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IN THIS ISSUE

How Current Restitution Law is Failing Victims in Child Abuse Image Cases

by Meg Garvin, M.A., J.D.

Legislators and courts have long recognized what common sense makes clear – children depicted in child abuse images[1] are harmed not only by the sexual abuse captured by the images, but also by the subsequent distribution, possession, and viewing of the images of their abuse. Legislators and courts have similarly recognized the importance of awarding restitution to victims to help make them whole, and to aid in their recovery. Thus, it seems a straightforward proposition that children depicted in child abuse images should be awarded restitution from their offenders, including those offenders who possess and view their abuse. In fact, this simple supposition seems to underpin 18 U.S.C. § 2259, the statute governing restitution in cases involving sexual exploitation.

Despite the logic, justness, and legality of affording restitution to the victims in child abuse images, federal courts differ greatly in their approach to the restitution rights of these victims[2] in the context of possession cases. As discussed below, over the last year alone, courts have awarded these victims full restitution, partial restitution, *di minimus* restitution, or even no restitution at all. These differences in outcome can be attributed, at least in part, to varied interpretations of 18 U.S.C. § 2259. This article provides a brief overview of the current state of the law, and suggests that a court-based or legislative solution is urgently needed to avoid further harming these victims.

Law Governing Restitution in Child Abuse Image Possession Cases

Section 2259 of Title 18 of the United States Code governs restitution for offenses involving the sexual exploitation and other abuse of children. Section 2259 provides that a district court "*shall* order restitution for any offense under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18]."[3] Possession of material depicting the sexual exploitation of children is an offense under the

[1] "Child pornography" is a term often used to describe an image that depicts a child being sexually abused. While the term is commonly accepted, its use dilutes the reality of what the image depicts, and the immense harm it causes the child depicted. Consequently, throughout this article the term "child abuse image" will be used instead of "child pornography" whenever possible.

[2] This article addresses only the issue of awarding restitution to those victims in child abuse images who have been identified, not the larger issue of how to help those thousands or tens of thousands of children whose identities are unknown. The National Center for Missing and Exploited Children is the organization that maintains the national identification database for these children, and is diligently working to identify more and more of the victims in the materials containing child abuse images that defendants possess.

[3] 18 U.S.C.§ 2259(a) (emphasis added).

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Message from the Director

by Meg Garvin, M.A., J.D.

Meaningful victim participation in the criminal justice process depends upon victims having a strong voice within that process. As highlighted in this edition of *NCVLI News*, victim voice is important for a number of reasons: it secures public recognition that crime harms not only society as a whole, but also individuals; it helps victims craft narratives to understand and process their experiences; and it aids in the truth-seeking function of courts.

First, in *How Current Restitution Law is Failing Victims in Child Abuse Image Cases*, I discuss the confusion that currently exists regarding how and when to afford restitution to victims of child abuse images in cases involving the possession of such images. The failure to award restitution in these cases improperly treats the possession of child abuse images as a victimless crime. It also undermines the well-established public policy of affording victims restitution as a critical component of the recovery process.

In *Arguments in Favor of Allowing Prosecutor-Introduced Evidence of Battering and Its Effects,* Alison Wilkinson discusses the importance of allowing prosecutors to introduce evidence of battering and its effects in domestic abuse cases. The admission of this evidence is critical to ensuring that even victims who act in a manner at odds with juror expectations have the opportunity not only to tell their story, but also to have it understood.

Finally, in *Integrating Crime Victims into the Sentencing Process,* Paul Cassell argues that courts too often treat a victim's right of allocution as merely an opportunity for general exhortation about the effects of the crime rather than an opportunity to provide information relevant to sentence calculation. Without meaningful participation in the sentencing process, a victim's right of allocution is not the right to be heard, but only the right to speak in a vacuum.

We absolutely must continue to fight for meaningful participation for victims so that we, as a society, never forget that crimes are committed against individuals, and so that we afford these individuals every opportunity to choose to speak and be heard about their victimization.

Back Row: Cassandra Mercer, Meg Garvin, Ali Wilkinson, Jeff Hanson, Sean-Michael Riley. Front Row: Sarah LeClair, Carol Schrader, Terry Campos, Lisa Farrell, Scott Flor. Not Pictured: Johanna Borkan, Susie Cowen, Marti Long.

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chapter to which Section 2259 applies.[4] The use of the word "shall" makes awarding restitution to persons who meet the Section 2259's definition of "victim."[5]

Children Depicted in Child Abuse Images are "Victims" Under Section 2259

Section 2259 employs a broad definition of victim, providing that a "victim" is an "individual *harmed* as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18]."[6] This definition stands in contrast to the narrower definition of "victim" contained in other federal restitution statutes. For instance, both the Victim Witness Protection Act and the Mandatory Victim Restitution Act define a "victim" to be a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . . ."[7] Since neither the word "directly" nor "proximately" appear in Section 2259, under the statute's plain language, any "harm" resulting from a qualifying offense is sufficient to create "victim" status.

Courts have clearly determined that an offender's possession of child abuse images harms the children depicted therein. The United States Supreme Court first acknowledged such harm in 1982 in *New York v. Ferber*.[8] In *Ferber*, the Court upheld a New York law that criminalized the promotion of child abuse images, finding that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[9] The Court also found that the distribution of child abuse images is "intrinsically related to the sexual abuse of children" because, among other things, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[10] In reaching this conclusion, the Court noted:

> 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.[11]

In 1998, the Fifth Circuit Court of Appeals expanded upon the *Ferber* Court's analysis to find that "the children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography."[12] The court then articulated three specific harms caused by the possession of child abuse images:

> *First,* the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. . . . The consumer who "merely" or "passively" receives or possesses child pornography directly contributes to the child's continued victimization.
>
> *Second,* the mere existence of the child pornography represents an invasion of the privacy of the child depicted. . . . The recipient of the child pornography obviously perpetuates the existence of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children.
>
> *Third*, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for

[4] 18 U.S.C. § 2252.

[5] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("As used in statutes . . . this word [shall] is generally imperative or mandatory.") (citations omitted).

[6] 18 U.S.C. § 2259(c) (emphasis added).

[7] 18 U.S.C. § 3663(a)(2) (Victim Witness and Protection Act); 18 U.S.C. § 3663A(2) (Mandatory Victim Restitution Act).

[8] 458 U.S. 747 (1982).

[9] *Id.* at 757.

[10] *Id.* at 759.

[11] *Id.* at 759 n.10 (quoting David P. Shoulvin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)).

[12] *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998).

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> creating and distributing the materials. . . . The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects.[13]

More recently, as discussed below, many federal courts have expressly found that, for the purposes of Section 2259, the possession of child abuse images harms the children depicted therein.

Congress has also recognized the harm caused by the possession of child abuse images in a variety of contexts. In the Child Pornography Prevention Act of 1996, Congress found that "where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."[14] More recently, Congress addressed the harm of child pornography in the Adam Walsh Child Protection and Safety Act of 2006.[15] In the statute's legislative history, Congress found that "[t]he illegal production, transportation, distribution, receipt, advertising, and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole."[16] Congress noted that "every instance of viewing child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse."[17]

As discussed above, Section 2259 mandates restitution for any individual "harmed as a result of a commission of a [qualifying crime]," including the crime of possessing child abuse images. The findings by courts and Congress make it clear that children depicted in child abuse images are harmed not only by the production of such images, but also by their distribution and possession. Thus, these victims are entitled to mandatory restitution from their offenders, including those individuals who possess images of their abuse.

Restitution Analysis in Recent Possession Cases

Since July 2009, over a dozen federal district courts have grappled with the specific question of restitution owed to victims depicted in child abuse images when the crime at issue is possession.[18]

[13] *Id.* at 929-30 (internal citations and quotations omitted).

[14] Child Pornography Prevention Act of 1996, Pub. L. 104-208 § 121, 110 Stat. 3009, 26 (1996).

[15] Pub. L. No. 109-248.

[16] *Id.* at § 501.

[17] *Id.*

[18] *See, e.g., United States v. Scheidt*, 1:07-CR-00293, 2010 WL 144837 (E.D. Cal. Jan 11, 2010); *United States v. Ferenci*, No. 1:08-CR-0414, 2009 WL 2579102 (E.D. Cal. Aug. 19, 2009); *United States v. Monk*, No. 1:08-CR-0365, 2009 WL 2567831 (E.D. Cal. Aug. 18, 2009); *United States v. Renga*, No. 1:08-CR-0270, 2009 WL 2579103 (E.D. Cal. Aug. 19, 2009); *United States v. Zane*, No. 1:08-CR-0369, 2009 WL 2567832 (E.D. Cal. Aug. 18, 2009); *United States v. Simon*, No. CR-08-0907, 2009 WL 2424673 (N.D. Cal. Aug. 7, 2009); *United States v. Staples*, No. 09-14017, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009); *United States v. Van Brackle*, No. 2:08-CR-042, 2009 WL 4928050 (N.D. Ga. Dec. 17, 2009); *United States v. Berk*, No. 08-CR-212, 2009 WL 3451085 (D. Me. Oct. 26, 2009); *United States v. Aumais*, No. 08-CR-711 (N.D.N.Y. Jan. 13, 2010); *United States v. Brunner*, No. 5:08cr16, 2010 WL 148433 (W.D.N.C. Jan. 12, 2010);

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During this time, every court that reached the issue found that the victim depicted was harmed by the offender's possession of the images depicting his or her abuse.[19]

Despite their consistency in finding the requisite harm to the victims, these courts have split on how much restitution to award the victims depicted in the images. Only one court has awarded the full restitution requested, while others have awarded partial restitution, *di minimus* restitution, or no restitution at all. The difference in outcome seems to turn on the courts' causation analyses – meaning what offer of proof the court deems necessary to establish a causal connection between the defendant's specific offense and the victim's losses.

Since July 2009, over a dozen federal district courts have grappled with the specific question of restitution owed to victims depicted in child abuse images when the crime at issue is possession. During this time, every court that reached the issue found that the victim depicted was harmed by the offender's possession of the images depicting his or her abuse.

The one court that awarded full restitution relied on "credible and persuasive" expert testimony that the child depicted in the images was harmed by the possession and distribution of her images.[20] With this finding of harm, the court held that the child was a "victim" under Section 2259, and was, pursuant to the statute, entitled to recover the full amount of her losses.[21] The court then turned to the calculation of the full amount of the victim's losses, and gave credence to the evidence put forth by the government and the victim's attorney regarding lost wages and benefits, as well as future counseling costs. It held the defendant jointly and severally liable for the full amount, stating that he shared liability with all other defendants ordered to pay restitution to the victim, even those that had yet to be identified.[22] Notably, the court held that the fact that the victim did not have personal knowledge of this particular defendant's activities at the time experts evaluated her and calculated her full loss did "not negate the harm that [she] suffered and continues to suffer as a result of this defendant's possession of images depicting her sexual abuse as a child."[23]

Relying on the victim's impact statement and expert testimony, one court that awarded partial restitution held that each person who possesses images of the victim exacerbates the harm from their original production and distribution, and even though hundreds or thousands may possess the same images, the defendant's conduct "remains a substantial cause of that harm."[24] In analyzing the victim's claim of loss, the court determined that the evidence presented improperly conflated the harm that the victim suffered from the possession of the images with the harm that she suffered as a result of the abuse depicted therein.[25] The court analyzed each of the victim's requests to decipher which losses were causally related to a possession offense. Using this analysis, the court refused to order restitution for lost income or benefits, holding that the government failed to meet its burden to show a causal connection

United States v. Hicks, No. 1:09-CR-150, 2009 WL 4110260 (E.D. Va. Nov. 24, 2009); *United States v. Paroline*, No. 6:08-CR-61, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009). The only federal circuit court of appeals to address this precise issue resolved the matter on standard of review grounds rather than engaging the merits of the arguments. *See In re Amy*, 591 F.2d 792 (5th Cir. 2009).

[19] *See, e.g.*, *Scheidt*, 2010 WL 144837, at *4; *Ferenci*, 2009 WL 2579102, at *4; *Monk*, 2009 WL 2567831, at *4; *Renga*, 2009 WL 2579103, at *4; *Zane*, 2009 WL 2567832, at *4; *Staples*, 2009 WL 2827204, at *3; *Van Brackle*, 2009 WL 4928050, at *3; *Berk*, 2009 WL 3451085, at *7; *Aumais*, No. 08-CR-711, at 13; *Brunner*, 2010 WL 148433, at *2; *Hicks*, 2009 WL 4110260, at *3; *Paroline*, 2009 WL 4572786, at *4. *But see Simon*, 2009 WL 2424673, at *6 (stating in *dicta* that the government had failed to meets its burden to show a causal connection between defendant's possession of child abuse images and harm to the victim).

[20] *Staples*, 2009 WL 2827204, at *3.

[21] *Id.*

[22] *Id.* at *4.

[23] *Id.* at *3.

[24] *Aumais*, No. 08-CR-711, at 4-13.

[25] *Id.* at 15.

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between such loss and the defendant's possession.[26] With regard to counseling costs, the court held that the harm from production, distribution, and possession "are closely related for purposes of counseling and cannot be separate[d] to allocate costs between them as it appears that [the victim] will require counseling for both."[27] Relying on the language of Section 2259 that requires an award for the full amount of damages, the court held the defendant liable for what it determined to be the full amount of future counseling costs.[28]

The courts that have awarded *di minimus* restitution have determined that, although restitution is mandatory in all possession cases under Section 2259, the statutory definition of "victim" requires some showing of a causal connection between the defendant's possession and the victim's losses.[29] For these courts, "Section 2259 leaves the court in a legal quandary: The court must award restitution and the government must show the harm caused by [defendant], but it is difficult to determine the amount of harm caused by [defendant]."[30] To resolve this "difficult determination," these courts have looked to 18 U.S.C. § 2255, which provides that the minimum amount recoverable in an action for personal injuries caused by the sexual exploitation of children is $150,000.[31] Based on this figure, and, through a discount calculation (the basis of which is less than clear), each came to a *di minimus* restitution award.[32]

The courts that have declined to award restitution have found that Section 2259 requires the government show, by a preponderance of the evidence, that a specific loss was proximately caused by an individual defendant's specific offense.[33] Based upon this reading of the law of causation, these courts have determined that, despite substantial victim impact statements and expert reports detailing "tragic harms" to the victim, the government and victim failed to sufficiently prove that any specific portion of the victim's harm was proximately caused by the defendant's specific possession or viewing of the images at issue, as opposed to the initial abuse or other acts of receipt and distribution.[34] Unlike the *di minimus* courts, these courts have not turned to the civil statute for guidance to calculate a minimum amount of harm, and instead have refused to award any restitution.

Causation Under Section 2259

So which court(s) are correctly analyzing the restitution issue? A key canon of statutory interpretation dictates that, when interpreting a statute, one must start with the language of the statute itself.[35] Section 2259 mandates restitution for "the full amount of the victim's losses as determined by the court."[36] Under the statute, the

[26] *Id.*

[27] *Id.* at 15-16.

[28] *Id.* at 16-17.

[29] *See, e.g., Scheidt*, 2010 WL 144837, at *4, *Ferenci*, 2009 WL 2579102, at *4; *Monk*, 2009 WL 2567831, at *4; *Renga*, 2009 WL 2579103, at *4; *Zane*, 2009 WL 2567832, at *4; *Hicks*, 2009 WL 4110260, at *3.

[30] *See, e.g.*, *Scheidt*, 2010 WL 144837, at *4; *Ferenci*, 2009 WL 2579102, at *4; *Monk*, 2009 WL 2567831, at *4; *Renga*, 2009 WL 2579103, at *4; *Zane*, 2009 WL 2567832, at *5.

[31] 18 U.S.C. § 2255(a).

[32] *See, e.g.*, *Scheidt*, 2010 WL 144837, at *5 ("The court finds that $3,000 should be awarded as restitution in favor of [the victim]. This amount is two percent of the $150,000 amount reflected in Section 2255. Given the high amount of the deemed damages in Section 2255, the court finds an amount less than $3,000 inconsistent with Congress's findings on the harm to children victims of child pornography. At the same time, the court finds $3,000 is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns."); *Ferenci*, 2009 WL 2579102, at *5 (same); *Monk*, 2009 WL 2567831, at *5 (same); *Renga*, 2009 WL 2579103, at *5 (same); *Zane*, 2009 WL 2567832, at *5 (same); *Hicks*, 2009 WL 4110260, at *6 ("[T]he Court finds that the amount of $3,000, the amount identified as the correct restitution figure in several of the previously-decided [cases involving the same victim and child abuse images], plus attorney's fees, is appropriate. The Court believes that at least fifty defendants will be successfully prosecuted for unlawfully possessing or receiving the [series of abuse images of the victim], given the numbers prosecuted to date. If restitution orders of $3,000 per case result, [the victim] will be compensated in full. Like the Eastern District of California, this Court is confident that the amount of harm [defendant] actually inflicted upon [the victim] exceeds the amount awarded, and thus [defendant] has little to protest in the way of due process or otherwise.").

[33] *See, e.g., Van Brackle*, 2009 WL 4928050, at *4; *Berk*, 2009 WL 3451085, at *5; *Paroline*, 2009 WL 4572786, at *8.

[34] *See, e.g., Van Brackle*, 2009 WL 4928050, at *5; *Berk*, 2009 WL 3451085, at *8; *Paroline*, 2009 WL 4572786, at *9.

[35] *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985).

[36] 18 U.S.C. § 2259(b)(1).

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Integrating Crime Victims Into the Sentencing Process*

*by Paul G. Cassell, J.D.***

The Current System Gives Victims a Limited Role in the Sentencing Process

[I]t is worth briefly highlighting the important role for victims provided for by the [Federal Sentencing] Guidelines and Rules of Criminal Procedure. Under the current system, a victim impact statement is typically included in the pre-sentence report prepared by the probation office. This "victim impact statement" is often written by the victim and explains the effect of the crime. Later, at the sentencing hearing, victims are allowed to speak or "allocute." As Rule 32 of the Federal Rules of Criminal Procedure currently provides, "[b]efore imposing sentence" the court must "address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."[1]

Yet while this rule gives many victims the right to allocute, courts typically seem to treat this right of allocution as a mere general exhortation about the effects of the crime rather than for providing specific information that goes into the Guidelines calculation or other specific information that bears on the sentencing. Handling victim allocution in this way often means that victims' information will have little or no effect on the sentence imposed. The most important determinant of most sentences is the applicable guideline. To be sure, the Supreme Court recently held in the well-known *Booker* decision that the federal sentencing guideline scheme is "advisory."[2] But most district judges continue to give the Guidelines "heavy weight"[3] and statistics collected by the Sentencing Commission show the most sentences continue to fall within the Guideline recommendations or are based on Guideline calculations in some fashion.[4] Indeed, while recognizing the right of district court judges to vary from the Guidelines, the Supreme Court has been quite clear that the sentencing judges "must treat the Guidelines as the starting point and initial benchmark" for calculating any sentence.[5] If crime victims do not participate in the sentencing guideline process – or are unable to provide information that influences the sentencing guideline calculation – then their right of allocution will have little effect on sentencing.

The Crime Victims' Rights Act Commands that Victims be Given an Expanded Role in the Sentencing Process, Including Access to Pre-Sentence Reports

Limiting crime victims' role in federal sentencing to mere general exhortation is inconsistent with the role that Congress envisions victims should play. In October 2004, Congress passed the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act."[6] Congress intended through this

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* This text is excerpted from the Statement of Paul G. Cassell before the United States Sentencing Commission on Protecting Crime Victims' Rights in the Sentencing Process, October 20, 2009. The full text of the Statement is available, upon request, from NCVLI.

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[1] Fed. R. Crim. P. 32(i)(4)(B).

[2] *United States v. Booker*, 543 U.S. 200, 234 (2005) (remedial majority opinion by Justice Breyer).

[3] *See, e.g.*, *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

[4] U.S. Sentencing Commission, Preliminary Quarterly Data Report (Sept. 8, 2009) (57.4% of all cases sentenced within the guideline range and an additional 25.0% were sentenced based on a government recommendation to go below the Guideline range). *See generally* Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After* Booker, 43 U. Houston L. Rev. 279, 319 (2006) ("[I]t seems reasonable to predict that the guidelines will remain the predominant factor in determining individual sentences for years to come.").

[5] *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

[6] Pub. L. No. 108-405, § 102(a), 118 Stat. 226 (Oct. 30, 2004).

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legislation to make crime victims real participants in the criminal justice process. To that end, the Act guarantees crime victims a series of rights, such as the right to be present and heard at appropriate points in the criminal justice process and the right to be treated fairly.[7]

Specifically, the Crime Victims' Rights Act guarantees crime victims the right "to be reasonably heard" and "to be treated with fairness" throughout the criminal justice process, including at sentencing hearings.[8] This congressional command is not an invitation for business as usual. Instead, Congress expected "*meaningful participation* of crime victims in the justice system . . . ."[9] In federal sentencings, crime victims cannot be such participants unless they are allowed an appropriate role in the process of determining the applicable sentencing guideline. In the great majority of cases, the Guidelines are *the* major factor driving a defendant's sentence. . . . [V]ictims must be given an opportunity to be involved in that guidelines determination. . . . Anything less will leave victims on the outside looking in at the process, rather than participating in the process as Congress – and justice – require.

One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. Among its comprehensive list of rights, the Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[10] This codifies the right of crime victims to provide a "victim impact statement" to the court.[11] The right is not narrowly circumscribed to just impact information, however. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The CVRA appears to legally entitle victims to be heard on disputed Guidelines issues and, as a consequence, to review parts of the pre-sentence report relevant to those issues. As Senator Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.[12]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).[13] For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated:

> The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.[14]

Again, it is hard to see how victims can meaningfully provide "any information" and their "opinion" about a sentence without being told what everyone else in the courtroom knows – the Guidelines calculations that likely will drive the

[7] *See generally* Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005).

[8] 18 U.S.C. §§ 3771(a)(4), (8).

[9] 150 Cong. Rec. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

[10] 18 U.S.C. § 3771(a)(4).

[11] *See generally* Douglas Beloof, Paul Cassell & Stephen Twist, Victims in Criminal Procedure ch. 10 (2d ed. 2006) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1395-96 (same).

[12] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* Beloof, Cassell & Twist, Victims in Criminal Procedure, ch. 10 (discussing three types of victim impact information).

[13] *See supra* note 4.

[14] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

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Crime Victim Litigation Clinic at Lewis & Clark Law School

NCVLI is committed to educating the legal profession on victim law. One of the places where that education begins is the Crime Victim Litigation Clinic at Lewis & Clark Law School in Portland, Oregon. In the Clinic, NCVLI's legal staff works with law students to support crime victim attorneys and advocates through legal research and writing. In Fall 2009, seven law students participated in the Clinic. Over the course of the semester, they worked on projects covering a wide range of issues, including: whether a victim is entitled to modification of a restitution order following settlement in a civil action; whether a criminal court has the authority to order parental visitation for a defendant; and whether human trafficking victims unnamed in an indictment are entitled to restitution.

Back Row: Travis Smith, Zachary Walker, Nick Tipton, Meg Garvin (Instructor).
Front Row: Mika'il Ali, Daniel DiVittorio, Fabiana Ochoa, Terry Campos (Instructor), Susie Cowen (Instructor), Matthew Abts. Not Pictured: Alison Wilkinson (Instructor).

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sentence.

Victims may often possess information quite relevant to the district court's assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to "victim-related adjustments" and issues relating to the victim are often part of the Guidelines calculation process.[15] This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnapping provision, for example, looks to such things as the degree of injury suffered by the victim.[16] The fraud provision looks to loss to the victim.[17]

To be sure, in many cases a prosecutor may bring some of these relevant facts to the court's attention. Indeed, under the [CVRA] prosecutors are required to "use their best efforts" to insure that victims' rights are protected.[18] But the [CVRA] clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the [CVRA] begins: "A *crime victim* has the following rights . . . ."[19] Moreover, the [CVRA] specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.[20] This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.[21] As Senator Kyl explained about the right-to-be-heard provision:

> This provision is intended to allow crime victims to directly address the court in person. It is not necessary for

[15] U.S.S.G. §§ 3A.1.1 *et seq.*

[16] U.S.S.G. § 2A4.1(b)(2).

[17] U.S.S.G. § 2B1.1(b).

[18] 18 U.S.C. § 3771(c).

[19] 18 U.S.C. § 3771(a) (emphasis added).

[20] 18 U.S.C. § 3771(d).

[21] *See generally* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289 (explaining victim participation model of criminal justice).

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> the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings*.[22]

An independent basis for the victim reviewing pre-sentence reports is the victim's broad right under the CVRA to be "treated with fairness."[23] This right seems to comfortably encompass a right of access to relevant parts of the pre-sentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, *fairness includes the notion of due process*. . . . This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process*.[24]

Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that "[i]t is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner*.'"[25] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process. . . ."[26]

A victim's right to be heard regarding sentencing issues is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.[27] While reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[28] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,[29] it is unclear how those provisions are integrated with the Guidelines procedural provisions.

For all these reasons, the Crime Victims' Rights Act should be understood as giving victims the right to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing matters. It is therefore incumbent on the judiciary to take specific steps to integrate victims into the sentencing process.

[22] 150 Cong. Rec. S10910-11 (Oct. 9, 2004) (remarks of Sen. Kyl) (emphasis added).

[23] 18 U.S.C. § 3771(a)(8).

[24] 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

[25] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added).

[26] 150 Cong. Rec. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); *see generally* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 Yale L. & Pol'y Rev. 431 (2008).

[27] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *accord* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[28] 18 U.S.C. § 3771(a)(6).

[29] 18 U.S.C. § 3664.

NCVLI Alumni Association

NCVLI Alumni now number nearly 300 and are located in 18 states, plus the District of Columbia. Together, we will build a community well-versed in victims' rights regardless of the area of law in which one practices, or the field in which one works. If you would like to join the NCVLI Alumni Association to connect with other victims' rights alumni, receive e-newsletters, and be invited to alumni events, please contact Cassandra Mercer at (503) 768-6957 or cmercer@lclark.edu.

Arguments in Favor of Allowing Prosecutor-Introduced Evidence of Battering and Its Effects

by Alison Wilkinson, J.D.

In the 1970s, Lenore Walker developed the concept of "Battered Woman Syndrome" (BWS).[1] The term was coined to describe "a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged period of time."[2] In the decades following its introduction, there has been a shift away from using the term "Battered Woman Syndrome" to describe this concept, as the term inaccurately "implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience."[3] The more inclusive phrase "battering and its effects" is now commonly used to describe such evidence.[4]

Currently, every state allows a defendant who is claiming an affirmative defense to a crime on the basis of being a victim of domestic violence[5] to introduce expert testimony on battering and its effects.[6] However, approximately only half of the states explicitly, by statute or case law, allow the prosecution to introduce expert testimony on battering and its effects.[7] The majority of the remaining states have not yet addressed whether the prosecution can introduce such evidence. This article discusses the policy rationales for allowing prosecutors to introduce expert testimony on battering and its effects, and surveys those states where it has been found to be admissible. This article also provides a roadmap for seeking the admission of expert testimony on battering and its effects in those jurisdictions that have not yet affirmatively ruled on its admissibility.

Policies Supporting the Admission of Expert Testimony on the Dynamics of Domestic Violence

More than other crimes, the credibility of the victim is a core issue in domestic violence cases. As one commentator noted, "credibility is the central factor around which . . . abuse and rape cases revolve."[8] Sadly, domestic violence cases often boil down to "he said, she said," "and the trial unfolds into a focus on the victim's – rather than the defendant's – behavior."[9]

Unfortunately, the victim's credibility is often called into question because the psychological effect that these crimes have on victims is so misunderstood.[10] Our society has certain expectations as to how a victim should behave:

[1] Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, 13 (Aug. 2007), available at http://www.ndaa.org/pdf/pub_introducing_ expert_ testimony.pdf.

[2] Christine Emerson, *Note:* United States v. Willis*: No Room for Battered Woman Syndrome in the Fifth Circuit?*, 48 Baylor L. Rev. 317, 320 (1996).

[3] U.S. Department of Justice, Office of Justice Programs, National Institute of Justice & U.S. Health and Human Services, National Institute of Mental Health, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to § 40507 of the Violence Against Women Act*, vii (1996), available at http://www.ncjrs.gov/pdffiles/batter.pdf.

[4] The term "battering and its effects" will be used in this article, whenever possible, instead of BWS.

[5] The term "victims of domestic violence" is used in this article to describe victims of non-sexual domestic violence, as well as victims of spousal or partner rape and other domestic sexual assaults.

[6] Long, *Introducing Expert Testimony* at 19.

[7] *Id.*

[8] Jennifer Adler Lifschitz, *Battered Woman Syndrome and Prosecution of Domestic Abuse and Rape Cases*, 5 Geo. J. Gender & L. 149, 150 (2004).

[9] Long, *Introducing Expert Testimony* at 1.

[10] Such misunderstanding is also common in the context of sexual assault. Because the credibility of victims of sexual violence, including both domestic and non-domestic sexual assaults, is often called into question, expert testimony regarding rape myths and the dynamics of sexual assault is often necessary to dispel juror misperceptions. Courts often address these topics in the context of BWS, despite the shift toward characterizing this type of evidence as evidence of battering and its effects. While the testimony at issue may not be styled as BWS evidence, because of the overlap between evidence on battering and its effects and BWS, a court would likely consider this, for all intents and purposes, to be evidence regarding BWS. *See Odom v. State*, 711 N.E.2d 71 (Ind. 1999) (finding that, although the expert did not testify about BWS specifically, the court would treat the testimony as such because, like BWS, the expert's testimony involved both an explanation as to why a victim may recant and the psychological dynamics common to victims of sexual violence).

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In the Trenches

In this column, NCVLI publishes news from the frontlines of the crime victims' rights movement – information about cases we all want and need to know but that are not published in

ALASKA - Upon a defendant's death, Alaska courts automatically apply the *abatement ab initio* doctrine, which provides that a criminal conviction abates if a defendant dies prior to the resolution of his or her direct appeal. Supporting the Attorney General's position that Alaska should abandon this practice, NCVLI and the Alaska Office of Victims' Rights, filed an amici curiae brief in which they argued that the doctrine violates the constitutional right of crime victims in Alaska to be treated with dignity, respect, and fairness during all stages of the criminal justice process. The case is pending.

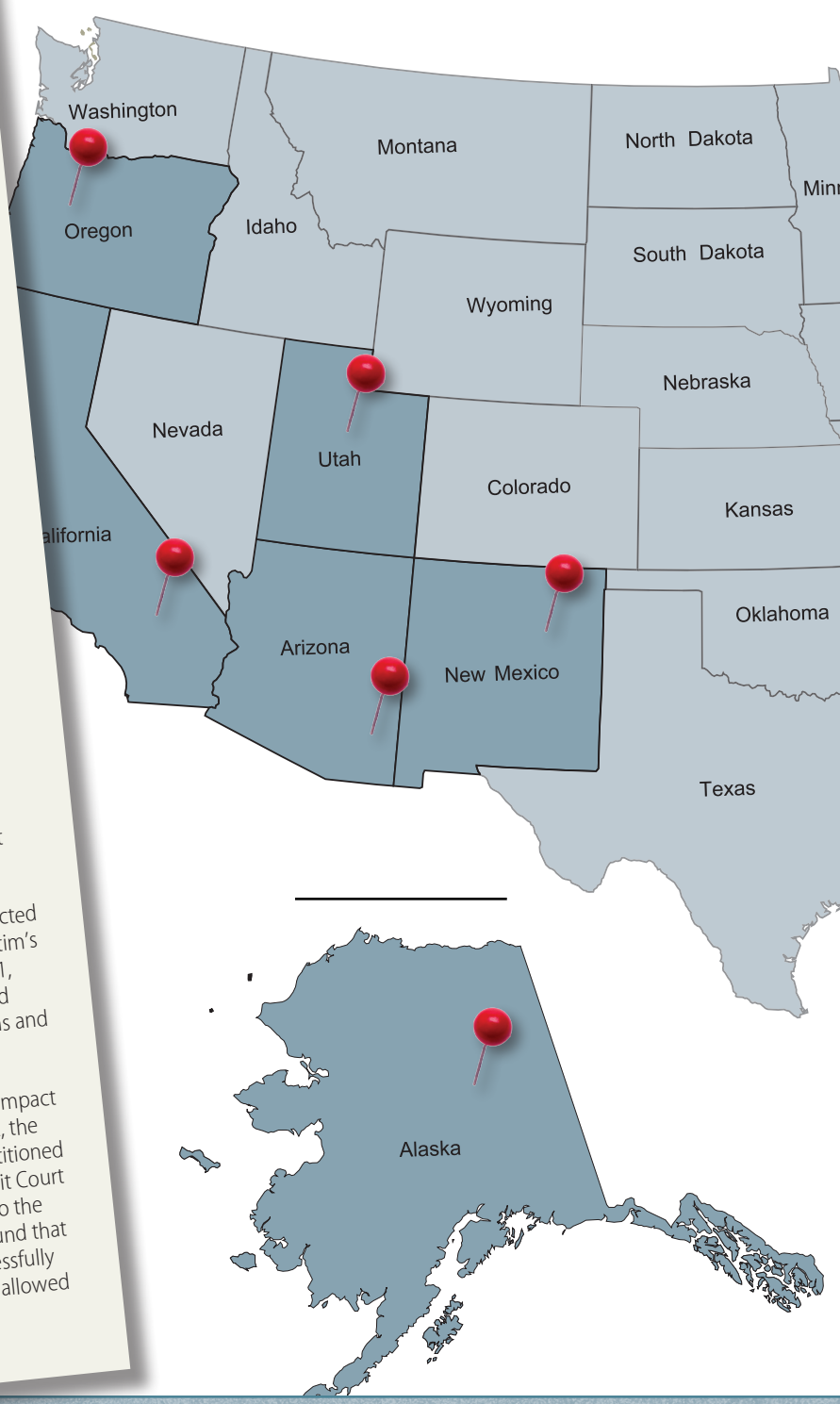
ARIZONA - An Apache tribal member who was the victim of a violent attack sought to exercise his rights under the Apache code. Representing the victim, NCVLI's Arizona Clinic, the Arizona Voice for Crime Victims, worked closely with the tribal prosecutor to ensure that the victim could exercise rights relating to release, trial, and sentencing, including the preparation of a victim impact statement and a request for restitution. Defendant was convicted and restitution was ordered for the victim.

CALIFORNIA - Represented by NCVLI's California Clinic, the California Voice for Crime Victims (CVCV), a homicide victim's widow and eight year-old daughter asserted their right to speak at defendant's bail hearing. The court allowed both victims to address the court. Upon considering the victims' statements, as well as arguments by CVCV and the prosecutor, the court set bail at $3 million.

CONNECTICUT - Defendant, convicted of attempted sexual assault and kidnapping, petitioned to have his kidnapping conviction reversed on collateral review. The relief that defendant sought would result in a new trial nearly ten years after his conviction. NCVLI, joined by Connecticut Sexual Assault Crisis Services, Inc., filed an amici curiae brief in the Connecticut Supreme Court, arguing that such an outcome would violate many of the victim's constitutional rights, including the right to be treated with fairness and respect and the right to timely disposition of the case. The case is pending.

DISTRICT OF COLUMBIA - After a sexual assault victim gave a statement at defendant's parole hearing, defendant attempted to cross-examine her about her sexual history. Representing the victim, NCVLI's D.C. Clinic, the District of Columbia Crime Victims' Resource Center (DCCVRC), objected to this line of questioning, arguing that it violated the victim's right under the Crime Victims' Rights Act, 18 U.S.C. § 3771, to be treated with fairness and respect for her dignity and privacy. The parole board sustained DCCVRC's objections and revoked defendant's parole.

MARYLAND - A rape victim sought to give her victim impact statement via video recording. NCVLI's Maryland Clinic, the Maryland Crime Victims' Resource Center (MCVRC), petitioned the Juvenile Division of the Montgomery County Circuit Court to allow the victim to so testify. Defendant objected to the introduction of the videotaped statement on the ground that he could not cross-examine the victim. MCVRC successfully rebutted defendant's arguments, and the victim was allowed to present her statement via video.



any of the reporters. Several of these cases are pending and will be updated in future columns, as information is available.

If you know of a victims' rights case that should be included in this column, please e-mail us at ncvli@lclark.edu.

NEW JERSEY - More than sixteen years after being convicted of sexually abusing the victim and being required to register as a sex offender, defendant requested termination of his registration and reporting requirements. On behalf of the victim, NCVLI's New Jersey Clinic, the New Jersey Crime Victims' Law Center (NJCVLV), filed a motion asserting the victim's right to provide a substantive impact statement and objection to defendant's request. The New Jersey Superior Court granted NJCVLV's motion.

NEW MEXICO - On behalf of a number of child sexual assault victims, NCVLI's New Mexico Clinic, the New Mexico Victims Rights Project (NMVRP), moved to compel service of all pleadings implicating the victims' rights. In response, defendants moved to strike all of the victims' pleadings and to otherwise limit their participation in the case. NCVLI filed an amicus curiae brief in support of NMVRP, which defendant also moved to strike. The court found, among other things, that: the victims had standing to assert their statutory and constitutional rights, that all pleadings involving the victims' rights should be served upon the victims' attorney, and that NCVLI's amicus brief was "appropriate and relevant" to the issues before it.

OHIO - Defendant, indicted for raping and kidnapping the victim, pleaded guilty to felony abduction. With assistance from NCVLI, the victim's attorney asserted the victim's right to be heard and read her victim impact statement to the court prior to sentencing.

OREGON - The prosecutor's office failed to notify an assault victim of defendant's entry of plea and sentencing hearing. As a result, the victim was denied her right to be heard, and the court did not order restitution. NCVLI's Oregon Clinic, the Oregon Crime Victims Law Center, successfully argued that Oregon's victims' rights statute required the proceeding be "rolled back," and the victim be given the opportunity to seek restitution. The court re-sentenced defendant, ordering him to pay full restitution and a compensatory fine. Based on the victim's statements about ongoing intimidation, the court also warned defendant and his girlfriend that any such behavior in the future would result in jail time.

UTAH - Represented by NCVLI's Utah Clinic, the Utah Crime Victims Legal Clinic (UCVLC), a domestic violence victim sought restitution for expenses related to medical treatment, travel, relocation, and mental health counseling. Defendant opposed the restitution request, arguing that the victim lacked standing to request restitution independent of the prosecutor, and that the types of restitution requested were inappropriate. With assistance from NCVLI, UCVLC replied to defendant's opposition. The court found in favor of the victim, concluding that a prosecutor's statutory obligation to file a restitution claim with the court does not bar a victim from applying directly to the court for restitution. The court further found that the victims' losses were all "pecuniary damages" suffered as a result of defendant's criminal conduct, and that restitution for those expenses was therefore appropriate.

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she should report immediately; she should leave her abuser; she should fully cooperate with the prosecution. As the California Supreme Court noted:

> When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. And when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor.[11]

Because a victim's credibility is central to the prosecution of a domestic violence case, and because a victim's credibility is likely to be misperceived by the jury, it is essential that jurors are aware of the reasons why the victim is not acting in conformity with their expectations. Expert testimony on the psychological effects and behavioral ramifications of domestic violence is a relevant, not unduly prejudicial way to set forth the rationales for this seemingly inconsistent behavior.

When the victim's behavior does not meet the jury's expectations, the tendency is to disbelieve that the victim was a "victim" at all. As the Washington Supreme Court noted in a domestic violence case: "The average juror's intuitive response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of the incidents and consensual participation."[12]

Because a victim's credibility is central to the prosecution of a domestic violence case, and because a victim's credibility is likely to be misperceived by the jury, it is essential that jurors are aware of the reasons why the victim is not acting in conformity with their expectations. Expert testimony on the psychological effects and behavioral ramifications of domestic violence is a relevant, not unduly prejudicial way to set forth the rationales for this seemingly inconsistent behavior.

[11] *People v. Brown*, 33 Cal. 4th 892, 906-907 (Cal. 1984).

[12] *State v. Ciskie,* 751 P.2d 1165, 1166 (Wash. 1988).

Accordingly, policy dictates that such evidence should be admissible, absent contrary rule or law.

Jurisdictions that Allow Testimony on Battering and Its Effects

In those jurisdictions where prosecutor-introduced evidence of battering and its effects is admissible, courts base their decisions about admissibility on three factors. They first look to whether the evidence is relevant. In making this determination, courts also consider a second factor: whether admission of the evidence would create a risk of undue prejudice. Their final consideration is whether the introduction of this evidence would be helpful to the jury. As discussed below, case law from these jurisdictions may guide those jurisdictions that have not yet made a determination as to the admissibility of such evidence.

The Evidence must be Relevant

Federal Rule of Evidence 402 sets forth the presumption that "all relevant evidence is admissible. . . . Evidence which is not relevant is not admissible."[13] Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[14] Those forty or so states that have adopted the Uniform Rules of Evidence as the basis of their state codes have rules largely similar rule to the federal rule.[15]

As discussed above, in domestic violence cases, the victim's credibility is routinely at issue.

[13] Fed. R. Evid. 402.

[14] Fed. R. Evid. 401.

[15] *See generally* Unif. R. Evid. 74 References & Annotations (table of jurisdictions that adopted 1974 Rules of Evidence with 1986 Amendments).

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Accordingly, courts consider expert testimony that may tend to explain why a victim is behaving in a way that a jury may find incredible to be relevant. For instance, the Indiana Supreme Court found that evidence on battering and its effects was relevant to provide an explanation as why the victim recanted her accusations against the defendant.[16] The New Hampshire Supreme Court held that expert testimony was relevant to preempt negative inferences based on the victim's "inconsistent" actions.[17]

The Evidence must not be Unduly Prejudicial

Even if a court determines that the evidence is relevant, it may still find the evidence to be inadmissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[18] Courts have most often found that when an expert testifies as to whether the victim in the case before them is a victim of domestic violence, the relevance of testimony regarding battering and its effects is outweighed by prejudice.[19] On the other hand, courts generally find such testimony admissible where the expert does not offer to diagnose the victim as someone who suffers from the effects of battery.[20] For instance, the Wisconsin Court of Appeals allowed expert testimony on the cycle of violence in abusive relationship where the expert did not opine as to whether the victim in the case in fact suffered from abuse.[21] In reaching this decision, the court noted that, had the expert diagnosed the victim "as a person with battered woman's syndrome, . . . such opinion would have been reversible error."[22] Accordingly, such assertions should be avoided.[23]

The Evidence must Assist the Trier of Fact

Federal Rule of Evidence 702, the text of which is similar to the corresponding rule of most states, allows expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Most courts admit evidence on battering and its effects on the basis that jurors would not understand why a victim may be acting in a way that is inconsistent with their expectations. As the Indiana Supreme Court noted: "Most courts agree that the reactions and behaviors of domestic violence are not commonly understood by lay persons."[24] The Massachusetts Supreme Court similarly recognized "that the pattern of behavior and emotional characteristics common to the victims of battering lies beyond the ken of the ordinary juror and may properly be the subject of expert testimony."[25]

In the majority of cases, the expert evidence is not introduced until the victim affirmatively acts in a way that is inconsistent with the jurors' expectations – most often, by recanting testimony or by being unwilling to go forward with the case.

[16] *Odom*, 711 N.E.2d at 75-76.

[17] *State v. Searles*, 680 A.2d 612, 615-16 (N.H. 1996).

[18] Fed. R. Evid. 403.

[19] *See, e.g.*, *Ciskie*, 751 P.2d at 1173-74 (finding that defendant might suffer undue prejudice if expert were to diagnose victim as a rape victim); *State v. Townsend*, 897 A.2d 316, 330-31 (N.J. 2006) (collecting cases).

[20] *See, e.g.*, *State v. Borrelli*, 629 A.2d 1105, 1113-14 (Conn. 1993) (finding that expert testimony on battering and its effects, when not specific to the victim, did not invade the province of the jury); *State v. Clark*, 926 P.2d 194, 203-04 (Haw. 1996) (allowing expert to testify about domestic violence generally, but not as to specific facts of the case or whether victim was, in fact, a victim of domestic abuse); *State v. Bednarz*, 507 N.W.2d 168, 171-72 (Wis. Ct. App. 1993) (allowing expert testimony on cycle of abuse when expert did not testify as to whether the victim in question suffered from domestic abuse).

[21] *Bednarz*, 507 N.W.2d at 171-72.

[22] *Id.* at 171.

[23] Contrary to the great weight of authority allowing prosecutorial experts on battering and its effects is *State v. Ogden*, 6 P.3d 1110, 1114 (Ore. Ct. App. 2000). In *Ogden*, the court found the testimony by an expert on battering and its effects was not relevant because the state had not shown that the victim in fact suffered from battering and its effects. *Id.* As noted above, this analysis is at odds with that of most courts, which find that such evidence will be admitted only if it is *not* tied to the victim by the expert, and that no evidence need be given that the victim in fact suffers from battering and its effects. Moreover, *Ogden* does not hold that such expert testimony will never be admissible, but the state must first establish that the victim in fact suffers from battering and its effects before the evidence can be found relevant for the purposes of admissibility. *Id.*

[24] *Odom*, 711 N.E.2d at 75.

[25] *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 244 (Mass. 1997); *see also Ciskie*, 751 P.2d at 1166 ("Neither logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror's understanding.").

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For instance, the Connecticut Supreme Court allowed expert testimony on battering and its effects when the victim had recanted,[26] and the Georgia Supreme Court allowed expert testimony on battering and its effects when the victim did not want to go forward with the case.[27]

However, other courts have allowed expert testimony on battering and its effects without recantation or an unwillingness to go forward. For instance, the Massachusetts Supreme Court allowed expert testimony to explain the victim's failure to get out of a relationship with her batterer.[28] The Washington Supreme Court allowed such testimony to explain the victim's failure to leave, as well as her failure to complain about the abuse earlier.[29] A New Jersey appellate court allowed such testimony upon finding that the victim's credibility "was very much under attack" because the theory of defense was that the defendant and the victim had consensual intercourse and spent the remainder of the day together.[30]

Rule 702 also requires that the expert be "qualified as an expert by knowledge, skill, experience, training, or education." The level of expertise required varies state to state, however those courts allowing for testimony on battering and its effects generally do not require that the testifying expert be a psychologist or psychiatrist in order to have sufficient expertise to testify.[31] Thus, many courts have qualified domestic violence advocates as experts for the purpose of testifying about battering and its effects.[32]

[26] *Borrelli*, 629 A.2d at 1113-15.

[27] *Hawks v. State*, 479 S.E.2d 186, 189 (Ga. 1996).

[28] *Goetzendanner*, 679 N.E.2d at 244.

[29] *Ciskie*, 751 P.2d at 1173.

[30] *State v. Frost*, 577 A.2d 1282, 1287 (N.J. Super. Ct. App. Div. 1990).

[31] *See, e.g., Goetzendanner*, 679 N.E.2d at 244 ("The witness did not have to be a trained clinician, capable of diagnosing particular cases of BWS, in order for the judge properly to qualify her as an expert concerning the general or typical characteristics of BWS.").

[32] *See, e.g., id.* (allowing director of New York State Office for Prevention of Domestic Violence to testify as an expert); *Clark*, 926 P.2d at 203-04 (allowing director of a crisis shelter to testify as an expert); *Frost*, 577 A.2d at 1287 (allowing the director of clinical services at a local shelter to testify as an expert).

Finally, Rule 702 requires that "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[33] There is significant research on battering and its effects, and testimony on battering and its effects has been allowed, when offered through the defense, in every jurisdiction.[34] Courts considering the use of battering and its effects when introduced through the prosecutor have also found that this type of testimony is sufficiently established under Rule 702 to be admissible.[35] Indeed, as one court noted, "[i]t is beyond debate that battered women's syndrome has gained general acceptance as a scientific doctrine within the scientific community."[36]

Road Map for Jurisdictions Yet to Rule on the Admissibility of Testimony on Battering and Its Effects

As the above-cited cases make clear, the central inquiries to determining the admissibility of battering and its effects are whether the evidence is relevant and not unduly prejudicial, and if so, whether the evidence would be helpful to the trier of fact. It is thus important to establish, through local case law and rules of evidence, that these three inquiries are satisfied.

A state without case law on battering and its effects can draw from other jurisdictions to show that this type of evidence has been been found admissible in other jurisdictions. The state should also point to the important policy reasons, described above, for allowing such testimony.

Even if a state does not have case law regarding the admissibility of battering and its effects, it may have case law regarding parallel issues. For

[33] Fed. R. Evid. 702.

[34] Long, *Introducing Expert Testimony* at 19.

[35] *See, e.g.*, *Clark*, 926 P.2d at 203 (finding testimony on battering and its effects admissible under Hawaii Rule of Evidence 702 and was not "junk science"); *Borrelli*, 629 A.2d at 1110 (finding BWS evidence admissible under rules of evidence and the "*Frye* test," which requires that the subject matter of scientific expertise testimony is sufficiently established to have gained general acceptance in the field to which it belongs).

[36] *Townsend*, 897 A.2d at 327 (internal citation omitted).

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instance, North Carolina, while silent on the admissibility of testimony on battering and its effects, has case law allowing for expert testimony on Post-Traumatic Stress Disorder and Rape Trauma Syndrome.[37] Similarly, Utah does not have any case law regarding whether a prosecutor can introduce evidence on battering and its effects, but it does have case law finding that an expert's testimony regarding the behavior of a child sexual assault victim was admissible.[38] Courts may rely on these parallel arguments in ruling on the admissibility of expert testimony on battering and its effects.[39] As with those jurisdictions that already allow such expert testimony, it is important that the testifying expert not opine directly as to whether the victim in the case actually suffers from battering and its effects so as to avoid a finding of undue prejudice.[40]

[37] *See, e.g.*, *State v. Hall*, 412 S.E.2d 883, 821 (N.C. 1992); *State v. Strickland*, 387 S.E.2d 62, 65-66 (N.C. Ct. App. 1990).

[38] *See, e.g., State v. Hall*, 946 P.2d 712, 720-22 (Utah App. 1997).

[39] In 2007, NCVLI, along with the Maryland Coalition Against Sexual Violence, National Alliance to End Sexual Violence, and Women's Law Center of Maryland, thoroughly discussed the arguments in favor of admitting expert testimony on Rape Trauma Syndrome in an amici curiae brief to the Maryland Court of Special Appeals in *State v. Baby*, No. 14 (Md. Ct. App. Sept. Term 2007). *Baby* involved a challenge to the admission of expert testimony about rape trauma and the experience, reactions, and behavior of sexual assault victims. Amici argued that expert testimony is necessary to help ameliorate common myths about rape and give jurors the information that they need to make a fair decision in rape cases.

[40] *See* nn. 19-23 *supra*; *see also State v. Huang*, 394 S.E.2d 279, 283 (N.C. Ct. App. 1990) (finding probative value of testimony regarding the behavioral patterns of sexual assault victims in the context of Post-Traumatic Stress Disorder was outweighed by testimony's prejudicial nature where expert testimony explicitly implicated defendant); *State v. Rimmasch*, 775 P.2d 388, 401 (Utah 1989) (finding inadmissible expert testimony that a child-victim fit a profile for battered children and therefore was abused).

Conclusion

Great importance is placed on a victim's credibility in domestic violence proceedings. When a victim of domesetic violence does not act in a manner consistent with the trier of fact's expectations, that victim's credibility may be called into question. Accordingly, it is important for prosecutors to be able to explain this "inconsistent" behavior through the use of expert testimony on battering and its effects.

Those states that have allowed such testimony base their decisions on the relevance of the evidence and the likelihood that such evidence will assist the trier of fact. States that have not yet ruled on the admissibility of expert testimony on battering and its effects can use the decisions of these jurisdictions as a roadmap, as well as relying upon the strong policy reasons for allowing such testimony and, where applicable, the states' own laws on parallel issues, such as Post-Traumatic Stress Disorder, Rape Trauma Syndrome or Battered Child Syndrome.[41]

[41] An effective means of educating courts on the importance of allowing expert testimony on topics such as battery and its effects is the submission of amicus curiae briefs.

NCVLI regularly submits amicus curiae briefs in state and federal courts, and welcomes the opportunity to further educate courts on the need for expert testimony in domestic violence and sexual assault cases. If you aware of a case that would benefit from such assistance, please contact NCVLI at ncvli@lclark.edu.

Local Sponsors

NCVLI is grateful to its many supporters, each of whom helps advance victims' rights. In this issue we thank those organizations that have made recent contributions.

Thank you to **Archery Summit**, **Columbia Sportswear**, and the **Portland Waterfront Marriott** for donating items to NCVLI's Victims' Rights Reception. The reception was a great success! Everyone enjoyed networking with colleagues from across the nation, and raising money to help victims. Proceeds have helped ensure that more victims have access to legal assistance.

Thank you to **Stoel Rives LLP** and **Zimmer Gunsul Frasca Architects LLP** for donating office furniture to NCVLI last summer. Our growing number of community volunteers and law students who now have work stations greatly appreciate your support!

Thank you to the **Greater Portland Chapter of Parents of Murdered Children** and the **Oregon Anti-Crime Alliance Foundation** for being amazing partners in our work to help crime victims and for making financial contributions that are advancing victims' rights in Oregon and nationwide.

Court Urged to Reinstate Conviction: Evidence of Prior Consensual Sexual Activity was Properly Excluded

*by Alice Ahn, J.D., Jeffrey Bornstein, J.D., Megan Cesare-Eastman, J.D., and Holly Hogan, J.D., K&L Gates LLP**

In *State v. Fontana*, the California Court of Appeal recently held that there was prejudicial error in the trial court's refusal to permit the defendant in a sexual assault case to introduce evidence of the victim's consensual sexual intercourse with her boyfriend.[1] The Court of Appeal believed that such evidence was admissible because it could bolster the defendant's proffered alternative explanation for some of the injuries sustained by the victim. The court further opined that the evidence could have "tended to corroborate defense testimony that might otherwise have been unbelievable to the jury."[2] Because it considered the evidence "crucial to [the] defense," the court found that its exclusion was not harmless beyond a reasonable doubt.[3]

The California Supreme Court, in a unanimous decision, granted the People of the State of California's petition for review of the lower appellate court's decision.[4] Represented by a team of attorneys from K&L Gates LLP, the National Crime Victim Law Institute, Bay Area Women Against Rape, San Francisco Women Against Rape, Community Violence Solutions, and the Cooperative Restraining Order Clinic submitted an amici curiae brief in support of the People of the State of California.[5] Amici urged the California Supreme Court to reinstate the conviction of the defendant, a serial rapist who was on parole at the time of the attack.

As discussed in the amici curiae brief, the Court of Appeal decision not only implicates the rights of the victim in this case, but also has a far-reaching impact on all victims of sexual assault. It eviscerates the protections afforded to victims under California's Rape Shield Law,[6] permits an appellate court to improperly substitute its own judgment of the potential prejudice versus the probative value of proffered evidence for that of the trial court, otherwise fails to correctly weigh the evidence as a whole, and mistakenly concludes that *any* error by the trial court was not harmless beyond a reasonable doubt.

Background

The overwhelming evidence presented in the case showed that the defendant strangled and sexually assaulted the nineteen year-old victim. The victim received significant injuries to her throat and mouth. The nurse who examined the victim noted that she had the most amount of petechiae[7] that she had seen on someone who had survived strangulation. The victim also had a congestion of blood in her throat. A subsequent medical examination revealed lacerations to her cervix.

The defendant admitted that he strangled the victim, thereby causing the significant observable injuries that she suffered to her throat and mouth. He claimed, however, that the victim was the sexual aggressor, and that he had observed "semen" when she took off her clothes, spread her legs, and tried to entice him to have sex with her. He then claimed that he strangled her in self-defense when she tried to orally copulate him. He claimed that he did so because he had a phobia of strange women orally copulating him and biting his penis. The evidence was uncontroverted, however, that he had committed prior acts of forcible oral

* K&L Gates LLP is comprised of approximately 1,800 lawyers who practice in 35 offices located on three continents. The firm believes that every attorney has the professional responsibility to provide pro bono services and encourages its members to undertake work in areas that are meaningful to them. K&L Gates typically handles hundreds of pro bono matters a year, and its dedication to pro bono efforts is unwavering. Our pro bono clients require devoted assistance, and the firm's lawyers have answered the call by providing trusted legal counsel in the communities in which we live and work.

[1] *State v. Fontana*, No. A117503, 2009 WL 74347, at *1 (Cal. Ct. App. Jan. 13, 2009).

[2] *Id.* at *6.

[3] *Id.*

[4] *State v. Fontana*, No. S1705082 (Cal. Apr. 15, 2009).

[5] A copy of Amici's brief is available, upon request, from NCVLI.

[6] Cal. Evid. Code §§ 782, 1103.

[7] Petechiae are small dots that occur when capillaries are broken from the intense pressure caused by strangulation.

copulation on other victims, thereby contradicting his "phobia" defense.

The trial court found that any evidence of the victim's prior consensual sex with her boyfriend, hours before the attack, was irrelevant, prejudicial, and otherwise inadmissible under California's Rape Shield Law. It properly weighed the high potential for prejudice against the minimal probative value of this evidence, and concluded that prior consensual sexual acts between the victim and her boyfriend would not explain the totality of the victim's injuries. The trial court determined that the defendant's version of the events was so incredible that it was not appropriate to admit the highly prejudicial evidence of unrelated prior consensual sexual acts.

> [T]he Court of Appeal decision . . . eviscerates the protections afforded to victims under California's Rape Shield Law, permits an appellate court to improperly substitute its own judgment of the potential prejudice versus the probative value of proffered evidence for that of the trial court, otherwise fails to correctly weigh the evidence as a whole, and mistakenly concludes that *any* error by the trial court was not harmless beyond a reasonable doubt.

Amici's Arguments

Amici's brief highlights how the Court of Appeal decision works an injustice in this case and undermines the protections provided by California's Rape Shield Law in future cases.

The Court Misapplied the Abuse of Discretion Standard

The trial court's decision to exclude the irrelevant and prejudicial evidence of the victim's prior sexual activity with her boyfriend was not an abuse of discretion. Indeed, the uncontradicted evidence presented at trial showed that the victim's injuries were due to the defendant's wrongful use of force and not a prior consensual sexual act. The Court of Appeal improperly substituted its own judgment for that of the trial court. In so doing, it misunderstood significant key facts and evidence, and relied upon this misunderstanding to reach its decision. The Court of Appeal should have deferred to the decision of the trial court in the first instance, because that court was in the best position to evaluate the evidence presented.

The Decision Fundamentally Undermines Rape Shield Protections

The appellate court's emphasis on the victim's relatively minor injuries of vaginal tenderness and discoloration, which could have been caused by consensual sexual activity, is not an appropriate justification for introducing testimony about a victim's prior consensual sexual encounter with her boyfriend, hours before the assault. In this case, the sexual assault caused much more significant injuries that are not in any way explained by consensual sex. The trial court correctly rejected this evidence after carefully balancing its prejudicial and probative value. If not overruled, the Court of Appeal decision could support the admission of such evidence in any case where the victim is a sexually active adult.

The Decision Harms All Victims of Sexual Assault

The impact of the Court of Appeal decision goes well beyond this case. It places all women at greater risk from predators like Fontana because the threat of unwarranted character attacks and invasions of privacy creates a disincentive for sexual assault victims to report the crimes committed against them. Further, the court's flawed reasoning could be used to influence trial courts to admit evidence of prior sexual activity in similar circumstances to avoid reversal. The Court of Appeal decision creates a new and unwarranted exception to the Rape Shield Law.

For all these reasons, Amici urged the California Supreme Court to reverse the Court of Appeal decision and to reinstate the defendant's conviction and sentence. The case is pending before the California Supreme Court.

Case Spotlights

Recent Cases Discussing Discovery Requests for Crime Victims' Private and Confidential Information

Discovery requests frequently implicate the privacy and safety interests of crime victims. Depending on the nature of the request and the jurisdiction in which it is made, these requests can also implicate a range of crime victims' constitutional and statutory rights, such as the rights to privacy, to refuse discovery requests, to reasonable protection, and to be treated with fairness, dignity, and respect. The law governing such discovery requests varies by jurisdiction, and is constantly evolving. Five recent cases discussing discovery requests for victims' private and confidential information are summarized below.

Kling v. Superior Court of Ventura County, 99 Cal. Rptr. 3d 149 (Cal. Ct. App. 2009). Defendant sought a writ of prohibition to compel the trial court to vacate its order granting the prosecution's motion to unseal transcripts of *in camera* hearings related to subpoenas *duces tecum* that defendant served on third parties. The appellate court granted the petition, concluding that, absent "exceptional circumstances," the prosecution is not entitled to know who or what a defendant subpoenas, unless the defendant decides to use the subpoenaed documents at trial. In reaching this decision, the court found that California's discovery rules authorize trial courts to order *in camera* hearings to determine whether a defendant is entitled to subpoenaed documents. It further found that, although the prosecution must receive notice of such a hearing, its ability to participate in the hearing is limited. The court rejected the government's argument that it must know what records are being sought by defendant and reviewed by the court in order to fulfill its obligations under California's crime victims' rights laws. Instead, it found that the state's victims' rights provisions do not authorize prosecutor participation in the *in camera* hearing unless a victim has asked the prosecutor to enforce his or her constitutional rights. The court nonetheless stated that the prosecution's "compelled silence may be broken when the court calls upon it to 'address any questions that the trial court has,'" and concluded that such a scenario is likely to occur when the subpoena concerns "the privacy rights of third parties." The California Supreme Court recently granted the state's petition for review of this decision. NCVLI will file an amicus curiae brief in support of the state's position in April 2010.

Sonia F. v. Eighth Judicial District Court, 215 P.3d 705 (Nev. 2009). A minor rape victim filed a civil action against her offender. During discovery, defendant filed a motion to compel the victim to submit to an independent medical examination to address her claims for emotional damages. The district court granted the request, finding that the victim had put her emotional and mental condition at issue. The victim moved for a protective order under Nevada's rape shield law to prevent defendant and the psychologist from questioning her about her sexual history. The motion was denied, and the victim filed an emergency petition with the Nevada Supreme Court, seeking clarification on the application of Nevada's rape shield law to civil cases. The court held that the "plain and unambiguous" language of the statute, which used the terms "prosecution" and "accused," required that the rape shield statute only be applied in criminal cases. However, the court noted that discovery in civil sexual assault cases was still bound by Nevada's discovery rules, which require that inquiries be relevant and reasonably calculated to lead to the discovery of admissible evidence. Thus, the court stated, lower courts can issue protective orders in order to protect a sexual assault victim from "annoyance, embarrassment, [or] oppression" where necessary.

Commonwealth v. Makara, 980 A.2d 138 (Pa. Super. Ct. 2009). During the criminal proceedings against defendant for multiple counts of child sexual offenses, defendant sought disclosure of two minor-victims' counseling and educational records. The trial court summarily granted the disclosure request. One of the record-holding institutions moved for reconsideration. After the court failed to act on its motion, the

record-holding institution appealed. Upon finding that neither the minor-victims nor the record-holding institutions were given notice of defendant's initial motion, the appellate court vacated the disclosure order and remanded the case "for a hearing consistent with due process on the motion seeking disclosure of the records."

State v. Worthen, 222 P.3d 1144 (Utah 2009). The state and the guardian ad litem representing the victim petitioned for certiorari after the court of appeals affirmed a trial court order granting defendant's motion for *in camera* inspection of the victim's mental health records under an exception to the psychotherapist-patient privilege. One issue raised in the guardian ad litem's petition was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. NCVLI and its Utah Clinic, the Utah Crime Victims Legal Clinic, filed an amici curiae brief in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court affirmed the court of appeals without ruling on whether the lower court's failure to consider Utah's victims' rights protections was erroneous. The court stated that it would not decide the issue because the statutory provision that requires appellate courts to consider all arguments relating to victims' rights was not triggered, as nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy concerns could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

In re Taylor, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009). A complaint was filed with the Oregon State Bar Professional Responsibility Board against an attorney related to his representation of an individual charged with raping a teenager. During this representation, the attorney moved to obtain the victim's Department of Human Services (DHS) records. Upon finding that the attorney had failed to identify any exculpatory evidence that would likely exist in these records, the court denied the motion. The attorney later provided his investigator with one or more blank signed subpoenas for service on potential additional trial witnesses. The investigator served one of these subpoenas on the victim's high school, requesting the production of all of her education records. Neither the attorney nor his investigator had any reason to believe that these records contained exculpatory information, and neither obtained permission from the victim or the court to acquire the records. In response to the subpoena, the school sent a copy of the victim's records directly to the attorney. Rather than return the records or notify the school that they had been improperly disclosed, the attorney reviewed them, forwarded portions on to his client, and used the information contained in them to support his second motion to obtain the victim's DHS records. The court granted that second motion, and, after an *in camera* inspection of the DHS records, delivered redacted DHS documents to the parties. The victim's attorney moved to suppress both the school and DHS records, arguing that both had been improperly obtained. The court granted the motion. The complaint later filed against the attorney with the Oregon State Bar resulted in a stipulation for discipline. As part of the stipulation, the attorney admitted to violating Oregon's Rules of Professional Conduct by failing to make reasonable efforts to ensure that the conduct of a nonlawyer over whom he had direct supervisory authority was compatible with his professional obligations, by ratifying misconduct by a nonlawyer employee, and by engaging in conduct that was prejudicial to the administration of justice. The Oregon State Disciplinary Board approved the stipulation and publicly reprimanded the attorney for these violations.

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term "full amount of the victim's losses" includes any costs incurred by the victim for:

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim as a proximate result of the offense.[37]

As the plain language makes clear, five of the six categories of losses recognized in Section 2259 do not contain a proximate cause requirement. Only the sixth "catchall" category of losses contains such a requirement.

Another common canon of statutory construction provides that, where Congress includes particular language in one section of a statute but omits it in another section of the same law, the omission is presumed intentional.[38] The presumptively intentional omission of "proximate result" in the first five subsections suggests that Congress did not want burden victims of child abuse images with a requirement that they show a proximate cause for these losses.

As discussed above, Section 2259 employs a broad definition of victim, providing that a "victim" is an "individual *harmed* as a result of a commission of [a qualifying crime]."[39] As also discussed above, courts and Congress have made clear findings that children depicted in child abuse images are harmed when someone possesses the images of their abuse. Thus, relying on the plain language of the statute, and courts' and Congress's findings, sufficient causal connection for categories of loss (A)-(E) is established upon a finding that the individual asserting "victim" status is, in fact, the person depicted in the image that is possessed.

Courts that have ordered *di minimus* restitution or no restitution require – contrary to the plain language of Section 2259, congressional intent, and good public policy – a causal connection of proximate cause for all six categories of claims. While this is not an ideal approach, victims in child abuse image possession cases are likely to meet such a requirement. Under general tort law,[40] the outcome of an act need only be foreseeable to establish that the act is the proximate cause of that outcome: "[W]hat is required to be foreseeable is only the general character or general type of the event or harm and not its precise nature, details, or above all manner of occurrence."[41] Thus, the applicable test "is whether the defendant reasonably should have anticipated *any* injury" resulting from his conduct.[42] As noted above, courts and Congress have determined that every possessor of child abuse images harms the children depicted in the images, and that possession of the images is, in fact, causally connected to the original creation and the distribution of these images. Thus, it is entirely foreseeable that each defendant who possesses child abuse images harms the victim.[43]

Conclusion

It is well-recognized that children depicted in child

[37] *Id.* at (b)(3).

[38] *Russello v. United States*, 464 U.S. 16, 23 (1983).

[39] 18 U.S.C. § 2259(c) (emphasis added).

[40] There are a variety of causation analyses that can be used, each of which applies to particular circumstances. This article is using the causation analysis from tort to exemplify how even under this analysis the courts are going astray.

[41] *See Prosser and Keeton on the Law of Torts* § 43, at 299 (5th ed. 1984); 4 *Harper, James and Gray on Torts* § 20.5(6), at 203 (3d ed. 2007) ("Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen.").

[42] *Elliot v. Turner Const. Co.*, 381 F.3d 995, 1006 (10th Cir. 2004) (emphasis in original).

[43] Notably, the victims in each of the recent cases discussed above did not rest on these presumptions, but presented considerable expert testimony and evidence of their losses, as well as victim impact statements recounting the harm. For instance, one victim submitted an impact statement that states, in part: "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'm being abused over and over again."

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abuse images suffer life-long harm from the sexual abuse captured in the images, as well as from the distribution, possession, and viewing of the images their abuse. It is also well-established that victims of these crimes should receive restitution for their harm. As discussed above, over the last year alone, courts have awarded a wide range of restitution these victims – full, partial, *di minimus*, or even no restitution at all.

A proper reading of Section 2259, together with prior court and Congressional findings on the harms that stem from possession, mandates that this causal relationship is sufficiently established upon a showing that the statutory definition of "victim" is met. Despite this, some courts are requiring that, before victims can recover restitution, they must endure a new harm – learning the details of each possessing offender's conduct so that they can meet a burden of demonstrated harm from specific conduct of each defendant's possession. Many of these victims have started on their path to recovery and have already submitted to courts substantial evidence of harm and the costs they have, and will incur, from this harm. To require these victims to learn details of each possession will cause new and increased harms, and flies in the face of public policy and congressional intent.

The better approach is to recognize that the harm suffered by these victims is complex and life-long. Given the interrelated nature of production, distribution, and possession, artificially segregating the harms from each of aspect the victim's abuse is improper. Instead courts should recognize that that the harm from production, distribution, and possession "are closely related" and "cannot be separate[d] to allocate costs between them,"[44] and require all defendants to be jointly and severally liable for the full amount of the victim's losses. If courts will not or cannot reach this outcome, the law must be clarified to ensure that these victims are afforded restitution for the full amount of their losses without requiring them to endure further victimization at the hands of the criminal justice system.

[44] *Aumais*, No. 08-CR-711, at 16.

Pro Bono Corner

NCVLI thanks all of the outstanding attorneys who serve as pro bono counsel to help crime victims. In this issue we thank attorneys who have recently served as local counsel in our amicus curiae efforts.

Alice Ahn, Jeffrey Bornstein, Megan Cesare-Eastman, and Holly Hogan. Ms. Ahn, Mr. Bornstein, Ms. Cesare-Eastman, and Ms. Hogan, of K&L Gates LLP in San Francisco, California, filed an amici curiae brief in *People v. Fontana*. NCVLI and other victim support organizations joined the brief, in which Amici urged the California Supreme Court to reinstate the conviction of a serial rapist on the ground that the trial court did not err in excluding evidence of the victim's prior consensual sex with her boyfriend.

Allen Bailey. Mr. Bailey, of the Law Offices of Allen M. Bailey in Anchorage, Alaska, served as local counsel in *State v. Carlin*, a case in which NCVLI filed an amici curiae brief in the Alaska Supreme Court supporting the Attorney General's position that Alaska should abandon the automatic application of the abatement ab initio doctrine, which provides a criminal conviction abates when the defendant dies prior to the resolution of his or her direct appeal.

Jennifer Eyl. Ms. Eyl, of the Law Offices of Jennifer Eyl in Boulder, Colorado, served as local counsel in *Stene v. Chambers*, a case in which NCVLI filed an amici curiae brief, arguing that the Colorado Court of Appeals erred in reversing the district court's decision to compel prosecution and appoint a special prosecutor in connection with the rape of a high school student.

Clifford Higby. Mr. Higby, of Bryant and Higby, Chartered in Panama City, Florida, served as local counsel in *Plaintiff B. v. Francis,* a case in which NCVLI filed an amicus curiae brief supporting the victim-plaintiffs' motion to continue to proceed anonymously during trial proceedings in a case involving sexual offenses against children.

Jamie Mills. Ms. Mills, of Jamie L. Mills Attorneys at Law, in Hartford, Connecticut, served as local counsel in *Luurtsema v. Warden*, a case in which NCVLI filed an amici curiae brief opposing defendant's petition to have his kidnapping conviction reversed on collateral review, arguing that such an outcome would violate the victim's state constitutional rights by disrupting her reliance on the finality of the conviction and requiring her to relive the sexual assault and confront her assailant again in court.

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In Spring 2010, NCVLI's National Bar Association, the National Alliance of Victims' Rights Attorneys (NAVRA), will launch its new website. The website is designed to help NAVRA members better serve the needs of crime victims by offering important resources, including:

- An **online legal brief and memoranda bank**, including amicus curiae briefs and samples of key victim law motions filed in state and federal court;
- Indexed **summaries of judicial opinions from across the country** touching on victims' rights;
- A repository of **past teleconference trainings, NCVLI Conference sessions, and new interactive web-based trainings** focusing on beginning and advanced levels of rights advocacy; and
- Improved opportunities to **share knowledge and resources** regarding victims' rights issues.

NAVRA is working hard to give you – the people on the front lines of victims' rights – the tools to be more effective advocates.

To learn more about NAVRA's soon-to-be-launched website and new membership structure and services, please visit www.navra.org.