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MANDATORY RESTITUTION FOR ENTICING A MINOR FOR SEXUAL PURPOSES: ADDITIONAL PUNISHMENT OR COMPENSATION FOR THE VICTIM?

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I. INTRODUCTION

The federal government charged and convicted Thomas Patrick Keelan (hereinafter "Keelan") under 18 U.S.C. § 2422(b) for coercing and enticing J.S., a fifteen-year-old boy, for prostitution or sexual activity by means of interstate commerce, and for an attempt at coercing and enticing J.S for prostitution or any sexual activity by means of interstate commerce.[1] On May 13, 2015, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order for Keelan to pay mental health expenses to J.S.'s parents as restitution.[2] On January 11, 2016, the Supreme Court denied certiorari to this case.[3] Pursuant to the Mandatory Victims Restitution Act ("MVRA"), Keelan was required to pay restitution for two counts of coercing and enticing a minor for prostitution.[4] The MVRA provides, inter alia, that a district court must order a defendant to pay restitution to the "victim" of a "crime of violence."[5]

Keelan's charges arose from his improper one-year sexual relationship with fifteen-year-old high school student, J.S.[6] Keelan was fifty-one years old and taught at J.S.'s Jewish high school.[7] J.S. suffered from racial, religious, and sexual identity discrimination, and after confiding in Keelan, their relationship gradually became sexual in nature.[8] At trial, the government offered expert testimony showing that Keelan's interactions with J.S. were part of a common technique that child predators used to manipulate their victims called the "grooming process."[9] The grooming

1. *See* United States v. Keelan, 786 F.3d 865, 866 (11th Cir. 2015) [hereinafter 18 U.S.C. § 2422(b) will be referred to as the crime of enticement and coercion of a minor] (explaining that Keelan maintained a sexual relationship with a high school student, J.S., for over a year and often traveled across state lines to continue the relationship until apprehended by an FBI agent).

2. *Id.* (showing the district court gave a restitution order of $104,886.05 for J.S.'s mental health expenses under the Mandatory Victim's Restitution Act).

3. *See* United States v. Keelan, 786 F.3d 865 (11th Cir. 2015), cert. denied, 136 S.Ct. 857 (U.S. Jan. 11, 2016) (No. 15-7100) (showing that the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit was denied).

4. *See id.* at 866. (charging Keelan under 18 U.S.C. § 2422(b) (2015)).

5. *See* 18 U.S.C. § 3663A(c)(1)(A) (2015) (allowing courts to order defendants to pay mandatory restitution for any harm caused if the offense is a crime of violence).

6. *Keelan*, 786 F.3d at 865 (declaring as a case of first impression that 18 U.S.C. § 2422(b) is a crime of violence pursuant to U.S.S.G. § 4B1.2(a)(2) and the MVRA).

7. *See id.*

8. *See id.* at 870 (showing J.S. confessing he was homosexual and being persuaded to explore sexual activity by Keelan).

9. *See id.*; *see generally* Thomas D. Lyon, *Children's Memory for Conversations about Sexual Abuse: Legal and Psychological Implications*, 19 ROGER WILLIAMS U.L. REV. 411, 423-24 (2014) (defining "child grooming" as the relationship between a

process refers to the relationship between a child and a child predator where the predator capitalizes on the child's trust, compliance, and silence to make the child comfortable with the prospect of having sex.[10] At Keelan's suggestion, they incorporated sex toys, bondage, pornography, and sadomasochism into their relationship.[11] Keelan relocated to Virginia for another teaching job but he would regularly drive back to Florida where he would select, reserve, and pay for a room to have sex with J.S.[12] J.S. cooperated with law enforcement officials who arrested Keelan during a sting operation at the Florida hotel.[13] On his way down to the hotel on an interstate highway, Keelan also bought various sex toys to use on J.S.[14] When FBI agents searched Keelan's car, they found a wide array of sex toys, bondage devices, lubricant, and pornographic DVDs featuring young adult males that Keelan purchased to use on J.S.[15]

Keelan argued against the propriety of the restitution order because J.S. did not suffer a bodily injury and J.S. cannot recover mental health expenses.[16] He also argued that his offense did not cause the medical treatment expenses.[17] Although he did admit that his offense was a crime of violence under the United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(a)(2), Keelan argued that coercion and enticement of a minor was not a crime of violence under the definition in 18 U.S.C. § 16(b).[18]

This Comment argues that coercion and enticement of a minor is a crime of violence under both 18 U.S.C. § 16(b) and U.S.S.G. § 4B1.2(a)(2); therefore, a victim of that type of crime should be paid restitution under the

child and a perpetrator where the perpetrator uses a specific method to capitalize on the child's trust to sexually exploit the child).

10. *C.f.* Lyon, *supra* note 9.

11. *See Keelan*, 786 F.3d at 868 (showing Keelan blindfolded, tied, spanked, and whipped J.S during their sexual encounters).

12. *See id*.

13. *See id.* at 865.

14. *See* Brief for Government at 11, United States v. Keelan, 786 F.3d 865 (2015) (No. 12-20496) (showing that Keelan incorporated sex toys such as cock rings, various bondage and restraint devices, nipple clamps, condoms, old ties, rope, a whip, a feather duster, six bottles of lubricant, dildos, two dozen latex gloves, a dual butt plug, and a muscle relaxant)

15. *See Keelan*, 786 F. 3d at 865 (finding the pornographic DVDs featured young males with sexually explicit titles and contents).

16. *See id.* at 872.

17. *See id.* (explaining defense counsel's argument there was no nexus between the enticement crime and psychological damage therefore Keelan should not be forced to pay mandatory restitution to J.S.'s parents).

18. *See id*. at 868. (showing that Keelan admitted to his crime under 18 U.S.C. § 2422(b) but that the crime was not included in the MVRA).

MVRA.[19] Part II of this Comment examines the type of victim the MVRA intended to protect, discrepancies in the definition of a crime of violence, and the crime of violence standard using the categorical and ordinary case approaches.[20] Part III argues that multiple definitions create restitution difficulties for the courts, victims, and the defendant; namely, if the defendant is considered a repeat offender.[21] Part IV recommends that there should be stricter elements to determine a crime of violence.[22] Finally, Part V concludes that the coercion and enticement of a minor should be considered a crime of violence because sexually exploited children are always at risk of danger.[23]

II. BACKGROUND

A. Mandatory Victims Restitution Act

Federal courts typically lack jurisdiction to order any type of restitution; however, Congress enacted a statute to permit federal court-ordered restitution for special circumstances.[24] On April 24, 1996, Congress codified the MVRA as a provision of the Anti-Terrorism and Effective Death Penalty Act.[25] This distinguishes itself by not only providing a means for punishment or rehabilitation, but also attempting to provide victims with a way to recover their personal and financial losses to create a more victim-focused criminal justice system.[26] Specifically, the MVRA requires that a defendant pay a victim court-ordered mandatory restitution for their crime.[27] The MVRA's restitution requirements are distinguished

19. *See* 18 U.S.C. § 3663A(c)(1)(A) (2015) (explaining that victims of a crime of violence as defined under 18 U.S.C. § 16(b) are entitled to restitution under the MVRA if the committed crime had a potential risk of physical harm).

20. *See infra* Part II (explaining the persons entitled to mandatory restitution under the MVRA).

21. *See infra* Part III (arguing that the different distinctions in crime of violence definitions allow defendants the opportunity to avoid paying restitution to victims).

22. *See infra* Part IV (recommending a creation of explicit elements for a crime of violence).

23. *See infra* Part V (concluding that the categorical approach to interpreting the MVRA should apply to § 2422(b)).

24. *See* Beth Bates Holliday, Annotation, *Who is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. Fed. 2d 283 (2008).

25. See 141 Cong. Rec. H1302-03 (daily ed. Feb. 7, 1995) (statement of Rep. Price).

26. *See id.*

27. *See* 18 U.S.C. § 3663A(a)(1) (2015) (stating that notwithstanding any other provision of law, when sentencing a defendant convicted of an offense of a crime of

from restitution orders governed by the Victim and Witness Protection Act in 18 U.S.C. § 3663 because judges can order the restitution.[28] The statute defines a victim as a person directly and proximately harmed by a crime of violence resulting from the defendant's criminal conduct.[29] Additionally, when a victim is a minor, the legal guardian of the victim may assert the victim's rights.[30]

To understand the application of the MVRA, it is necessary to understand several different provisions of federal law.[31] The MVRA *only* applies to crimes of violence under the definition of 18 U.S.C. § 16 and cannot be used otherwise.[32] The act was broadly created to reform the federal criminal code in areas such as sentencing, bail, and drug enforcement and the statute's definitions also include a distinction between violent and non-violent offenses.[33] 18 U.S.C. § 16(a) defines a "crime of violence" as an offense involving an element of physical force while the definition of 18 U.S.C. § 16(b) defines a "crime of violence" as an offense involving a substantial risk of physical force against another person or property during the execution of the offense.[34] The MVRA also requires that a known victim suffer physical injury or calculable monetary loss.[35] The MVRA requires four criteria to be met: (1) a crime of violence must have occurred; (2) the victim suffered bodily injury; (3) there is a

violence, the court shall order that the defendant make restitution to the victim of the offense).

28. *See id.* (allowing district courts to order restitution for victims of violent crimes).

29. *See* 18 U.S.C. § 3663A(a)(2) (defining "victim" under the MVRA).

30. *See id.* (allowing the legal guardian of the victim, a representative of the deceased's estate, or legally appointed individual to assert the victim's rights, but the defendant cannot be named as such representative or guardian).

31. *See generally* 18 U.S.C. § 16 (2015) (defining a crime of violence for sentencing purposes); *see also* U.S.S.G. § 4B1.2 (2015) (defining a crime of violence under the U.S. Sentencing Guidelines).

32. *See* 18 U.S.C. § 3663A(c)(1)(A)(i)(explaining that only defendants who commit a crime under the specific definition defined in 18 U.S.C. § 16 (2015) can receive mandatory restitution).

33. *See Leocal v. Ashcroft*, 543 U.S. 377, 381 (2004) (citing § 1001(a), 98 Stat. 2136) (showing the legislative history of 18 U.S.C. § 16).

34. *Compare* 18 U.S.C. § 16(a) (2015) (explaining a crime of violence needs an element of physical force during the commission of the crime); *with* 18 U.S.C. § 16(b) (2015) (explaining the requirements for a crime of violence that is not an enumerated felony or has an element of actual physical force).

35. *See* 18 U.S.C. § 3663A(c)(1)(B) (explaining that the monetary damages awarded under the MVRA may be applied as mental health damages associated to a victim if there is a proven nexus between the defendant's conduct and the victim's mental health issues).

calculable amount of costs; and (4) there is proximate cause between the injury and the restitution.[36] When a crime is considered a crime of violence under the MVRA, the convicted defendant may become a classified career criminal for sentencing purposes.[37]

Keelan was convicted of one count of coercion and enticement of a minor and one count of attempted coercion and enticement of a minor.[38] The statute he was convicted under assigns criminal culpability to an individual who uses interstate commerce to knowingly persuade, induce, entice, or coerce a minor to engage in prostitution or sexual activity.[39] Keelan's case is a matter of first impression because coercion and enticement of a minor was never categorized as a crime of violence under the definition of § 16(b).[40] The Eleventh Circuit used the sentencing guidelines definition of a "crime of violence" as a comparison to 18 U.S.C. § 16's definition.[41]

1. Discrepancies between 18 U.S.C. § 16(b) and U.S.S.G. §4B1.2(a)(2)

As emphasized by *United States v. Schmidt*, the MVRA has two factors to consider when determining whether restitution is allowed.[42] The first factor in determining restitution is whether the victim is the type of victim covered by restitution in the act.[43] The second factor is whether the victim suffered a harm that can be calculated.[44]

Case law creates a distinction in interpreting the construction of § 16(b) and § 4B1.2 for three main reasons.[45] First, the case *United States v.*

36. *See* 18 U.S.C. § 3663A (explaining the four elements required by statute necessary to receive restitution).

37. *See id.* (demonstrating that under the MVRA a defendant may also be considered a career criminal).

38. *See* United States v. Keelan, 786 F.3d 865, 865 (11th Cir. 2015).

39. *See* 18 U.S.C. § 2422(b) (2015) (explaining the elements for the federal crime of coercion and enticement of a minor).

40. *See Keelan*, 786 F.3d at 868 (explaining that a violation of 18 U.S.C. § 2422(b) had not previously been considered a crime of violence, but Keelan conceded his crime was violent under U.S.S.G. § 4B1.2.).

41. *See id.*; *see also* U.S.S.G. § 4B1.2(a)(2) (2015) (defining a crime of violence as involving conduct with a serious potential risk of physical injury to another).

42. *See* United States v. Schmidt, 675 F.3d 1164, 1170 (8th Cir. 2012) (determining that government employees can be considered victims under the MVRA).

43. *See id.* at 1167-68.

44. *See id.* at 1169 (showing that calculated harm is any harm that can be converted into a monetary value).

45. *See generally* United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001) (illustrating distinctions in definitions between 18 U.S.C. § 16(b) and U.S.S.G. § 4B1.2).

Chapa-Garza holds that § 16(b) has narrower language than § 4B1.2(a)(2).[46] Second, that the "substantial risk that physical force . . . may be used" from § 16(b) implies only reckless disregard for the probability that intentional force may be used.[47] Third, the physical force in § 16(b) is force that is used during the committing of the crime and not force that resulted from the offense.[48] The Fifth Circuit reinforced this notion in *United States v. Charles*, where the court concluded that there were many definitions of a crime of violence and that each definition may have a different application.[49]

A distinction between violent and non-violent crimes creates a way to decide sentencing penalties.[50] Under 18 U.S.C. § 924, a crime of violence has a substantially similar definition to the definition used in § 16(b).[51] A crime defined as a crime of violence in 18 U.S.C. § 16(b) will be subject to the sentencing increases as defined by U.S.S.G. § 4B1.1.[52] When classifying a crime, the statute uses the terms "crime of violence" and "violent felony" interchangeably.[53]

The issue of whether coercion and enticement of a minor is considered a crime of violence had not been directly addressed by the Eleventh Circuit prior to *Keelan.*[54] However, the Tenth Circuit considered this issue in *United States v. Johnson* where the defendant challenged an MVRA restitution order for one count of coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b) and one count of interstate travel for the

46. *See Chapa-Garza*, 243 F.3d at 924 (holding driving while intoxicated is not a violent felony under the Sentencing Guidelines because §16(b) is narrower than U.S.S.G. § 4B1.2.).

47. *See id.* (explaining that the language of U.S.S.G. § 4B1.2 (2015) is broader than the language in 18 U.S.C. § 16(b) (2015)).

48. *See id.*

49. *See* United States v. Charles, 301 F.3d 309, 309 (5th Cir. 2002) (acknowledging that while the definitions for a crime of violence under § 16(a) and § 4B1.2(a)(1) are identical, they are interpreted differently).

50. *See* 18 U.S.C. § 924 (2015).

51. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2015) (defining a crime of violence as involving a substantial risk that physical force).

52. *See* 18 U.S.C. § 924(e)(1) (2015) (stating a felon with three previous convictions for other violent felonies shall be fine and imprisoned not less than fifteen years without sentence suspension or probation).

53. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (stating a violent felony is any crime punishable by imprisonment for a term exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another").

54. *See* United States v. Keelan, 786 F.3d 865, 865 (11th Cir. 2015) (analyzing whether 18 U.S.C. § 2422(b) (2015), is considered a crime of violence under the MVRA).

purpose of engaging in sexual acts with a minor in violation of 18 U.S.C. § 2423(b).[55] The defendant argued that the restitution was unlawful because the court did not consider his ability to pay.[56] The Tenth Circuit affirmed the decision of the district court without actually addressing whether the charges were crimes of violence.[57] The Eleventh Circuit, however, responded by citing that the Ninth Circuit did address transportation of a minor as a crime of violence for restitution purposes.[58]

2. Determining the Crime of Violence Standard

While Keelan's scenario is a case of first impression, precedent exists for classifying the charge as a crime of violence according to U.S.S.G. § 4B1.2(a)(2) on the basis that the crime itself involves conduct that, by its nature, poses a serious potential risk of physical injury to another.[59] For example, in *United States v. Searcy,* the Eleventh Circuit broadly ruled that any felony involving the sexual exploitation of a minor inherently retains a serious potential risk of physical injury to the victim and is a "crime of violence" using the categorical approach.[60] In *United States v. Rutherford,* the same court found that a court should only look to the elements of the convicted offense and not the underlying conduct of the conviction for determining violent felonies.[61]

Additionally, the Tenth Circuit in *United States v. Munro* held that crimes involving child exploitation will always have a substantial risk that physical force will be used to ensure a child's submission to the predator's sexual demands.[62] Furthermore, in *United States v. Johnson*, the Tenth

55. *See* United States v. Johnson, 183 F.3d 1175, 1176 (10th Cir. 1999) [hereinafter 18 U.S.C. § 2423(b) (2015) will be referred to as 'transportation of minors'].

56. *See id.* (arguing that the court should consider the defendant's unemployed status and inability to pay restitution).

57. *See id.* at 1178. (showing that the defendant failed to prove standing in his appeal, thus the MVRA crime of violence analysis was unnecessary because the order was valid).

58. *See id.* at 1179; *see also* United States v. Butler, 92 F.3d 960, 964 (9th Cir. 1996) (deciding that § 2423(b) is a crime of violence by its nature).

59. *Compare* United States v. Searcy, 418 F.3d 1193, 1196 (11th Cir. 2005) (using the categorical approach to determine crimes of violence); *with* United States v. Rutherford, 175 F.3d 899, 905 (11th Cir. 1999) (using the ordinary case approach to determine crimes of violence).

60. *Searcy*, 418 F.3d at 1196.

61. *See Rutherford*, 175 F.3d at 905 (citing United States v. Lipsey, 40 F.3d 1200, 1201 (11th Cir. 1994)) (using the ordinary case approach to determine that lewd assault was a violent felony on the basis of the underlying elements).

62. *See* United States v. Munro. 394 F.3d 865, 870 (10th Cir. 2005) (showing that

Circuit also acknowledged that other similar child exploitation crimes require restitution under the MVRA.[63]

The Fifth Circuit in *Charles* also acknowledged that the definitions for a crime of violence under § 16(a) and § 4B1.2(a)(1) are identical but § 16(b) and § 4B1.2(a)(2) are different.[64] The court affirmed the decision in *Chapa-Garza* that § 16(b) applied to the force used against a person or property, while § 4B1.2 only applies to conduct that presents a serious potential risk of physical injury to another person.[65]

A recent case may have overturned this analysis. In *Johnson v. United States*, the defendant pled guilty to a felon in possession of a firearm under 18 U.S.C. § 922(g) and was found to not have committed a crime of violence under the residual clause of the Armed Career Criminal Act.[66] The government requested an enhanced sentence under the Armed Career Criminal Act because the defendant had a long criminal history such as the unlawful possession of a short-barreled shotgun and that his possession of a gun was a crime of violence.[67] The Supreme Court concluded that 18 U.S.C. 924(e)(2)(B)(2) is unconstitutionally vague and thus violates an individual's due process rights.[68] The government takes away this liberty if a law is so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so lacking in enforceable standards that it invites arbitrary enforcement.[69] The defendant appealed and the Supreme Court

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the attempted sexual abuse of a minor is a crime of violence even without a physical injury because crimes against minors will always have a potential for risk of harm).

63. *See* United States v. Johnson, 183 F.3d 1175, 1178 (1999) (stating that 18 U.S.C § 2423(b) is a crime of violence).

64. *See* United States v. Charles, 301 F.3d 309, 311-12 (5th Cir. 2002) (explaining that that there are differences between the crime of violence definition in § 16(b) and § 4B1.2(a)(2) and that the definition in § 16(b) is narrower than the definition in § 4B1.2(a)(2)).

65. *See id.* at 312; *see generally* United States v. Jackson, 220 F.3d 635, 637 (5th Cir. 2000) (stating that 18 U.S.C. § 16(b)'s definition of a crime of violence is different from U.S.S.G. § 4B1.2's definition of a crime of violence).

66. *See* Johnson v. United States, 135 S. Ct. 2551, 2553 (2015); *see also* 18 U.S.C. § 922(g) ("It shall be unlawful for any person . . . who is a fugitive from justice . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

67. *See id.*; *see also* 18 U.S.C. § 924 (2015) (criminalizing previous offenders for possession of a gun who also have more than three violent felonies).

68. *See id*. at 2554 (*citing* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. Batchedlder, 442 U.S. 114, 123 (1979))(explaining that the vagueness within criminal statutes violate due process and that the standard also applies to statutes dealing with sentencing).

69. *See id.* (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)).

ruled that the possession of the short barreled shotgun was not a violent felony due to the vagueness of 18 U.S.C. § 924(e)(2)(B)(ii).[70]

3. Ordinary Case and Categorical Approaches

The Eleventh Circuit is unique because it uses both the categorical approach and the ordinary case method to determine a crime of violence.[71] However, recently the "ordinary case" method was overturned by the Supreme Court in *Johnson v. United States*.[72] The "ordinary case" method is one way to determine a crime of violence under U.S.S.G. § 4B1.2(a)(2) and the process was explained by Justice Alito in the majority opinion of *James v. United States*.[73] Previously in *James*, the Supreme Court held that a crime of violence is violent not because of the actual physical harm suffered, but because there is a possibility that an innocent person may be harmed during the crime.[74] The attempt of a crime of violence poses the same risk that completion of a crime would hold.[75]

The "ordinary case" method focuses on the plain language of the statute by using the ordinary meaning of the elements and determining if the elements of the crime are violent.[76] Using the residual clause of § 924(e)(2)(B)(ii), Justice Alito measured the risk associated with the offense.[77] His analysis began with comparing the attempted burglary to the complete burglary, which is an enumerated offense.[78] An attempt of a crime does not require completion of all of the elements of the crime, but rather, only a substantial step.[79] To qualify as a crime of violence, Justice

70. *See id.* at 2551.

71. *See* United States v. Keelan, 786 F.3d 865, 870-71 (11th Cir. 2015).

72. *See* Johnson v. United States, 135 S. Ct. 2551, 2557-58 (2015) (determining that the definition of a crime of violence under the residual clause of 18 U.S.C. § 924 (e)(2)(B)(ii) is unconstitutionally vague).

73. *See James*, 550 U.S. at 203; *see also* United States v. Avila, 770 F.3d 1100, 1107 (4th Cir. 2014); Rodriguez–Castellon v. Holder, 733 F.3d 847, 853–55 (9th Cir. 2013); United States v. Chitwood, 676 F.3d 971, 977 (11th Cir. 2012).

74. *See James*, 550 U.S. at 194 (holding that a crime of violence arises from the possibility that an innocent person may confront the burglar and be injured).

75. *See id.* at 203-04. (showing that an attempted burglary has the same level of danger as the danger involved in an actual burglary).

76. *Id.* at 192.

77. *See id.* (using a two-step analysis to determine a crime of violence: 1) the offense presents a serious potential risk of physical injury and 2) similarity to another enumerated crime).

78. *See id.* at 204-10 (using the residual clause from § 941(e)(2)(B)(ii) to expand the definition of a violent felony to include attempt crimes and a potential risk of harm).

79. *See id.* at 197 (citing Taylor v. United States, 495 U.S. 575, 598 (1990))

Alito concluded that a court must determine if the crime's elements inherently pose a serious potential risk of injury to another.[80]

The "categorical approach" is an analysis method used to determine whether the elements of the statute are congruent with the elements of the crime by using the plain text of a statute to separate the elements of the crime from the facts of the case.[81] The Supreme Court found that § 16(b) categorizes a broader range of offenses than 18 U.S.C. § 16(a) as crimes of violence.[82] However, the Court found that § 16(b) does not include all negligent misconduct because the reckless disregard relates to the potential risk of physical force used against another when committing a crime.[83]

III. ANALYSIS

A. Distinctions Between "Crime of Violence" Definitions Allow a Defendant to Escape Paying Restitution to His or Her Victim.

The multiple definitions for "crime of violence" felonies for restitution and sentencing purposes create confusion when determining whether a felony is an aggravated felony.[84] The committed felony must be a "crime of violence" under 18 U.S.C. 16(b) to receive restitution under the MVRA.[85] Thus, at a sentencing hearing many prosecutors try to compare the definitions from other sources to get an increase for the defendant's prison sentence.[86] The three definitions for a crime of violence are used interchangeably for both sentencing and restitution purposes.[87] The

(claiming successful entry into a building is not required in an attempted burglary).

80. *See id.* at 208 (finding attempted burglary is an interrupted burglary which has the potential of risk or more risk than a completed burglary; therefore by the nature of the offense, an attempted burglary is a crime of violence).

81. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (using the categorical approach to prove that 18 U.S.C. § 16(b) has a broader definition of a crime of violence but requires intent).

82. *See id.*; 18 U.S.C. § 16 (2015).

83. *See Leocal*, 543 U.S. at 10.

84. *See* 18 U.S.C. 16(b) (2015); *see also* U.S.S.G. 4B1.2(a) (U.S. Sentencing Comm'n 2010); *accord* 18 U.S.C. 924(c)(3), (e)(2)(B) (2015) (defining "crime of violence" and "violent felony").

85. *See* 18 U.S.C. 3663A(c)(1)(A)(i) (2015).

86. *See generally* 18 U.S.C. § 924(e)(1) (2015) (allowing prosecutors to increase prison sentences to defendants who have committed more than three crimes of violence under the definition provided in the Armed Career Criminal Act).

87. *See generally* 18 U.S.C. § 16 (2015) (defining crimes of violence used for determining restitution under the MVRA); 18 U.S.C. § 924(e)(2)(B)(ii) (2015) (stating the crime of violence definition used for determining sentencing outside of enumerated felonies under the Armed Career Criminal Act).

definition necessary to gain restitution under the MVRA is 18 U.S.C. § 16(b) and it has been compared to § 924(e)(2)(B)(ii) and the U.S.S.G. § 4B1.2 to enforce its validity.

As demonstrated in *Chapa-Gazra* and *Charles*, the Fifth Circuit holds a narrow interpretation of the definition in §16(b) compared to the requirements needed by §4B1.2.[88] In *Chapa-Garza,* the Texas felony of driving while intoxicated was the disputed offense.[89] For sentencing purposes, the Fifth Circuit applied the categorical approach to determine the crime's status as an aggravated felony.[90] Looking at the sentencing guideline in §4B1.2, any offense that contains pure recklessness or a conscious disregard of a substantial risk of injury to others is a crime of violence.[91] However, the reading of § 16(b) applies only when the nature of the offense leads to a substantial likelihood that the suspect intentionally employs physical force against another person or property during the commission of the crime.[92] Additionally, §16(b) requires the "recklessness as regards a substantial risk that intentional force will be utilized by the defendant to effectuate commission of the offense".[93] The physical force or risk of harm from the physical force must be directly linked to the specific crime and the commission of that crime.[94] The definition of a "crime of violence" for sentencing career offender purposes differs somewhat from that in 18 U.S.C. § 16. The touchstone of 'violence' in the career offender provisions is the risk that physical injury will result, rather than the risk that physical force may be used to carry out the offense."[95]

88. *See* United States v. Chapa-Garza*,* 243 F.3d 921, 924 (5th Cir. 2001); *accord* United States v. Charles*,* 301 F.3d 309, 412 (5th Cir. 2002) (adopting a narrower interpretation).

89. *See Chapa-Garza*, 243 F.3d at 923.

90. *See id.* at 924 (disputing whether a Texas state felony of driving while intoxicated was a crime of violence when the statute did not have an element of force).

91. *See id.* at 925 (discussing the *Rutherford* case, which found that the defendant was intentionally negligent when deciding to drive while intoxicated, thereby creating a potential risk of physical harm to another).

92. *See id.*; *compare* 18 U.S.C. § 924(e)(2)(B)(ii) (2015) (stating the residual clause), *with* 18 U.S.C. 16(b) (2015) (defining a crime of violence under the MVRA for restitution purposes). *But see* Johnson v. United States, 135 S. Ct. 2551, 2557-60 (2015) (finding that the residual clause under 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague).

93. *See Chapa-Garza,* 243 F.3d at 925.

94. *See id*. at 927.

95. *See id*. (discussing United States v. Velazquez-Overa, 100 F.3d 418, 422 (5th Cir. 1996), which held that the crime of indecency with a minor involving sexual conduct was violent under §16(b) because a perpetrator would find it necessary to use physical force to "ensure the child's compliance" and "perpetrate the crime").

The Fifth Circuit in *Charles* discussed that the definitions for a crime of violence under § 16(a) and § 4B1.2(a)(1) are identical but § 16(b) and § 4B1.2(a)(2) are different.[96] The Fifth Circuit affirmed the decision in *Chapa-Garza* that § 16(b) applied to the force used against a person or property, while § 4B1.2 only applies to conduct that presents a serious potential risk of physical injury to another person.[97] Furthermore, the court ruled that § 16(b) focuses on a risk of physical force and § 4B1.2(a)(2) focuses on a risk of physical injury.[98] By following this logic, only victims that have suffered an actual physical harm can receive restitution under the MVRA and not victims who have only had the potential risk of harm.[99]

Additionally, § 16(b) emphasizes a "substantial risk" and § 4B1.2(a) requires a "serious potential risk" which is a higher level of risk than § 16(b) and includes potential risk where § 16(b) only covers actual risk.[100] Section 16(b) focuses on the "nature of the felony" which is the statute itself and not the actual facts of case, but § 4B1.2(a)(2) focuses on the "conduct" of the crime which may take the facts of the case into consideration.[101]

According to the analysis of *Chapa-Garza* and *Charles*, some victims would be excluded from receiving restitution under the MVRA even if the defendant committed a crime of violence for sentencing purposes.[102] The victim in *Chapa-Garza* would not be able to receive restitution.[103] While the defendant's crime has a level of risk, the crime of driving under intoxication does not involve an intentional harm that necessarily always

96. *See* United States v. Charles, 301 F.3d 309, 311-12 (5th Cir. 2002) (finding a felon in possession of a firearm as a violent felony pursuant to the sentencing guidelines in §4B1.2).

97. *See id.* at 312; *see generally* United States v. Jackson, 220 F.3d 635, 637 (5th Cir. 2000) (explaining § 16(b)'s definition includes force against property, risk of physical force, a substantial risk, and the phrase "by its nature" unlike §4B1.2).

98. *See Charles*, 301 F.3d at 312.

99. *See id*. (allowing crimes that are broader than the definition described in § 16(b) to not be considered a crime of violence even though the crime is a crime of violence according to § 4B1.2(a)(2)).

100. *See id.* (drawing a distinction between a potential risk of harm versus an actual risk of harm based on the language covered in each crime of violence definition).

101. *See id.*

102. *See* United States v. Chapa-Garza, 243 F.3d 921, 924-26 (5th Cir. 2001); *see also id.* at 311-12 (showing that a distinction between a crime of violence under the sentencing guidelines and the definition for restitution purposes are similar but not equal in application).

103. *See Chapa-Garza*, 243 F.3d at 927 (stating that although the victim suffered harm because the defendant was driving under the influence, this offense was not a crime of violence under § 16(b)).

occurs during the commission of this type of crime.[104] There is always a potential of harm when driving under intoxication, but the act of the crime itself does not cause harm, and therefore, is not a crime of violence for restitution purposes.[105] Similarly, the victim in *Charles* would also be unable to receive restitution.[106] This type of defendant would have the potential to harm others but the crime itself does not on its face require the defendant to harm others.[107] In these situations, if those victims wanted to receive restitution they would have to rely on a different charge that has a more direct relation to physical harm.[108]

Chapa-Gazra's narrow interpretation of a crime of violence between 18 U.S.C. §16(b) and U.S.S.G. §4B1.2(a)(2) created a loophole that allows defendants to escape restitution because the defendant did not intend to harm someone with the use of bodily force.[109] Keelan argued that J.S. did not suffer a "bodily injury" under 18 U.S.C. § 3663A(b)(2) and therefore J.S.'s parents cannot claim restitution for a harm that did not occur.[110] Keelan attempted to use this argument in order to avoid paying restitution for J.S.'s mental health expenses.[111] Keelan also tried to avoid the restitution order by arguing that J.S. suffered from severe psychological problems before Keelan's sexual abuse.[112] Therefore, while a crime may be considered a crime of violence for sentencing purposes, the same crime

104. *See id.*

105. *See id.*

106. *See Charles,* 301 F.3d at 311-12 (stating the crime of possession of a gun was not a crime of violence under § 16(b) for restitution and that sentences for felons in possession of a firearm should only be analyzed under the U.S. Sentencing Guidelines Manual § 4B1.2(a) definition of crime of violence).

107. *See* James v. United States, 550 U.S. 192, 203-04 (2007) (finding that a crime of violence may be extended to attempt crimes of violence as long as there is a potential risk of harm). *But see* Johnson v. United States, 135 S. Ct. 2551, 2557, 2563 (2015) (overruling *James* by ruling that a potential risk of harm is a vague standard for a crime of violence for sentencing purposes and violates a defendant's Fifth Amendment rights).

108. *See James*, 550 U.S. at 197.

109. *See Chapa-Garza*, 243 F.3d at 927.

110. *See* United States v. Keelan, 786 F.3d 865, 872 (11th Cir. 2015) (determining that Keelan forfeited his right to seek review on J.S.'s bodily injury under MVRA because Keelan failed to raise a specific objection to the factual finding in the Report and Recommendation).

111. *See id.* at 872 (discussing Keelan's argument that the MVRA limits restitution to medical services that treat only bodily injury itself not psychological consequences following from that injury).

112. *See id.* at 872-73 (examining Keelan's contention that the evidence of J.S. cutting himself before the sexual relationship demonstrates the absence of proximate cause of the psychological damages).

should not be considered a crime of violence for restitution standards. Applying this analysis to Keelan's one count of coercion and enticement of a minor and one count of attempted coercion and enticement of a minor, the Eleventh Circuit had the option to consider the definition of 18 U.S.C. §2422(b) as narrow, thereby barring J.S.'s parents from restitution, but ultimately rejected that methodology.[113]

Another crime of violence definition discrepancy is the meaning of the statutes themselves and the scope of the risk or potential risk of harm involved in these types of crimes. The issue of a crime's potential risk of harm in relationship to a crime of violence can be best explained through the Supreme Court's decision in *Johnson v. United States*, which overturned *James v. United States*.[114] The ruling in *James v. United States* determined that an attempted burglary would have the same potential risk of harm as committing the actual act of burglary under the definition from the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii).[115] A felony under both 18 U.S.C. 16(a) and 18 U.S.C. §924(e)(1) requires use of physical force or commission of an enumerated felony to be considered a crime of violence for either restitution or sentencing purposes.[116] Prosecutors have used the residual clause of § 924(e)(2)(B)(ii) to expand the definition of violent felonies to include crimes that do not require physical force for the purpose of increasing prison sentences under the Armed Career Criminal Act.[117] The application of the residual clause is controversial because it may be seen as an abuse of prosecutorial discretion and potentially imposing an

113. *See id.* at 870 (finding that the definition of a crime of violence in 18 U.S.C. § 16(b) (2015) is more narrow than the definition is U.S.S.G. § 4B1.2 (2015)); s*ee also Chapa-Garza*, 243 F.3d at 925.

114. *See* Johnson v. United States, 135 S. Ct. 2551, 2557, 2561 (2015) (arguing that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2015), is unconstitutionally vague about the standards of risk when determining a crime of violence). *But cf.* James v. United States, 550 U.S. 192, 203-04 (2007) (holding that a crime of violence may be extended to attempt crimes of violence as long as there is a potential risk of harm).

115. *See James*, 550 U.S. at 207-08 (allowing crimes with the potential of violence to be considered violent for sentencing).

116. 18 U.S.C. § 16(a) (defining a crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another); *accord* 18 U.S.C. § 924(e)(1), (2)(B) (defining a violent felony for armed career criminals as a felon in possession of a gun that has committed three previous convictions including serious drug offenses or crimes of violence).

117. *See Johnson*, 135 S. Ct. at 2556; *see also* 18 U.S.C. § 924(e)(1) (stating that Armed Criminal Career Act punishes felons for shipping, possessing, and receiving firearm and, if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the prison term is increased to a minimum of fifteen years and a maximum of life).

unfair or unjust prison sentence.

The analysis in *Johnson v. United States* threatens the constitutionality of the definitions of a crime of violence explained in 18 U.S.C. § 16(b) and U.S.S.G. §4B1.2.[118] The definition of a crime of violence under 18 U.S.C. 924(e)(2)(B)(2) is unconstitutionally vague because the potential risk of harm cannot be measured in easily understandable terms.[119] The definition failed to give ordinary people fair notice of the conduct it punishes as well inviting arbitrary enforcement based on the government's wishes.[120] Furthermore, the vague language of 18 U.S.C. § 924(e)(2)(B)(ii) is similar to language used in the definition in 18 U.S.C. § 16(b).[121] The ruling of this recent case potentially could have altered the analysis of how Keelan's case was decided for restitution based on congressional intent. The crime of violence definition provided by 18 U.S.C. §16(b) for restitution purposes has a similar definition to the definition under 18 U.S.C. § 924(e)(2)(B)(ii).[122] The District Court originally ordered Keelan to pay restitution for two counts under 18 U.S.C. § 2422(b): one count of enticement and coercion of a minor for the purposes of prostitution or sexual activity, and one count of attempt enticement and coercion of a minor for the purposes of prostitution or sexual activity.[123]

Previously, *United States v. James* allowed the scope of a violent felony to expand beyond the enumerated felonies for sentencing purposes.[124]

118. *See* Johnson, 135 S. Ct. at 2563; *see also* 18 U.S.C. § 922(g) ("It shall be unlawful for any person . . . who is a fugitive from justice . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

119. *See Johnson*, 135 S. Ct. at 2556-57 (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) and United States v. Batchelder, 442 U.S. 114, 123 (1979) to explain that the vagueness within criminal statutes violates due process and that the standard also applies to statutes dealing with sentencing).

120. *See id.* (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)).

121. *See id.* at *1; *see also* 18 U.S.C. § 16(b).

122. *Compare* 18 U.S.C. 16(b) (defining a violent felony under the MVRA as an offense involving a substantial risk that physical force against the person or property of another may be used in the course of committing the offense); *with* 18 U.S.C. § 924(e)(2)(B)(ii) (defining a violent felony under the ACCA as an enumerated felony such as burglary, arson, or extortion, involving the use of explosives, or conduct that presents a serious potential risk of physical injury to another).

123. *See* United States v. Keelan, 786 F.3d 865, 872-73 (11th Cir. 2015) (citing that the district ordered Keelan to pay $10,886.05 in mental health expenses to J.S.'s parents due to the severe psychological problems).

124. *See* James v. United States, 550 U.S. 192, 203-04 (2007) (allowing the residual to extend to any felony that includes the potential risk of physical harm and attempts of crimes of violence which have the potential risk of harm). *But see Johnson*, 135 S. Ct.

Currently, § 16(b) is still considered good law and the standard for restitution.[125] Although the restitution standard is similar to sentencing, it should be considered as a separate determination. However, § 16(b) can no longer be compared to § 924(e)(2)(B)(ii) to gain restitution under the MVRA.[126] If the law changes and § 16(b) is interpreted as substantially similar to § 924(e)(2)(B)(ii), then violent felonies will be limited only to enumerated felonies or felonies which require proof of physical force or physical injury.[127] Based on that comparison, attempts of violent felonies or crimes that are not on their face physically harmful to the victim would bar a victim from receiving restitution for those crimes.[128] By this logic if Keelan's case was tried after the *Johnson v. United States* decision, Keelan could have had the potential to escape paying his restitution.

Keelan's case is a case of first impression; essentially, whether the coercion and enticement of minor for sexual purposes of prostitution should be considered a crime of violence has never been analyzed or discussed.[129] However, there is similar case law regarding a similar statute being classified as a crime of violence, not only for sentencing purposes but also for restitution purposes.[130] One case factually similar to Keelan's case that involves an analysis for restitution is the Tenth Circuit decision *United Stated v. Johnson.*[131]

In *United States v. Johnson,* the defendant pled guilty for a total of four counts including the coercion and enticement of a minor, 18 U.S.C. §

at 2563 (overruling *United States v. James*).

125. *See* 18 U.S.C. 16(b).

126. *See Johnson*, 135 S. Ct. at 2557 (ruling the language of the residual clause is unconstitutionally vague because there is no way to adequately measure the potential risk of harm).

127. *See* 18 U.S.C. § 924(e)(2)(B) (stating a crime of violence is any violent felony which includes enumerated felony or has an element of use, attempted use of physical harm against another).

128. *See generally Johnson*, 135 S. Ct. at 2557 (holding that cases that only have a potential for harm are not crimes of violence under the Armed Career Criminal Act).

129. *See* United States v. Keelan, 786 F.3d 865, 870 (11th Cir. 2015) (stating that Keelan's case is a case of first impression in the Eleventh Circuit about whether the coercion and enticement of a minor should be a violent felony).

130. *See* United States v. Johnson, 183 F.3d 1175, 1179 (10th Cir. 1999) (citing *United States v. Butler*, 92 F.3d 960, 964 (9th Cir. 1996) (determining if the coercion of an enticement of a minor for prostitution, traveling in interstate commerce for sex with a minor, and possession of child pornography is considered a crime of violence under the MVRA).

131. *See id.* at 1179 (declining to overturn the district court's determination that § 2423(b), interstate travel for the purpose of engaging in sexual acts with a minor, as a crime of violence).

2422(b), and the transportation of minors, 18 U.S.C. § 2423(b), and the first count he is charged with is the same count which is under dispute in *Keelan*.[132] Furthermore, in *United States v. Johnson*, the defendant appealed to contest the increase in his sentencing offense level, the restitution order without considering his ability to pay, and the restitution order for the victim's mental health treatment where the victim suffered no bodily injury.[133] This line of reasoning mirrors Keelan's argument that a victim who did not suffer bodily injury should not be able to recover restitution under the MVRA.[134]

The defendant met his victim, a minor, in an internet chat room where they corresponded for several months.[135] Similarly, the evidence presented in trial showed that Keelan corresponded by talking and texting every day for several hours over the course of five months.[136] In *United States v. Johnson,* the defendant traveled through interstate commerce to meet with his victim for sex.[137] Similarly, Keelan also traveled fourteen hours from Roanoke, Virginia to Hollywood, Florida to have sex with J.S. in a motel.[138] For a week, the defendant in *United States v. Johnson* and the minor engaged in numerous sexual acts and the two continued correspondence through the Internet and telephone.[139] The victim ran away from home in an attempt to contact the defendant but he was apprehended by law enforcement officials and returned to his parents.[140] Similarly, Keelan and J.S. engaged in a sexual relationship over the course of a year

132. *See id.* at 1176 (charging the defendant with one count of coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b), interstate travel for the purpose of engaging in sexual acts with a minor, in violation of 18 U.S.C. § 2423(b), one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B), and one count of criminal forfeiture in violation of 18 U.S.C. § 2253).

133. *See id.*

134. *Compare id.*, *with Keelan*, 786 F.3d at 867.

135. *See United States v. Johnson*, 183 F.3d at 1176 (discussing that the defendant also talked to the victim by phone).

136. *See Keelan*, 786 F.3d at 868 (explaining that Keelan slowly incorporated sexual innuendos into their conversation to make J.S. more comfortable with sexual activities).

137. *See United States v. Johnson*, 183 F.3d at 1176 (showing that the defendant flew from Boston to Texas where he rented a car and drove the victim's home in New Mexico).

138. *See Keelan*, 786 F.3d at 869; *see also* Brief of Appellant at 16, United States v. Keelan, 786 F.3d 865 (11th Cir. 2015) (No. 13-11878FF) (discussing evidence of recorded telephone calls between J.S. and Keelan).

139. *See United States v. Johnson*, 183 F.3d at 1176.

140. *See id.* (stating that the victim flew from New Mexico to Massachusetts to go to the defendant's address but the defendant was not home).

involving between thirty to sixty sexual encounters.[141] In *Johnson,* after encouragement from the defendant's victim's mother, the victim worked together with the FBI to monitor conversations with the defendant and eventually the FBI searched the Defendant's residence.[142] Likewise, J.S.'s mother also convinced J.S. to cooperate with law enforcement officials.[143]

The defendant in *United States v. Johnson* disputed his $2,875.97 restitution order by arguing that the statutes regarding coercion and enticement of minors and the transportation of a minor were not under the MVRA and that the district court could not order restitution without considering his ability to pay.[144] Similarly, Keelan also disputed his $104,886.05 restitution order from the district courts based on his crime's status as a crime of violence.[145] The Tenth Circuit did not analyze whether the transportation or the coercion and enticement of minors were crimes of violence under the §16(b) definition because the defendant only contested the restitution on the basis of his ability to pay.[146] However, the court did acknowledge that other circuits found the transportation of minors by its nature a crime of violence, citing the analysis of other circuits regarding other crimes involving minors.[147] Specifically, *United States v. Johnson* distinguished the analysis used in *United States v. Butler* and ruled that § 2423(b) is a crime to engage in sexual acts with specifically juvenile victims and a crime of violence under § 16(b) because the crime itself has a dangerous nature.[148]

141. *See supra* note 138, at 1 (stating that the encounters occurred in various locations such as Keelan's apartment, a motel, and a secluded island).

142. *See United States v. Johnson*, 183 F.3d at 1176-77 (explaining that FBI agents found 238 floppy disks containing 13 images of children younger than sixteen engaging in sexual conduct).

143. *See* Brief for Appellee, *supra* note 14, at 10 (showing J.S. agreed to assist law enforcement officers investigating Keelan by making recorded phone calls to Keelan that were later turned into evidence).

144. *See* United States v. Johnson, 183 F.3d at 1178; *see also* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(i).

145. *See* United States v. Keelan, 786 F.3d 865, 869-72 (arguing that Keelan should not pay the restitution order because his convicted offense was not a violent offense due to the absence of physical harm which was required by statute).

146. *See* United States v. Johnson, 183 F.3d at 1178-79 (showing that the defendant failed to show his inability to pay the restitution order and the error in the order was not "clear and obvious").

147. *See id*. (citing *United States v. Butler*, 92 F.3d 960, 964 (9th Cir. 1996)) (ruling that transportation of a minor over state lines for sexual purposes is a crime).

148. *Compare id.*, *with* United States v. Butler, 92 F.3d 960, 963-64 (9th Cir. 1996) (finding that the crime of transporting a minor over state lines for the purpose of prostitution or sexual activities was a crime of violence for sentencing and restitution purposes).

While the coercion and enticement of minors and the transportation of a minor over state lines are two distinct crimes, both crimes involve the sexual exploitation of a minor without criminalizing the actual sexual encounter.[149] The transportation of a minor Statute, 18 U.S.C. § 2423(b) criminalizes the transportation for the purposes of illicit sexual activity and it does not require the actual sexual activity to occur.[150] Other circuit courts have found that the transportation with the intent to have sex with a minor has a potential risk of physical harm for the minor.[151] Separating the statute from the facts of the case and applying the categorical approach, § 2423(b) is a crime with the potential for serious harm to its victims.[152] The crime of coercion and enticement of minors criminalizes the enticement and coercion of a minor for prostitution or illicit sexual conduct.[153] The statute focuses on enticement and coercion of the defendant towards the child where the defendant persuades the child to engage in sexual activity.[154] The main crime regards the actions defendants took to manipulate or groom the child into becoming more comfortable with the idea of participating in illicit sexual activities, but does not criminalize the actual sexual activity with the child, similar to 18 U.S.C. § 2423(b).[155] Therefore, the coercion and enticement actions required in § 2422(b) should be regarded as equally harmful as the transportation actions required in § 2423(b).[156] Both statutes are subsets within group of statutes that pertain to the child sexual exploitation, but do not focus on the specific act

149. *See* 18 U.S.C. § 2422(b) (criminalizing enticement and coercion of a minor for prostitution or illicit sexual activity); *accord* 18 U.S.C. § 2423(b) (criminalizing interstate travel with intent to engage in illicit sexual conduct with a minor).

150. *See* 18 U.S.C § 2423(b) (illustrating that within the statute the actual sexual activity of sex with a minor is not an element but rather the statute criminalizes the transportation with the intent to have sexual intercourse).

151. *See* United States v. Johnson, 183 F.3d at 1179 (citing *United States v. Butler*, 92 F.3d 960, 963-64 (9th Cir. 1996)).

152. *See id.*

153. *See* 18 U.S.C. § 2422(b) (defining that the crime criminalizes the enticement act and not the act of sex).

154. *See id.* (explaining that completion of a sexual act is not required for the crime of coercion and enticement of a minor for prostitution or sexual activity).

155. *See* 18 U.S.C. § 2423(B); United States v. Keelan, 786 F.3d 865 (11th Cir. 2015) (No. 13-11878-FF) (explaining that Keelan enticed J.S. into participating in sexual activities by emotionally manipulating J.S. and through sexual speech and showing him pornographic videos); Brief of Appellee at 6, 8-9, 39-40.

156. *Compare* 18 U.S.C. § 2422(b) (criminalizing the coercion and enticement of a minor for the purposes of sexual activity or prostitution), *with* 18 U.S.C. § 2423(b) (criminalizing interstate traveler using interstate commerce to participate in sexual activities with a minor).

of sexual activity.[157] Sexual activity with a minor is inherently harmful behavior, but it is not an element of either of these statutes.[158] Both statutes seek to criminalize behavior that occurs leading up to the event of sex with a minor; the act of sex is not necessary for one's actions to be considered harmful.[159] Thus, if the transportation of a minor was considered a crime of violence for both sentencing and restitution purposes then the coercion and enticement of minors should follow the same standard.[160] There are many discrepancies within the language of the definitions in 18 U.S.C. § 16(b), 18 U.S.C. § 924(e)(2)(B)(ii), and U.S.S.G. § 4B1.2 that can be exploited to wrongfully contest a restitution order.[161] However, case law attempts to remedy the discrepancies by treating similar cases the same way.[162]

The standard for a crime of violence should be uniform throughout all types of crimes. The multiple definitions of a violent felony simply leave too many loopholes in the law and ultimately allows defendants to have a sentencing increase without having to pay the restitution associated with the same crime.[163] The Eleventh Circuit decided that Keelan had to pay the restitution to J.S.'s parents; however, the standard for crimes of violence for restitution does not have a history of being consistent.[164] Restitution orders are not necessarily parallel with the current sentencing guidelines, which creates problems in the criminal justice system for defendants who

157. *Compare* 18 U.S.C. § 2422(b), *with* 18 U.S.C. § 2423(b)(demonstrating that both statutes do not criminalize the act of intercourse but rather the conduct leading up to the act).

158. *See* 18 U.S.C. § 2422(b); 18 U.S.C. § 2423(b); *see also* United States v. Munro, 394 F.3d 865, 870-71 (10th Cir. 2005) (finding attempted sexual abuse as a violent when physical harm did not occur).

159. *See* 18 U.S.C. § 2422(b); *see also* 18 U.S.C. § 2423(b).

160. *See generally* United States v. Johnson, 183 F.3d at 1178 (citing *United States v. Butler*, 92 F.3d 960, 963-64 (9th Cir. 1996)) (determining that because § 2423(b) is a crime of violence that it is likely that other similar crimes involving children should be treated in a similar fashion).

161. *Compare* 18 U.S.C. 16(b) *with* 18 U.S.C. § 924(e)(2)(B)(ii); *and* U.S.S.G. § 4B1.32(a)(2) (demonstrating the similarities between the language used in all three crime of violence definitions).

162. *See generally* United States v. Searcy, 418 F.3d 1193, 1193 (11th Cir. 2005); United States v. Rutherford, 175 F.3d 899, 899 (11th Cir. 1999) (defining the standard in the Eleventh Circuit).

163. *See generally* United States v. Searcy, 418 F.3d at 1193.

164. *See* United States v. Keelan, 786 F.3d 865, 869 (11th Cir. 2015) (showing that Keelan was convicted by a jury after a three day trial and that Keelan was sentenced to two concurrent prison terms of 200 months and a 25 year term of supervised release in addition to the restitution order of 04,886.05 on August 7, 2013 for J.S.'s mental health expenses).

are unwilling to pay restitution to exploit.[165] The percentage of victims that actually receive restitution is very low and generally victim satisfaction may not actually be provided through the MVRA.[166]

B. Forcing Victim's to Prove They Suffered a "Crime of Violence" Makes Receiving Restitution More Difficult and Contradicts the Purpose the Legislation.

To gain restitution under the MVRA, the defendant must commit a crime of violence as defined by 18 U.S.C. § 16(b).[167] Crimes of violence that involve elements requiring physical force are considered enumerated felonies, which are uncontested as being a crime of violence.[168] However, the defendant can always contest felonies under 18 U.S.C. § 16(b) by challenging whether the felony involved a substantial risk that physical force may be used against the person or property of another during the commission of the offense.[169] The district court decides who is considered a victim in each case and the victim is the one who must assert their rights to restitution.[170] In Keelan's case, the victim was under the age of eighteen, and therefore, J.S.'s parents assumed his rights to receive the restitution under the MVRA.[171]

The Eleventh Circuit has also ruled that other similar felonies involving the sexual exploitation of children are also crimes of violence, such as *United States v. Rutherford,* where for sentencing purposes in a case regarding a defendant who had both drug trafficking and child exploitation

165. *See generally* Searcy, 418 F.3d at 1193.

166. *See generally* Matthew Dickman, *Should Crime Pay: A critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1697-1699 (2009) (arguing that the amount of restitution ordered by the court is not correlated to the amount of satisfaction received by victims because about 3.5 percent of restitution orders are actually paid by the criminal offender).

167. *See generally* 18 U.S.C. § 3663A(c)(1) (explaining that the enumerated violent felonies all involve a physical element of force).

168. *See generally* 18 U.S.C. § 16(a) (requiring physical force as a necessary element for a violent felony).

169. *See generally* 18 U.S.C. § 16(b) (showing that other crimes which are not enumerated felonies may still be considered a crime of violence if there is a potential risk of harm as an alternative for crimes not mentioned in 18 U.S.C. § 16(a)).

170. *See generally* 18 U.S.C. § 3663A(2) (allowing the parents to receive restitution if the victim is under eighteen year old).

171. *See* United States v. Keelan, 786 F.3d 865, 865 (11th Cir. 2015) (stating that J.S.'s parent wanted to receive restitution for $104,886.05 for the payment of J.S.'s mental health expenses from the psychologist therapy sessions that J.S. is required to attend as which arise from Keelan's emotional manipulation of the victim).

charges.[172] The Eleventh Circuit decided that a court should only look to the elements of the convicted offense and not the conduct underlying the conviction when determining a crime of violence.[173] The Eleventh Circuit again used a categorical approach to prove a statute is a crime of violence under U.S.S.G. §4B1.2 and further used this analysis to conclude that there is no substantial difference between a decision that a statute is a crime of violence under 18 U.S.C. 16(b) and § 4B1.2.[174] The Eleventh Circuit interpreted this more broadly stating that the two crimes of violence definitions are equivocal.[175]

While Keelan's scenario is a case of first impression, there are other cases which define the coercion and enticement as a crime of violence.[176] In *Searcy*, the court ruled that the statute qualifies as a crime of violence under U.S.S.G. § 4B1.2 as a career offender.[177] The defendant in *Searcy* had two prior state charges—both were considered crimes of violence.[178] The *Searcy* court determined this by comparing the federal coercion and enticement statute to other similar statutes determined to be a crime of violence from the Tenth and Sixth Circuit.[179]

The defendant argued that the essential elements of 18 U.S.C § 2422(b) do not require any behavior that would, by its nature, pose a serious risk of physical injury to another individual.[180] The Eleventh Circuit used the categorical to determine whether the coercion and enticement is a crime of

172. *See* United States v. Rutherford, 175 F.3d 899, 905 (11th Cir. 1999) (ruling that a Florida conviction for lewd assault of a minor was a crime of violence under U.S.S.G. §4B1.2 showing the defendant as a career offender).

173. *See id.* (citing *United States v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994)).

174. *See id.* at 905 (citing *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1243 (10th Cir. 1998) (concluding that both statutes defining a crime of violence are somewhat different but if a statute is a crime of violence under 18 U.S.C. § 16(b) then it should also be under § 4B1.2(a)(2)).

175. *See id.* (ruling that the definitions under § 4B1.2 and § 16(b) have the same application).

176. *See generally* United States v. Searcy, 418 F.3d 1193, 1196 (11th Cir. 2005).

177. *See id.* at 1195 (stating a defendant convicted under § 2422(b) was a career offender under when he exchanged messages online with an undercover law enforcement).

178. *See id.* at 1194 (citing that the defendant was previously convicted for sexual activity with a child and lewd, lascivious or indecent assault upon a child in Florida).

179. *See* United States v. Searcy, 418 F.3d at 1196-97 (using precedent from other circuits as persuasive law to determine how the law should be interpreted in the Tenth Circuit).

180. *See id.* at 1196 (arguing the underlying criminal conduct of § 2422(b) is enticement, and not the sexual act therefore the statute does not pose a serious risk of physical injury).

violence under U.S.S.G. § 4B1.2.[181] The first approach was determining whether the use of attempted use of the coercion and enticement with the federal statute has an element of physical force against another.[182] However the analysis failed because the statute only pertains to the act of persuasion, inducement, coercion or enticement, which does not involve physical force under U.S. Sentencing Guidelines Manual § 4B1.2(a)(1).[183] The use, attempted use, or threatened use of physical force against another is also not included as elements in the statute.[184] The second approach used U.S. Sentencing Guidelines Manual § 4B1.2(a)(2) to see if the Coercion and Enticement Statute involves conduct that, by its nature, present a serious potential risk of physical injury to another individual.[185] Furthermore, the Eleventh Circuit cited cases from the Sixth Circuit which applied a broad interpretation of the categorical approach to determine that similar statutes relating to the sexual exploitation of a child are crimes of violence.[186] The Sixth Circuit broadly interpreted the coercion and enticement of a minor as a crime of violence because "any felony involving the sexual exploitation of a juvenile inherently poses a serious potential risk of physical injury to the victim."[187]

As a case of first impression in the Eleventh Circuit, the Government has the burden to prove that the coercion and enticement of a minor is a crime of violence for restitution purposes for J.S.'s parents to receive compensation for his mental health expenses.[188] While the district court may issue restitution, the government will always have to prove that the

181. *See* James v. United States, 550 U.S. 192, 194 (2007).

182. *See id.*

183. *See* Unites States v. Johnson, 183 F.3d 1175, 1175 (10th Cir. 1999) (finding that the underlying crime did not include an element of force).

184. *See generally* U.S.S.G. § 4B1.2(a)(2) (showing that there is no requirement for physical force to be used for a felony to be considered a crime of violence).

185. *Compare* U.S.S.G. § 4B1.2(a)(2) (defining a crime of violence for sentencing purposes as any conduct that by its nature presents a serious potential risk of injury to another), *with* 18 U.S.C. §16(b) (requiring a serious potential risk of injury as an element of a violent felony).

186. *See United States v. Searcy*, 418 F.3d 1193, 1167-68 (11th Cir. 2005) (citing *United States v. Champion*, 248 F.3d 502, 505 (6th Cir. 2001)) (determining that 18 U.S.C. § 2251(a), child pornography production is a violent felony); *see also* 18 U.S.C. § 2251(a) (2015) (criminalizing any person who entices or coerces any minor to engage in sexually explicit conduct for the purpose of creating a depiction of a sexual act).

187. *See id.* at 1196 (citing *United States v. Smith*, 20 Fed. Appx. 412, 418 (6th Cir. 2001), *cert. denied*, 535 U.S. 1070, 122 S. Ct. 1944, 152 L.Ed.2d 848 (2002)).

188. *See* United States v. Keelan, 786 F.3d 865, 869 (11th Cir. 2015) (explaining that the magistrate judge entered a Report and Recommendation recommending Keelan pay $104,886.05 pursuant to the MVRA in mental health expenses).

committed crime is violent due to the discrepancies in definitions.[189] Furthermore, the Government must also prove that the victim was directly harmed by the defendant.[190] If the Eleventh Circuit found that the coercion and enticement of a minor was a crime of violence according to the sentencing guidelines for a career offender, then the Eleventh Circuit would have applied the same analysis to Keelan's case.[191] During the district court trial, the court concluded that Keelan "groomed" J.S. and therefore J.S. would more easily accept Keelan's sexual advances.[192] The magistrate judge also excluded all costs before Keelan's first sexual encounter with J.S. because the previous psychological damages did not involve Keelan.[193] Ultimately, the Eleventh Circuit found that Keelan did cause J.S.'s mental health problems.[194]

Due to the recent decision in *Johnson v. United States* overruling *James v. United States*, the Supreme Court ruled that the residual clause was unconstitutionally vague for trying to extend the definition of a crime of violence to include attempted crimes and felonies that did not have direct use of physical force under the Armed Career Criminal Act.[195] If the same analysis for this act is applied to the MVRA, then it would make restitution harder for victims to receive.[196] The court in *James* relied heavily on the ordinary case approach to show that a serious potential risk of injury would create a crime of violence.[197] Before the *Johnson v. United States* decision,

189. *See id.* at 865 (stating Keelan opposed the restitution because the state was not a crime of violence, the victim did not suffer a bodily injury, the victim cannot recover mental health treatment expenses for a physical injury, and the criminal offense did not proximately cause the victim's treatment expenses).

190. *See* 18 U.S.C. § 3663A.

191. *See Searcy,* 418 F.3d at 1193.

192. *See Keelan*, 786 F.3d at 873 (stating J.S.'s psychologist, Dr. Patterson gave expert testimony for the prosecution about Keelan's child grooming process of J.S.).

193. *See id.* (finding that there was "no doubt" Keelan proximately caused J.S.'s psychiatric problems after that date).

194. *See id.* (demonstrating testimony that J.S.'s prior mental health problems were secondary to Keelan's manipulation and abuse which further deteriorated when the sexual exploitation started and J.S's medical providers corroborated J.S.'s testimony).

195. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (arguing that language in the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutional).

196. *See generally id.*

197. *Compare* James v. United States, 550 U.S. 192, 192 (2007) (showing that the residual clause can extend a crime of violence to include offenses that do not have an element of physical force as a crime of violence); *with Johnson v. United States*, 135 S. Ct. at 2563 (ruling that the residual clause is too vague by allowing the definition of a violent felony to extend so far that it includes felonies without an element of physical force).

the ordinary case approach would also reach the same conclusion, thereby allowing J.S.'s family to receive restitution from Keelan under the MVRA.[198] However, if only the ordinary case approach was applied after *Johnson v. United States*, then it is likely that J.S.'s parents would not receive any restitution for the one count of attempted coercion and enticement of a minor.[199] Furthermore, J.S.'s parents may not receive restitution at all because none of the elements of the Coercion and Enticement Statute involve physical force, thus it may not be considered a crime of violence.[200]

C. Restitution and Sentencing Increases Serve Different Purposes and Should be Held to Different Standards.

Restitution serves a completely different purpose from general sentencing and should not be held to the same standards. While restitution is only one aspect of sentencing, the legislative history behind the MVRA proves that Congress enacted the MVRA to deal with the rising costs incurred as a result of violent crime-related injuries.[201] The MVRA gives district courts the discretion to order mandatory restitution paid to persons who were harmed physically, emotionally, or financially by a criminal's unlawful conduct.[202] Rather than merely addressing the rights of victims in the criminal justice system, the MVRA expands the role of the justice system to provide a means to make victims "whole".[203] Unlike the civil court systems where the aggrieved parties receive damages as compensation, the criminal justice system did not have a method to address the issue of victim compensation.[204] The MVRA requires full restitution for the calculated harm caused by the defendant.[205] This act makes it possible for the defendant to be accountable for the harm suffered by his

198. *See generally* James v. United States, 550 U.S. at 192; *see also* Keelan, 786 F.3d at 871.

199. *See Johnson v. United States*, 135 S. Ct. at 2553.

200. *See id.* (demonstrating that the analysis shows that a crime needs a measurable risk of harm or actual threat of harm to be considered a crime of violence).

201. *See* Victim Restitution Act of 1995, P.L. 104-132, § 735, 141 Stat. 4 (1995) (explaining that the costs associated with crime include economic, physical and emotional costs for victims and their families and that those costs remained unaddressed).

202. *See id.* (showing the legislative intent behind the implementing of the MVRA).

203. *See id.* (addressing that the criminal justice system is flawed when addressing the needs of victims who have suffered and amending the issue through the MVRA).

204. *See id.* (addressing the legislative intent behind the MVRA).

205. *See id.* (explaining that to receive mandatory restitution, a victim can only receive damages for a harm suffered that can be calculated and converted into a monetary amount, such as a medical bill for an injury incurred during an assault).

victims and other individuals harmed by his criminal conduct.[206] Therefore, restitution provides a means for a new beginning to victims who have suffered personal and financial losses resulting from crime.[207] The legislators who enacted the MVRA stated that their goal was to "provide the victim with some small sense of satisfaction that the system will addresses their needs" and the MVRA has acted out this purpose in its application.[208] Even if the restitution ordered was nominal, the restitution would represent personal accountability from the offender no matter how small the payment, leaving the victim satisfaction with the criminal justice system.[209]

However, by expanding the definition of a violent felony of 18 U.S.C. § 16(b) to be the equivalent of the definition in U.S. Sentencing Guidelines Manual § 4B1.2 does have consequences for other sentencing purposes. Under the Armed Career Criminal Act, the amount of violent felonies received has an impact on one's overall prison term if the defendant is a career offender.[210] If a defendant has three or more convictions, including a conviction under 18 U.S.C. § 922(g) for unlawful use of a firearm, then his sentence would increase to a mandatory minimum of fifteen years.[211] Applying the crime of violence standard this way to the crime of coercion and enticement of a minor would directly conflict with the recent Supreme Court ruling in *Johnson v. United States* for sentencing purposes.[212] However, by considering the intent of the MVRA legislation, separating the standards for crimes of violence between the standard for restitution and the standard for regular sentencing would continue to enforce the original intention of the MVRA.[213] Congress repeatedly emphasized that

206. *See id.*

207. *See id*.

208. 141 CONG. REC. H1302, H1303 (daily ed. Feb. 7, 1995) (quoting a statement of Rep. Pryce).

209. *See generally A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing in S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Sen. Hatch); see also 141 CONG. REC. H1302, H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Foley) ("For far too long we have forgotten the innocent victims of crime.").

210. *See generally* 18 U.S.C. § 924(e)(1) (2015) (stating that under the ACCA, if a defendant has three or more violent felonies and has also violated 18 U.S.C. §922(g), he will have his prison sentence increased to a minimum of fifteen years in prison); *see also* 18 U.S.C. § 922 (2)(g) (explaining the statute for an unlawful use of a firearm).

211. *See id.* (explaining that a felon with three or more convictions for drug trafficking crimes or crimes of violence are required to serve more time in jail because the defendant is a repeat offender).

212. *See generally* Johnson v. United States, 135 S. Ct. 2551, 2551 (2015).

213. *See* Victim Restitution Act of 1995, P.L. 104-132, § 735, 141 Stat. 4 (1995)

the MVRA was created for the purpose of compensating victims and not for furthering punishment.[214]

The main opposition for the MVRA are people who find it unfair for defendants to pay restitution to a victim if the defendant cannot afford to pay the restitution.[215] Opponents of the MVRA argue that the MVRA is unconstitutional for not considering the defendant's ability to pay, therefore further punishing a defendant who will never be able to pay.[216] In the Tenth Circuit decision *United States v. Johnson*, the defendant was required to pay the district court's restitution order despite being unemployed and the court argued that his current unemployment status was not enough evidence to prove that he could not pay the restitution order.[217] Within the Victims Restitution Act of 1995, the MVRA complies with the court-prescribed restitution payments and the courts allow both the victim and the offender to petition the courts to modify the restitution order at any time.[218] Unlike normal federal sentences where there is no prospect of parole and the defendant must serve an entire sentence, the mandatory restitution may be contested and modified during the process of payment.[219] The MVRA follows the court-prescribed schedule and may act as a condition for probation or supervised release.[220] Although restitution is only one aspect of general sentencing issues, it should not be treated the same way as a normal prison sentence; therefore, restitution should not be taken into consideration with the same analysis as a regular law that defines sentencing.[221]

(demonstrating Congress' legislative intent behind creating the MVRA and the desire to compensate victims who have suffered from violent crime).

214. *See id*.

215. *See generally* United States v. Johnson, 183 F.3d 1175, 1175 (10th Cir. 1999) (arguing that the MVRA is unconstitutional for not considering the defendant's ability to pay restitution, however the argument is never analyzed because the defendant failed to provide a factual claim in his appeal).

216. *See generally id.*

217. *See* United States v. Johnson, 183 F.3d at 1178 (explaining that the defendant was still required to pay restitution for several counts of child exploitation although he claims that he did not have the ability to pay because he was unemployed).

218. *See* Victim Restitution Act of 1995, P.L. 104-132, § 735, 141 Stat. 4 (1995) (showing that the MVRA allows the victim or offender to petition the court to modify a restitution order at any time and that there is a court-prescribed schedule of restitution payments as a condition for probation or supervised release).

219. *See generally id.*

220. *See id.*

221. *See id.; see also* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (ruling that the definition of a crime of violence for sentencing purposes under the Armed Career Criminal Act is unconstitutionally vague).

IV. POLICY RECOMMENDATIONS

While there are many positive aspects about the MVRA, there are also many discrepancies with determining what crimes are considered violent and non-violent for restitution purposes.[222] One way to eliminate this problem in the MVRA is to expand the list of specific enumerated felonies by explicitly stating that only felonies that involve physical force and eliminating the condition of 18 U.S.C. § 16(b).[223] However, this approach may exclude more ambiguous crimes that do not have a clear requirement of physical harm; specifically child exploitation crimes which may have been either consensual due to "child grooming" or were abruptly stopped before a physical assault could occur.[224] At Keelan's trial, an expert witness testified about the six phase "grooming process" which persuaded J.S. into sexual activity with Keelan.[225] Crimes such as trafficking of a minor or coercion and enticement of a minor may not be included in that category because the physical harm is not an explicit element of those crimes. However, case law has determined that crimes against children, specifically child exploitation crimes, taken at face value are violent because a child is always at a risk of physical harm for not complying with the offender.[226] Furthermore, child victims should be held to a different standard than other victims because children, especially victims of "child grooming," may comply with an adult's demands simply because the adult is a figure of authority.[227] Restitution under the current standard, using the

222. *See generally* Beth Bates Holliday, Annotation, *Who is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996* (18 U.S.C.A. § 3663A), 26 A.L.R. Fed. 2d 283 (2008); *see also* Kimberly J. Winbush, Article*, Persons or Entities Entitled to Restitution as "Victim" Under State Criminal Restitution Statute,* 92 A.L.R. 5th 35.

223. *Compare* 18 U.S.C. § 16(a) (showing that an element of force is required for a crime of violence for restitution purposes); *with* 18 U.S.C § 16(b) (demonstrating a crime of violence for restitution purposes has is a potential risk of physical harm within the crime itself).

224. *See generally* 18 U.S.C. § 2422(b) (criminalizing the coercion and enticement of a minor); *see also* 18 U.S.C. § 2423(b) (criminalizing the transportation of a minor over state lines for sex); *see also* United States v. Keelan, 786 F.3d 865, 868 (11th Cir. 2015).

225. *See id.* (demonstrating the six steps of child grooming: "identification, connection, information gathering, need fulfillment, sexual inhibition reduction, and preservation").

226. *See generally* United States v. Munro. 394 F.3d 865 (10th Cir. 2005).

227. *See id.* (finding that any crime against a child involves an element of force because the offender uses their status as an adult to claim authority and power over the child); *see also* Bridget M. Boggess, Note, *Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. § 2422(b),* 72 Mo. L. Rev. 909 (2007) (noting that children are vulnerable to the advances and abuse from an adult due to the

categorical approach, creates the best result for fairness for the defendant and justice for the victim.[228] Unless Congress is willing to review all statutes and define whether there should be mandatory restitution for those crimes, the categorical analysis is the preferred method because it keeps sentencing and restitution within the powers of the judiciary branch and not the legislative branch.

V. CONCLUSION

Congress enacted the MVRA to provide a means of monetary compensation to make a victim of a crime of violence "whole."[229] However, the statute itself has many problems in practically providing restitution to the victims who are entitled to the restitution.[230] One of the many problems of the act is trying to classify the charged crime as a crime of violence under the MVRA to receive restitution such as Keelan's scenario.[231] While the MVRA allows some kind of restitution for victims, there are still many problems because the victims' power is limited by the presiding judge, who ultimately determines the restitution order and the actual restitution the defendant pays.[232] Furthermore, the MVRA itself does not take into account the ability of the defendant to actually pay the restitution.[233] Thus, it is difficult for victims to really know if they are being compensated and "made whole" by the MVRA.[234]

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influence and power an adult has over a child).

228. *See Keelan,* 786 F.3d at 870-71 (noting several cases where courts applied the categorical approach in the Eleventh Circuit to determine whether a crime was a crime of violence under the MVRA).

229. *See generally A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing in S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Sen. Hatch) (noting that the purpose of the MVRA is to compensate the victims of violent crime through monetary damages).

230. *See* Dickman, *supra* note 166, at 1695 (citing R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution,* FED. PROBATION, June 2004, at 21, 25) (stating that the MVRA's restitution framework exponentially increases the low levels of criminal debt collection).

231. *See generally Keelan*, 786 F.3d at 868.

232. *See generally* Victim Restitution Act of 1995, P.L. 104-132, § 735, 141 Stat. 4 (1995) (showing that the offender and victim may petition the court to amend the restitution order but only the judge decides if there will be an order).

233. *See generally* 18 U.S.C. § 3663A (stating that the ability to actually pay the restitution is not an element of the MVRA and that the courts would schedule smaller payment increments).

234. *See* Dickman, *supra* note 166, at 1695 (arguing that victims are not actually compensated through the MVRA because the percentage of victims who actually receive compensation is low).

Alternative government programs to the MVRA exist such as the VOM program which allows the victim and the offender to regularly meeting in supervised counseling sessions.[235] This program not only forces the offender to take responsibility for the harm they have caused, but it also gives the victim peace of mind.[236] However, for sex crimes, especially child exploitation crimes, this method of trying to make the victim "whole" may be detrimental to the victim. Specifically, children who are victims of the child grooming process would not benefit from these supervised sessions because the victim's trauma resulted from the contact with a predator similar to Keelan.[237] Furthermore, the victim bears the responsibility of initiating this type resolution.[238] There is no other program that provides resolution for a victim of a sex crime which does not involve actively meeting with the victim.[239] Currently, the restitution ordered by the courts is the best and only type of court-ordered act that can possibly come close to compensating for the psychological harm that J.S. suffered.[240] While J.S. actually receiving restitution is a completely separate matter, the idea that the criminal justice system is moving towards a more victim-focused approach shows progression in policy and application.

235. *See* Dickman, *supra* note 166, at 1715 (suggesting that an alternative to the MVRA is a court ordered counseling program between offenders and victims).

236. *See* Dickman, *supra* note 166, at 1715 (arguing that the VOM is a superior alternative to the MVRA because it provides better victim satisfaction).

237. *See* United States v. Keelan, 786 F.3d 865, 868 (11th Cir. 2015) (showing that J.S.'s mental health expenses directly resulted from the psychological mistreatment from Keelan's child grooming techniques which were used to entice J.S.).

238. *See* Dickman, supra note 166, at 1716.

239. *See id.* at 1688 (showing that the MVRA is one of the first attempts of the criminal justice system to try to compensate victims of crime through monetary means).

240. *See generally Keelan*, 786 F.3d at 865-66; *see also generally* Victim Restitution Act of 1995, P.L. 104-132, § 735, 141 Stat. 4 (1995).