

## Securing Restitution for Victims of the Viewing, Possession, and Distribution of Child Abuse Images\*

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The viewing, possession, and distribution of child abuse images<sup>1</sup> causes tremendous harm to the victims of such images, perpetuating the original abuse and furthering the emotional and psychological damage done to the victim.<sup>2</sup> As one victim stated, "[T]he abuse and exploitation I suffer has . . . destroyed the normal childhood, teenage years, and early adulthood that [everyone] deserves."<sup>3</sup> Over the past several years, courts have evaluated whether to award restitution to victims of child abuse images whose images were viewed, possessed, or distributed by the defendant, as well as how much to award. Although many courts are still determining how to calculate restitution in these cases, law and policy support awarding the full amount of losses victims of child abuse images incur as a result of the defendant's actions.

### I. Victims of Child Abuse Images Are Legal Victims

Under 18 U.S.C. § 2259, a victim – broadly defined as an "individual harmed as a result of a commission of a crime under [the statutes regarding child pornography]"<sup>4</sup> – is entitled to mandatory restitution.<sup>5</sup> Thus, for a victim of child abuse images to be entitled to restitution, the court must first determine that the individual has been "harmed."

Courts regularly recognize at least three distinct harms caused to victims by the viewing, possession, and distribution of child abuse images.<sup>6</sup> First, as the Supreme Court recognized, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."<sup>7</sup> Second, "the mere existence of child pornography represents an invasion of the privacy of the child depicted."<sup>8</sup> Finally, "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials."<sup>9</sup>

Recognizing these harms, courts routinely find that victims of child abuse images are harmed not only by the taking or purchasing of the images, but also by their subsequent receipt and possession.<sup>10</sup> As one federal court stated, "by both legislative intent and judicial construction, the law is clear that the children depicted in child pornography are victims not only of the makers of the pornography but also of its possessors."<sup>11</sup>

The psychological harm suffered by victims of child abuse images further supports

the argument that they should be considered legal victims. Congress has found that the “illegal production, transportation, distribution, receipts, advertising, and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography.”<sup>12</sup> One victim of child abuse images described her knowledge that her images were being disseminated on the Internet as an ongoing “slow acid drip.”<sup>13</sup> Children depicted in child abuse images may be “forever psychologically damaged and their self-image and future relationships . . . are affected as well.”<sup>14</sup> Victims of child abuse images manifest many similar symptoms to those linked with other forms of sexual exploitation, and “[f]eelings of powerlessness, shame and fear of disclosure [are] all heightened.”<sup>15</sup> As one victim testified about the distribution and availability of images of her, “It’s like I’m being abused over and over again.”<sup>16</sup> Thus, both case law and social science evidence makes clear that victims of child abuse images have been “harmed” and are therefore legal victims when their images have been viewed, possessed, or distributed by the defendant.

## II. Victims Are Entitled to Restitution Equal to the Full Amount of Their Loss

*A. Defendants who receive, possess, or distribute child abuse images are the proximate cause of victims’ harm.*

Based on a straightforward statutory reading of § 2259, victims should not be required to show defendants proximately caused their harm.<sup>17</sup> The great majority of courts are, however, requiring some type of proximate cause showing.<sup>18</sup>

Some jurisdictions have found that the defendant’s actions are a direct cause of the harm done to the victim.<sup>19</sup> For instance, one court stated that “[t]he 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 this continuing victimization.”<sup>20</sup> Although the court in this case was focused primarily on sentencing issues, if this *per se* rationale were applied at the merits stage, the proximate cause requirement would be met upon a showing that the defendant is guilty of the crime, and that the victim was depicted in one of the images which the defendant was found guilty of possessing.

Other courts have used a “reasonableness” standard in determining causation, which is applied by evaluating whether the defendant’s actions were a “substantial factor” in causing the victim’s harm.<sup>21</sup> A person who distributes, possesses, or views child abuse images is a substantial factor in causing harm to the victim.<sup>22</sup> The victim’s knowledge of the “publication of the visual material increases the emotional

and psychic harm suffered by the [victim].”<sup>23</sup> Many victims live in constant fear that someone will recognize them from the images that were taken.<sup>24</sup> The knowledge that their images are being downloaded and distributed by others leads to “heightened symptoms of post traumatic

stress disorder, [and] depression and or [sic] anxiety.”<sup>25</sup> In one case, an expert testified that the victim’s knowledge that her images were being disseminated on the Internet caused her to suffer a continuing trauma that she compared to an ongoing “slow acid drip.”<sup>26</sup> Furthermore, the defendant does not need to be the only source of the victim’s harm to meet the substantial factor requirement.<sup>27</sup> Nor need the victim know the defendant’s identity.<sup>28</sup>

Thus, regardless of the standard used by the court to determine proximate causation, the victim is entitled to receive full compensation from the defendant for all appropriate types of restitution.

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*B. Defendants should be held jointly and severally liable for the full amount of victims' losses.*

Courts have discretion to apportion liability or to hold the defendant jointly and severally liable for the victim's losses.<sup>29</sup> This discretion is circumscribed by the language of § 2259, which *requires* that victims be paid the "full amount" of their losses.<sup>30</sup> Additionally, a court may not decline to order restitution based on the defendant's economic circumstances or the victim's entitlement to receive compensation from other sources.<sup>31</sup> As a result, the court should award the full amount of restitution even in cases where the victim may seek restitution from other defendants.<sup>32</sup> Courts should not allow the burden of a crime to fall on the person who has been victimized, but should instead ensure that it falls on the criminal who caused the victimization by committing a federal felony offense.<sup>33</sup> The nature of the crime, as well as the strong public policy supporting full compensation for the victim in each case, reinforces the conclusion that each defendant should be held jointly and severally liable.

### III. Victims are Entitled to "Full" Restitution, Including for Future Costs

Restitution is necessary to help restore victims financially and aid in their overall recovery. The extent of the victimization extends far beyond the original act of making the image as "one photograph . . . can haunt a child for a lifetime."<sup>34</sup> The fact that the victim "can never know, never be certain, who might have seen or downloaded [the images] . . . severely undermines [the victim's] self confidence and gnaws away at their self esteem."<sup>35</sup> While victims are entitled to restitution for all of the costs listed under § 2259,<sup>36</sup> this section of this paper addresses only those costs associated with future counseling expenses and lost income.

Because of the psychological harm that possession of child abuse images causes victims, restitution is necessary to compensate victims for counseling expenses, including future counseling

#### Practice Pointers

If you are confronted with a situation in which a victim of child abuse images is seeking restitution, remember:

- Victims of the possession, distribution, or receipt of child abuse images are just as much victimized by these crimes as by the initial abuse.
- Even with a proximate cause standard, victims are entitled to full restitution.
- Defendants may be held jointly and severally liable for the harm caused to the victim.
- Think big – victims are entitled to full financial recovery under § 2259, including for future costs.
- Call or email NCVLI for help.

expenses. The long-term impact on victims of child abuse images may be more debilitating than the immediate effects. "The initial negative responses . . . develop into extremely negative self-concepts, sustained shame and anxiety, deep despair, inability to feel, hopelessness, and psychological paralysis."<sup>37</sup> The distribution, possession, or viewing of the child abuse images further re-abuses the victim and works to exacerbate these negative effects, making the victim's recovery much more difficult. As one victim powerfully conveyed, "Those who view the images of my abuse are no different from those who made them in the first place. It feels like they are in the room, encouraging my abuse."<sup>38</sup> In addition, "the fact of permanence [is] a heavy extra burden in trying to cope and find some sort of closure for the child."<sup>39</sup> Although it is often difficult to calculate with precision the amount of future expenses that will be incurred due to the harm suffered by the victim, numerous courts have found an award of future counseling expenses to be appropriate.<sup>40</sup>

Victims of child abuse images are also entitled to restitution for future lost income. Although

future lost income can be difficult to prove, courts have awarded future lost income when experts have testified as to anticipated future losses.<sup>41</sup> Many victims of child abuse images may be unable to work due to the continued emotional or physical trauma they experience, and some victims “never get back into the main stream.”<sup>42</sup> As one victim stated, “I find myself unable to do the simple things that other teenagers handle easily.”<sup>43</sup> Victims should therefore also receive restitution for future lost income resulting from the harm they continue to suffer.

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<sup>1</sup> While the term “child pornography” is commonly used to describe an image that depicts a child being sexually abused, its use dilutes the reality of what the image depicts and the immense harm it causes to the child depicted. Consequently, throughout this paper, the term “child abuse image” is used instead of “child pornography.”

<sup>2</sup> See e.g., Tory J. Caeti, *Sex Crimes, Part I: Child Pornography*, Law Enforcement Training Network, 11 (2004), available at <http://www.twlk.com/law/tests/letn1640102ct.pdf> (last visited July 25, 2011) (“Even if the child never sees the images again, he knows that they exist. In short, it forever invades the child’s privacy, complicating moral and normal sexual development.”); Briefing Note on Child Abuse Images and the Internet, Children’s Charities’ Coal. on Internet Safety (July 25, 2010), at 3 available at <http://www.chis.org.uk/2010/07/25/briefing-on-child-abuse-images-and-blocking> (last visited July 25, 2011) (“For as long as the images remain on public view on the internet the abused child is in a very real sense being ‘re-abused’ and being put at risk of further harm”).

<sup>3</sup> Victim Impact Statement of “Amy,” a prominent victim of child abuse images, as appeared in John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. Times, February 2, 2010,

available at <http://www.nytimes.com/2010/02/03/us/03offender.html> (Par. 16 link to “statement”) (last visited July 25, 2011).

<sup>4</sup> 18 U.S.C. § 2259(c).

<sup>5</sup> 18 U.S.C. § 2259(a) (stating that “the court *shall* order restitution for any offense under this chapter”) (emphasis added). Victims may also independently have victim status under the Crime Victims’ Rights Act (CVRA), which gives victims a right to restitution. See 18 U.S.C. § 3771(a)(6) (providing crime victims with “[t]he right to full and timely restitution as provided in law”). Victims may also bring a claim under the Mandatory Victim Restitution Act (MVRA), which states that in “all sentencing proceedings . . . in which an identifiable victim or victims has suffered a physical injury or pecuniary loss,” “the court shall order . . . that the defendant make restitution to the victim of the offense). 18 U.S.C. § 3663A (a)(1), (c)(1)(B).

<sup>6</sup> See *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) (stating that “[t]he consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways”); *United States v. Planck* 493 F.3d 501, 505 (5th Cir. 2007) (same); *United States v. Church*, 701 F. Supp. 2d 814, 820 (W.D.Va. 2010) (same).

<sup>7</sup> *New York v. Ferber*, 458 U.S. 747, 759 (1982) (indicating acceptance of the legislative judgment “that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,” and stating that child abuse images “are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation”).

<sup>8</sup> *Norris*, 159 F.3d at 930.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) (stating, in possession case, “[h]aving paid others to ‘act out’ for him, the victims are no less damaged for his having remained safely at home, and his voyeurism has actively contributed to a tide of depravity that Congress, expressing the will of

our nation, has condemned in the strongest terms”); *United States v. Tillmon*, 195 F.3d 640, 644 (11th Cir. 1999) (finding that children depicted in child abuse images remain victims not only when the pictures are taken or purchased, but also when they are transported or distributed); *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998) (finding, in receipt of child pornography case, that “the pornography’s continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years”) (internal citation omitted); *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (finding it “scarcely debatable” that children depicted in child abuse images were victims in case trying defendant of conspiracy to distribute or receive child pornography and distribution of child pornography); *Church*, 701 F. Supp. 2d at 820 (stating that “[n]ot only is the production and initial distribution of child pornography injurious to the child victim, but so too is each subsequent distribution and each subsequent viewing”); *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*3 (S.D. Fla. Sept. 2, 2009) (finding victim to be a victim under 18 U.S.C. § 2259 due to the harm she “suffered and continues to suffer as a result of [defendant’s] possession of images depicting her sexual abuse as a child”).

<sup>11</sup> *United States v. Brunner*, No. 5:08cr16, 2010 WL 148422, \*2 (W.D.N.C. Jan. 12, 2010).

<sup>12</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(A), 120 Stat. 587, 623 (July 27, 2006).

<sup>13</sup> *United States v. McDaniel*, 631 F.3d 1204, 1207 (11th Cir. 2010).

<sup>14</sup> Caeti, *supra* note 2, at 11.

<sup>15</sup> Susan J. Creighton, *Child Pornography: Images of the Abuse of Children*, NSPCC Information Briefings, 4 (November 2003), [http://ec.europa.eu/justice\\_home/daphnetoolkit/files/projects/2003\\_017/childpornography.pdf](http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/2003_017/childpornography.pdf) (last visited July 25, 2011).

<sup>16</sup> Transcript of Restitution Hearing Proceedings, June 22, 2009, R837:19-20, *United States v. McGarity*, No. 09-12070 (11th Cir.).

<sup>17</sup> Under 18 U.S.C. § 2259, a victim must be compensated for “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.” 18 U.S.C. § 2259(b)(3). Only section F mentions a proximate cause requirement, and therefore sections A through E should require only a generalized showing of harm. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (stating “the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written”). A reading that sections A through E require only a generalized showing of harm is consistent with Congress’ intent to protect children victimized by child abuse images, as protecting “our children from abuse and exploitation . . . is one of the most important duties of our criminal justice system.” Bill to Amend Certain Provisions of Law Relating to Child Pornography and For Other Purposes: Hearing on S. 1237 Before the S. Comm. on the Judiciary, 104th Cong. (1996) (Statement of Sen. Biden, Member). However, few courts have awarded restitution under § 2259 without a finding of proximate cause, holding that the victim was harmed by the defendant’s possession of the victim’s images and that therefore the defendant was “required to pay [the victim] the full amount of her losses as a result of the harm she suffered.” *Staples*, 2009 WL 2827204, at \*3. See also *In re Amy Unknown*, 636 F.3d 190, 198-99 (5th Cir. 2011) (finding, based on the language of § 2259, that there was no proximate cause requirement except for those types of restitution found in the “catch-all” category of § 2259).

<sup>18</sup> See, e.g., *Church*, 701 F. Supp. 2d at 827 (finding that § 2259 required a showing of proximate cause); *United States v. Hardy*, 707 F. Supp. 2d 597, 610 (W.D. Pa. 2010) (same); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (same).

<sup>19</sup> *Norris*, 159 F.3d at 929; *Goff*, 501 F.3d at 259 (stating that “[c]onsumers such as [defendant] who ‘merely’ or ‘passively’ receive or possess child pornography directly contribute to this continuing victimization. Having paid others to ‘act out’ for him, the victims are no less damaged for his having

remained safely at home”).

<sup>20</sup> *Norris*, 159 F.3d at 929 (emphasis added).

<sup>21</sup> *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (applying rule of reasonableness to establish causation); *Crandon*, 173 F.3d at 126 (affirming district court’s finding of proximate cause based on its determination that it was “entirely reasonable for the District Court to conclude that the additional strain or trauma stemming from [defendant’s] actions was a substantial factor in causing the ultimate loss”).

<sup>22</sup> *Hardy*, 707 F. Supp. 2d at 612 (finding defendant’s conduct to be a substantial factor in the harm done to the victim because “Defendant’s conduct aided in the circulation of the [harmful] images, [and] the circulation has harmed [the victim]”); *Crandon*, 173 F.3d at 126 (affirming trial court’s finding that defendant’s conduct was proximate cause of victim’s hospitalization due to defendant’s actions being a substantial factor in victim’s loss).

<sup>23</sup> Christopher T. Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J.L. Reform 295, 301 (1978-1979).

<sup>24</sup> See Briefing Note on Child Abuse Images and the Internet, *supra* note 2, at 2 (stating that “[e]very casual glance or remark, for example from a stranger on a bus, potentially can be interpreted through the prism of the possibility, the anxious embarrassing worry, that this other person has recognised them from the picture”).

<sup>25</sup> *Id.* (quoting Dr. Sharon Cooper, MD FAAP, University of North Carolina Chapel Hill School of Medicine, USA).

<sup>26</sup> *McDaniel*, 631 F.3d at 1207.

<sup>27</sup> *Hardy*, 707 F. Supp. 2d at 614 (finding defendant to be a proximate cause of victim’s harm even though the images of the victim would be circulating on the internet if it were not for defendant).

<sup>28</sup> *Staples*, 2009 WL 2827204, at \*3 (stating that “[t]he fact that the victim . . . did not have personal knowledge of this defendant’s activities at the time she was evaluated . . . [did] not negate the harm that [the victim] suffered and continues to suffer as a result of this defendant’s possession of images

depicting her sexual abuse as a child”).

<sup>29</sup> 18 U.S.C. § 3664(h) (“If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant”).

<sup>30</sup> 18 U.S.C. § 2259 (b)(1),(4).

<sup>31</sup> 18 U.S.C. § 2259(b)(4)(B)(i),(ii) (“A court may not decline to issue an order under this section because of – (i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.”) See also *Crandon*, 173 F.3d at 126 n.2 (rejecting defendant’s argument that he should only be required to pay restitution for a percentage of the harm proximately caused by him under § 2259); *Staples*, 2009 WL 2827204, at \*4 (finding defendant jointly and severally liable for payment of restitution award); *Hardy*, 2010 WL 1543844, at \*16 (stating that “applying joint and several liability to any losses that [the victim] can be shown to have suffered, by a preponderance of the evidence, will best balance between making [the victim] whole and not subjecting Defendant to greater restitution liability than his criminal activity warrants”).

<sup>32</sup> Holding a defendant jointly and severally liable for the full amount of the victim’s losses does not violate the defendant’s Sixth or Eighth Amendment rights. See *Hardy*, 707 F. Supp. 2d at 616 (finding that “so long as the restitution amount is justified by the facts supporting Defendant’s guilty plea, his restitution sentence will comply with the Sixth Amendment” and that “since the Court has found that Defendant’s conduct proximately caused [victim’s] harms, an award of restitution that approximates those harms will satisfy the Eighth Amendment”).

<sup>33</sup> This rationale finds support in the tort context, that it is better that the tortfeasor wrongdoer should bear the burden of any harm rather than the innocent victim. See *Command Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 330 (2d Cir. 2000) (stating rationale for joint and several liability).

<sup>34</sup> Franklin M. Osanka & Sara L. Johann, *Sourcebook on Pornography* 448, 454 (Lexington Books 1989).

<sup>35</sup> Briefing Note on Child Abuse Images and the Internet, *supra* note 2, at 2.

<sup>36</sup> See 18 U.S.C. § 2259(3) (stating that “the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for – (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys’ fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense”).

<sup>37</sup> Mimi H. Silbert, *The Effects on Juveniles of Being Used for Pornography and Prostitution, in Pornography: Research Advances & Policy Considerations* 215, 228 (Dolf Zillman & Jennings Bryant eds., 1989).

<sup>38</sup> Briefing Note on Child Abuse Images and the Internet, *supra* note 2.

<sup>39</sup> Julia von Weiler, Annette Haardt-Becker & Simone Schulte, *Care and Treatment of Child Victims in Pornographic Exploitation (CPE) in Germany*, 16 J. Sexual Aggression 211, 218 (2010).

<sup>40</sup> *United States v. Julian*, 242 F.3d 1245, 1248 (10th Cir. 2001) (finding it was appropriate to order future counseling costs under § 2259); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (“In light of Congress’s intent to make whole those victims of sexual exploitation, we find that section 2259 allows for restitutionary damages for the future costs of therapy.”); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (“The language of the relevant statutes shows that Congress intended to allow district courts to include future counseling expenses in the amount of restitution under section 2259.”). Courts have awarded restitution for amounts ranging from 2 years to life. *United States v. Doe*, 488 F.3d 1154, 1161-1162 (9th Cir. 2007) (awarding \$1,426 for psychological counseling for each victim, which covered once a month counseling for two years); *Staples*, 2009 WL 2827204, at \*4 (awarding \$475,800 for future treatment and counseling costs to victim under § 2259, including one hour of counseling per

week through the age of 81); *Brunner*, 2010 WL 148433, at \*4 (awarding \$5,000 under § 2259 for future counseling services).

<sup>41</sup> See *Staples*, 2009 WL 2827204, at \*4 (awarding \$1,000 for future lost earnings under § 2259). See generally *United States v. Serawop*, 409 F. Supp. 2d 1356, 1358 (D. Utah 2006), *aff’d*, 505 F.3d 1112 (10th Cir. 2007) (awarding future lost income under the Mandatory Victim Restitution Act (MVRA)); *United States v. Cienfuegos*, 462 F.3d 1160, 1169 (9th Cir. 2006) (finding an award of future lost income to be appropriate under the MVRA); *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) (finding an award of future lost income to be appropriate under the MVRA).

<sup>42</sup> Osanka & Johann, *supra* note 34, at 454.

<sup>43</sup> Schwartz, *supra* note 3.

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## NCVLI's Tools: Legal Advocacy, Training & Education, and Public Policy



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**Legal Advocacy.** We fight for victims' rights by filing amicus curiae (friend of the court) briefs in victims' rights cases nationwide. Through our National Alliance of Victims' Rights Attorneys (NAVRA), we also work to pair crime victims with free attorneys and work to ensure that those attorneys can make the best arguments possible. We do this by providing the attorneys with legal technical assistance in the form of legal research, writing, and strategic consultation.

**Training & Education.** We train nationwide on the meaning, scope, and enforceability of victims' rights through practical skills courses, online webinars, and teleconferences. We also host the only conference in the country focused on victim law.

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