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Beyond *Paroline*: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad

By Warren Binford, Janna Giesbrecht-McKee, Joshua L. Savey, and Rachel Schwartz-Gilbert*

I. INTRODUCTION

January 22, 2014, was an historic day in the U.S. Supreme Court. It was the first day that a crime victim appeared in the Court through her own counsel in a criminal case filed by the government.¹ The case was *Paroline v. United States*, and the victim was “Amy,” a young woman whose child sex abuse images have become some of the most widely-distributed child pornography images on the Internet.² In the four years immediately prior to that clear, but frigid, day in Washington, D.C., law enforcement sent to the National Center for Missing and Exploited Children (“NCMEC”) more than 35,000 files involving images of Amy being sexually abused, increasing the total number of Amy’s sex abuse images processed by NCMEC to more than 70,000 since 2002.³ The images of Amy’s sexual abuse have been recovered by law enforcement in Denmark, Germany, Canada, New Zealand, and Australia,⁴ and NCMEC attributes the “dramatic increase” in the number of Amy’s sex abuse images being found to the fact that “child pornography is now a crime of international distribution.”⁵

The day after Amy appeared at the oral argument in *Paroline*, Ryan Loskarn, the former Chief of Staff of U.S. Senator Lamar Alexander, descended into the basement of his childhood

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¹ See Crime Victims’ Rights Act, 18 U.S.C. § 3771(d)(3) (2012) (providing that under the Crime Victims’ Rights Act, crime victims are entitled to seek appellate review of a denial of their rights under the act).

² Pema Levy, *Child Porn Victims Go to Court to Try to Make Collectors Pay*, NEWSWEEK (Jan. 22, 2014, 1:37 PM), <http://www.newsweek.com/child-porn-victims-go-court-try-make-collectors-pay-226812>. The phrase “child pornography” is used in this Article interchangeably with “child sexual abuse images.” Use of the latter phrase emerged to distinguish it from virtual child pornography where no actual child is used in the production of the images. See *Appropriate Terminology*, INTERPOL, <http://www.interpol.int/Crime-areas/Crimes-against-children/Appropriate-terminology> (last visited Feb. 1, 2015). Thus, “child sexual abuse images” refers specifically to child pornography in which an actual child is abused to produce the images. This is the child pornography this Article addresses because a child is harmed in the production of the child sexual abuse images and then continues to be harmed when the images are distributed and consumed. The term “images” is expansive and may include digital imagery, photographs, sketches, cartoons, movies, sound recordings, paintings, or any other depiction of the sexual abuse of a child regardless of media.

³ Brief for the National Center for Missing and Exploited Children as Amicus Curiae in Support of Respondent Amy Unknown at 11, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561). NCMEC explains in its amicus brief that “[t]he number of image or video files pertaining to ‘Amy’ represents separate instances in which her image or video files are seen and does not indicate the total number of unique or distinct files.” *Id.* at 11 n.5. NCMEC works in conjunction with federal and state law enforcement to collect a database of photos and files in order to identify and prosecute individuals involved in the child pornography industry.

⁴ *Id.* at 12.

⁵ *Id.* at 11.

home fifty-four miles north of the U.S. Supreme Court Building and hanged himself.⁶ The thirty-five-year-old was arrested the previous month for possession of child pornography with the intent to distribute as part of an international police investigation into child pornography called "Operation Spade."⁷ His suicide letter disclosed that he had been sexually abused as a child and was "drawn" to videos that resembled his own abuse.⁸

Loskarn was not the only rising political star who fell in the wake of Operation Spade. More than four thousand miles away, Sebastian Edathy resigned from the German parliament after Loskarn's suicide,⁹ citing health reasons. Three days later, Edathy's home and office were searched by authorities based on allegations of child pornography.¹⁰ The scandal rocked Chancellor Angela Merkel's negotiations to form a coalition government in Germany.¹¹ Edathy was a key member of the Social Democratic Party ("SPD") and was bound for a high-level position in the next German government.¹² He was not the only political casualty. Germany's interior minister, Hans-Peter Friedrich, leaked the information that Edathy was under investigation for buying child pornography to the head of the SPD, and Chancellor Merkel asked for Friedrich's resignation in the wake of the scandal.¹³

The lessons from Operation Spade are not primarily political. The multi-year investigation exemplifies the complexities of child pornography in the twenty-first century, including its exploding market, cross-border distribution, and the prominence of some perpetrators. The investigation itself began in 2010 in Toronto, Canada, with a single film company named Azov Films that operated openly and marketed itself as a producer and distributor of "naturist" films, primarily depicting boys engaged in sports and recreational scenes coming of age.¹⁴ The films marketed by Azov Films did not include explicit sexual acts and so they did not meet the standards for child pornography in some jurisdictions.¹⁵ Indeed, in the case of Edathy, he maintains that all of the material he purchased from Azov Films was "unambiguously legal" in Germany at the time because it did not contain sex acts; the raid on his home was criticized by Thomas Fischer, Chief Judge of the German Federal Court, in an editorial published in *Die Zeit*.¹⁶ By contrast, Loskarn, who also appeared on the Azov Films customer list, was reported to have a video of a young girl being raped in the woods.¹⁷

⁶ Ruth Marcus, *The Tragedy of Ryan Loskarn*, WASH. POST (Feb. 6, 2014), http://www.washingtonpost.com/opinions/ruth-marcus-the-tragedy-of-ryan-loskarn/2014/02/06/e75d3dfe-8f46-11e3-b227-12a45d109e03_story.html; John Bresnahan & Manu Raju, *Ryan Loskarn Believed to Have Committed Suicide*, POLITICO (Jan. 24, 2014, 11:41 AM), <http://www.politico.com/story/2014/01/ryan-loskarn-death-102565.html>.

⁷ Joe Sorensen, *Bucks County Man Indicted on Child Porn Charges Related to Videos from International Pedophile Ring*, TRENTONIAN (June 5, 2014, 8:11 PM), <http://www.trentonian.com/general-news/20140605/bucks-county-man-indicted-on-child-porn-charges-related-to-videos-from-international-pedophile-ring>.

⁸ Rebecca Shabad, *Loskarn's Mother Releases Open Letter He Wrote Before Committing Suicide*, HILL (Jan. 28, 2014, 11:44 AM), <http://thehill.com/blogs/blog-briefing-room/news/196635-loskarns-mother-releases-open-letter-he-wrote-before-committing>.

⁹ Alison Smale, *A Minister in Germany Steps Down Amid Uproar*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/world/europe/german-minister-who-divulged-investigation-resigns.html?_r=0.

¹⁰ *Id.*

¹¹ *Entangled: A Child-Porn Scandal Triggers the First Big Crisis in the Grand Coalition*, ECONOMIST (Feb. 22, 2014), <http://www.economist.com/news/europe/21596985-child-porn-scandal-triggers-first-big-crisis-grand-coalition-entangled>.

¹² *Id.*

¹³ *Id.*

¹⁴ Helen Davidson, *Child Abuse Investigation: 65 Arrested and Six Children Rescued in Australia*, GUARDIAN (Nov. 14, 2013), <http://www.theguardian.com/society/2013/nov/15/child-abuse-investigation-australia-arrests> (noting that Brian Way, the owner of Azov Films, claimed that because the films were marketed as naturist movies the films were legal in Canada and the United States).

¹⁵ For example, they were classified as Level One on the COPINE scale in the United Kingdom. *Statement on CEOP's Involvement in Toronto Police's Project Spade*, NAT'L CRIME AGENCY (Nov. 15, 2013), <http://nationalcrimeagency.gov.uk/news/258-statement-on-ceop-s-involvement-in-project-spade> (stating that Phil Gormley, a deputy director at the National Crime Agency in the United Kingdom, made the statement that the screen shots the agency received were considered Level One on the COPINE Scale).

¹⁶ See Vera Kern, *Edathy Pornography Affair: The Story So Far*, DEUTSCHE WELLE (Feb. 19, 2014), <http://www.dw.de/edathy-pornography-affair-the-story-so-far/a-17439048>; see also Thomas Fischer, *Bitte Entschuldigen Sie, Herr Edathy*, DIE ZEIT ONLINE

Loskarn and Edathy are just two of the more prominent customers of Azov Films. In all, the company had customers in over ninety-four countries.¹⁸ Following the web of relationships from that one company, Operation Spade has led to the arrest of almost 350 persons thus far, including clergymen, professors, and teachers across six continents.¹⁹ Nearly four hundred children were rescued from sexual abuse.²⁰ More than fifty countries have been involved, but each has its own laws defining child pornography with consequences in both the prosecution of offenders, as well as recovery for the victims.²¹ At the extreme, for example, are countries like Japan who, at the time of Operation Spade, had not criminalized the possession of child pornography.²²

In the case of Edathy, German prosecutors were faced with a “legal grey zone” because the definition of child pornography in Germany arguably did not include the images recovered.²³ German law requires child sexual abuse images to contain explicit sexual acts, such as sexual intercourse or acts close to the genital area.²⁴ A German criminal law expert explained, “pictures containing only nudity or pictures of a child taken secretly are not punishable.”²⁵ As a result, although Edathy’s political career may be ruined, his criminal prosecution is uncertain.²⁶

What about Edathy’s victims? The children in the images were mainly from poor villages in Romania.²⁷ In 2007, Marcus R., a German timber worker in Romania, began selling videos of naked children to Azov Films.²⁸ Prior to moving to Romania, Marcus R. had served a prison sentence in Germany for sexually abusing children, but he was able to reinvent himself in Romania as an active community member.²⁹ He taught local boys karate and bought them treats

(Mar. 6, 2014), <http://www.zeit.de/2014/10/staatsanwaltschaft-fall-edathy> (English translation can be found at <http://www.boychat.org/messages/1386543.htm>).

¹⁷ M.L. Nestel, *EXCLUSIVE – ‘He Didn’t Want to Cause Us Anymore Shame’: Father Reveals it was Family Babysitter who Molested Senate Aide who Killed Himself After Child Porn Bust and Blamed Abusive Past in Haunting Suicide Note*, DAILY MAIL (Jan. 31, 2014, 4:15 PM), <http://www.dailymail.co.uk/news/article-2549007/Father-Senate-aide-left-haunting-suicide-note-blaming-past-sex-abuse-child-porn-bust-reveals-son-molested-twice-familys-babysitter.html>. Loskarn was also participating in a child pornography peer-to-peer network file-sharing site called “Gnutella,” credited as being the source for the rape video.

¹⁸ Kern, *supra* note 16. The Canadian company came under examination as part of the Canadian government’s “Operation Spade,” a three-year investigation into a large child pornography operation that led to the rescue of 386 children and the arrest of 348 people. *Canada: Hundreds Arrested in Child Pornography Investigation*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/world/americas/canada-hundreds-arrested-in-child-pornography-investigation.html?smid=pl-share> (“The investigation led to the arrest of 108 people in Canada, 76 in the United States and 164 in other countries during the investigation. Schoolteachers, doctors and actors were among those arrested.”).

¹⁹ David Osborne, *Hundreds Arrested as Canadian Police Smash Worldwide Paedophile Ring*, INDEPENDENT (Nov. 14, 2013), <http://www.independent.co.uk/news/world/americas/hundreds-arrested-as-canadian-police-smash-global-paedophile-ring-8940562.html>.

²⁰ *Id.*

²¹ *Hundreds Held Over Canada Child Porn*, BBC (Nov. 14, 2013, 1:24 PM), <http://www.bbc.com/news/world-us-canada-24944358>; ALISDAIR A. GILLESPIE, *CHILD PORNOGRAPHY: LAW AND POLICY* 339 (2011).

²² Jethro Mullen & Yoko Wakutsuki, *After Long Wait, Japan Moves to Ban Possession of Child Pornography*, CNN (June 9, 2014, 10:37 PM), <http://www.cnn.com/2014/06/06/world/asia/japan-child-pornography/index.html>. It was not until June 2014 that Japan finally criminalized possession of child pornography.

²³ Nastassja Stuedel, *Child Pornography’s Legal Grey Zone*, DEUTSCHE WELLE (Feb. 14, 2014), <http://www.dw.de/child-pornographys-legal-grey-zone/a-17434876>.

²⁴ STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BGBL I at 3322, § 184b, 176(1) (Ger.); Stuedel, *supra* note 23.

²⁵ Stuedel, *supra* note 23.

²⁶ Evidence may also be a problem in this case. After searching Edathy’s home, prosecutors found “less than they expected, including signs that a hard disc may have been destroyed.” *Entangled: A Child-Porn Scandal Triggers the First Big Crisis in the Grand Coalition*, *supra* note 11. Edathy also reported his laptop stolen. *Id.*

²⁷ *Id.*

²⁸ Maximilian Popp, *Child Pornography: Victims of Exploitation Struggle to Forget*, SPIEGEL ONLINE INT’L (Feb. 26, 2014, 5:01 PM), <http://www.spiegel.de/international/europe/exploited-young-romanians-from-azov-films-videos-traumatized-a-955748.html>.

²⁹ *Id.*

like pizza and lemonade.³⁰ After gaining their trust, he took naked videos of them in the pool at his home.³¹

One of the children in the videos is named Adrian,³² a nineteen-year-old from Rasca, a town in northern Romania.³³ He was fourteen years old when Marcus R. took the videos.³⁴ Adrian remains traumatized because the videos of him and his friends have been sold; he speaks of how he cannot remove the “terrible” footage from his head.³⁵ His father describes Adrian as having been “such a happy child,” but now “he’s very withdrawn.”³⁶ After finding out about the videos, Adrian was so ashamed he was unable to leave his house for months.³⁷ Unfortunately, as tragic as Adrian’s exploitation is by individuals like Marcus R. and Edathy, it is neither unique nor extreme by today’s child pornography standards.

In 2011, U.S. officials penetrated a child pornography ring that engaged in “horrific” and “unspeakable” crimes involving the sexual exploitation of children, some of whom were infants.³⁸ This ring centered on a members-only online community called Dreamboard, which required prospective members to upload pornography of children under twelve years of age.³⁹ After being admitted to the community, participants had to continually upload child sexual abuse images, with greater access and higher statuses awarded based on their “level of commitment to the enterprise.”⁴⁰ Participants achieved the highest level of membership by producing their own child pornography, with particular benefits bestowed on members who caused the infants and children “obvious and . . . intentional pain.”⁴¹ One area of the site mandated that the victims were “in distress and crying.”⁴²

The child pornography ring was truly an international affair.⁴³ The global nature of the Internet meant that U.S. law enforcement arrested not only members from various states, but also required cooperation from foreign officials to arrest offenders in “Canada, Denmark, Ecuador, France, Germany, Hungary, Kenya, the Netherlands, the Philippines, Qatar, Serbia, Sweden, and Switzerland.”⁴⁴ The victims were similarly spread out across the globe, and law enforcement struggled to identify the children who were sexually abused in the production of these images.⁴⁵ U.S. Attorney General, Eric Holder, recognized the “nightmare” the community had created and the extensive damage to the lives of the victims.⁴⁶

Online communities like Dreamboard not only harm victims when members abuse

³⁰ *Id.*

³¹ *Id.*

³² Most victims of child pornography prefer pseudonyms, and the authors have taken every effort to ensure the privacy of victims is protected and referred to victims by their requested pseudonym. The Spiegel article is unclear whether “Adrian” is a pseudonym, but Maximilian Popp chose to preserve the victims’ anonymity by blurring out the faces in the pictures that accompany the article. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Terry Frieden, *72 Charged in Online Global Child Porn Ring*, CNN (Aug. 3, 2011, 7:57 PM), <http://www.cnn.com/2011/CRIME/08/03/us.child.porn.ring/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ The rules of conduct for the website were printed in English, Russian, Japanese, and Spanish. Press Release, Dep’t of Justice Office of Pub. Affairs, Attorney General and DHS Secretary Announce Largest U.S. Prosecution of International Criminal Network Organized to Sexually Exploit Children (Aug. 3, 2011), available at <http://www.justice.gov/opa/pr/2011/August/11-ag-1001.html>.

⁴⁴ Frieden, *supra* note 38.

⁴⁵ Andrew Seidman, *72 Charged in Online Child Pornography Ring*, L.A. TIMES (Aug. 3, 2011), <http://articles.latimes.com/2011/aug/03/nation/la-na-child-porn-20110804>.

⁴⁶ Frieden, *supra* note 38.

children and produce child pornography, but also harm the children portrayed in the child sexual abuse images by distributing and possessing the images.⁴⁷ The sharing of the child sexual abuse images revictimizes children.⁴⁸ Many victims know that the images of their sexual abuse as children are being consumed by numerous, and often unknown, perpetrators and that this revictimization may continue for the rest of their lives due to the nature of the Internet. Amy Unknown, the child portrayed in the “Misty series,” one of the most widely-distributed and collected sets of child sexual abuse images, wrote about this problem in her victim impact statement.⁴⁹ She wrote:

Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. . . . I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle. When they first discovered what my uncle did, I went to therapy and thought I was getting over this. I was very wrong. My full understanding of what happened to me has only gotten clearer as I have gotten older. My life and my feelings are worse now because the crime has never really stopped and will never really stop. It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It’s like I am being abused over and over and over again.⁵⁰

Amy’s experience of revictimization is common among victims of child pornography. These victims have extensive and ongoing medical and psychological needs.⁵¹ In addition, the constant fear of recognition keeps many victims from being able to obtain education and employment.⁵² As a result, tangible support of victim restoration is imperative, both morally and legally.

⁴⁷ One of the first academic articles to study the role of Internet-based communities in the creation and perpetuation of child sex abuse and child sex abuse images was by Ethel Quayle and Max Taylor. Ethel Quayle & Max Taylor, *Child Pornography and The Internet: Perpetuating A Cycle Of Abuse*, 23 *DEVIANT BEHAV.: AN INTERDISC. J.* 331, 331 (2002).

⁴⁸ *New York v. Ferber*, 458 U.S. 747, 759–60 n.10 (1982) (“[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.”).

In addition to revictimizing the children whose sexual abuse is portrayed in the images, the possession and distribution of child sexual abuse images “validates and normalizes the sexual exploitation of children, and fuels a market, thereby leading to further production of images.” Letter from Anne Gannon, Nat’l Coordinator for Child Exploitation Prevention and Interdiction, U.S. Dep’t of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n (Mar. 5, 2013) (on file with author) (citing H.R. Rep. No. 108-66, at 58–59 (2003)).

⁴⁹ Amy is the victim at the center of a recent case before the Supreme Court of the United States, *Paroline v. Amy Unknown and United States*. *Paroline v. United States*, 134 S. Ct. 1710 (2014). In *Paroline*, the Supreme Court interprets the Mandatory Restitution Statute, 18 U.S.C. § 2259 (2012), to determine child pornography victims’ ability to obtain restitution, which is used to provide restoration services to the victim such as psychological counseling, compensation for lost income, and medical expenses. *Id.* at 1760. Amy’s appearance represents a momentous day for crime victim advocates—for the first time in U.S. history, a victim argued as a party before the Supreme Court along with the defendant and Government. Brooke Adams, *Utah Law Professor to Make Case for Child-Porn Victims*, SALT LAKE TRIBUNE (Jan. 16, 2014, 12:50 PM), <http://www.sltrib.com/sltrib/mobile3/57400897-219/amy-restitution-court-child.html.csp>. Amy argues that once an individual meets the definition of victim in the Mandatory Restitution Statute, the individual is entitled to the full amount of her losses. The Court rejects this theory and holds that victims may only receive restitution for injuries directly caused by the defendant using a number of factors. *See infra* Part V for a more extensive discussion of the case.

⁵⁰ Joint Appendix vol. 1 at 60–61, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

⁵¹ *See* Part II.B for a discussion of the victims’ medical and psychological needs.

⁵² *Id.*

The stories of Adrian, Amy, and the unknown Dreamboard victims demonstrate the many facets of the growing, global, and increasingly grotesque sexual abuse of children through child pornography. This Article argues that the United States must act quickly to enhance its statutory framework for providing restoration to victims of child pornography in light of the U.S. Supreme Court's recent decision in *Paroline*.⁵³

Part II focuses on child pornography in the Internet age. In the past twenty years, technological innovations and the rise of the Internet have transformed child pornography into a problem that is transnational, borderless, and never-ending in its growth. It also means that any adequate framework for restoration must recognize the complexity of a global and robust child pornography market that is described as reaching "epidemic" proportions.⁵⁴ Part III describes U.S. jurisprudence concerning child pornography and restitution to victims. Part IV analyzes the international community's attempts to provide a framework ensuring victims' full psychological and physical recovery and social reintegration (we refer to these conditions collectively as "restoration" throughout this Article). Part IV examines in detail the relevant provisions of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography ("Optional Protocol"),⁵⁵ which the United States signed and ratified. The Optional Protocol, together with a number of other global efforts concerning the restoration of child pornography, provides the foundation for an evolving international norm that requires countries to provide victims with full restoration.

Part V argues that although the United States has provided leadership by creating an initial legal framework domestically and supporting the promulgation of international treaties and instruments, the current legal framework fails to provide meaningful and adequate compensation to victims, which is required under its treaty obligations. The recent decision of the U.S. Supreme Court in *Paroline* makes clear that victims cannot rely on the Mandatory Restitution Statute⁵⁶ to recover fully or quickly from most perpetrators.⁵⁷ Thus, Congress must pass new legislation. The new legal framework should recognize the complexity of the current global and growing child pornography market to ensure that all victims, both foreign and domestic, have access to the resources they need both to end their victimization and recover fully from perpetrators, regardless of where they are located. The new framework could include criminal laws (both domestic, international, and foreign) with effective restitution provisions, crime victims' funds, civil remedies, copyright protections, third-party liability, and access to government benefits. Private industry could also be engaged in the fight against child pornography to implement software that

⁵³ *Paroline*, 134 S. Ct. 1710.

⁵⁴ Marisol Bello & Yamiche Alcindor, *Police Chief, Rabbi Among 71 Nabbed in Child Porn Bust*, USA TODAY (May 21, 2014, 10:19 PM), <http://www.usatoday.com/story/news/nation/2014/05/21/child-porn-nyc-internet/9367471/>. A five-week federal investigation of child pornography based in the New York area in spring 2014 ("Operation Caireen") resulted in the arrests of seventy men and one woman, including two police officers, a rabbi, a registered nurse, a paramedic, and a Boy Scout den leader. According to James Hayes, the head of U.S. Immigration and Customs Enforcement's Homeland Security Investigation's New York office, "the sheer volume of confirmed and suspected instances of individuals engaging in the sexual exploitation of children . . . is shocking and the professional backgrounds of many of the defendants is troubling. We can no longer assume that the only people who would stoop to prey on children are unemployed drifters. Clearly, this criminal activity has reached epidemic proportions." *Id.* The investigation began in January 2014 when Brian Fanelli, the chief of the Mount Pleasant Police Department, was arrested and charged with possession of child pornography, followed by the arrest of Rabbi Samuel Waldman on March 5, 2014. Joseph Berger, *71 Are Accused in a Child Pornography Case, Officials Say*, N.Y. TIMES (May 21, 2014), http://www.nytimes.com/2014/05/22/nyregion/dozens-arrested-in-new-york-state-child-pornography-investigation.html?_r=0.

⁵⁵ United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002; United States ratified Dec. 23, 2002) [hereinafter Optional Protocol].

⁵⁶ 18 U.S.C. § 2259 (2012).

⁵⁷ *Paroline*, 134 S. Ct. at 1722, 1728 (requiring that the offender proximately caused the harm and providing courts with factors to determine restitution).

would allow child sex abuse images to be quickly identified and immediately removed, so that the victimization does not continue in perpetuity and the individuals harmed by this horrific crime have the opportunity to recover once and for all.

Finally, Part VI briefly considers the insidious challenges, legal obligations, and moral imperative of restoring foreign victims. Due to the global nature of modern child pornography, and the increasing sexual exploitation of children in developing countries (which often have fewer resources for victims) by perpetrators in developed countries, it is critical that the global community create efficient and effective systems to allow victims of child pornography to access support for their restoration across borders.

II. THE RISE OF CHILD PORNOGRAPHY

Numerous civilized societies have condemned the sexual abuse of children as far back as the Byzantine Empire.⁵⁸ Individuals who had sex with free children in Ancient Rome were sentenced to death.⁵⁹ During this period, there was no way to capture actual images of the sexual abuse of a child except through one's memory and drawing or another manual recreation of the incident. However, this changed with the invention of the camera in 1839.⁶⁰ For the first time, a person could memorialize the sexual abuse of a child, and those images could be used to perpetuate the abuse.⁶¹ The technological limitations of cameras and the physical limitations on delivery methods, such as postal services and the need to seek an outside developer for physical film, significantly restricted the growth of the child pornography market for more than one hundred years.⁶² However, with the introduction of affordable, easy-to-use cameras in the mid-twentieth century, technological advances significantly expanded the child pornography market.⁶³ The rise of the Internet and digital technologies multiplied this growth.

A. A Child Pornography Pandemic in the Digital Age

In the late twentieth century, digital technologies and the widespread use of the Internet together facilitated an explosive growth in the child pornography market. Between 1996 and 2009, the number of individuals with Internet access increased from 100 million to 1.25 billion users and continues to rise.⁶⁴ As a result, it is impossible to quantify the actual volume of these images or the number of offenders possessing and distributing child pornography materials at any given time.⁶⁵ Before the rise of the digital age, child pornography could only be shared physically through the use of mailings or face-to-face encounters.⁶⁶ Accordingly, "child pornography was difficult to find, risky to produce, expensive to duplicate and required secure and private

⁵⁸ John Lascaratos & Effie Poulakou-Rebelakou, *Child Sexual Abuse: Historical Cases in the Byzantine Empire (324–1453 A.D.)*, 24 CHILD ABUSE & NEGLECT 1085, 1085 (2000).

⁵⁹ CHRISTIAN LAES, CHILDREN IN ANCIENT ROME 244 (2006). However, it is important to note that children who were slaves were not protected. *Id.*

⁶⁰ NAT'L RAPPORTEUR ON TRAFFICKING IN HUMAN BEINGS, CHILD PORNOGRAPHY: FIRST REPORT OF THE DUTCH NATIONAL RAPPORTEUR 33 (2011) [hereinafter DNR REPORT], available at http://www.dutchrapporteur.nl/Images/child-pornography_tcm64-426462.pdf.

⁶¹ *Id.* at 33–34.

⁶² U.S. SENTENCING COMM'N, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 5, 328 (2012), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf; see DNR REPORT, *supra* note 60, at 33–34.

⁶³ DNR REPORT, *supra* note 60, at 34.

⁶⁴ Robert J. Edelman, *Exposure to Child Abuse Images as Part of One's Work: Possible Psychological Implications*, 21 J. FORENSIC PSYCHIATRY & PSYCHOL. 481, 481 (2010) (discussing the growth of the Internet).

⁶⁵ U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 11 (2010), available at <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

⁶⁶ U.S. SENTENCING COMM'N, *supra* note 62, at 5, 328.

storage.”⁶⁷ Distribution has become far less risky and difficult with the Internet and is now a common component of child pornography offenses.⁶⁸

The Internet's current “global, decentralized and borderless” nature allows for a “potentially infinite and unbreakable communications complex” that law enforcement, thus far, is unable to break.⁶⁹ The United States alone has two hundred forty-five million Internet users.⁷⁰ Millions of individual users consume⁷¹ more than fifteen million child sexual abuse images in a market currently valued between three and twenty billion U.S. dollars annually.⁷² The child pornography market is one of the fastest growing businesses on the Internet.⁷³ Currently, 750,000 predators are online at any time.⁷⁴ Moreover, with the rapid proliferation of Internet usage, the child pornography market is projected to continue growing exponentially.⁷⁵

Along with the expansion of the Internet came the development of digital, remote, and wireless technologies.⁷⁶ Today, personal devices such as smartphones, tablets, digital recording devices, and hand-held digital cameras are increasingly affordable, convenient, and widespread, making the Internet even easier to access from almost any inhabited area.⁷⁷ Recent studies reported that by the end of 2013, there were 6.8 billion mobile subscriptions worldwide, which is nearly the Earth's population.⁷⁸ Additionally, in the past decade, Internet access has become more readily available. As of January 2014, fifty-eight percent of American adults own smartphones, which gives them access to the Internet from any location with cellular service.⁷⁹ Many smartphones contain security that prevents law enforcement from accessing data, making a smartphone an ideal medium for perpetrators.⁸⁰

Devices such as smartphones allow offenders to access child pornography images easily and on-the-go, as well as create and distribute the sex abuse images relatively simply and quickly from a technological perspective.⁸¹ Moreover, whereas historically child pornography was

⁶⁷ U.S. SENTENCING COMM'N, *supra* note 62, at 71.

⁶⁸ *Id.* According to the U.S. Department of Justice, “nearly two-thirds of all offenders distribute [sexual abuse] images to others.” Letter from Anne Gannon, *supra* note 48.

⁶⁹ YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 2 (2008).

⁷⁰ CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html>.

⁷¹ Many individuals who consume or possess child pornography also distribute child pornography. U.S. DEP'T OF JUSTICE, *supra* note 65, at 18. One reason is the ability to create “community” relationships and peer groups on the Internet. *Id.* Often these groups have initiation processes that require potential members to distribute new child pornography images to the existing members in order to join the group. *Id.*

⁷² Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, paras. 44, 80, Human Rights Council, U.N. Doc. A/HRC/12/23 (July 13, 2009) (by Najat M'jid Malla) [hereinafter U.N. Special Rapporteur Report].

⁷³ Press Release, Int'l Ctr. for Missing & Exploited Children, The Financial Coalition Against Child Pornography Adds Four Financial Services Leaders to its Roster (Nov. 1, 2006), available at http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&Pagelid=2853.

⁷⁴ U.N. Special Rapporteur Report, *supra* note 72, para. 34.

⁷⁵ See Edelmann, *supra* note 64, at 481 (discussing internet growth, and the potential for child abuse image distribution and its negative effect on investigators of child abuse images).

⁷⁶ See U.S. SENTENCING COMM'N, *supra* note 62, at 5.

⁷⁷ See *id.* at 5–6.

⁷⁸ INT'L TELECOMM. UNION, MEASURING THE INFORMATION SOCIETY 1 (2013), available at http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013_without_Annex_4.pdf.

⁷⁹ *Mobile Technology Fact Sheet*, PEW INTERNET (Jan. 14, 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>; see DEBORAH MUIR, VIOLENCE AGAINST CHILDREN IN CYBERSPACE 11 (2005), available at http://www.ecpat.net/sites/default/files/Cyberspace_ENG_0.pdf.

⁸⁰ Craig Timberg & Greg Miller, *FBI Blasts Apple, Google for Locking Police Out of Phones*, WASH. POST (Sept. 25, 2014), http://www.washingtonpost.com/business/technology/2014/09/25/68c4e08e-4344-11e4-9a15-137aa0153527_story.html (noting that “Apple will become the phone of choice for the pedophile”).

⁸¹ ECPAT INT'L, THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES IN CONNECTION WITH CASES OF CHILD-SEX

produced and then distributed at a later time, now a child's victimization can be viewed in real-time, and replayed again and again in the future.⁸² For example, a perpetrator in Europe can go online and instruct a Filipino child to perform sexually for him via a webcam in real time.⁸³ As the world's population has "gone mobile," advancements in storage capacities and Internet speeds have allowed offenders to store and share more child pornography images and videos than ever before.⁸⁴

Modern technology and the Internet have not only increased production of child pornography, but also allow offenders to access the images surreptitiously by using aliases, Wi-Fi locations, proxy servers, and peer-to-peer file sharing.⁸⁵ Peer-to-peer file sharing allows individuals to share their collections of child pornography anonymously on a global basis.⁸⁶ A recent study by U.S. law enforcement agencies found that more than 11.8 million unique international Internet Protocol ("IP") addresses engaged in peer-to-peer file sharing of child pornography between October 2008 and October 2009.⁸⁷ During that same period, more than 9.7 million unique IP addresses in the United States engaged in peer-to-peer file sharing of child sexual abuse images.⁸⁸

There are two distinct types of peer-to-peer file sharing: centralized sharing networks and decentralized sharing networks.⁸⁹ Centralized sharing networks connect their users' content to a central database in which all users can access the files through the main network.⁹⁰ When one user searches for child sexual abuse images, other users direct them to the correct location and the user who has the file available sends a copy to the interested user.⁹¹ Generally, child pornography offenders prefer decentralized sharing networks because a centralized sharing network involves multiple directing parties that law enforcement can track.⁹² Decentralized networks do not store users' file names and allow users to disconnect immediately and to share files without a centralized server.⁹³

In addition to peer-to-peer networks, some offenders utilize chat rooms to connect with potential victims, as well as to connect with other offenders. Offenders use chat rooms to "swap" child sexual abuse images with other offenders, treating the images as collectibles, which in turn, objectifies children.⁹⁴ These interactions help to provide offenders with access to secret chat rooms with more child sex abuse images and communal validation that their crimes are

TOURISM IN EAST AND SOUTHEAST ASIA 25 n.35 (2010), available at http://www.ecpat.net/sites/default/files/ecpat_journal_mar2010_final_0.pdf.

⁸² See CHILD EXPLOITATION & ONLINE PROTECTION CTR., THREAT ASSESSMENT OF CHILD SEXUAL EXPLOITATION AND ABUSE 80 (2013), available at http://ceop.police.uk/Documents/ceopdocs/CEOP_TACSEA2013_240613%20FINAL.pdf (explaining the use of live video streaming as a method of distributing child pornography).

⁸³ *Stop Webcam Child Sex Tourism*, TERRE DES HOMES INT'L FED'N (Nov. 4, 2013), <http://www.terredeshommes.org/webcam-child-sex-tourism/>.

⁸⁴ *Id.*; U.S. DEP'T OF JUSTICE, *supra* note 65, at 12.

⁸⁵ U.S. DEP'T JUSTICE, *supra* note 65, at 23.

⁸⁶ U.S. SENTENCING COMM'N, *supra* note 62, at 51 ("In 2011, it was estimated that [fifty-seven] percent of global Internet traffic was [peer-to-peer] traffic.")

⁸⁷ U.S. DEP'T OF JUSTICE, *supra* note 65, at 14.

⁸⁸ *Id.*

⁸⁹ U.S. GEN. ACCOUNTING OFFICE, GAO-03-537T, FILE SHARING PROGRAMS: CHILD PORNOGRAPHY IS READILY ACCESSIBLE OVER PEER-TO-PEER NETWORKS 15–16 (2003), available at <http://www.gao.gov/products/GAO-03-537T> (to view full text, follow "VIEW REPORT" hyperlink) (statement of Linda D. Koontz, Dir., Info. Mgmt. Issues).

⁹⁰ *See id.* at 16–17.

⁹¹ *Id.* at 16.

⁹² *See id.* at 15.

⁹³ See Matei Ripeanu et al., *Mapping the Gnutella Network: Properties of Large-Scale Peer-to-Peer Systems and Implications for System Design*, 3, <http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf> (last visited Feb. 1, 2015).

⁹⁴ See KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 81 (Nat'l Ctr. for Missing & Exploited Children ed., 5th ed. 2010), available at http://www.missingkids.com/en_US/publications/NC70.pdf; Quayle & Taylor, *supra* note 47, at 331.

acceptable.⁹⁵ Like Dreamboard, many chat rooms encourage offenders to submit new images in order to join specific groups.⁹⁶ Often these groups consist of a hierarchy based on the number of images submitted to the group as a whole.⁹⁷ This, in turn, leads to the proliferation of abuse and, in some cases, has led to offenders who were previously “hands off” abusers to become “hands on” abusers.⁹⁸ Some users even abuse their own children to gain access to more restrictive groups.⁹⁹ Chat rooms provide offenders with a community of abusers who accept and reaffirm their addiction to the abuse of children by normalizing their behavior and encouraging desensitization to abuse materials.¹⁰⁰ Currently, there are nearly forty thousand active public chat rooms in which offenders seek to meet children and abuse potential victims.¹⁰¹

Offenders may also access illegal content through the “Deep Web,” a group of websites that remain hidden through a predetermined digital path, and thus, allow offenders access to illegal content, such as child pornography.¹⁰² These “disguised” websites will only display illegal content when accessed through this path and will display legal adult content if accessed through a different path.¹⁰³ Due to the ability of offenders to hide their identity and access this information in a more “risk-free” way, it is not surprising that there has been a significant rise in the proliferation of child pornography since the introduction of the Internet.¹⁰⁴

These technological innovations allow offenders to procure and distribute child sex abuse images worldwide. A 2012 report by the Internet Watch Foundation in the United Kingdom found that out of the 9477 reports of websites hosting child sexual abuse content outside of the United Kingdom, fifty-four percent were hosted in North America, thirty-seven percent were hosted in Europe, and eight percent were hosted in Asia.¹⁰⁵ In 2011, a transnational investigation resulted in the shutdown of a child pornography network, boylover.net, which hosted up to seventy thousand members worldwide.¹⁰⁶ The investigation was coordinated among thirteen different countries, including the United States, and resulted in the identification of 670 suspects, 184 arrests, and the safeguarding of 230 children.¹⁰⁷ The international nature of recent child pornography investigations affirms that technology is contributing to the rapid growth and globalization of the child pornography industry, compelling the need for a much more aggressive and coordinated global response.

B. Victimization Continues Indefinitely through the Internet

The transformation from tangible to digital child sexual abuse images has had a debilitating effect on victims. Digital child sexual abuse images are virtually impossible to permanently destroy because millions of unidentified perpetrators around the world can easily

⁹⁵ Quayle & Taylor, *supra* note 47, at 332.

⁹⁶ See *Child Exploitation & Obscenity Section*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html> (last visited Feb. 1, 2015).

⁹⁷ U.S. SENTENCING COMM'N, *supra* note 62, at 96.

⁹⁸ See *id.* (noting that there is evidence that offenders produce new images and videos in order to gain access into child pornography communities).

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 97.

¹⁰¹ MICHAEL SHIVELY ET AL., SURVEY OF PRACTITIONERS TO ASSESS THE LOCAL IMPACT OF TRANSNATIONAL CRIME, TASK ORDER FINAL REPORT 14 (2003), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/217587.pdf>.

¹⁰² U.S. SENTENCING COMM'N, *supra* note 62, at 60 (noting several synonyms for the deep web); see INTERNET WATCH FOUND., ANNUAL AND CHARITY REPORT 17 (2012), available at <https://www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf> (explaining predetermined path websites).

¹⁰³ *Id.*

¹⁰⁴ U.S. DEP'T OF JUSTICE, *supra* note 65, at 2.

¹⁰⁵ INTERNET WATCH FOUND., *supra* note 102, at 14.

¹⁰⁶ *More than 200 Children Identified and Rescued in Worldwide Police Operation*, EUROPOL (Mar. 16, 2011), <https://www.europol.europa.eu/content/more-200-children-identified-and-rescued-worldwide-police-operation>.

¹⁰⁷ *Id.*

store, copy, distribute, and consume the images.¹⁰⁸ Offenders who together perpetuate the distribution and possession of the victims' sexual abuse images all contribute to the indefinite victimization of child pornography victims.¹⁰⁹

As child pornography victims grow older, many come to realize that the images of their sexual abuse will continue to exist and be consumed for the remainder of their lives, and that they are largely powerless to end the abuse.¹¹⁰ This knowledge may haunt the victims for years because possessors and distributors will continue to consume, and possibly distribute, the images and recordings indefinitely.¹¹¹ In addition, the problem is taking on a new dimension as child sexual abuse images are becoming more violent and graphic as perpetrators demand younger victims, vaginal and anal penetration (sometimes with sex toys and foreign objects), rape, bestiality, defecation and urination, bondage, torture, and other sadistic behavior.¹¹²

A recent survey revealed that almost ninety-five percent of child pornography victims suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy.¹¹³ The continual victimization can take an extreme physical, psychological, and financial toll on the victim and the victim's family.¹¹⁴ Victims of child pornography may have difficulty maintaining jobs and relationships because of the fear that people they interact with have viewed the sexual abuse images and will recognize them.¹¹⁵ Victims are also more likely to suffer from alcoholism later in life with the severity of the child abuse correlating with the severity of alcohol abuse.¹¹⁶

Perpetrators use victims' sexual abuse images for the purpose of grooming other children in order to facilitate subsequent sexual abuse. Offenders will frequently share images with potential victims "to desensitize them to a degree that the child feels everyone is doing these things, and there is nothing wrong with taking these kinds of sexually graphic pictures."¹¹⁷ Viewing these images will often convince a child to engage in sexual activity, thereby increasing the child pornography market and the number of victims who need restoration services.¹¹⁸

The psychological damage that child pornography victims suffer is experienced across cultures. For example, German victims report feelings of shame, hate, disgust, loathing, fear,

¹⁰⁸ U.S. SENTENCING COMM'N, *supra* note 62, at 112; U.S. DEP'T OF JUSTICE, *supra* note 65, at 9, 23; DNR REPORT, *supra* note 60, at 75.

¹⁰⁹ See PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 187–95 (2001) (describing the global community of offenders and policing efforts). Many child pornography market participants engage in all three market stages (creation, distribution, and possession), but even those who enter at one point collectively victimize the child. See U.N. Special Rapporteur Report, *supra* note 72, para. 42.

¹¹⁰ U.S. SENTENCING COMM'N, *supra* note 62, at 112; U.S. DEP'T OF JUSTICE, *supra* note 65, at 9; DNR REPORT, *supra* note 60, at 36, 50, 75–77.

¹¹¹ DNR REPORT, *supra* note 60, at 75. The U.S. Supreme Court has also recognized that victims are revictimized from the existence of their abuse images. See *infra* Part III.

¹¹² U.S. SENTENCING COMM'N, *supra* note 62, at 85, 90–92. In a recent survey, twenty-one percent of child pornography depicted violence such as bondage, rape, or torture. JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 5 (2005), available at <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf>. "Most of these involved images of children who were gagged, bound, blindfolded, or otherwise enduring sadistic sex." *Id.*

¹¹³ U.S. DEP'T OF JUSTICE, *supra* note 65, at D-12.

¹¹⁴ See U.S. SENTENCING COMM'N, *supra* note 62, at 112; see Julia von Weiler et al., *Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany*, 16 J. SEXUAL AGGRESSION 211, 218–19 (2010) (discussing the effects of abusive images on victims and their caretakers).

¹¹⁵ See U.S. SENTENCING COMM'N, *supra* note 62, at 113.

¹¹⁶ Joseph Nowinski, *Childhood Trauma and Adult Alcohol Abuse: Shedding Light on the Connection*, HUFFINGTON POST (Sept. 21, 2013, 5:12 AM), http://www.huffingtonpost.com/joseph-nowinski-phd/alcohol-abuse_b_3595743.html.

¹¹⁷ K. Jaishankar et al., *Pedophilia, Pornography, and Stalking: Analyzing Child Victimization on the Internet*, in CRIMES OF THE INTERNET 34 (Frank J. Schmalleger & Michael Pittaro eds., 2009).

¹¹⁸ See LANNING, *supra* note 94, at 90; U.S. SENTENCING COMM'N, *supra* note 62, at 113.

repression, guilt, and speechlessness.¹¹⁹ Victims in the United States have also reported feelings of depression, posttraumatic stress disorder, non-delusional paranoia, low self-esteem, withdrawal, and worthlessness.¹²⁰ The mere knowledge of the existence and circulation of the images of the victim's sexual abuse causes feelings of shame, humiliation, and powerlessness.¹²¹ Unfortunately, these feelings do not dissipate over time, but rather intensify due to feelings of deep despair, worthlessness, and helplessness.¹²² In the recent study of Filipino children, Westerners solicited the children to participate in live digital sexual abuse via the Internet ("webcam sex"), and the child victims demonstrated significantly higher rates of post-traumatic stress and feelings of low self-esteem, worthlessness, shame, guilt, and being contaminated.¹²³ The study found that the children's feelings were intensified after learning that the images of their sexual abuse may be available on the Internet indefinitely.¹²⁴

Compounding the problems that child pornography victims face, a recent survey among German victim assistance professionals found that even therapeutic professionals are ill-equipped to deal with the type of psychological damage suffered by child pornography victims.¹²⁵ Thus, it is difficult for victims to find effective therapeutic support.¹²⁶ The therapeutic professionals surveyed in a German study indicated that "working with victims of [child pornographic exploitation] is more complex than working with child sexual abuse victims."¹²⁷ The difference between child pornography victims' psychological harm and victims of other crimes is the permanent presence of the abuse material on the Internet.¹²⁸ These victims, thus, have "a higher susceptibility to post-traumatic stress disorder, depression, and psychoses."¹²⁹ Two-thirds of professionals working with child pornography victims reported that they themselves felt "deep feelings of helplessness" because the victims' sexual abuse images on the Internet are permanent.¹³⁰ Indeed, one-third of the professionals treating child pornography victims experienced thoughts such as, "in this situation healing becomes impossible."¹³¹

C. Technology Is Also a Solution to Reducing Victimization

Although technology has created unique and complex problems for victims and law enforcement, technology is also part of the solution. Technology is now being developed that can quickly identify child pornography and remove it from the Internet, thus reducing the number of pedophiles able to access the child pornography.¹³² Twitter, Facebook, Microsoft, and Google have already implemented software known as PhotoDNA that can quickly identify child

¹¹⁹ Von Weiler et al., *supra* note 114, at 214 (discussing how victims felt after the abuse they suffered).

¹²⁰ See U.S. SENTENCING COMM'N, *supra* note 62, at 112 n.44, 113.

¹²¹ TERRE DES HOMMES, FULLSCREEN ON VIEW: AN EXPLORATORY STUDY ON THE BACKGROUND AND PSYCHOSOCIAL CONSEQUENCES OF WEBCAM CHILD SEX TOURISM IN THE PHILIPPINES 13 (2013), available at <http://www.menschenhandelweb.nl/system/files/documents/25%20feb%202014/Rapport%20Fullscreen%20on%20View%20Terre%20des%20Hommes%202013.pdf>.

¹²² *Id.*

¹²³ *Id.* at 41, 43.

¹²⁴ See *id.*

¹²⁵ Von Weiler et al., *supra* note 114, at 218.

¹²⁶ See *id.* (discussing how counselors and therapists deal with the idea of permanence of the child abuse images online and how difficult it can be).

¹²⁷ *Id.* at 214 (discussing how it can be even more difficult to help victims of child pornographic exploitation than children that experienced sexual abuse).

¹²⁸ *Id.* at 217.

¹²⁹ *Id.* (discussing the different psychological disorders that child pornography victims suffer from and how they are more susceptible to these harms).

¹³⁰ *Id.* (discussing the helplessness that some professionals deal with while trying to help victims of child pornography victims).

¹³¹ *Id.* (discussing further the helplessness that some professionals deal with while trying to help victims of child pornography victims).

¹³² As discussed *supra* Part II.B, revictimization through the spread of images on the Internet is a major cause of victims' harm.

pornography, allowing the companies to report the possessor to authorities.¹³³ Microsoft and Dartmouth College developed PhotoDNA in 2009, which works by creating a “hash” or fingerprint¹³⁴ for each child pornography image in a database.¹³⁵ When PhotoDNA is used in computer systems such as Facebook, it can search the system for images that contain the hash and identify the child pornography.¹³⁶

Microsoft donated the system to NCMEC.¹³⁷ NCMEC is able to distribute updated hash information to the technology companies using PhotoDNA without providing images to the companies.¹³⁸ The International Centre for Missing and Exploited Children (“ICMEC”) has a similar system that can identify up to eighty-five percent of images seized on a hard drive, enabling law enforcement to focus its labor primarily on the remaining fifteen percent.¹³⁹ Google has also been using “hash” technology since 2008 to identify images that would not normally be identified.¹⁴⁰

Additional efforts are still needed to combat the vast amount of child pornography online. More webpages must be searched. For example, Google searches approximately fifteen billion pages, merely a fraction of the Internet.¹⁴¹ Google and other search engines are only able to report child pornography and block it from appearing in a search result.¹⁴² While this reduces the number of offenders, it does not permanently eradicate the child pornography, which law enforcement may use to identify and prosecute offenders.¹⁴³ Additionally, it is unknown how many sex abuse images are contained in the various databases because of the number of government entities around the globe maintaining these databases.¹⁴⁴ Thus, more collaboration between victims, law enforcement, private industry, NCMEC, and their international counterparts

¹³³ Charles Arthur, *Twitter to Introduce PhotoDNA System to Block Child Abuse Images*, THE GUARDIAN (July 22, 2013, 5:39 AM), <http://www.theguardian.com/technology/2013/jul/22/twitter-photodna-child-abuse>; see also *Our Continued Commitment to Combatting Child Exploitation Online*, GOOGLE OFFICIAL BLOG (June 15, 2013), <http://googleblog.blogspot.com/2013/06/our-continued-commitment-to-combating.html> (explaining the technology used by Google to combat child pornography).

¹³⁴ Zack Whittaker, *Microsoft Develops Image DNA Technology for Fighting Child Porn*, ZDNET BLOG (Dec. 17, 2009, 6:07 PM), <http://www.zdnet.com/blog/jeneration/microsoft-develops-image-dna-technology-for-fighting-child-porn/3655>. The hash resolves privacy concerns for victims by only providing companies a unique signature of the image that is reported to authorities. Authorities have access to the child pornography images and are able to determine who the victim is from the unique hash. The company does not receive the victim’s personal information. Adi Robertson, *Microsoft Gives PhotoDNA Matching Software to Police to Help Find Child Pornography*, THE VERGE (Mar. 20, 2012, 9:51 AM), <http://www.theverge.com/2012/3/20/2886999/microsoft-licensing-photodna-child-pornography-matching-software-police>.

¹³⁵ *PhotoDNA Press Materials are Now on the Microsoft Digital Crimes Unit Newsroom*, MICROSOFT, <https://www.microsoft.com/en-us/news/presskits/photodna/> (last visited Feb. 1, 2015); Robertson, *supra* note 134.

¹³⁶ Arthur, *supra* note 133.

¹³⁷ *PhotoDNA Press Materials are Now on the Microsoft Digital Crimes Unit Newsroom*, *supra* note 135.

¹³⁸ 18 U.S.C. § 2258C (2012) (requiring NCMEC to partner with technology companies to reduce the sharing of child pornography); *Voluntary Industry Initiatives*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, <https://secure.missingkids.com/Exploitation/Industry> (last visited Feb. 1, 2015). In addition to PhotoDNA, NCMEC has a URL initiative that reports child pornography websites to electronic service providers for takedown. *Id.* A Hash Value Sharing Initiative, similar to PhotoDNA, provides electronic service providers with “hash” values of the “worst of the worst” images. *Id.* In 2011, NCMEC reviewed 17.3 million images and videos of suspected child sexual abuse through both public and private efforts. *Our Continued Commitment to Combatting Child Exploitation Online*, *supra* note 133.

¹³⁹ Int’l Ctr. for Missing & Exploited Children, *Video Fingerprinting Technology Removes Child Pornography Online*, DFI NEWS (May 1, 2014, 3:25 PM), <http://www.dfinews.com/news/2014/05/video-fingerprinting-technology-removes-child-pornography-online>.

¹⁴⁰ *Our Continued Commitment to Combatting Child Exploitation Online*, *supra* note 133.

¹⁴¹ Tim Worstall, *I’m Not Sure that Google’s New Child Pornography Database Is Going to Work*, FORBES (June 17, 2013, 6:06 AM), <http://www.forbes.com/sites/timworstall/2013/06/17/im-not-sure-that-googles-new-child-pornography-database-is-going-to-work/>.

¹⁴² *See id.*

¹⁴³ There is an argument to be made that victims should be given the absolute right to order their sex abuse images destroyed either before or after it comes into the control of law enforcement, but unfortunately, a discussion of that right is beyond the scope of this Article. At a minimum, victims should have the same right to access their sex abuse images as defendants.

¹⁴⁴ Arthur, *supra* note 133 (noting that a small portion of child pornography images are actually given a hash); see also Gillespie, *supra* note 21, at 295 (noting Interpol’s duty to coordinate the “many countries” with child pornography databases).

is needed to identify potential solutions to rein in the rapid proliferation of child pornography being witnessed in the digital era.

III. THE UNITED STATES FRAMEWORK FOR COMBATING CHILD PORNOGRAPHY

In responding to the unique challenges of child pornography, the United States has developed a framework for deterring the spread of child pornography by criminalizing the creation, distribution, and possession of child pornography. The framework also tries to provide methods for victims to receive compensation for restoration services. This Part will discuss the efforts in the United States, especially at the federal level, to combat the child pornography market and restore victims.

A. *The United States Fails to Eliminate the Child Pornography Market*

The Supreme Court of the United States first addressed the question of pornography as a First Amendment issue in 1969.¹⁴⁵ In *Stanley v. Georgia*, the U.S. Supreme Court held that American citizens have a First Amendment right to possess pornography in the home.¹⁴⁶ Unfortunately, the *Stanley* decision did not delineate any differences between adult pornography and child pornography.¹⁴⁷ In fact, until the mid-1970s, neither the courts nor the legislature prohibited the production of child pornography or provided any real tools to aid and assist victims of this damaging industry.¹⁴⁸ Instead, the courts relied on rape, incest, and child welfare statutes to hold individuals responsible for the sexual exploitation of children, which left prosecutors unable to prosecute many offenders.¹⁴⁹

Fortunately, the 1970s brought about the progression of social activism, including a demand for further protections of civil, women's, and victims' rights, among others.¹⁵⁰ Until this time, issues involving child pornography had not raised national concern, but with the rise of the victims' rights movement, the public began to demand remedies for crime victims, including victims of child pornography.¹⁵¹ This movement led Congress to enact the Protection of Children Against Sexual Exploitation Act of 1977, which criminalized the commercial production and distribution of any "sexually explicit" pornography that utilized an individual under the age of sixteen.¹⁵²

In 1982, the Supreme Court in *New York v. Ferber* held that individuals do not have a right to distribute child pornography.¹⁵³ The Court further found that the only way to combat the expanding market of child pornography was to "dry up the market for this material by imposing severe criminal penalties" on those promoting the images.¹⁵⁴ In doing so, the Supreme Court recognized the continuing harm inherent in child pornography.¹⁵⁵ In 1990, eight years after the

¹⁴⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹⁴⁶ *Id.* at 568–69.

¹⁴⁷ *Id.* at 557.

¹⁴⁸ Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174 (1994).

¹⁴⁹ *Id.*; Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1013 (1993).

¹⁵⁰ Katherine M. Giblin, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109, 1115 (2011).

¹⁵¹ *Id.* at 1115–16.

¹⁵² Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. § 2252 (1978)).

¹⁵³ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁵⁴ *Id.* at 760.

¹⁵⁵ *Id.* at 759 n.10 ("Because the child's actions are reduced to a recording, the pornography may haunt . . . [the child] in future years, long after the original misdeed took place.").

Ferber decision, the Court again recognized a victim's continuing harm when it upheld a law prohibiting the *possession* of child pornography in *Osborne v. Ohio*.¹⁵⁶ The Court found that the images represent a permanent record of the minor's initial sexual abuse and every time an offender views the image, the child is revictimized and suffers ongoing harm.¹⁵⁷ The Court also found that the images may be used to groom other children into thinking the depicted behaviors are normal, essentially using the images to normalize sex abuse in the mind of a potential victim.¹⁵⁸

Before *Osborne*, Congress enacted the Child Protection Act of 1984 to account for the weaknesses in the 1977 Act, which criminalized certain child pornography.¹⁵⁹ With this act, Congress acknowledged that:

- (1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;
- (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
- (3) 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.¹⁶⁰

The Child Protection Act greatly improved upon the Protection of Children Against Sexual Exploitation Act of 1977 by eliminating the commercial purpose requirement and the obscenity requirement, increasing the age of a minor to eighteen years of age, and increasing penalties for offenders.¹⁶¹ States also began enacting laws to criminalize possession of child pornography, with nineteen states enacting legislation by 1990.¹⁶² Despite both state and federal governmental efforts to end the child pornography industry, the market and the number of victims continued to increase dramatically.¹⁶³ In response to the effects of changing technologies on the child pornography market, Congress enacted the Child Pornography Prevention Act ("CPPA") of 1996.¹⁶⁴ The Act specifically made it a crime to transmit child pornography through electronic means, marking Congress's first attempt at combating the child pornography market in the digital age.¹⁶⁵

¹⁵⁶ *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990).

¹⁵⁷ *Id.* at 111.

¹⁵⁸ *Id.* While the Court has recognized the future harm to children in both *Ferber* and *Osborne*, the Court struck down a law banning virtual child pornography in *Ashcroft v. Free Speech Coalition* because no "real" children were harmed. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002). However, the Court affirmed its previous precedents of *Ferber* and *Osborne*. *Id.* In another case, the Sixth Circuit required a defendant to pay three hundred thousand dollars under Masha's law for possession of two "morphed" images that caused emotional distress to the children. *Doe v. Boland*, 698 F.3d 877, 879–81 (6th Cir. 2012). A morphed image is an image that has been digitally manipulated to look like a child. *Id.* The Supreme Court denied certiorari in the case. *Boland v. Doe*, 133 S. Ct. 2825, 2825 (2013).

¹⁵⁹ Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified at 18 U.S.C. § 2252 (2012)).

¹⁶⁰ *Id.* at § 2.

¹⁶¹ *Id.* at §§ 3–5.

¹⁶² The states that enacted legislation by 1990 were: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, and West Virginia. Smith, *supra* note 149, at 1021–22 n.106; see *Osborne*, 495 U.S. at 111 n.6.

¹⁶³ U.S. DEP'T OF JUSTICE, *supra* note 65, at 4 ("Between 1996 and 2007, there was a 2062 [percent] increase in child exploitation investigations throughout the FBI.")

¹⁶⁴ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996) (codified at 18 U.S.C. § 2251 (2012)).

¹⁶⁵ 18 U.S.C. § 2252A(a)(1) ("Any person who . . . knowingly mails, or transports or ships . . . interstate or foreign commerce by any means, including by computer, any child pornography . . .").

In 2003, Congress again responded to the increasingly global nature of child sexual crimes by enacting the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”), which, *inter alia*, allows U.S. authorities to prosecute citizens of the United States when they sexually abuse children abroad.¹⁶⁶ The PROTECT Act also establishes minimum sentences for most child pornography offenses.¹⁶⁷ Although sentencing guidelines divide child pornography offenses into two categories, those involving production and those not involving production, the second category represents nearly 90 percent of all child pornography prosecutions.¹⁶⁸ The severity of these offenses differs dramatically. Production offenses carry a mandatory minimum sentence of fifteen years imprisonment, with a maximum of thirty years for a first offense.¹⁶⁹ Subsequent production offenses carry a minimum of twenty-five years and a maximum of fifty years.¹⁷⁰ Distribution offenses are subject to a minimum sentence of five years imprisonment with a maximum of twenty years for a first offense and a minimum fifteen years to a maximum of forty years if the offender has a prior sex offense conviction.¹⁷¹ A possession charge has no statutory minimum sentence if the offender has not been previously convicted with a sex crime and holds a maximum sentence of up to ten years imprisonment.¹⁷² If the possessor has previously been convicted, the minimum sentence is ten years and the maximum is twenty years.¹⁷³ The PROTECT Act has dramatically increased the average sentences of imprisonment and supervised release for offenders of child pornography offenses.¹⁷⁴ However, with increasing prison sentences, significant disparities have developed in sentencing guidelines, as offenders in different courts are being subjected to far harsher penalties than others.¹⁷⁵ Leading members of Congress expressed their deep concern over these downward departures from the sentencing guidelines for child pornography offenders, which conveyed the federal judiciary’s “fail[ure] to appreciate the severity of child pornography to the victims and to society at large.”¹⁷⁶

Despite legislative, law enforcement, and technological efforts, child pornography continued to be one of the fastest growing crimes in the United States, growing at a rate of 150 percent per year, with victims becoming increasingly younger.¹⁷⁷ Thus, Congress passed the

¹⁶⁶ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. § 2252) (applying U.S. criminal laws extraterritorially is necessary because many countries do not have adequate child pornography laws, including criminalization of child pornography); see DNR REPORT, *supra* note 60, at 54–55 (discussing various laws around that world that are inadequate to protect children).

¹⁶⁷ U.S. SENTENCING COMM’N, *supra* note 62, at i. The PROTECT Act was “in part, a response to the prevalence of downward departures and the general inadequacy of sentences in child pornography cases.” Letter from Anne Gannon, *supra* note 48.

¹⁶⁸ U.S. SENTENCING COMM’N, *supra* note 62, at iv. Child pornography in both categories has continued to increase. From 1994 to 2006, child pornography accounted for eighty-two percent of the growth in sexual exploitation cases referred to the U.S. Attorney’s Office. MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 2006 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

¹⁶⁹ 18 U.S.C. § 2251(e) (2012).

¹⁷⁰ *Id.*

¹⁷¹ 18 U.S.C. § 2252(b)(1) (2012).

¹⁷² *Id.* § 2252(b)(2).

¹⁷³ *Id.*

¹⁷⁴ U.S. SENTENCING COMM’N, *supra* note 62, at x.

¹⁷⁵ *Id.* at xii. When offenders are released, they are subject to the Adam Walsh Protection and Safety Act, which created a national sex offender registry with three types of offenders, determined by the severity of their crimes. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006).

¹⁷⁶ Letter from U.S. Sen. Charles E. Grassley, Ranking Member of the Judiciary Comm., U.S. Congressman Lamar Smith, Chairman, House Judiciary Comm., & U.S. Congressman F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, and Homeland Security, to Hon. Patti B. Saris, Chairwoman, U.S. Sentencing Comm’n (Feb. 14, 2012) (on file with the author). “By far, the greatest percentage of downward departure sentences are for those possessing and producing child pornography—a startling [forty percent] variance rate in child pornography offenses since [the U.S. Supreme Court’s 2005 ruling] in *Booker*.” *Id.*

¹⁷⁷ *Id.*; U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 11 (2012).

Child Protection Act of 2012, which raised the statutory maximum sentence (from ten to twenty years) for possession of child pornography that portrays prepubescent children or those younger than twelve years old.¹⁷⁸

As of 2014, the United States has created a comprehensive legal framework to prosecute offenders, with guidelines for longer prison sentences. However, most victims still receive no restitution or access to the resources they need to achieve the full physical and psychological recovery and social reintegration to which they are entitled.

B. Domestic Efforts to Provide Restoration Services to Child Pornography Victims

Despite the efforts of the United States to combat child pornography through a legal framework focused primarily on prosecution, the United States has failed to ensure that child pornography victims experience full physical and psychological recovery and social reintegration. For example, victims of child pornography possession do not have access to victims' funds in many states because the funds are limited to violent crimes.¹⁷⁹ As another example, prosecutors in many cases do not seek restitution, even though it is mandatory under 18 U.S.C. § 2259.¹⁸⁰ A further example is that civil remedies cases are expensive and difficult for victims to prosecute, especially when they do not have control of their own sex abuse images.¹⁸¹ Even when a child pornography victim is able to access a resource due to her victimization, she almost never receives the full amount of her losses.

In 1982, shortly after the *Ferber* decision, then-President Ronald Reagan compiled a Task Force on Victims of Crime to (1) address the ever-increasing victims' rights concerns and (2) research how legal reform could further aid victims of crime around the United States.¹⁸² In December 1982, the task force published a report suggesting that legislation should be enacted to "require restitution in all cases, unless the court provides specific reasons for failing to require it."¹⁸³ In that same year, partially in response to the Task Force report, Congress enacted the Victim and Witness Protection Act ("VWPA") of 1982.¹⁸⁴ The VWPA was enacted:

[T]o enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and, to provide a model for legislation for State and local governments.¹⁸⁵

For the first time, restitution was no longer limited to the concept of unjust enrichment or the pure value of material goods taken by an offender. Instead, the VWPA allowed victims to recover damages for physical and psychological care, including emotional and mental damages from

¹⁷⁸ Child Protection Act of 2012, Pub. L. No. 112-206, § 2(b), 126 Stat. 1490 (2012); Letter from Anne Gannon, *supra* note 48 (recognizing that child pornography was "featuring more explicit and violent conduct involving younger children").

¹⁷⁹ See *infra* Part V.C for a discussion on victims' funds.

¹⁸⁰ See *infra* Part V.A for a discussion on improving mandatory restitution.

¹⁸¹ The question of who should control the victims' sex abuse images is a complex and difficult one. However, the attorney who represented the victim in *Paroline*, James R. Marsh, reports that the F.B.I. failed to respond to requests for access to her own images on the same terms and conditions as criminal defendants, so that she can prove the elements of a civil remedies case brought under § 2252 and to work with her to establish the chain of custody of those images. Interview with James R. Marsh, Attorney, Marsh Law Firm, in Portland, Or. (June 20, 2014).

¹⁸² LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT DECEMBER 1982 ii (1982), available at <http://www.ovc.gov/publications/presdntstskforcprpt/87299.pdf>.

¹⁸³ *Id.* at 18.

¹⁸⁴ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified at 18 U.S.C. § 3664 (2012)).

¹⁸⁵ *Id.* § 2(b).

criminal defendants.¹⁸⁶ Although the VWPA was the first attempt to compensate crime victims, it was limited by a discretionary prong, which directed judges to take into account the defendant's economic situation as well as the severity of the victim's harm when ordering restitution.¹⁸⁷ Accordingly, there was still much work to be done on behalf of the fight for victim recovery.

In 1984, Congress enacted the Victims of Crime Act ("VOCA").¹⁸⁸ The VOCA created the first victims' compensation fund, which federal criminal prosecutions subsidized through fines from offenders.¹⁸⁹ VOCA attempted to reimburse crime victims for expenses directly related to crimes by granting money to state-administered victims' assistance funds.¹⁹⁰ Every state now has a compensation program that can aid victims and their families, and only about thirty-five percent of the total revenue involved in these funds comes from federal government grants, mostly collected from offender fines, penalties, and forfeited bail bonds.¹⁹¹

Crime victims' funds are able to offer victims a limited amount of funding for a variety of expenses ranging from medical expenses to lost wages attributable to a physical injury resulting from a compensable crime.¹⁹² These funds provide some relief to a limited number of victims by distributing almost five hundred million dollars annually to more than two hundred thousand victims across the country.¹⁹³ Considering that there were nearly seven million victims of violent crime who were twelve years of age or older in 2012, it becomes clear that crime victim funds are vastly underutilized.¹⁹⁴ Indeed, there is currently a balance approaching eleven billion dollars in the Crime Victims Fund established by VOCA.¹⁹⁵ The funds appear to be underutilized and have administrative complexities that make it difficult for victims to receive compensation.¹⁹⁶

Access to crime victims' funds is especially challenging for victims of child pornography possession and distribution because they are not classified as "violent" crimes.¹⁹⁷ Additionally, while a number of funds agree to provide funding for the expenses incurred as a result of the possession or distribution of their sexual abuse images,¹⁹⁸ many states have not amended their statutory language, which limits fund eligibility to victims who suffer physical harm; thus, claims by victims of child pornography possession or distribution are often denied.¹⁹⁹ Victims' funds in their current form also fail to account for foreign victims of child pornography as well as U.S. citizens or residents who are victimized outside of the country or by foreign perpetrators.²⁰⁰ Even when child pornography victims meet the eligibility requirements and overcome the

¹⁸⁶ Courtney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 352 (2013).

¹⁸⁷ 18 U.S.C. § 3663(a)(1)(B)(i) (2012).

¹⁸⁸ Victims Compensation and Assistance Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 42 U.S.C. § 10601 (2012)).

¹⁸⁹ *Id.*

¹⁹⁰ 42 U.S.C. § 10602 (2012).

¹⁹¹ 42 U.S.C. § 10601; *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> (last visited Feb. 1, 2015).

¹⁹² 42 U.S.C. § 10602(b)(1).

¹⁹³ *Id.*; *Crime Victim Compensation: An Overview*, *supra* note 191.

¹⁹⁴ DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIMINAL JUSTICE, COMPENSATING VICTIMS OF CRIME 1 (2014), available at http://www.justicefellowship.org/sites/default/files/Compensating%20Victims%20of%20Crime_John%20Jay_June%202014.pdf.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* at 1.

¹⁹⁷ *Id.*

¹⁹⁸ U.S. DEP'T OF JUSTICE, VISION 21: TRANSFORMING VICTIM SERVICES 21 (2013), available at http://ovc.ncjrs.gov/vision21/pdfs/Vision21_Report.pdf (noting that most states do not have specific policies on child pornography but most claim to compensate for the harm).

¹⁹⁹ *Id.* Oregon defines injury as "[a]ctual bodily harm and, with respect to a victim, includes pregnancy and mental or nervous shock." OR. REV. STAT. ANN. § 147.005(9) (West 2015). Because possession and distribution cause mental harm, victims should be compensated. However, in other states such as California, physical injury is required and a victim could only be compensated for the initial harm. CAL. GOV'T CODE § 13955(f) (West 2015).

²⁰⁰ EVANS, *supra* note 194, at 18.

administrative obstacles to receive compensation from one of these funds, the amounts often are insufficient to fully restore a victim. For example, the average state cap on these benefits is approximately twenty-five thousand dollars,²⁰¹ and the victim must agree to reimburse the crime victim's fund if she receives damages or restitution from the offender.²⁰² Accordingly, even after the enactment of VOCA, child pornography victims still are not obtaining meaningful recovery as a result of crime victims' funds.

The Federal Crime Victim Assistance Fund ("FVAF") is also available to aid crime victims in need of immediate assistance.²⁰³ This fund is intended as a last resort for victims and is used to cover costs such as transportation to criminal proceedings, emergency shelter, and crisis intervention.²⁰⁴ Although the proceeds of this fund provide emergency care for sexual assault victims, it does not provide funds for child pornography victims to receive long-term care. The FVAF is extremely limited and cannot be used to pay restitution to victims such as that of lost wages or health care. As a result, it does not effectively aid child pornography victims in obtaining the care and assistance that they require.

In 1994, Congress enacted the Violence Against Women Act ("VAWA"), which provided extensive protections, programs, and funding toward aiding victims of sexual and domestic assault, including children.²⁰⁵ VAWA was expansive and included various protections such as providing for the payment for testing and counseling for sexually transmitted diseases for sexual assault victims,²⁰⁶ establishing federal penalties for sex crimes,²⁰⁷ providing domestic violence victims the right to be heard at pre-release hearings of defendants,²⁰⁸ and forming various grant systems to provide education and support resources for domestic violence programs and victims.²⁰⁹ These remedies ranged anywhere from providing states with grants for nonprofit nongovernmental victim assistance programs to providing grants for lighting and security on public transportation systems and in public parks to combat violence against women.²¹⁰ VAWA symbolized "an essential step in forging a national consensus that our society will not tolerate violence against women"²¹¹ and was "intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence."²¹²

Congress recognized the need to provide child pornography victims with adequate restitution by revisiting the discretionary grant of restitution they offered in the VWPA and enacting the Mandatory Victims Restitution Statute as part of VAWA.²¹³ The statute pushed past the limitations of the VWPA and made restitution mandatory for victims of certain federal crimes, regardless of the offender's ability to pay.²¹⁴ The statute also mandates that offenders at

²⁰¹ *Crime Victim Compensation: An Overview*, *supra* note 191.

²⁰² Amy Unknown's, one of the victims described in the introduction, restitution claim is \$3,408,404. Joint Appendix vol. 1 at 52, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561); EVANS, *supra* note 194, at 1.

²⁰³ *Office of the United States Attorneys: Services to Crime Victims*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/briefing_room/vw/services.html (last visited Feb. 1, 2015).

²⁰⁴ *Id.*

²⁰⁵ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, 1904 (codified at 18 U.S.C. § 2248 (2012)).

²⁰⁶ *Id.* §§ 40114, 40121, 40503.

²⁰⁷ *Id.* § 40112.

²⁰⁸ *Id.* § 40501.

²⁰⁹ *Id.* §§ 40121.

²¹⁰ *Id.* §§ 40131–40133.

²¹¹ S. REP. NO. 103-138, at 41 (1993).

²¹² *Id.* at 38.

²¹³ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 2259, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2259 (2012)).

²¹⁴ 18 U.S.C. § 2259(b)(4)(B) (2012).

all points in the child pornography market (production, distribution, and possession) pay full restitution to child pornography victims and for victims to recover the full amount of victims' losses.²¹⁵ Losses include any costs that the victim incurs 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.²¹⁶

During this same time period, Congress further expanded the principle of mandatory restitution by enacting the Mandatory Victims Restitution Act of 1996 ("MVRA"), a more general restitution act that provided restitution for victims of crimes that cause monetary losses, such as a loss of property, or for bodily injury to the victim.²¹⁷ Mandatory restitution was part of a comprehensive federal statutory framework that also included clear definitions and criminalizing participation at every stage of the child pornography market.²¹⁸

As part of this framework, the Crime Victims' Rights Act ("CVRA") was enacted in 2004 as part of the Justice for All Act.²¹⁹ The CVRA was revolutionary in the fight for victims' rights as it granted victims the ability to be present in court proceedings, the right to notice of when such proceedings were occurring, and the right to be heard at these public hearings.²²⁰ However, perhaps most importantly, the CVRA reflected language set forth in the MVRA and reemphasized that victims in federal criminal cases have the right to collect "full and timely restitution" from offenders.²²¹ However, the CVRA defines a victim as someone who is "directly and proximately harmed as a result of the commission of a federal offense," which is often very difficult for child pornography victims to prove.²²² Accordingly, although the CVRA was an important part of the victims' rights movements, child pornography victims still failed to obtain meaningful restitution with its enactment.

In addition to restitution, Congress provided civil recovery options by enacting the Child Abuse Victims' Rights Act in 1986 ("CAVRA").²²³ The Child Abuse Victims Rights Act allows a child pornography victim, who suffers personal injury from a violation of § 2251 (sexual exploitation of a child) or § 2252 (distribution or possession of child abuse images), to bring a civil cause of action to recover the actual damages he or she sustained, the cost of the suit, and reasonable attorney's fees.²²⁴ The CAVRA presumed damages of no less than fifty thousand dollars.²²⁵ Although this statute seemed like a promising option for victims, it remained largely unused, and the first reported case to use this statute was in 2001, fifteen years after its

²¹⁵ *Id.* § 2259(b)(1) ("[T]his section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court . . .").

²¹⁶ *Id.* § 2259(b)(3).

²¹⁷ Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214 (1996) (codified as amended at 18 U.S.C. § 3663A (2012)).

²¹⁸ *See* 18 U.S.C. §§ 2251–2260 (2012).

²¹⁹ Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified as amended at 18 U.S.C. § 3771 (2012)).

²²⁰ 18 U.S.C. § 3771(a)(1)–(8) (2012).

²²¹ *Id.* § 3771(a)(6).

²²² *Id.* § 3771(e).

²²³ Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (1987).

²²⁴ *Id.* § 703(a).

²²⁵ *Id.*

enactment.²²⁶ The law was further amended in 1998 to include a larger array of offenses ranging from child pornography, to sexual abuse of a minor, and the buying or selling of children.²²⁷

In 2006, Masha's Law, part of the Adam Walsh Child Protection and Safety Act of 2006, amended the civil recovery statute in the Child Abuse Victims' Rights Act.²²⁸ Masha's Law raised the minimum damages a victim would receive to \$150,000, rather than only \$50,000.²²⁹ Masha's Law also extended the previous law to allow adults, who were victims of sexual abuse as minors, to sue not only their original abusers, but also distributors and possessors of their sexual abuse images.²³⁰

In order for victims to recover under Masha's Law, the victim must first meet the statute of limitations.²³¹ Once the action accrues, there is a ten-year general statute of limitations.²³² However, if the person is under a legal disability, such as minority status, the statute of limitations is three years after the disability ends.²³³ The victim must then show that he or she was personally injured as a result of the defendant's violation of a federal child pornography statute.²³⁴ *Ferber* established many years ago that the act of child pornography causes personal injury to victims; accordingly, victims are usually able to meet the personal injury requirement.²³⁵

The plaintiff also must successfully prove, by a preponderance of the evidence, that the defendant violated a federal statute covered by the CAVRA.²³⁶ Since this is a civil remedy, a criminal conviction is not necessary.²³⁷ However, proving a violation may still be an extremely difficult task for some victims. Especially challenged are victims who (1) lack resources; (2) are unable to meet certain statutory requirements, such as proving that a defendant had knowledge that the victim was underage at the time of the act or proving that the photography depicts "sexually explicit conduct"; or (3) must prove that they were aware of the defendant's photographs and, as a result, suffered damages from the specific defendant's possession of these images.²³⁸ Even if the perpetrator has been criminally convicted, that does not necessarily have a preclusive effect on the civil claim since the conviction likely would not specify who the victims were portrayed in the sexual abuse images.²³⁹ This element is especially challenging for the vast majority of victims who do not have access to or control over their own sexual abuse images and who consequently would be unable to offer crucial evidence.²⁴⁰ Additionally, Masha's Law does not provide an avenue for foreign plaintiffs to sue domestic defendants in federal district courts

²²⁶ James R. Marsh, *Masha's Law: A Federal Civil Remedy for Child Pornography Victims*, 61 SYRACUSE L. REV. 459, 470 (2011).

²²⁷ *Id.*; see 18 U.S.C. §§ 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423 (2012).

²²⁸ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 707(b), 120 Stat. 587, 650 (2006); Civil Remedy for Personal Injuries, 18 U.S.C. § 2255(a) (2012).

²²⁹ Adam Walsh Child Protection and Safety Act § 707(b)(2).

²³⁰ *Id.* § 707(b)(1).

²³¹ 18 U.S.C. § 2255(b).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* § 2255(a).

²³⁵ See *New York v. Ferber*, 458 U.S. 747, 756–60 (1982).

²³⁶ 18 U.S.C. § 2255(a); Marsh, *supra* note 226, at 478.

²³⁷ 18 U.S.C. § 2255(a); Marsh, *supra* note 226, at 474.

²³⁸ Marsh, *supra* note 226, at 477–82 (citing *Tilton v. Playboy Entm't Grp., Inc.*, 554 F.3d 1371 (11th Cir. 2009)); *Lora v. Boland*, 2009 WL 2901306 (N.D. Ohio Sept. 1, 2009).

²³⁹ See U.S.C. § 2255(a); Marsh, *supra* note 226, at 474.

²⁴⁰ See Interview with James R. Marsh, *supra* note 181 (stating that without access by victims to such evidence, the civil recovery statute becomes meaningless).

when the conduct occurred abroad.²⁴¹ Accordingly, while some victims may utilize this statute, recovery is neither certain nor comprehensive.

Although it is clear that child pornography is illegal in the United States, the rights and remedies available to victims fail to ensure full psychological and physical recovery and social reintegration. Victims of child pornography are often unable to pay for the psychological care they need²⁴² and are left with few if any options to address their harms and achieve full restoration from the indefinite cycle of revictimization witnessed in the digital age, especially when one considers the globalization of this crime and its myriad of consequences.

IV. INTERNATIONAL LAW SUPPORTS VICTIM RESTORATION

The United States and the international community have long recognized the special care needed for children. In addition to domestic efforts, the United States has been an active participant in creating international law to protect children and combat child pornography. While providing victims with restoration through compensation is unlikely *jus cogens*,²⁴³ the United States has signed many treaties that mandate special protections to children generally, as well as to child pornography victims specifically. This Part will explore both international law binding on the United States, the United States' commitment to developing global solutions to compensate victims, and emerging international norms supporting the restoration of child pornography victims.

A. Early Developments in International Children Rights Law

In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child, the first international instrument recognizing the inherent uniqueness of childhood, which gave rise to the need for special care and protection.²⁴⁴ Twenty-five years later, the United Nations 1959 Declaration of the Rights of the Child²⁴⁵ expanded on the original principles of the 1925 Geneva Declaration. The 1959 Declaration incorporated references to the United Nations Charter and the Universal Declaration of Human Rights,²⁴⁶ making clear that children are entitled to most previously recognized human rights in addition to rights due to their special status as children. The United States actively participated in the drafting of the 1959 Declaration.²⁴⁷

²⁴¹ A Thai victim brought suit against a U.S. citizen under Masha's Law for acts occurring in Thailand, however, the case was dismissed under the doctrine of forum non conveniens. *Boonma v. Bredimus*, No. CIV.A.3:05-CV-0684-D, 2005 WL 1831967, at *1 (N.D. Tex. July 29, 2005).

²⁴² See Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?pagewanted=all&_r=0 (noting that "[r]estitution has allowed Amy and Nicole, [two victims], to get the counseling they need").

²⁴³ *Jus cogens* is defined as "a mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 876 (8th ed. 2004). What constitutes *jus cogens* is often debated. Examples of commonly accepted *jus cogens* are the prohibition of torture, genocide, and slavery. See *In re Estate of Ferdinand E. Marcos*, 978 F.2d 493, 500 (9th Cir. 1992); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715–17 (9th Cir. 1992).

²⁴⁴ Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (stating expressly that children should be protected from "every form of exploitation").

²⁴⁵ United Nations Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), GAOR 14th Sess., Supp. No. 16, U.N. Doc. A/4249 (Nov. 20, 1959) [hereinafter "Declaration of the Rights of the Child"] (asserting that "mankind owes to the child the best it has to give" and "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . .").

²⁴⁶ *Id.*; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) (recognizing childhood is entitled to "special care and assistance").

²⁴⁷ GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 10 (1998).

The 1959 Declaration included ten principles, reaffirming the importance of children's rights contained in the 1924 declaration.²⁴⁸ Relevant to the discussion of child pornography is Principle 2, stating that children:

[S]hall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable [them] to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.²⁴⁹

Principle 9 further provides that children “shall be protected against all forms of neglect, cruelty and exploitation. [They] shall not be the subject of traffic, in any form.”²⁵⁰ As discussed above, victims suffer severe mental problems as a result of their victimization and continued victimization. The 1959 Declaration clearly states that children should be free from this sort of cruelty.²⁵¹

While the 1924 and 1959 Declarations recognized that children needed special protection, both were non-binding instruments.²⁵² The drafting of the first binding children's rights treaty, the United Nations Convention on the Rights on the Child (“CRC”),²⁵³ began in 1979, which was designated as the “International Year of the Child” by the international community.²⁵⁴ The drafting of the CRC involved more than seventy countries (including the United States) and spanned ten years.²⁵⁵

The CRC was introduced to the United Nations General Assembly in 1989, just four years after the first child pornography network was identified on the Internet.²⁵⁶ The General Assembly unanimously adopted the Convention on the Rights of the Child and broke records for the greatest number of signatories to a treaty on the day it opened for signature.²⁵⁷ Today, the CRC is the most widely-ratified human rights treaty in the world and sets universal standards for the protection of children for countries to strive towards and by which they agree to be measured.²⁵⁸ The only countries to not ratify the treaty are the United States and South Sudan.²⁵⁹

²⁴⁸ Geneva Declaration of the Rights of the Child, *supra* note 244; TREVOR BUCK, INTERNATIONAL CHILD LAW 89 (3d ed. 2014).

²⁴⁹ *Id.* at princ. 2.

²⁵⁰ *Id.* at princ. 9.

²⁵¹ *Id.*

²⁵² BUCK, *supra* note 248, at 89.

²⁵³ Question of a Convention on the Rights of the Child: Report of the Working Group, U.N. Comm'n on Hum. Rts., 35th Sess., Agenda Item 13, at 1, U.N. Doc. E/CN.4/L.1468 (1979).

²⁵⁴ BUCK, *supra* note 248, at 89.

²⁵⁵ Question of a Draft Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, as Well as Basic Measures Needed for Their Eradication: Report of the Working Group on Its Second Session, U.N. Comm'n on Hum. Rts., 52d Sess., at 3, U.N. Doc E/CN.4/1996/101 (Mar. 25, 1996) (noting the countries involved in drafting the Convention on the Rights of the Child); BUCK, *supra* note 248, at 89–90 (describing the ten-year span of enactment).

²⁵⁶ YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 5 (2008).

²⁵⁷ Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L. J. 966, 970 (2006); see generally Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁵⁸ *Convention on the Rights of the Child Ratification Status*, U.N. TREATY COLLECTION DATABASE, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 1, 2015); LUISA BLANCHFIELD, CONG. RESEARCH SERV., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES I (2010), available at <http://fpc.state.gov/documents/organization/153279.pdf>.

²⁵⁹ *Convention on the Rights of the Child Ratification Status*, *supra* note 258. South Sudan's parliament has passed a law to ratify the Convention that is waiting for the President's signature. Jo Becker, *Dispatches: Will US Be Last to Endorse Child Rights Convention?*, HUMAN RIGHTS WATCH (Nov. 26, 2013), <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention>; *Parliament Passes Bill to Ratify Child Rights Convention*, U.N. MISSION IN SOUTH SUDAN (Nov. 20, 2013), <http://reliefweb.int/report/south-sudan-republic/parliament-passes-bill-ratify-child-rights-convention>.

While the United States has not ratified the CRC, it signed the CRC on February 16, 1995,²⁶⁰ and was more active in the drafting of the CRC than any other government.²⁶¹ The United States proposed text or amendments for thirty-eight of the CRC's forty substantive articles, including several regarding exploitation, abuse, and the rehabilitation and reintegration of victims.²⁶² Despite the failure of the United States to ratify the CRC, the U.S. Supreme Court relied on the near universal ratification of the CRC in gauging the weight of international opinion affirming the Court's decision effectively banning the juvenile death penalty in *Roper v. Simmons*.²⁶³

The CRC requires that countries take all appropriate measures to promote physical and psychological restoration and social reintegration of a child victim of exploitation, abuse, or any other form of "cruel, inhuman or degrading treatment."²⁶⁴ Parties to the CRC must also take appropriate measures to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. . . ."²⁶⁵ While the CRC makes clear that parties are obligated to protect children from abuse (such as child pornography), the Optional Protocol, to which the United States is a party, focuses even more directly and specifically on the parties' obligations to eliminate child pornography and to ensure the full recovery and social reintegration of victims.

B. Multilateral Efforts to Provide Restoration to Victims

The Optional Protocol is the world's most comprehensive treaty to focus on the eradication of child pornography by banning the production, distribution, and possession of child abuse images, requiring parties to provide restorative services, and requiring parties to allow victims to receive compensation from their offenders.²⁶⁶ The Optional Protocol entered into force on January 18, 2002, and the United States ratified the treaty on December 23, 2002.²⁶⁷ As of today, 121 countries have signed the treaty, and 169 countries from all over the world have ratified the treaty.²⁶⁸

When the United States ratified the Optional Protocol, it became obligated as a state party to ensure that sexually exploited children, including child pornography victims, receive medical and psychological services for their full reintegration into society.²⁶⁹ In fact, the United States required no new legislation after it ratified the Optional Protocol, signaling that domestic law

²⁶⁰ *Convention on Rights of the Child Ratification Status*, *supra* note 258. Article 18 of Vienna Convention on the Law of Treaties requires a signatory of a treaty not to defeat the purpose of a treaty before ratification. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. Similar to the CRC, the United States has signed but not ratified the Vienna Convention on the Law of Treaties. However, the U.S. Department of State has recognized many of its provisions as customary international law. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 298–307 (1988).

²⁶¹ See generally Office of the U.N. High Comm'r for Human Rights, *Legislative History of the Convention on the Rights of the Child*, U.N. Doc. HR/PUB/07/1 (2007); Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating A New World For Children*, 4 LOY. POVERTY L.J. 9, 12, 26–36 (1998).

²⁶² Q&A: *The Convention on the Rights of the Child*, HUMAN RIGHTS WATCH (Nov. 18, 2009), <http://www.hrw.org/news/2009/11/18/qa-convention-rights-child>.

²⁶³ See *Roper v. Simmons*, 543 U.S. 551, 575–77 (2005) (finding unconstitutional the imposition of the death penalty for juvenile offenders).

²⁶⁴ Convention on the Rights of the Child, *supra* note 257, at art. 39.

²⁶⁵ *Id.* at art. 19.

²⁶⁶ Optional Protocol, *supra* note 55.

²⁶⁷ *Id.*; *Status of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11-c&chapter=4&lang=en (last visited Feb. 1, 2015) [hereinafter *Status of the Optional Protocol*].

²⁶⁸ *Status of the Optional Protocol*, *supra* note 267. Nine countries (Cameroon, Fiji, Ghana, Ireland, Kenya, Liberia, Nauru, Solomon Islands, and Zambia) have signed the treaty but not ratified it. *Id.* Whether these countries are parties to the Optional Protocol and bound by its terms depends on whether their signatures were simple (requiring further state action such as ratification, acceptance, or approval) or definitive (requiring no further state action to bind the state to the treaty). UNITED NATIONS, TREATY HANDBOOK 5–6 (2012), available at <https://treaties.un.org/doc/source/publications/THB/English.pdf>. The Optional Protocol requires ratification, making signatures simple. Optional Protocol, *supra* note 55, at art. 13.

²⁶⁹ Optional Protocol, *supra* note 55, at art. 9(3).

provided the protections the treaty required.²⁷⁰ Therefore, U.S. domestic law²⁷¹ must comply with the Optional Protocol, which expressly requires that states parties “ensure that all child victims have access to adequate procedures to seek . . . damages from those legally responsible.”²⁷² Moreover, the Optional Protocol requires that the United States, and other states parties, ensure that victims of child pornography have access to procedures that are adequate and non-discriminatory.²⁷³

The United States has relied expressly and specifically on the Mandatory Restitution Statute²⁷⁴ to fulfill its treaty obligations under Article 9 of the Optional Protocol.²⁷⁵ The United States first cited the Mandatory Restitution Statute in 2007 in its initial report to the United Nations Committee on the Rights of the Child (“U.N. Committee”) regarding the United States’ implementation of the Optional Protocol domestically.²⁷⁶ The United States’ Initial Report explained that the Mandatory Restitution Statute provides “mandatory restitution for any offense involving the sexual exploitation of children.”²⁷⁷

After receiving the United States’ Initial Report on its compliance with the Optional Protocol, the U.N. Committee requested additional information, including data for the years 2005, 2006, and 2007 regarding “[t]he number of child victims provided with recovery assistance and compensation as indicated in Article 9, paragraphs 3 and 4 of the Protocol.”²⁷⁸ The United States’ response did not indicate that a single victim had received compensation from an offender under the Mandatory Restitution Statute or any other statute despite the fact that the Statute was the cornerstone of the United States’ statement of compliance with Article 9, paragraph 4.²⁷⁹ Instead, the United States indicated that some victims “may be eligible” for a variety of government programs such as Medicaid, Temporary Assistance for Needy Families (“TANF”), and Job Corps.²⁸⁰ In its Concluding Observations regarding the United States’ Initial Report, the U.N. Committee identified the United States as “one of the world’s largest producers, distributors and consumers of child pornography” and expressly encouraged the United States, inter alia, to “[i]mprove enforcement of the existing legislative framework on child pornography.”²⁸¹

In 2010, the United States submitted a periodic report on its compliance with the Optional Protocol and again cited the Mandatory Restitution Statute as providing “mandatory

²⁷⁰ INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY para. 3 (2007) [hereinafter INITIAL REPORT], available at <http://www.state.gov/documents/organization/84647.pdf>.

²⁷¹ Treaties are on “the same footing and made of like obligation, with an act of legislation.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Medellin v. Texas*, 552 U.S. 491, 504–07 (2008). When a statute and treaty conflict, a court will give meaning to both, if it can, without violating the language of either. *Whitney*, 124 U.S. at 194 (noting that the treaty later in time must be self-executing). While the Optional Protocol is not self-executing (able to be implemented without domestic legislation), it is later in time and courts can arguably construe legislation to uphold the intent of the protocol.

²⁷² Optional Protocol, *supra* note 55, at art. 9(4) (emphasis added). Those “legally responsible” include offenders found guilty of child pornography possession, distribution, and creation. *Id.* at art. 3(1)(c).

²⁷³ *Id.* at art. 9(4).

²⁷⁴ 18 U.S.C. § 2259 (2012).

²⁷⁵ INITIAL REPORT, *supra* note 270, at para. 89.

²⁷⁶ *Id.* at para. 3.

²⁷⁷ *Id.* at para. 89.

²⁷⁸ U.N. Committee on the Rights of the Child, Lists of Issues to be Taken Up in Connection with the Consideration of the Initial Report of the United States of America, para. 1(c), U.N. Doc. CRC/C/OPSC/USA/Q/1 (Feb. 14, 2008), available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.OPSC.USA.Q.1.doc>.

²⁷⁹ U.N. Committee on the Rights of the Child, *United States Response to Lists of Issues to Be Taken Up in Connection with Consideration of the Initial Report of the United States of America*, paras. 8–10, U.N. Doc. CRC/C/OPOSC/USA/1/Add.1 (May 13, 2008), available at <http://2001-2009.state.gov/g/drl/rls/105435.htm>.

²⁸⁰ *Id.*

²⁸¹ U.N. Committee on the Rights of the Child, *Concluding Observations: United States of America*, para. 27, U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008).

restitution for child sexual exploitation and other abuse offenses.”²⁸² The United States explained in its 2010 report that restitution is mandatory and must include the “full amount of the victim’s losses”²⁸³ The United States cited no other statutory remedy supporting full restoration of child pornography victims.²⁸⁴

In 2012, the U.N. Committee again identified victim restoration (including compensation to victims) as an issue in response to the United States’ 2010 periodic report, and requested additional information.²⁸⁵ Specifically, the U.N. Committee asked the United States for an indication of the measures enacted to ensure that victims “are provided with appropriate assistance for their full social reintegration: physical, psychological, and psychosocial recovery, as well as compensation.”²⁸⁶ In its response, the United States again failed to identify even one specific measure that it is taking to ensure compensation to child pornography victims.²⁸⁷ Thus, in its Concluding Observations, the U.N. Committee expressed concern “about the growing availability of child pornography online, the use of ever younger children and the increase in the violence of images recorded” as well as the fact that sexually exploited children in the United States “still lack adequate . . . compensation.”²⁸⁸ The U.N. Committee also addressed the United States’ treaty obligations under Articles 8 and 9 of the Optional Protocol and claimed that the United States should seek “adequate remed[ies] and reparation[s]” through legal channels and other means.²⁸⁹

Other international treaties also evidence the rise of an international norm in the twentieth century recognizing that children have a right to special protections.²⁹⁰ Nations have gone further in developing international instruments that require States Parties to provide assistance for victims’ physical and psychological restoration.²⁹¹ The International Labour Organization (“ILO”) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Convention No. 182, requires parties to “provide the necessary and appropriate direct assistance for . . . their rehabilitation and social integration.”²⁹² In ratifying ILO Convention No. 182, the Senate did not specifically reference the Mandatory Restitution Statute, but recognized that the United States already criminalized child pornography and that

²⁸² U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA AND U.S. RESPONSE TO RECOMMENDATIONS IN COMMITTEE CONCLUDING OBSERVATIONS OF JUNE 25, 2008, para. 421 (Jan. 22, 2010), available at <http://www.state.gov/documents/organization/136023.pdf>.

²⁸³ *Id.* (quoting 18 U.S.C. § 2259(b)(3) (2012)).

²⁸⁴ *Id.*

²⁸⁵ U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States of America*, para. 12, U.N. Doc. CRC/C/OPSC/USA/Q/2 (July 25, 2012), available at <http://www.state.gov/j/drl/rls/201651.htm>.

²⁸⁶ *Id.*

²⁸⁷ While the United States provides a list of services available to victims in its response, the list does not contain any method for victims to receive compensation, such as restitution, from those legally responsible. U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Consideration of the Second Report of the United States of America: Addendum Written Replies of the United States of America*, paras. 52–57 U.N. Doc. CRC/C/OPSC/USA/Q/2/Add.1 (Dec. 12, 2012), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=CRC/C/OPSC/USA/Q/2/Add.1.

²⁸⁸ U.N. Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the United States of America*, paras. 27, 44, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013), available at http://www2.ohchr.org/English/bodies/crc/docs/co/CRC_C_OPSC_USA_CO_2.doc.

²⁸⁹ *Id.* at para. 45.

²⁹⁰ International Covenant on Civil and Political Rights art. 24, Dec. 16, 1996, 999 U.N.T.S. 171 (United States ratified June 8, 1992) (noting a child’s right to “measures of protection” from state, society, and the child’s family).

²⁹¹ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 2, 3, 4(d), 4(g), U.N. Doc. A/RES/48/104 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>; International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 7(2)(b), June 17, 1999, 2133 U.N.T.S. 161 [hereinafter ILO Convention No. 182], available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

²⁹² ILO Convention No. 182, *supra* note 291, at art. 7(2)(b).

“U.S. law is sufficient in order for the United States to comply with the Convention.”²⁹³ In total, 179 countries have ratified the ILO Convention No. 182.²⁹⁴ Both the Optional Protocol and ILO Convention No. 182, along with others, convey an emerging international norm condemning child sexual abuse and child pornography, and compelling States Parties to develop laws to protect and care for children and support their restoration when harm occurs.

A series of World Congresses against Commercial Sexual Exploitation of Children also evidence the international community’s multilateral efforts to provide victims with restoration services. The First World Congress called on governments to provide recovery services to sexually exploited children.²⁹⁵ The Second World Congress recognized that the development of technology created more difficulties for victims and called on countries to help victims recover and reintegrate into society.²⁹⁶ At the conclusion of the Second World Congress, the United States pointed to the Optional Protocol as providing a “clear starting point” for the international elimination of sexual exploitation of children.²⁹⁷ Between the Second and Third World Congresses, the United States conducted a “mid-term review” on the commercial sexual exploitation of children in America in collaboration with three non-governmental agencies.²⁹⁸ A report from the mid-term review was submitted at the Third World Congress and found that the U.S. Congress and Executive Branch had “aggressively” confirmed their commitment to combating the sexual exploitation of children through legislative measures, including the recognition and protection of victims’ rights.²⁹⁹

The Council of Europe, an international organization including both European and non-European countries, has also formed treaties to protect children from child sexual abuse.³⁰⁰ The United States actively participated in the drafting of the Council of Europe’s Convention on Cybercrime, which requires states to adopt legislative and other measures necessary to criminalize possession of child pornography on data storage media.³⁰¹ The United States ratified the treaty in 2006 with no need for implementing legislation because the United States had complied with the Convention on Cybercrime’s provisions prior to the drafting of the convention.³⁰²

Four years later, the Lanzarote Convention, another Council of Europe convention, expanded on the Convention on Cybercrime to require States Parties to take all necessary measures to assist victims with their physical and psycho-social restoration through adopting a more protective approach towards victims.³⁰³ Although the United States has not ratified the

²⁹³ S. EXEC. REP. NO. 106-12, at 4 (1999), available at <http://www.gpo.gov/fdsys/pkg/CRPT-106erpt12/pdf/CRPT-106erpt12.pdf>.

²⁹⁴ *Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)*, INT’L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327 (last visited Feb. 1, 2015).

²⁹⁵ First World Congress Against Commercial Sexual Exploitation of Children, The Stockholm Declaration and Agenda for Action art. 5 (Aug. 31, 1996), available at http://www.ecpat.net/sites/default/files/stockholm_declaration_1996.pdf.

²⁹⁶ VITT MUNTARBORN, GENERAL RAPPOREUR’S REPORT FROM SECOND WORLD CONGRESS AGAINST CSEC (2001), available at www.childrights.org/vbulletin5/filedata/fetch?id=1461.

²⁹⁷ UNITED NATIONS CHILDREN’S FUND, THE YOKOHAMA GLOBAL COMMITMENT 6 (2001), available at <http://www.unicef.org/events/yokohama/outcome.html>.

²⁹⁸ INITIAL REPORT, *supra* note 270, at para. 84.

²⁹⁹ SHARED HOPE INT’L ET AL., REPORT FROM THE U.S. MID-TERM REVIEW ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AMERICA pmbll., add. III at 5 (2006), available at http://sharedhope.org/wp-content/uploads/PIC/US_MTR_of_CSEC.pdf.

³⁰⁰ BUCK, *supra* note 248, at 360.

³⁰¹ S. EXEC. REP. NO. 109-6, at 2 (2006); Convention on Cybercrime art. 9(1), Nov. 23, 2001, T.I.A.S. No. 13,174, C.E.T.S. No. 185, available at <http://conventions.coe.int/Treaty/en/Treaties/html/185.htm>.

³⁰² S. EXEC. REP. NO. 109-6, *supra* note 301, at 6; *Convention on Cybercrime Ratification Status*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> (last visited Feb. 14, 2015).

³⁰³ Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse art. 30(2), Oct. 25, 2007, C.E.T.S. No. 201 [hereinafter Lanzarote Convention], available at <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

Lanzarote Convention, it participated in the drafting of the treaty and has been a permanent observer of the Council of Europe since 1995.³⁰⁴ Moreover, the Lanzarote Convention is additional evidence of emerging international legal norms focused on criminalizing modern child pornography and providing for restoration of victims.

C. Regional Efforts to Protect and Support Victims of Child Pornography

Regionally, countries have also committed to protecting potential victims of child pornography and supporting their recovery when victimized. The European Union requires member states to punish the “acquisition or possession of child pornography” and “knowingly obtaining access.”³⁰⁵ Significantly, in accordance with the Optional Protocol, the CRC, and the Lanzarote Convention, the European Union requires member states to provide assistance, support, and protection to victims, taking into account the best interests of the child.³⁰⁶ Among other things, this includes ensuring that victims have access to free legal representation for “the purposes of claiming compensation.”³⁰⁷ Member states must also ensure that victims receive assistance and support before, during, and after the criminal proceedings.³⁰⁸ The European Union law also directs member states to ensure that victims of crime receive adequate protection, acknowledgement of their rights, and special assistance.³⁰⁹

The European Union has recently expanded the rights, support, protection, and compensation for victims of child pornography by implementing a new Directive that will take effect in 2015.³¹⁰ The new Directive instructs member states to protect victims from continuing victimization and ensures that victims receive “appropriate support to facilitate their recovery.”³¹¹ Victim support services must provide, at a minimum, emotional and psychological support services.³¹² Member states must ensure that victims also have the right to receive compensation from offenders through a judgment in criminal proceedings.³¹³ Member states are obliged to promote measures to “encourage offenders to provide adequate compensation to victims.”³¹⁴ The new Directive demonstrates the European Union’s evolving standards on crime victim standing, and when read in conjunction with Article 19 of Directive 2011/92/EU,³¹⁵ the new Directive advances the European Union’s goal to provide greater support to victims of child pornography.

African and Asian countries have also responded on a regional basis. In 1999, the African Charter on the Rights and Welfare of the Child entered into force, which requires states to ensure

³⁰⁴ COUNCIL OF EUROPE, ON OBSERVER STATUS FOR THE UNITED STATES OF AMERICA WITH THE COUNCIL OF EUROPE, COMM. OF MINISTERS RES. (95) 37 (1995), available at http://www.coe.int/t/der/docs/CMRes9537USA_en.pdf; COUNCIL OF EUROPE, EXPLANATORY REPORT: COUNCIL OF EUROPE CONVENTION ON THE PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION AND SEXUAL ABUSE para. 284 (2007), available at <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>.

³⁰⁵ Framework Decision 2004/68/JHA art. 3(1)(d), 2003 O.J. (L13) 44, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:013:0044:0048:EN:PDF>; Directive 2011/92/EU, of the European Parliament and of the Council of 13 December 2011 on Combatting the Sexual Abuse and Sexual Exploitation of Child and Child Pornography and Replacing Council Framework Decision 2004/68/JHA art. 5(2)–(3), 2011 O.J. (L 335) (1) [hereinafter Directive 2011/92/EU], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0093&from=EN>.

³⁰⁶ Directive 2011/92/EU, *supra* note 305, at art. 18(1).

³⁰⁷ *Id.* at art. 20(2).

³⁰⁸ *Id.* at art. 19(1).

³⁰⁹ Framework Decision 2001/220/JHA, of 15 March 2001 on the Standing of Victims in Criminal Proceedings, 2001 O.J. (L082) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:EN:PDF>.

³¹⁰ Directive 2012/29/EU, of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L315) 57, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32012L0029>.

³¹¹ *Id.* at pmb1. para. 9.

³¹² *Id.* at art. 9.

³¹³ *Id.* at art. 16(1).

³¹⁴ *Id.* at art. 16(2).

³¹⁵ Directive 2011/92/EU, *supra* note 305, at art. 19.

that children “enjoy the best attainable state of physical, mental and spiritual health.”³¹⁶ Parties to the treaty must also protect children from “all forms of torture, inhuman or degrading treatment,” which includes sexual abuse.³¹⁷ In fact, Article 27 specifically requires parties to protect children from sexual exploitation, including “the use of children in pornographic activities, performances and materials.”³¹⁸ In addition to preventing abuse, members must establish support and treatment for the victims of abuse when it does occur.³¹⁹

The South Asian Association for Regional Cooperation (“SAARC”), which includes eight member states and nine observer states, have also entered into regional efforts.³²⁰ The Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia asks member states to reaffirm their commitment to the CRC, uphold the “best interest of the child,” and provide basic services to children.³²¹ While many of the countries have signed or ratified the Optional Protocol, the African convention and SAARC convention provide reaffirmation of the regions’ commitment to protecting children.

In sum, the United States has played an active role in developing an international legal framework that condemns child sexual abuse and the proliferation of child sexual abuse images. This framework also recognizes the harm done to victims and the need to provide for their restoration. In addition to multilateral efforts such as the Optional Protocol, regional efforts are underway to protect children from child pornography, signaling an international norm. The United States has previously identified the Mandatory Restitution Statute as its means of complying with international obligations. Unfortunately, the statute has been ineffective, and the domestic statutory framework for restoring victims must be expanded, reinforced, and effectively implemented.

V. ENSURING FULL RESTORATION OF VICTIMS BOTH AT HOME AND ABROAD

The United States has been a leader in efforts to combat child pornography worldwide, but its leadership falls short when it comes to restoring victims. In order to comply with its own treaty obligations and as a moral imperative because of the rising problem of child pornography, the United States must effectively ensure the full and adequate restoration of victims of child pornography. The United States has a number of options. For one, the United States already has a statutory framework for providing restoration to victims of child pornography through restitution—the Mandatory Restitution Statute.³²² The United States could amend this statute to achieve Congress’s original intent to provide full recovery to victims of child pornography. Additional options include expanding victim funds, supporting victims’ use of civil remedies and copyright protections, requiring the widespread implementation of child pornography identification software, providing victims with a variety of government benefits, and appointing attorneys or guardians ad litem to advocate for victims and guide them through a complex and discouraging justice system.

³¹⁶ African Charter on the Rights and Welfare of the Child art. 14(1), OAU Doc. CAB/LEG/24.9/49 (1990) (*entered into force* Nov. 29, 1999), available at <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acrwc-en/>.

³¹⁷ *Id.* at art. 16(1).

³¹⁸ *Id.* at art. 27(1)(c).

³¹⁹ *Id.* at art. 16(2).

³²⁰ *Cooperation with Observers*, S. ASIAN ASS’N FOR REG’L COOP’N, <http://saarc-sec.org/Cooperation-with-Observers/13/> (last visited Feb. 1, 2015).

³²¹ S. ASIAN ASS’N FOR REG’L COOP’N, CONVENTION ON REGIONAL ARRANGEMENTS FOR THE PROMOTION OF CHILD WELFARE IN SOUTH ASIA 2 (2001), available at <http://www.saarc-sec.org/userfiles/conv-children.pdf>.

³²² 18 U.S.C. § 2259 (2012).

A. The Mandatory Restitution Statute

In Part III.B, the context for the development of the Mandatory Restitution Statute was discussed. In spite of convincing bipartisan support for the statute,³²³ and a strongly-worded title that begins with the word “mandatory,” prosecutors have failed to use the statute as a tool for providing restoration to victims of child pornography.³²⁴ In fact, it was a children’s rights lawyer, James R. Marsh, who first began utilizing the statute effectively.³²⁵ When Amy’s family hired him, Marsh initially thought of utilizing Masha’s Law, the civil recovery option, as a means of obtaining restoration for Amy.³²⁶ However, when *United States v. Hesketh*³²⁷ involved a wealthy offender with assets in foreign countries with strict banking secrecy laws, Marsh began to research criminal restitution—which places the burden on the federal government to collect, rather than the individual, and allows the government to utilize its powerful collection powers to levy assets, including the seizure of bank and retirement accounts.³²⁸

Marsh asked Amy to write a victim impact statement and hired a psychologist to examine her.³²⁹ Marsh also had economists calculate damages “that included counseling, diminished wages and lawyer fees.”³³⁰ The total was approximately \$3.4 million.³³¹ Afterwards, Marsh began emailing Amy’s filings to U.S. Attorneys—as of September 2012, “Amy had filed claims in 744 cases and had been identified in more than [1500].”³³² Courts varied in their responses to these petitions: some district courts rejected them, some awarded paltry sums, while others responded with significant awards.³³³ On appeal, the circuits split in their interpretations of the Mandatory Restitution Statute, with the Fifth Circuit holding that “the plain language of the statute dictates that a district court must award restitution for the full amount of those losses.”³³⁴ The offender in the case, Doyle Randall Paroline, appealed the decision and the circuit split led to the Supreme Court granting certiorari in June 2013 in *Paroline*.³³⁵

The briefing and oral argument in *Paroline* revealed a significant disagreement over the interpretation of the Mandatory Restitution Statute. The statute requires that a defendant, once convicted of production, distribution, or possession of child pornography, pay the “full amount of victim’s losses.”³³⁶ The statute defines the “full amount of victim’s losses,” as including:

- (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;

³²³ Fifty-four Democrats and seven Republicans voted to pass the Act in the Senate, 61-38. 140 CONG. REC. S12600 (1994). One hundred eighty-eight Democrats, forty-six Republicans, and one independent voted for the Act in the House, 235-195. 140 CONG. REC. H9005 (1994).

³²⁴ See Emily Bazelon, *supra* note 242.

³²⁵ *Id.*

³²⁶ Lorelei Laird, *Pricing Amy: Should Those Who Download Child Pornography Pay the Victims?*, ABA JOURNAL (Sept. 1, 2012, 10:30AM),

http://www.abajournal.com/magazine/article/pricing_amy_should_those_who_download_child_pornography_pay_the_victims/.

³²⁷ *United States v. Hesketh*, No. 3:08-CR-00165 (WWE) (D. Conn. Oct. 13, 2008).

³²⁸ Laird, *supra* note 326.

³²⁹ John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES, Feb. 3, 2010, at A19.

³³⁰ *Id.*

³³¹ *Id.*

³³² Schwartz, *supra* note 329. Marsh said, “I’m able to leverage the power of the Internet to get restitution for a victim of the Internet.” *Id.*

³³³ The average restitution award is \$3000. Robert William Jacques, *Amy and Vicky’s Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1189 (2011).

³³⁴ *In re Amy Unknown*, 701 F. 3d 749, 752 (5th Cir. 2012).

³³⁵ *Paroline v. United States*, 134 S. Ct. 1710 (2014).

³³⁶ 18 U.S.C. § 2259(b)(1) (2012).

- (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.³³⁷

The Supreme Court granted certiorari on the question: “What, if any, causal relationship or nexus between the defendant’s conduct and the victim’s harm or damages must the government or the victim establish in order to recover restitution under [the Mandatory Restitution Statute]?”³³⁸ In other words, does the proximate cause language in (F) modify (A)–(E) or only (F)? If only (F), then *Paroline* would be liable to the victim, Amy, for the full amount of her damages, \$3.4 million, even though he “only” possessed two of her sex abuse images. Not surprisingly, *Paroline* took the position that he owed no restitution to Amy,³³⁹ while she argued that *Paroline* owed her full restitution.³⁴⁰ The U.S. Solicitor General argued that the amount was somewhere in between, but could not offer a clear formula for determining the precise amount owed or how it would be determined on a consistent basis for all child pornography victims entitled to restitution under the statute.³⁴¹

At oral argument, the Justices appeared to be as divided as the parties. For example, Justice Scalia acknowledged that *Paroline* was obviously a “bad guy” but found it incredulous that Congress could have intended “to sock” *Paroline* with the full amount of Amy’s damages (\$3.4 million), while Justice Sotomayor appeared to defend full restitution to Amy, and Justice Ginsburg pressed the Government to offer a formula for restitution that could be applied consistently across child pornography cases.³⁴² Throughout oral argument, the complexities inherent in apportioning causation and liability for child pornography possession and distribution in the digital age, due to the continuing revictimization that is inherent in the perpetual proliferation of this crime on a global scale, seemed to place solutions out of the reach of some of the brightest minds in the United States.³⁴³

Thus, it was not surprising when the Court’s decision was issued on April 23, 2014, that it conveyed a divided Court, with Justices Ginsburg, Breyer, Alito, and Kagan joining Justice Kennedy in a majority opinion, Justices Scalia and Thomas joining Chief Justice Roberts in a dissent, and Justice Sotomayor entering a separate dissent.³⁴⁴ According to the majority, the restitution should be “reasonable” and “circumscribed,” neither “severe” nor “token” nor “minimal.”³⁴⁵ The majority acknowledged that child pornography victims were entitled to full restitution for their losses “someday,” but failed to provide a concrete formula to determine how

³³⁷ 18 U.S.C. § 2259(b)(3).

³³⁸ *Paroline v. United States*, 133 S. Ct. 2886 (2013) (granting certiorari).

³³⁹ See Brief for Petitioner at 66, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁴⁰ Brief for Respondent Amy Unknown at 6–7, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁴¹ See Brief for the United States at 40–49, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561); see Petitioner’s Reply Brief at 14–16, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁴² Transcript of Oral Argument at 21, 30, 36, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561). The Government stated that it would leave it up to district courts to determine methods of granting restitution to victims. One option was for courts to divide the number of people who have been ordered to pay restitution to Amy into the total harm—\$3.4 million. *Id.* at 23. Justice Ginsburg quickly pointed out a problem with this method, stating, “[i]t wouldn’t include the people who are not prosecuted and it wouldn’t include the people who in the future are prosecuted.” *Id.* at 24. Justice Kagan mentioned concerns with alternative approaches that seemed like “somebody just plucks an initial number out of the air.” *Id.* at 26. Justice Scalia expressed strong emotions about the Government attorney’s reference to district courts making calculations and then applying a “fudge factor” to round out the estimation. *Id.* at 32.

³⁴³ See Adam Liptak, *Justices Seem Stumped on Calculating Damages Over Child Pornography*, N.Y. TIMES (Jan. 22, 2014), <http://www.nytimes.com/2014/01/23/us/justices-struggle-to-determine-restitution-over-child-pornography.html>.

³⁴⁴ See *Paroline v. United States*, 134 S. Ct. 1710, 1716 (2014).

³⁴⁵ *Id.* at 1727.

to apportion full restitution, let alone when that day will come.³⁴⁶ Chief Justice Roberts wrote in his dissent that clearly, child pornography victims deserve restitution and that Congress intended for them to receive it, but unfortunately, the Mandatory Restitution Statute was so poorly drafted that it allowed no victim recovery, and Congress needed to “fix” the statute.³⁴⁷ In Justice Sotomayor’s dissent, she, too, suggested that Congress should consider revising the Mandatory Restitution Statute and offered concrete suggestions for doing so, such as including mandatory minimum restitution amounts similar to the \$150,000 minimum set in the Civil Remedy Statute.³⁴⁸ In the meanwhile, Justice Sotomayor opined that Amy was entitled to restitution from Paroline in the full amount of her losses (\$3.4 million).³⁴⁹

Although the Justices disagreed on the amount of restitution owed to Amy by Paroline, all nine Justices agreed that victims of child pornography are entitled to restitution from those who possess their sexual abuse images.³⁵⁰ The Court recognized that “every viewing of child pornography is a repetition of the victim’s abuse.”³⁵¹ According to the majority, one purpose of the Mandatory Restitution Statute is “to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims.”³⁵² One of the identifiable victims of Paroline’s crimes was not only in the Court that day, she was represented by counsel.³⁵³ It was the first time in the Court’s history that a crime victim was allowed to be represented by counsel in an appeal of a criminal case heard by the U.S. Supreme Court.³⁵⁴ It was especially fitting that the first crime victim was a child pornography victim, given that the growing number of victims affected by this rapidly expanding crime compels strong and effective legislative solutions to ensure their full restoration.

B. Post-Paroline Restitution Legislation

Paroline demonstrates that the Mandatory Restitution Statute presents complex questions about the statute’s workability and effectiveness. In response to these problems, Congress could create a new statutory framework that more clearly lays out how victims receive restoration. The statutory framework could clarify the language necessary for adequate restitution and incorporate and improve on other potential sources of support for victim restoration such as victims’ funds, civil remedies, copyright, government benefits, technological innovation, and victim advocacy.

A new statutory framework would have the ability to recognize the ways that child pornography has changed since the mid-nineties, when Congress enacted the Mandatory Restitution Statute. The rise in technology over the past twenty years is unprecedented, particularly with regard to the Internet and smartphones. This statutory framework would view restoration in light of the uniquely global nature of child pornography and the corresponding

³⁴⁶ *Id.* at 1729.

³⁴⁷ *Id.* at 1735.

³⁴⁸ *Id.* at 1744. The dissents of both Chief Justice Roberts and Justice Sotomayor were consistent with the position of both the U.S. Department of Justice and the U.S. Sentencing Commission, who had previously publicly stated that “improvements to the statutory restitution mechanism are warranted.” Letter from Anne Gannon, *supra* note 48; *see also* U.S. SENTENCING COMM’N, *supra* note 62, at 311–31 (discussing recommendations to Congress for statutory improvements).

³⁴⁹ *Paroline*, 134 S. Ct. at 1744.

³⁵⁰ *Id.* at 1722, 1730, 1735.

³⁵¹ *Id.* at 1727. Of course, this was a reiteration of the Court’s previous holdings in *New York v. Ferber*, 458 U.S. 747, 758 (1982), and *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

³⁵² *Paroline*, 134 S. Ct. at 1727.

³⁵³ Emily Bazelon, *How Much Does Doyle Paroline Owe?*, SLATE (Jan. 22, 2014, 5:01 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/child_pornography_restitution_the_supreme_court_struggles_to_figure_out.html.

³⁵⁴ Paul Cassell, *I’m Hoping for a Victory for Crime Victims’ Rights Tomorrow Before the Supreme Court*, WASH. POST (Jan. 21, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/21/im-hoping-for-a-victory-for-crime-victims-rights-tomorrow-before-the-supreme-court/>.

difficulties to: (1) obtain restitution from defendants in foreign jurisdictions, and (2) identify the total number of offenders and, as a result, the full extent of a victim's harm. The new framework would also need to be flexible enough to accommodate rapidly changing technology and recognize that the harm to victims of child pornography will only grow as technology becomes increasingly sophisticated.

Two weeks after the U.S. Supreme Court issued its decision in *Paroline*, Congress responded with a new statutory framework that would update the Mandatory Restitution Statute. The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014,³⁵⁵ was introduced on May 7, 2014, by Senator Orrin Hatch (R-UT)³⁵⁶ and twenty-one co-sponsors.³⁵⁷ The Act was referred to the Committee on the Judiciary on the same day.³⁵⁸ An identical bill, H.R. 4981, was introduced in the House of Representatives.³⁵⁹ Representative Matt Cartwright (D-PA) and eighty-eight co-sponsors introduced the House version.³⁶⁰

The Amy and Vicky Child Pornography Victim Restitution Improvement Act reaffirms Congress's previous findings that demand for child pornography continuously victimizes a child, causing victims to suffer throughout their lives.³⁶¹ Congress also recognizes that every perpetrator throughout the supply chain (producer, distributor, and possessor) plays a part in the victim's harm.³⁶² To remedy the harm to a victim, Congress intends to fully compensate the victim through an aggregate causation standard, while also recognizing any constitutional limits and protections for defendants.³⁶³

Under the revised act, a victim may recover: lifetime medical services related to physical, psychiatric, or psychological care; lifetime physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lifetime lost income; and attorneys' fees, as well as other costs incurred.³⁶⁴ Further, other losses suffered by the victim are recoverable if those losses are a *proximate result of the offense*.³⁶⁵ The Act clearly states that the proximate cause is only required for other losses and not the statutorily-enumerated losses.

To determine the restitution amount, the court will decide the amount of the victim's losses and enter an order for that amount when one defendant harms the victim.³⁶⁶ When multiple defendants harm the victim, the court will enter a restitution order for the full amount of the victim's losses or an amount not less than a statutorily-enumerated amount.³⁶⁷ The statutorily-enumerated amounts are as follows: \$250,000 for production, \$150,000 for distribution, and

³⁵⁵ Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. (2014).

³⁵⁶ Senator Orrin Hatch was part of the 103rd Congress that considered the original legislation. In addition to introducing the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, Senator Hatch and a bipartisan group of Senators who were also part of the 103rd Congress, filed an amicus curiae brief in *Paroline*. Brief for United States Senators Orrin G. Hatch, Dianne Feinstein, Charles E. Grassley, Edward J. Markey, John McCain, Patty Murray, and Charles E. Schumer as Amici Curiae in Support of Amy Unknown at 1–2, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁵⁷ The Senators are a bipartisan group of twelve Republicans and nine Democrats. *Cosponsors: S.2301 — 113th Congress (2013-2014)*, LIBRARY OF CONG., <https://beta.congress.gov/bill/113th-congress/senate-bill/2301/cosponsors> (last visited Feb. 1, 2015).

³⁵⁸ 160 CONG. REC. S2796 (2014).

³⁵⁹ Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, H.R. 4981, 113th Cong. (2014).

³⁶⁰ *Id.* The House version of the act includes fifty-eight Democrats and thirty Republicans. *Cosponsors: H.R.4981 — 113th Congress (2013-2014)*, LIBRARY OF CONG., <https://beta.congress.gov/bill/113th-congress/house-bill/4981/cosponsors> (last visited Feb. 1, 2015).

³⁶¹ Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. § 2 (2014).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* § 3.

³⁶⁵ *Id.* (emphasis added).

³⁶⁶ *Id.* § 3.

³⁶⁷ *Id.*

\$25,000 for possession.³⁶⁸ A victim is able to utilize joint and several liability to recover from multiple defendants.³⁶⁹ Defendants can also seek contribution from other defendants.³⁷⁰

Senator Pat Toomey (R-PA) introduced an alternative bill, the Justice for Amy Act of 2014, on May 15, 2014, in the wake of the U.S. Supreme Court decision in *Paroline*, and it was immediately referred to the Senate Judiciary Committee.³⁷¹ The bill would amend the Mandatory Restitution Statute and make restitution mandatory regardless of the defendant's economic circumstance or the victim's other sources of recovery (i.e., insurance).³⁷² In determining the victim's losses, courts would use aggregate causation principals.³⁷³ Multiple defendants would be jointly and severally liable.³⁷⁴ A defendant who pays more than his share could seek contribution from other defendants or subsequent offenders.³⁷⁵

The primary difference between the acts is the Justice for Amy Act does not include the statutorily-enumerated amounts that the Amy and Vicky Child Pornography Victim Restitution Improvement Act contains. The statutorily-enumerated amounts, \$250,000 for production, \$150,000 for distribution, and \$25,000 for possession, are similar to the civil recovery statute where damages are presumed to be at least \$150,000.³⁷⁶ While these statutory minimums will provide some assurances to victims who seek compensation, whichever approach is ultimately adopted will greatly improve access to restitution for victims.

At the conclusion of the 113th Congress, neither act had been enacted,³⁷⁷ which led the 114th Congress to reintroduce the Amy and Vicky Child Pornography Victim Restitution Improvement Act.³⁷⁸ On February 11, 2015, the Senate unanimously passed the act.³⁷⁹ The House referred the bill to the House Judiciary committee on February 12, 2015.³⁸⁰ With widespread bipartisan support in the Senate, hopefully the House of Representatives will act swiftly to improve the restitution system.

C. Victims' Funds

As discussed in Part III.B above, victims' funds could be an effective method of directing resources to support the restoration of victims of child pornography, but not in their current form. There are a number of positive aspects of crime victims' funds. For one, victims can access at least some of the funds they need to support their restoration relatively quickly, especially compared to restitution³⁸¹ or civil litigation. Funds do not require a showing of proximate cause between the defendant's harm and the victim's losses. Funds allow defendants to pay into the

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Justice for Amy Act of 2014, S. 2344, 113th Cong. (2014).

³⁷² *Id.* § 2.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ 18 U.S.C.A. § 2255 (West 2015); Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. § 3 (2014).

³⁷⁷ *Major Actions: S.2301 — 113th Congress (2013-2014)*, LIBRARY OF CONG., <https://beta.congress.gov/bill/113th-congress/senate-bill/2301/actions> (last visited Feb. 1, 2015); *Major Actions: H.R. 4981 — 113th Congress (2013-2014)*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-bill/4981/actions> (last visited Feb. 1, 2015); *Major Actions: S.2344 — 113th Congress (2013-2014)*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/senate-bill/2344/actions> (last visited Feb. 1, 2015).

³⁷⁸ Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, H.R. 595, 114th Cong. (2015).

³⁷⁹ *Major Actions: S.295 — 114th Congress (2015-2016)*, LIBRARY OF CONG., <https://www.congress.gov/bill/114th-congress/senate-bill/295/actions> (last visited Feb. 14, 2015).

³⁸⁰ *Id.*

³⁸¹ Providing victims with immediate post-conviction relief through restitution is challenging. Since the passage of the MVRA, which provides restitution for victims of several crimes, federal criminal debt has increased to fifty billion in 2007 from six billion in 1996. Eighty percent of the increase is from uncollected restitution orders. Jacques, *supra* note 333, at 1195.

fund whether or not a victim is identified, meaning that offenders do not escape liability. These funds may also provide assistance to families of child pornography victims who also have expenses, such as for counseling.³⁸²

One enormous benefit of a victim compensation program rather than restitution would be the elimination of notification letters, which victims receive to determine whether to seek restitution.³⁸³ The notifications that victims like Amy and Vicky receive can be “unnerving and traumatic.”³⁸⁴ Much of the ongoing harm to victims of child pornography is from the knowledge that unknown perpetrators are deriving “sick enjoyment” from images of their child sexual abuse,³⁸⁵ and that these images will most likely never be removed from the Internet. The constant flow of notification letters can “exponentially and repetitively reactivate[]” victims’ psychological harm.³⁸⁶ However, at this point, these notices are required for victims to receive restitution.³⁸⁷ A fund would allow victims to “opt-out of receiving notices yet still receive reimbursement for psychological and counseling services.”³⁸⁸

Currently, the majority of child pornography offenses are prosecuted at the state level,³⁸⁹ and the majority of the federal funds allocated to victims’ compensation are allocated to state victims’ compensation programs.³⁹⁰ Thus, it is critical that federal lawmakers make federal funding of state-administered victims’ funds contingent upon amending statutes and regulations to ensure that victims of child pornography possession and distribution are eligible for support from state-administered victims’ funds. Indeed, Congress recently recognized the need to make special funds available for child pornography victims. The Justice for Victims of Trafficking Act of 2014 authorizes the federal government to make grants to states for direct assistance to child pornography victims.³⁹¹ The Act passed the House of Representatives by a vote of 409 to 0 and is pending in the Senate.³⁹² While victims are likely to only receive a limited amount of funds, the additional sources might be able to compensate victims for losses attributed to possession and distribution and provide a method of compensation.

Meanwhile, Congress should consider the formation of a victims’ fund for child pornography victims that is administered at the federal level. The fund could also be supported with fines and penalties collected from offenders convicted of federal child pornography crimes. It could be accessible to victims regardless of their state of residence or the state of residence of the perpetrator or the location of the crime, which is increasingly difficult to specify with digital

³⁸² *Crime Victim Compensation: An Overview*, *supra* note 191; *see, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 56.32 (West 2015).

³⁸³ U.S. SENTENCING COMM’N, *supra* note 62, at 115.

³⁸⁴ Jennifer A.L. Sheldon-Sherman, *Rethinking Restitution in Cases of Child Pornography Possession*, 17 LEWIS & CLARK L. REV. 215, 286 (2013).

³⁸⁵ *See* Amy’s victim statement. Joint Appendix vol. 1 at 60–61, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁸⁶ Sheldon-Sherman, *supra* note 384, at 286 (“Vicky’s psychologist, for example, reports that Vicky receives ‘thousands of notification letters telling her of new cases in which additional defendants have been caught downloading the images of her sexual abuse’ and her psychological harm is ‘exponentially and repetitively reactivated’ by the approximately two to ten letters she receives daily.”).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ WENDY WALSH ET AL., PROSECUTION DILEMMAS AND CHALLENGES FOR CHILD PORNOGRAPHY CRIMES: THE THIRD NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY (NJOV-3) 2 (Univ. of N.H., 2013).

³⁹⁰ *See* 42 U.S.C. § 10602(a)(1) (2012).

³⁹¹ Justice for Victims of Trafficking Act of 2014, H.R. 3530, 113th Cong. § 4(b) (2014).

³⁹² 160 CONG. REC. H4534–35 (2014); *H.R. 3530 - Justice for Victims of Trafficking Act of 2014*, LIBRARY OF CONG., <http://beta.congress.gov/bill/113th-congress/house-bill/3530> (last visited Feb. 1, 2015). When the 114th Congress convened, the bill was immediately reintroduced and passed in the House. It is now pending in the Senate. *H.R. 181 - Justice for Victims of Trafficking Act of 2015*, LIBRARY OF CONG., <https://www.congress.gov/bill/114th-congress/house-bill/181/actions> (last visited Feb. 14, 2015). The 2015 act is slightly different from the 2014 act but still contains a provision to provide grants for direct services to child pornography victims. Justice for Victims of Trafficking Act of 2015, H.R. 181, 114th Cong. § 3 (2015).

crimes. Indeed, child pornography victims could be permitted to access funding from the federal child pornography victims' fund even if the perpetrator is foreign or the crime is committed abroad. Moreover, foreign victims of child pornography offenders who are U.S. citizens should also be permitted to file claims with the fund to support their restoration. This would help overcome some of the jurisdictional and logistical issues that currently prevent child pornography victims from abroad from recovering restitution or damages from perpetrators in the United States, and would better address the changing nature of child pornography crimes, which tend to occur across multiple borders and jurisdictions.

Regardless of whether a victims' fund for child pornography victims would be administered at the state or federal level (or both), it is critical to address the many problems present with existing crime victims' funds.³⁹³ Victims' funds caps would need to be raised from their current average of approximately twenty-five thousand dollars.³⁹⁴ Moreover, victims should not have to reimburse the fund if the victim subsequently receives any restitution or civil damages related to the crime.³⁹⁵ Also, victims should be permitted to seek reimbursement for lost income.³⁹⁶ As over \$3 million out of the \$3.4 million pleaded in Amy's restitution claim accounted for lost wages,³⁹⁷ it is clear that lost wages are key to full restoration, which includes community reintegration. The funds also do not typically include attorneys' fees, and have an overall annual cap for total distributions.³⁹⁸ After that cap is reached, funds cannot be disbursed to victims.³⁹⁹ Finally, the funds fail to account for support of foreign victims and those harmed abroad,⁴⁰⁰ even though foreign children are increasingly victimized by U.S. perpetrators, and are also entitled to full restoration.

One should consider the psychological impact that a fine-based system supporting a crime victims' fund could have on both the victim and the perpetrator. In theory, the victim in a fine-based system would be the public rather than the individual, which may diminish "the rehabilitative psychological benefits of restitution, in terms of making a victim feel directly compensated by the person who aggrieved her" ⁴⁰¹ Therefore, part of the sentencing and payment process should require defendants to realize that the children they exploited are real people to whom they have caused tangible harm. Many offenders do not connect their actions with harm to a living and breathing girl or boy who are like their own children, sisters, neighbors, or friends. This is a significant part of the process that should not be lost if the method of resources are directed through a fund rather than through restitution or civil recovery.

D. Civil Remedies for Child Pornography Victims

Masha's Law, a method for victims to bring civil causes of action, is another method of providing victims access to resources that support their restoration. Under 18 U.S.C. § 2255, "[o]nce a plaintiff has proven personal injury, they are entitled to recover the actual damages they sustain and the cost of the suit, including a reasonable attorney's fee. The statute sets a floor on

³⁹³ See generally U.S. DEP'T OF JUSTICE, *supra* note 198, at 21. Further, the Office for Victims of Crime conducted an informal poll of states that found most states compensated child pornography victims for losses incurred from distribution and possession but most victims do not file claims. *Id.*

³⁹⁴ *Crime Victim Compensation: An Overview*, *supra* note 191.

³⁹⁵ *Id.*

³⁹⁶ Sheldon-Sherman, *supra* note 384, at 287.

³⁹⁷ Joint Appendix vol. 1 at 52, *Paroline v. United States*, 134 S. Ct. 1710 (2014) (No. 12-8561).

³⁹⁸ *OVC Fact Sheet: Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIME, <http://www.ovc.gov/pubs/crimevictimsfundfs/intro.html> (last visited Feb. 1, 2015);

³⁹⁹ *Id.*; *Crime Victim Compensation: An Overview*, *supra* note 191.

⁴⁰⁰ U.S. DEP'T OF JUSTICE, *supra* note 198, at 21.

⁴⁰¹ Sheldon-Sherman, *supra* note 384, at 286–87.

‘actual damages’ of \$150,000, which is the minimum amount a plaintiff can be awarded.”⁴⁰² Courts have interpreted “personal injury” to include emotional harm and mental suffering.⁴⁰³

On its face, § 2255 is an excellent tool for victims of child pornography to have access to adequate damages. Even though the burden is on the plaintiff victim to prove “she suffered ‘personal injury’ as a result of the defendant’s predicate act,” cases like *Doe v. Boland* have shown this burden is not high.⁴⁰⁴ For victims who have the substantial time and resources required to pursue civil litigation, Masha’s Law is an option to be considered in addition to restitution and victims’ funds.

Unfortunately, when one considers the challenges of a civil suit under § 2255 more carefully, it becomes clear that these lawsuits present child pornography victims with a multitude of challenges. First, as with any form of civil litigation, it costs money to go through civil litigation and more money to pursue judgments. Even when defendants are wealthy, their funds may be sufficiently guarded so that plaintiffs bear the costs of going after judgments. There are also problems of judicial efficiency in pursuing civil litigation against defendants who are going through criminal trials. Courts must already hear the facts in a criminal case. There are questions about excessive costs to the public because of multiple hearings on the same issue. In these ways, restitution may be a better option. When one also considers the challenges that Amy’s attorney reports in trying to access the sexual abuse images on file with the Federal Bureau of Investigation (“F.B.I.”) and to establish chain of custody, both of which are necessary to prove her case, one starts to wonder if § 2255 provides any tangible relief to child pornography victims.⁴⁰⁵

Lastly, the civil recovery statute alone does not likely satisfy the United States’ obligations under the Optional Protocol. Article 9(4) of the Optional Protocol states, “States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”⁴⁰⁶ While the United States has previously cited Masha’s Law as a means of complying with Article 9(4), the U.N. Committee has continuously questioned the United States’ fulfillment of this treaty provision.⁴⁰⁷

E. Victims Should Pursue Copyright Protections and Remedies

One of the most perverse and frustrating aspects of child pornography is that the victims do not own or control the images of their sexual abuse. Thus, in Amy’s case, her attorney had to negotiate with the uncle who raped her to transfer his copyright in Amy’s sex abuse images to her.⁴⁰⁸ Amy and her attorney then tried to register her copyright in those images with the U.S. Copyright Office.⁴⁰⁹ Registering a copyright in her sex abuse images would allow Amy to bring a

⁴⁰² 18 U.S.C § 2255 (2012); Marsh, *supra* note 226, at 496.

⁴⁰³ Marsh, *supra* note 226, at 494; *see Doe v. Boland*, 698 F.3d 877, 880–81 (6th Cir. 2012).

⁴⁰⁴ *Id.* In *Doe v. Boland*, an attorney who superimposed the faces of children onto pornographic images of adults was ordered to pay three hundred thousand dollars in damages to the children pictured, because of emotional distress suffered by the children. Even though the children were not harmed in the creation of the images, the court recognized the emotional harm to the children in the distribution of the pornographic images. *Id.*

⁴⁰⁵ *See* Interview with James R. Marsh, *supra* note 181. Of course, this problem could be partially solved if courts were to identify known victims as part of the criminal judgment, but would not address the problem as to victims who were subsequently identified.

⁴⁰⁶ Optional Protocol, *supra* note 55, at art. 9(4).

⁴⁰⁷ *See supra* Part IV.B.

⁴⁰⁸ Interview with James R. Marsh, *supra* note 181. An initial review of the literature suggests that this is a novel approach to victim recovery that has not been previously considered. We were unable to identify any cases or law review articles that address the question of whether child pornography victims can use copyright infringement claims as a method of recovery against their perpetrators. This recovery method should be more fully explored, especially in light of the challenges child pornography victims face in receiving prompt and adequate restitution under *Paroline v. United States*.

⁴⁰⁹ *Id.*

copyright infringement claim against anyone who published her sex abuse images after the registration of her copyright and seek statutory damages under 17 U.S.C. § 504.⁴¹⁰ However, although the Copyright Office agreed to waive the registration fees, the Office initially insisted that the images had to be submitted with the application.⁴¹¹ Neither Amy nor her uncle had the images since they had been confiscated by the F.B.I. The F.B.I. refused to provide Amy, her attorney, or the Copyright Office copies of the sex abuse images since to do so, they argued, would violate the Adam Walsh Child Protection and Safety Act.⁴¹² Amy's attorney was finally able to convince the Copyright Office to submit written descriptions of the sex abuse images instead to complete the registration.⁴¹³

The advantages for a child pornography victim like Amy to register a copyright to her sex abuse images is not limited to the ability to seek statutory damages for infringement. It also allows the victim to demand that Internet Service Providers ("ISPs") notify the infringer, take down the images, or lose the safe harbor protections of the Digital Millennium Copyright Act.⁴¹⁴ If the Internet Service Provider fails to do so, the provider may be liable for monetary damages.⁴¹⁵ Either way, the victim benefits by being able to gain more control over the distribution and posting of her sex abuse images online, as well as having another source of recovery for the funds needed to support her restoration and reintegration.

Indeed, legislators should consider automatically assigning copyright to all sex abuse images (and all derivative works) to the victim portrayed, so that the victim has control over the images and is able to utilize copyright protections to limit their distribution and to seek damages from both individuals and ISPs who play a role (actively or passively) in perpetuating her victimization.⁴¹⁶ In the meanwhile, child pornography victims, their attorneys, and the government should seek an assignment of the copyright to the victim in all of their sex abuse images in concert with the criminal or civil proceedings against child pornography producers.

F. The Role of Private Industry: Private Regulation, Vicarious Liability, and Technological Solutions

Given the significant role that commercial technology has played in the global expansion of the child pornography industry and the perpetuation of victimization due to the digitalization and rapid redistribution of child sex abuse images, it is critical for private industry to be actively engaged in the effort to curb child pornography and protect and restore victims. As discussed in

⁴¹⁰ *Id.*; 17 U.S.C. § 504 (2012).

⁴¹¹ Interview with James R. Marsh, *supra* note 181.

⁴¹² *Id.*; 42 U.S.C. § 16918 (2012). The Adam Walsh Act severely restricts access to child sex abuse images. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 623 (2006). Although the initial intent of the restriction was to limit the alleged perpetrator's access to the images, the law has been interpreted by some government agencies to restrict access both by other government agencies and the victim herself. Interview with Andrew Oosterbaan, Jeffrey Zeeman, and Mi Yung Park, U.S. Dep't of Justice, Child Exploitation and Obscenity Section, in Washington, D.C. (Apr. 3, 2014); Interview with James R. Marsh, *supra* note 181.

⁴¹³ Interview with Andrew Oosterbaan, Jeffrey Zeeman, and Mi Yung Park, *supra* note 412.

⁴¹⁴ Digital Millennium Copyright Act, Pub. L. No. 105-304, § 512, 112 Stat. 2860, 2879 (1998).

⁴¹⁵ *Id.* § 202.

⁴¹⁶ Copyright as a remedy for victims of child pornography, revenge porn, and sexting should be considered in greater detail and more depth than space here allows, and the authors strongly encourage scholars, policymakers, and lawmakers to do so. Questions to be answered include when and how the copyright would vest (for example, the copyright could vest at the victim identification and notification stage), what is to be included as child sex abuse images subject to this automatic assignment (the federal definition of child pornography could be adopted), whether to waive notice requirements, registration, and fees, and whether the rights would be retroactive to the date of production. Of course, under normal circumstances, public policy would argue against the ability to hold copyright to child pornography but, under these circumstances, empowering victims to be able to actively pursue the take down of their images online, and to have increased access to monetary damages justifies a departure from this policy. Moreover, even if copyright could be held in child sex abuse images as a matter of public policy, the government could hold the copyright in trust for the victim, which would prevent perpetrators from owning the copyright, while still allowing victims to utilize copyright protections to control their images and seek damages when appropriate.

Part II.C above, Microsoft and Dartmouth College developed software that allows the rapid identification of child sex abuse images.⁴¹⁷ Twitter, Facebook, Google, and Microsoft have all implemented the software and are able to report identified images to the authorities.⁴¹⁸ More technology companies should utilize this software, as should the federal and all state and local governments.⁴¹⁹ All government contractors⁴²⁰ and entities receiving government funding should also be required to implement the software on their computers and systems as one of the conditions of receiving a government contract or funding. When one considers the reach of just this group—technology companies; federal, state, and local governments; government contractors; and government-funded entities—the distribution and consumption of child pornography would be substantially disrupted and likely reduced.

Moreover, lawmakers can incentivize private employers to implement similar software by creating employer liability for access of child pornography images on employers' computers by employees. Now that PhotoDNA is available to identify child sexual abuse images, it is time for lawmakers to revisit the safe harbor provisions of the Digital Millennium Copyright Act,⁴²¹ at least with respect to child pornography, since presumably now ISPs have the ability to identify the images quickly and efficiently. It is time for them to take a more active role in doing so.

G. Victims Should Seek and Receive Government Benefits Necessary to Support Their Restoration

The United States has an affirmative obligation as a party to the Optional Protocol to ensure that child pornography victims receive the services they need to become fully reintegrated into society.⁴²² In the reports filed by the United States with the U.N. Committee regarding the fulfillment of treaty obligations, the United States identified a variety of government programs that victims “may be eligible” for including Medicaid, TANF, and Job Corps, among others.⁴²³ If the United States is not going to provide victims access to efficient and effective remedies to support their recovery through restitution, civil remedies, and victims' funds, for example, the government's reliance on these programs to support victim recovery is that much more important. The restoration of all child pornography victims should be supported by categorical eligibility for a variety of government programs that provide or subsidize health care, nutrition, housing, education, and supplemental income. The United States should not limit eligibility for these and other support services to qualifications other than their status as a victim of child pornography.

H. Child Pornography Victims Should Seek Court Appointment of Attorneys or Guardians ad Litem to Assist Them

Federal law allows courts to appoint guardians ad litem to represent child victims and witnesses in federal criminal cases.⁴²⁴ However, an informal survey recently conducted by a law firm representing Amy suggests that courts almost never exercise this discretion in federal child

⁴¹⁷ *PhotoDNA Press Materials are Now on the Microsoft Digital Crimes Unit Newsroom*, *supra* note 135.

⁴¹⁸ See *supra* note 133 and accompanying text.

⁴¹⁹ Child pornography has been found on government computers, which could be more efficiently investigated with the use of technologies already available. See, e.g., *Defense Officials Investigated for Child Porn*, CNN (July 23, 2010, 2:37 PM), <http://www.cnn.com/2010/CRIME/07/23/pentagon.porn/>; Lori Handrahan, *To Catch Government Workers with Ties to Child Porn, Call the IRS*, FORBES (Sept. 19, 2012, 7:29 AM), <http://www.forbes.com/sites/85broads/2012/09/19/to-catch-government-workers-with-ties-to-child-porn-call-the-irs/>.

⁴²⁰ A Department of Defense contractor was charged with possessing child pornography on a government-issued computer. Mike Donoghue, *Defense Department Contractor from Colchester Faces Child-Porn Charges*, BURLINGTON FREE PRESS (Jan. 26, 2014, 12:00 AM), <http://www.burlingtonfreepress.com/story/news/2014/01/26/defense-department-contractor-from-colchester-faces-child-porn-charges/4922541/>.

⁴²¹ Digital Millennium Copyright Act, Pub. L. No. 105-304, § 512, 112 Stat. 2860, 2879 (1998).

⁴²² Optional Protocol, *supra* note 55, at art. 9(3); see discussion *supra* Part IV.B.

⁴²³ U.N. Committee on the Rights of the Child, *supra* note 279, at paras. 8–10.

⁴²⁴ 18 U.S.C. § 3509(h) (2012).

pornography cases.⁴²⁵ Of approximately 263 child pornography cases filed between 2000 and 2013, only three had a guardian ad litem appointed to represent the victim.⁴²⁶ In a fourth case, a Victim Witness Coordinator was noted on the record but did not appear to actively represent the victim.⁴²⁷ The complexity of the Supreme Court's decision in *Paroline*⁴²⁸ makes it more critical than ever for victims of child pornography to have sound legal advice and effective advocacy.

In one of the first child pornography restitution decisions issued after *Paroline*, the court noted "the difficulty of calculating an appropriate amount of restitution."⁴²⁹ In *United States v. Galan*, the Government sought restitution for two of the defendant's victims: \$3433 for "Cindy" and \$500 for "John Doe IV."⁴³⁰ Since *Paroline* failed to provide a reliable formula for calculating the amount of restitution owed to victims, in Cindy's case, the Government used the method of restitution endorsed by the Sixth Circuit in *United States v. Gamble*,⁴³¹ and pooled the losses incurred by Cindy after the date of the defendant's offense and then divided that amount by the number of standing restitution orders.⁴³² Based on the evidence submitted, the court found that Cindy was harmed by the defendant's trade in her sex abuse images, held that the *Gamble* method proposed by the government satisfied *Paroline*, and ordered restitution in the full amount sought (\$3433).⁴³³

However, the same court held that it could not order restitution in any amount for John Doe IV because the restitution submission on his behalf, which included both a previous restitution submission from 2008 and a recent letter from his adoptive mother that "evinces the extent of the trauma and torment caused by the continued trade in his images" and makes

⁴²⁵ Susannah Kahler, Marsh Law Firm, Preliminary Survey of Federal Child Pornography Production Cases Between 2000 and 2013 (Aug. 2013) (unpublished, on file with author).

⁴²⁶ *Id.* In *United States v. Duckey*, the Government moved for the appointment of a guardian ad litem "because the defendant is the father of the twelve-year-old victim." Motion to Appoint Guardian Ad Litem at 2, *United States v. Duckey*, No. CR 07-869-PHX-FJM, 2008 WL 619145 (D. Ariz. July 24, 2007). According to the motion:

The defendant admitted to an FBI agent that he beat the victim, and the victim's step-mother was a witness to this beating and past beatings. The victim's biological mother is not a part of the victim's life at this point. The victim is in the care of State CPS, and the defendant is fighting to get custody back of the victim. In order to proceed with this case, the prosecutor is required to confer with the victim or the victim's representative concerning various matters such as any possible resolution. Normally the prosecutor would confer with the victim's parents as the victim's representative. In the case at hand that is not possible since one is the defendant and one is a witness to the abuse.

Id. The court granted the motion and a non-profit victims' rights legal services organization was appointed as guardian ad litem. The defendant was ultimately acquitted, but the record reflects that the guardian ad litem actively participated in the proceedings.

In *United States v. Hoggard*, the Government filed a motion requesting the appointment of a guardian ad litem for two minor victims. Since all of the documents are sealed, it is not clear why the Assistant U.S. Attorney asked for the appointment of a guardian ad litem in this case. *United States v. Hoggard*, No. 00-20035-RTD (W.D. Ark. Aug. 16, 2000). The case involved a prosecution under § 2251(b) (parent or guardian involved in the production of child pornography). A private attorney was appointed as guardian ad litem to represent the victim. Ultimately, the case was dismissed upon the Government's motion (the record suggests that the defendant was being prosecuted in a parallel state proceeding).

In the third case, *United States v. Lewis*, the court, on its own motion, ordered the parties to show why a guardian ad litem should not be appointed pursuant to § 3509(h) for four sex trafficking victims who were minors. *United States v. Lewis*, No. 09-00213-EGS (D.D.C. Sept. 1, 2010). The court appointed a private attorney to serve as a guardian ad litem for the victims primarily for the purpose of assisting the court in determining restitution. The record indicates that the guardian ad litem actively participated in the proceeding by, inter alia, securing expert witnesses and filing and responding to motions. The court ultimately ordered almost four million dollars in restitution.

⁴²⁷ Kahler, *supra* note 425. In *United States v. Boyd*, the Government filed a motion asking that the U.S. Attorney's Victim Witness Coordinator be provided with emailed notices in the case, but there was no indication in the record that the Victim Witness Coordinator was "representing" the victim. *United States v. Boyd*, No. 06-00464-DB (D. Utah July 14, 2006).

⁴²⁸ See, e.g., *Paroline v. United States*, 134 S. Ct. 1710, 1727-29 (2014) (determining the amount of restitution).

⁴²⁹ *United States v. Galan*, No. 11-60148-AA, 2014 WL 3474901, at *4 (D. Or. 2014).

⁴³⁰ *Id.* at *3.

⁴³¹ *United States v. Gamble*, 709 F.3d 541, 554 (6th Cir. 2013).

⁴³² *Galan*, 2014 WL 3474901, at *3.

⁴³³ *Id.* at *6.

“palpable” the “heartache and grief” experienced, did not provide an amount of losses incurred after the defendant’s offense nor provide a basis for calculating an amount of losses attributable to child pornography offenses.⁴³⁴ Thus, the court held that it “regrettably” could not honor the restitution request submitted on behalf of John Doe IV, “even in the amount of \$500.”⁴³⁵ The court explained its frustration with the current statutory framework:

Though the court has awarded restitution, the negligible amount and the piecemeal process under [the Mandatory Restitution Statute] can hardly be considered a victory for Cindy and other victims like her. The current statutory process for restitution does not fully compensate losses suffered by child pornography victims and may, in fact, dissuade victims from seeking restitution; the end result is hardly worth yet another reminder of their continued exploitation. The court cannot remedy this problem. Rather, it is up to Congress to develop a system to truly compensate child pornography victims for the losses they continue to suffer.⁴³⁶

The restitution opinion in *Galan* highlights the complicated analysis that courts must apply in light of *Paroline* (at least until Congress fixes the current statutory framework),⁴³⁷ and the need for victims to receive accurate and adequate guidance and support so that they can access the resources they need to fully recover.

Indeed, the United States, and other states parties to the Optional Protocol, are expressly required to provide child pornography victims with support during criminal proceedings under Article 8, which states, “States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process.”⁴³⁸ Specifically, states parties must inform victims of “their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases,”⁴³⁹ provide “appropriate support services to child victims throughout the legal process,”⁴⁴⁰ and “take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.”⁴⁴¹ Finally, the best interests of the child shall be a primary consideration in the treatment of child victims by the criminal justice system.⁴⁴²

⁴³⁴ *Id.* at *7–8.

⁴³⁵ *Id.* at *8.

⁴³⁶ *Id.*

⁴³⁷ Another opinion issued shortly after *Paroline*, echoes the frustrations conveyed by the *Galan* court. In *United States v. Crisostomi*, the court wrote:

For each of the victims, there are well-documented past and future medical and legal needs that can be considered for restitution. Nevertheless, even with the factors provided by the U.S. Supreme Court, this court has struggled in determining the proper level of restitution from Mr. Crisostomi. In this Court’s opinion, while some of the *Paroline* factors are determinable with some precision, a number of the factors are virtually unknown and unknowable, regardless of the detail available in the record. For example, how is a district judge to make a “reliable estimate of the broader number of offenses involved” when even the U.S. Supreme Court admits parenthetically that “most of whom will, of course, never be caught, or convicted?” It appears to this Court that some of the factors that the Supreme Court suggests be considered are at best difficult, and at worst impossible to calculate in this case as in most similar cases.

United States v. Crisostomi, No. 12-166-M, 2014 WL 3510215, *25–26 (D.R.I. July 16, 2014) (citation omitted).

⁴³⁸ Optional Protocol, *supra* note 55, at art. 8.

⁴³⁹ *Id.* at art. 8(1)(b).

⁴⁴⁰ *Id.* at art. 8(1)(d).

⁴⁴¹ *Id.* at art. 8(4).

⁴⁴² *Id.* at art. 8(3).

These provisions are in addition to those previously discussed in this Article including the United States' obligation to "take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery,"⁴⁴³ and to "ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible."⁴⁴⁴ In light of these obligations under the Optional Protocol, it is clear that victims of child pornography like John Doe IV in *Galan* need well-trained professional support and advocacy to guide them through today's complex restitution process and to direct them to other resources that can support their restoration such as victims' funds, civil remedies, copyright protections, government benefits, and more. Thus, federal courts routinely should be appointing guardians ad litem or attorneys to support child pornography victims under the law,⁴⁴⁵ and sufficient funding should be allocated specifically for that purpose.

VI. RESTORING FOREIGN VICTIMS

One of the most challenging and urgent aspects of victim restoration in the early twenty-first century is ensuring that foreign victims have meaningful access to the resources they need to support their full restoration. As one of the largest consumers of child pornography and a party to the Optional Protocol, the United States has a duty to ensure that victims from other countries are fully restored, at least from sexual exploitation by offenders who are citizens of or present in the United States (or its territories or aircraft or ships) or when the offenses were committed here.⁴⁴⁶ Although the Optional Protocol expressly distinguishes between those offenses that states parties are obligated to establish jurisdiction over, it does not limit the population of victims whose restoration must be supported with equal access to adequate procedures to seek compensation from those legally responsible.⁴⁴⁷

Specifically, Article 4 provides that a State Party "shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State."⁴⁴⁸ States parties also are required to "take such measures as may be necessary to establish its jurisdiction over the above-mentioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals."⁴⁴⁹ In other words, the Optional Protocol mandates that the United States work to establish jurisdiction if either (1) a child pornography offence is

⁴⁴³ *Id.* at art. 9(3).

⁴⁴⁴ *Id.* at art. 9(4).

⁴⁴⁵ 18 U.S.C. § 3509 (2012).

⁴⁴⁶ As discussed *supra* Part IV.B, Article 9(4) of the Optional Protocol states, "States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible." Optional Protocol, *supra* note 55, at art. 9(4). The language seems to imply that states parties have a duty to provide procedures for *all* child victims to receive compensation from those legally responsible. Further, Article 4(2) confers jurisdiction on states parties when the perpetrator is a national of the state, the perpetrator has his habitual residence in the territory, or the victim is a national of that state. *Id.* at art. 4(2). The broad scope of jurisdiction seems to imply that foreign victims are encompassed in "all child victims."

⁴⁴⁷ Optional Protocol, *supra* note 55, at art. 9(4).

⁴⁴⁸ *Id.* at art. 4(1) (emphasis added). The offenses referred to in Article 3, paragraph 1, expressly include "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2." *Id.* at art. 3(1)(c). Article 2 defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes." *Id.* at art. 2(c).

⁴⁴⁹ *Id.* at art. 4(3).

committed in the United States, its territories, or aircraft or ships registered in the United States, or (2) an alleged child pornography offender is simply present in U.S. territories.⁴⁵⁰ The only exception is if the alleged offender in the latter circumstance is being extradited for the offense, but only if the country to which the alleged offender is being extradited is also a state party to the Optional Protocol and the extradition is based on the fact that the alleged offender is a national of the receiving state.⁴⁵¹ When one considers the scope of child pornography offenses and offenders subject to the mandatory assertion of jurisdiction by the United States, the country's potential impact on child pornography crimes worldwide is profound.

However, there is more. In addition to the United States' mandatory assertion of jurisdiction over offenses and crimes under the circumstances described above, the Optional Protocol also allows the United States to work to establish jurisdiction over child pornography offenses without regard to where they occurred or where the alleged offender is if (1) the victim is a U.S. national, (2) the alleged offender is a U.S. national, or (3) the alleged offender makes the United States his or her habitual residence.⁴⁵² In summary, the United States either must or may try to establish jurisdiction over all alleged child pornography offenses committed: (1) against U.S. nationals (optional); (2) by U.S. nationals (optional);⁴⁵³ (3) by persons who make the United States their habitual residence (optional); (4) in the United States, its territories, or on board a ship or aircraft registered in the United States (mandatory); or (5) by an alleged offender who is present in the United States or its territories (subject to the extradition exception outlined above) (mandatory). This wide assertion of jurisdiction could be even greater if one were to recognize that child pornography offenses that are committed via ISPs based in the United States bring those offenses within the mandatory jurisdiction provision of Article 4, paragraph 1 of the Optional Protocol.⁴⁵⁴ In other words, it is arguable that the U.S. government is obligated to work to assert jurisdiction of a child pornography offense involving a Dutch national viewing the sexual abuse images of a Filipino child via an ISP based in the United States, even if neither the offender nor the victim has ever stepped foot in the United States physically. Such are the jurisdictional challenges of child pornography in the digital age.⁴⁵⁵ It becomes even more complex when one tries to define the "presence" of an alleged offender under Article 4, paragraph 3 committing a digital crime over an international network. Are we moving in a direction where a digital presence online will bring an offender or a victim under a country's jurisdiction without direct physical contact within the country's jurisdictional boundaries?

Even before these rapidly emerging questions are definitively answered, it is clear that the Optional Protocol obligates the United States to support the restoration of a significant number of child pornography victims both at home and abroad. At a minimum, it owes support to victims of offenses where the United States has (or should have) asserted jurisdiction. This support is owed to all victims of such offenses regardless of the victim's nationality or residence. In Article 8, it can be argued that the protections to victims are contextually limited to those

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.* at art. 4(2).

⁴⁵³ As noted in Part III.A, the PROTECT Act provides for extraterritorial prosecution of U.S. nationals. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. § 2252 (2012)).

⁴⁵⁴ Optional Protocol, *supra* note 55, at art. 4(1).

⁴⁵⁵ Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1954 (2005); Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community*, 4 J. GENDER RACE & JUST. 15, 29–32 (2000). States Parties to the Optional Protocol should consider amending the treaty to more precisely define where a digital offense of child sexual exploitation is deemed to occur. A limited attempt was made to allow for recognition of overlapping jurisdictional authority in the Optional Protocol. Optional Protocol, *supra* note 55, at art. 5(4).

engaged in the criminal justice process, but Article 9 provides no explicit or implicit limitation on which victims are to be supported in “their full social reintegration and their full physical and psychological recovery.”⁴⁵⁶ Instead, States Parties are simply obligated to “take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences” in their full restoration.⁴⁵⁷ There is no limitation on victims. Moreover, Article 9, paragraph 4, expressly provides that states parties “must ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, *without discrimination*, compensation for damages from those legally responsible.”⁴⁵⁸ In short, it is arguable that the United States, and all other states parties to the Optional Protocol, is legally obligated to ensure that all victims of child pornography, regardless of nationality, residence, or location of offense or offender, are able to pursue compensation for the harms they have suffered.

One may interpret the legal obligations of the United States under the Optional Protocol several ways: (1) supports the restoration of only those victims harmed by those offenses that the United States actually gained jurisdiction over; or (2) expands the population to include those victims of offenses that the United States was mandated to try to assert jurisdiction of; or (3) further widens the population to include victims of those offenses that the United States had discretion to claim jurisdiction of; or (4) defines the population to its widest possible scope and asserts that the United States is obligated to support the restoration of all victims of child pornography around the world. Regardless, no one can dispute that within this population, even in its narrowest scope, is a group of victims who are foreign to the United States. The Optional Protocol is clear that the United States must ensure that they, too, have equal access to adequate procedures to seek compensation from those legally responsible.⁴⁵⁹

As outlined above, the United States' current statutory framework is failing domestic victims of child sex abuse and must be redesigned. During the process, it is critical for lawmakers to ensure that foreign victims will also have meaningful access to resources to support their recovery. As challenging and time- and resource-consuming as civil recovery is for domestic victims, it is not difficult to recognize that such lawsuits become virtually impossible for a village child in Guatemala, for example. Restitution is also clearly an empty process for most foreign children. If the Assistant U.S. Attorney working with John Doe IV and his adoptive mother in *Galan* was unable to prepare a restitution application that meets the standards of *Paroline*,⁴⁶⁰ then how is a rural child from Thailand expected to do so, especially when, as witnessed in most federal child pornography cases in recent years, the court fails to appoint a guardian ad litem?

With neither civil recovery nor restitution providing any meaningful access to adequate procedures to seek compensation for foreign victims, victims' funds become increasingly prominent as a possible solution. Unfortunately, most state-administered victims' funds currently require that the offense was committed in the state or the victim is a resident of the state in order for a claim to be approved.⁴⁶¹ When a perpetrator possesses or distributes foreign child pornography from his U.S. residence, the foreign victim should, at least, be able to recover some

⁴⁵⁶ Optional Protocol, *supra* note 55, at art. 9(3).

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at art. 9(4) (emphasis added).

⁴⁵⁹ *Id.*

⁴⁶⁰ *See supra* Part V.G.

⁴⁶¹ *See, e.g.*, OR. REV. STAT. ANN. § 147.015 (West 2015) (stating a person is eligible for compensation if defined as a victim); OR. REV. STAT. ANN. § 147.005(15) (West 2015) (defining victim as an Oregon resident or if the act occurred in the state). The requirement that the act occur in the state or the victim be a resident of the state is a mandate of using federal funds. 42 U.S.C. § 10602(b) (2012).

compensation from the victims' fund in the state where the perpetrator lives or where the offense was committed.⁴⁶²

Even when the law allows foreign victims to recover in the United States, many challenges are inherent. Child pornography distribution and possession offenders often live thousands of miles away from the victims and are never prosecuted. If a perpetrator were convicted, the cost to the victim in pursuing recovery in a foreign jurisdiction would be considerable, making recovery both impractical and unlikely. As discussed,⁴⁶³ victims' funds appear to be vastly underutilized by domestic victims; it is hard to envision foreign victims overcoming the administrative and other challenges that domestic victims have been unable to tackle, starting with the exclusion of certain child pornography offenses from eligibility in many state-administered victims' funds.

A coordinated global response focused on victim restoration may be the answer. Currently, no international body exists that distributes compensation to victims of child pornography. As child pornography continues to become more transnational, countries must consider how victims of one country can recover from perpetrators of another country in a fair and efficient method. There are a variety of models to consider.

States parties to the Optional Protocol could task the U.N. Committee with hearing claims.⁴⁶⁴ This could be done as an expansion of the Optional Protocol to the Convention on the Rights of the Child on the Communications Procedure, which already allows for the filing of individual claims, but in a different context.⁴⁶⁵ Alternatively, the international community could create a new international court or hearing body (or amend the International Court of Justice's jurisdiction)⁴⁶⁶ to hear international child pornography claims from individual claimants. Another model would be an "International Victims Fund" modeled after the International Monetary Fund where countries would contribute to the fund on a pro rata basis according to the share of the child pornography offenses committed in their country or by their residents or nationals. Individual countries could collect their pro rata contributions to an international victims' fund from, for example, offenders' fines, penalties, forfeited bail bonds, and disgorged profits. Victims of child pornography could apply for a distribution from the fund regardless of the child's residence or nationality, the offender's residence or nationality, or the location of the offense.

Of course, the creation of an international victims' fund presents its own set of questions and challenges. For example, should all distributions be equal or should they be adjusted based upon the victims' local economy? A twenty-five thousand dollar distribution to a child in a rural village in India could have a significant transformative impact on a child and her family, and that impact could be positive or negative. Indeed, it could in fact, prevent the victim's rehabilitation and reintegration into her community, which would be contrary to the intent of the Optional Protocol. On the other hand, if distributions are made based on the victims' local economy, would that not create economic classes of victims that perpetuate and institutionalize discriminations

⁴⁶² However, as discussed above, determining the location of digital offenses is becoming increasingly complex. *See supra* Part II.A.

⁴⁶³ *See supra* Part III.B.

⁴⁶⁴ The U.N. Committee was established by the CRC and includes eighteen independent experts that monitor the implementation of the CRC and the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography. Convention on the Rights of the Child, *supra* note 257, at art. 42–43; Optional Protocol, *supra* note 55, at art. 12. States Parties submit reports to the Committee on their implementation and the Committee may make recommendation on the state party's improved compliance. Convention on the Rights of the Child, *supra* note 257, at art. 44; Optional Protocol, *supra* note 55, at art. 12.

⁴⁶⁵ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res. 66/138, annex, U.N. Doc. A/RES/66/138, 66th Sess. (Jan. 27, 2012).

⁴⁶⁶ The International Court of Justice ("ICJ") is the primary court for disputes between U.N. member states. Currently the ICJ only has jurisdiction when a dispute is between states. Statute of the International Court of Justice art. 34(1), June 26, 1949, 59 Stat. 1031, 33 U.N.T.S. 993. If the ICJ were to hear claims by individuals, the ICJ statute would need to be amended.

that already exist within the global community? Should there be controls in place to ensure that fund distributions are being used for victim restoration or will it be paid to victims and their families without any conditions on how it is used? How can the international community ensure that the funds distributed are used for the benefit of the victim? If trusts are created for victims to ensure that the funds are used for their benefit, who would administer the trusts and oversee their integrity? How could an international fund avoid fostering “jackpot” mentality that might further incentivize the exploitation of vulnerable children? Would an international fund encourage and reward a victim mentality? Are there ways to create a fund that would foster and value victims’ resiliency and help them to view themselves as survivors? Is a “survivor mentality” possible in light of the continued victimization that is characteristic of child pornography in the digital age? These are just a few of the questions that should be considered as the United States and other States Parties to the Optional Protocol find ways to fulfill their legal obligations under Article 9 to support the full restoration of victims of child pornography in the digital age.

VII. CONCLUSION

Child pornography is rapidly spreading across the globe because of the rise of the Internet and other technologies. These technologies have compounded the harm caused to victims. No longer can a victim achieve full and lasting recovery after the initial sexual abuse ends. Today’s victims now face the possibility that they will be continually revictimized around the world as child pornography perpetrators view and distribute the sex abuse images of the original crimes. Victim restoration is as important as ever, but has become far more complex in an age of digitalization and increased globalization.

Although the United States provided leadership in creating a legal framework domestically and internationally to help combat child pornography and provide restoration to victims, the current framework is failing victims on a near-universal basis by not ensuring the recovery of victims. As all nine Justices of the U.S. Supreme Court made clear in *Paroline*, child pornography victims are entitled to restitution to support their restoration.⁴⁶⁷ The challenge is determining how, when, and in what amount. None of the current legal resources—the mandatory restitution statute, civil remedies, crime victim funds, or government benefits—provides child pornography victims with reliable access to resources that effectively support their full recovery and reintegration. It is time for the United States to adopt and implement effective legislation that supports the recovery of both domestic and foreign victims of child pornography and to ensure that they have meaningful access to the support and resources they need to fully recover from their abuse and exploitation.

⁴⁶⁷ *Paroline*, 134 S. Ct. at 1722, 1730, 1735.