cases because “the defendant’s gain places a natural ceiling on the amount of recovery.” Causal limits on restitutionary recovery exist, but these limits are based on the defendant’s gain, not the plaintiff’s loss.

In a certain set of cases, the differences in causal requirements will make a restitution claim easier to prove than a tort-based claim. Specific losses are difficult to prove in child pornography cases because so many different people are implicated in the injury. The determination of specific losses will always be muddied by the losses caused by the original injury and by the losses caused by other possessors and distributors of the images. For example, the losses sustained by Amy were caused, in large part, by the loss of earnings that resulted from her inability to finish college. Amy was unable to finish college because she watched a movie with her psychology class that focused on the plight of abused children. It is very difficult to trace the loss of earnings that resulted from this decision to the hundreds or thousands of people who contributed to Amy’s injury.

In contrast, demonstrating the defendant’s gain may be relatively simple in some child pornography cases. The determination of specific gains by the defendant may be straightforward if, for example, the defendant traded images of the particular victim for money. Thus, a section 44 claim may

209. Id.
210. See id.
211. Id. at 384.
212. See id. at 372. One example of a causal limit placed on a restitution claim is that courts will not ordinarily “require a defendant to return any extraordinary gains attributable to his personal efforts that were unconnected to the fraud.” Id. A person who steals paints and creates a masterpiece will not be required to turn over the painting or the proceeds from its sale. Id.
213. See, e.g., United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009) (“The losses described in Amy’s reports are generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images.”).
214. See id.
216. Id. at *5.
provide a better chance of proving the causal element of the claim—the benefit gained—in a limited class of cases.

Plaintiffs suing under section 44 will likely seek a remedy under section 51 of the Third Restatement. Section 51 provides for recovery from defendants who have been enriched by their own misconduct. Section 51 describes the main contours of the provision:

(1) [A] “conscious wrongdoer” is one who acts with knowledge or reason to know of the underlying wrong.

(3) Unless the rule of subsection (2) imposes a greater liability, the unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate any profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called “disgorgement” or “accounting.”

This section also speaks to the issue of calculating gains. It requires that a claimant produce evidence “permitting at least a reasonable approximation of the amount of the wrongful gain.” Any “[r]esidual risk of uncertainty in calculating net profit is assigned to the wrongdoer.”

The disgorgement remedy described in section 51 may prove advantageous for child pornography victims. As discussed above, proving the benefit gained by a single defendant may be easier than proving the loss to the plaintiff. Although the Restatement requires that a claimant prove “what portion (if any) of the defendants’ profits is attributable to the tort,” section 51 allows for some flexibility in calculating the gain. The Restatement provides an example of a situation where 15% of a defendant’s underground storage capacity is situated on the claimant’s property. In this situation, the claimant is entitled to 15% of defendant’s profits from the underground storage. Using similar logic, if 1% of the pornographic photographs on a website depicted the plaintiff, the plaintiff would be entitled to 1% of the defendant’s profits from that website.

This example brings to light another potential advantage of section 51 recovery. Online child pornography is, sadly, an incredibly profitable

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218. Id. § 51(4)(d).
219. Id.
221. Restatement (Third) of Restitution & Unjust Enrichment § 51 cmt. e (Tentative Draft No. 5, 2007).
222. Id.
industry.223 One global child pornography ring had 70,000 subscribers at the time it was discovered.224 Such subscribers are willing to pay relatively large sums of money to access child pornography websites.225 Victims like Amy, who are depicted in popular child pornography series, could be entitled to substantial recovery if they sue in civil court.226

Another benefit of the disgorgement remedy provided by section 51 is that it places the risk of uncertainty in calculating net profits on the defendant.227 This provision sidesteps a major problem in Section 2259 claims—the Eighth Amendment’s prohibition on excessive fines.228 If a court awards criminal restitution without a reasonably certain connection between the particular defendant and the specific losses suffered by the plaintiff, the defendant may end up paying the victim for losses that were caused by others.229 This presents a problem in a criminal setting but not in a civil setting.230

Thus, a certain subset of plaintiffs would find a civil restitution claim more advantageous than a tort claim: those plaintiffs who (1) can target a distributor (or other defendant who has benefitted financially from the illicit image) and (2) have suffered losses to which many people have contributed, such that specific losses caused by particular defendants are difficult to ascertain. These cases will likely involve someone, like Amy, whose images are part of a popular series that is widely distributed online. In such cases, the large number of people possessing or distributing the images will muddy the assessment of specific losses. At the same time, the large number of possessors and distributors increases the likelihood that at least one defendant profits substantially from the images. These profits can be captured by a

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225. See, e.g., Veronica Oleksyn, Austria says busts of global child porn ring involves 2,360-plus suspects worldwide, ASSOCIATED PRESS, Feb. 7, 2007, available at 2/7/07 APWORLD 10:18:47 (Westlaw) (noting that users of a certain website had to pay eighty-nine dollars to access the material); see also Suzanne Smith, Police crack global child porn ring, AUSTL. BROAD. CORP. NEWS, Mar. 6, 2008, http://www.abc.net.au/news/stories/2008/03/06/2181544.htm (noting that members of a child pornography ring were willing to pay “hundreds and hundreds of euros” for certain images).


229. See United States v. Paroline, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009) ("A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant’s specific conduct.").

Section 2259 Restitution Claims

Civil restitution claim without the burden of proving the specific losses caused by that defendant.

Tort and civil restitution both provide useful avenues to recovery for child pornography victims who seek to vindicate their rights in the civil system. The advantages and disadvantages of each claim will differ depending on the circumstances of each plaintiff, but it is clear that either area of law can provide some measure of recovery to victims who have suffered deeply as the result of the wrongdoing of another.

CONCLUSION

This Note has used traditional common law doctrine of proximate causation to clarify a novel legal issue: whether, under Section 2259, child pornography possessors should be liable to the children depicted in the images they possess.

The Andrews/Cardozo dichotomy provides two different ways of framing this issue. Andrews’s policy-based approach focuses on the need to cabin the bounds of liability. The Ninth Circuit’s opinion in Laney suggested that such a line-drawing approach is appropriate in the context of Section 2259 claims. Given the serious administrative concerns these claims present, this Note agrees that drawing the line at child pornography possession on policy grounds would be appropriate. Cardozo’s conception of proximate cause, by contrast, revolves around a specific relationship between the offender and the victim. By analyzing the nature of the relationship presented by Section 2259 claims, this Note explores the reasons for the criminalization of child pornography possession and whether the offense of child pornography possession is primarily designed to protect society or the individual depicted children. Though there are powerful arguments on both sides, this Note agrees with Judge Posner that the offense of child pornography possession is meant to protect society as a whole. Drawing an analogy to the republication of defamatory statements—where readers of the defamatory statement are not liable to the defamed person—this Note suggests that, in the chain of production, distribution, and consumption of material that itself harms an individual, the end consumers are not and should not be liable to that individual. This indicates that child pornography is criminalized because of society’s moral repugnance toward those people who are interested in child pornography and because of a sneaking suspicion that such people pose a threat to society. If child pornography is indeed a societal harm, rather than an individualized harm, then this conclusion undercuts the type of relationship necessary to establish proximate causation under the Cardozo framework.

Finally, this Note argues that child pornography victims should vindicate their rights in the civil system. Tort claims and civil restitution claims both provide distinct advantages over criminal restitution claims. In the civil system, child pornography victims will be able to gain some measure of redress for the immense harms they have suffered.