
IMPROVING THE RESPONSE TO Victims of Child Pornography

Section 7: The Justice Response to Victims



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The Justice System Response to Victims

The Justice System Response to Victims

Victims of child pornography (CP) production, dissemination, and possession have certain rights and interests relating to the criminal justice process. In all cases, victims have an interest in being treated fairly, and in being protected from additional trauma caused by their participation in the investigation and prosecution of the case. They also have legal rights relating to notification, protection, and compensation; however, the scope and implementation of these rights vary, both between the federal and state systems and between the states. This chapter describes the justice agencies involved in the investigation and prosecution of child pornography cases, the potential impact of involvement on victims and families, and the state of victims' rights in these cases.

Child pornography crimes may be prosecuted at the federal, state, or local level. In 2009, about 10 percent of child pornography production cases and one-third of possession and distribution cases involved federal charges, with the remainder charged at the state or local levels.²²

At the federal level, agencies responsible for investigating and responding to child pornography include several within the Department of Justice (principally the Federal Bureau of Investigation (FBI), the Child Exploitation and Obscenity Section of the Criminal Division (CEOS), and U.S. Attorney's Offices), the Department of Homeland Security (principally the Cyber Crimes Center Child Exploitation Section of the Office of Investigations at Immigration and Customs Enforcement), the Department of Defense and military criminal investigative organizations, and the U.S. Postal Inspection Service.²³

At the state and local levels, investigation and prosecution of child pornography cases may involve police departments, sheriff's offices, state bureaus of investigation, local prosecutor offices, and state attorney general offices. In many jurisdictions those agencies work with children's advocacy centers (CACs)—multidisciplinary centers with representatives from related disciplines working together to provide child-focused investigation, prosecution, and treatment of child abuse victims.

Two large-scale attempts have been made to promote a coordinated response in child pornography cases: the Internet Crimes Against Children (ICAC) Task Forces, a national system of coordinated bodies of federal, state, local, and tribal law enforcement and prosecutorial agencies that assist in investigations of technology-facilitated child exploitation cases; and the federal Child Pornography

²² Wolak, Finkelhor & Mitchell, 2012a; Wolak, Finkelhor & Mitchel, 2012b.

²³ For a detailed description of federal efforts, see U.S. Dep't of Justice. 2010. *National Strategy for Child Exploitation and Interdiction: A Report to Congress*. <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

Victim Assistance (CPVA) program, a joint effort among various federal agencies to coordinate the victim response in federal cases.

The ICAC Task Forces comprise a national network of 61 coordinated bodies representing federal, state, local, and tribal law enforcement and prosecutorial agencies, which conduct investigations of child sexual exploitation crimes involving the internet and related technologies and provide investigative training and technical assistance to other agencies in such cases. In FY 2011, those task forces documented more than 3,975 complaints regarding the production of child pornography and more than 26,000 complaints concerning the possession and distribution of child pornography.²⁴ Altogether, ICAC Task Forces made 5,819 arrests in 2011.²⁵ A national study estimated there were 1,910 arrests for CP production in 2009 by local, state, and federal law enforcement agencies²⁶ and 4,901 arrests involving CP possession and distribution.²⁷

When ICAC Task Forces pursue cases that involve identified child victims, the response to those victims is not uniform across ICACs. Some may involve local children's advocacy centers in victim interviews and victim interactions, especially for younger victims, but others do not.²⁸ The ICAC Operational and Investigative Standards mandated for task forces relate primarily to the conduct of undercover investigations. They do not include victim response or victim services, such as standards relating to forensic interviews.²⁹ Because most of the funding provided to task forces comes from local sources, rather than federal funding, there may be some hesitation to increase federal demands for uniformity.³⁰

The CPVA program, a joint initiative among the FBI, CEOS, the Executive Office of United States Attorneys (EOUSA), U.S. Postal Inspection Service (USPIS), Immigration and Customs Enforcement (ICE), and the National Center for Missing and Exploited Children (NCMEC), works to coordinate a victim response at the federal level. The CPVA has created systems to comply with federal crime victims' rights laws in child pornography possession and distribution cases. These rights require that victims of child pornography production whose images have been distributed be given the option to be notified of and to participate in the prosecution of cases that involve those illegal images. As a result, some victims whose images have been widely distributed online may be involved in multiple cases of child pornography possession and distribution.

²⁴ Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice. *Review of the Internet Crimes Against Children Task Force Program: Interim Report to the Attorney General Fiscal Years 2010 and 2011*, Table 3. <http://www.ojjdp.gov/pubs/240146.pdf>.

²⁵ *Id.* at Table 4. The report does not break out how many of those involved child pornography production versus cases involving child pornography possession or distribution.

²⁶ Wolak, Finkelhor & Mitchell, 2012b.

²⁷ Wolak, Finkelhor & Mitchell, 2012a.

²⁸ Telephone Interview with Brad Russ, Dir., Nat'l Criminal Justice Training Inst. (June 20, 2013).

²⁹ *Id.*

³⁰ Office of Juvenile Justice & Delinquency Prevention, *supra* note 3, 81 (assessing the level of state and local funding leveraged by ICACs based on a sample from ICAC Task Forces over a three-year period).

Victim Involvement in the Justice Process

In cases of child pornography production, victim involvement with the justice process often includes the services of a children’s advocacy center (CAC) at an early stage. CACs work to coordinate investigation and intervention in child abuse cases, with the goal of ensuring that children disclosing abuse are not further victimized by the intervention systems designed to protect them.³¹ CACs generally provide a range of services, including mental health treatment for the victim and family. Almost all of the parents interviewed as part of this project whose children had been victims of child pornography production (n=13) had been referred to a CAC and most found the staff at the child advocacy centers very helpful. In comments, several parents said that the CACs treated them respectfully, professionally, and fairly.

Most of the parents we interviewed indicated that criminal charges had been filed against the perpetrator in their child’s case. In two cases, victims had participated in prosecutions involving the possession or distribution of illegal images depicting them. Most of those parents stated that their child had a victim advocate during criminal proceedings and that the advocate was helpful, answered questions, and provided support. In none of the cases was a guardian ad litem (GAL) appointed for the child.

Few of the adult survivors responding to our online survey had involvement in the criminal or civil justice system. Less than 10 percent had cases where images were treated as evidence in an investigation or in court.

The majority of clinicians interviewed in the course of this project had provided therapy to at least one client involved in a criminal proceeding against an individual who had created or possessed child pornography depicting the client. All clinicians supported holding perpetrators accountable, and many believed an adequate legal response was vital to the victim’s recovery. However, more than half of clinicians stated that the impact of court proceedings on victims was “mostly negative.” Many noted that court proceedings presented more opportunities for triggering trauma symptoms. Most of the particular issues raised by clinicians related to prolonged court proceedings or victim anxiety concerning testifying in court. A few noted beneficial effects of the court process, including opportunities for victims to tell their stories and to see offenders held accountable.

It is worth noting that the particular concerns expressed by clinicians – length of time of proceedings and victims testifying in court – may occur less frequently in cases involving child pornography than in other cases of child sexual abuse. Nearly three-fourths of prosecutors responding to our online survey agreed that victims of child sexual abuse were less likely to have to testify in cases where there were images. In addition, a significant number of prosecutor respondents thought cases involving child pornography images were resolved faster than child sexual abuse cases without images.

³¹ See Nat’l Children’s Alliance. <http://www.nationalchildrensalliance.org/index.php?s=24>. Accessed Feb. 10, 2014.

Treatment of Victims during the Investigative Process

Many of the teen victims of sexual abuse and child pornography crimes interviewed (n=11) reported negative experiences with the police during the interview process, such as being required to describe the crimes in great detail, undergoing multiple interviews by a range of people, or being treated rudely. In clinician interviews and a discussion among clinicians and members of the project's advisory committee, many expressed concern regarding the potential for harm during forensic interviews of child pornography victim where a victim is confronted with the sexually explicit images in an attempt to elicit disclosure of the crime. Because clinicians note that victims of child pornography often fear that images will be exposed, and that they commonly exhibit self-blame, denial, and similar emotions, the forensic interview may be fraught with danger for inflicting additional trauma on a victim where it is not conducted by a specially trained forensic interviewer.

Investigators in a child pornography case may be focused not only on the perpetrator's conduct toward the individual victim, but on the possibility of other victims. Forty percent of law enforcement respondents to our survey indicated their most recent child pornography case involved multiple victims. This concern may lead investigators to press a victim to disclose information with some urgency.

There is a desire on the part of law enforcement officers working with child pornography victims to improve their response to victims. A majority of investigators responding to our online survey expressed an interest in more training, especially on responding to victims and families, including training for first responders who must "break the news" to the family and strategies to deal with reluctant victims and families. When we asked for recommendations for ways to better support victims and caregivers, many recommended improvements in training and resources for forensic interviewers and victim advocates. These recommendations primarily involved improved linkages to victim advocacy, counseling, and other services.

A great deal of work is already underway to provide and promote the use of trained child forensic interviewers in cases involving child sexual abuse, including child pornography. The AG Guidelines encourage the use of specially trained forensic interviewers with child victims and witnesses in child abuse and sexual abuse cases as a way to best elicit truthful information while minimizing additional trauma to the child.³² The FBI's Office of Victim Advocacy (OVA) has a Forensic Child Interviewing Program that works to ensure that investigative interviews of child victims and witnesses of federal crimes are tailored to the child's stage of development and minimize any additional trauma to the child.³³ The FBI's four full-time child interview specialists are not currently able to meet all the demand for their assistance, but they do provide training to special agents and other law enforcement on child

³² Office for Victims of Crime, U.S. Dep't of Justice. 2012. *Attorney General's Guidelines on Victim and Witness Assistance, NCJ 235121*. http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf.

³³ Fed. Bureau of Investigation. *Victim Assistance: Overview*. http://www.fbi.gov/stats-services/victim_assistance/overview/overview. Accessed February 26, 2014.

interviewing. Some of this training is available online.³⁴ The FBI has also developed guides for investigative interviews of child and adolescent victims. Similarly, the Department of Homeland Security has four experienced child forensic interviewers on staff who are available to assist with that Department's investigatory interviews and to train others in forensic interviewing of child and adolescent victims.³⁵

In addition to this federal effort, many organizations, including the National Children's Advocacy Center, the American Professional Society on the Abuse of Children, and CornerHouse, provide national, regional, local, and online training in forensic interviewing of children so as to minimize the risk of additional trauma to the victim.³⁶ These include training in the complex cases involving victims of child pornography and working with adolescent victims.

However, there is no federal or state mandate that law enforcement always involve trained child forensic interviewers in all cases involving child sexual abuse, including cases of child pornography. Thus, the use of such trained interviewers remains inconsistent.

Victims' Rights in Child Pornography Cases

Victims' Rights at the Federal Level

Victims of federal child pornography crimes—whether production, dissemination, or possession—have many legal rights. These include the rights that apply to all federal crime victims, rights that apply to child victims and witnesses, and rights specific to victims of child sexual exploitation, including child pornography.

Rights for crime victims at the federal level are well established and are most broadly outlined in the Crime Victims' Rights Act (CVRA)³⁷ and the Victims' Rights and Restitution Act (VRRRA).³⁸ The CVRA defines a victim as "a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable

³⁴ Fed. Bureau of Investigation. *FBI Child Forensic Interview Training*. <http://www.fbi.gov/news/videos/fbi-child-forensic-interview-training>.

³⁵ See Midwest Reg'l Children's Advocacy Ctr. *The Prepare and Predict Model of Forensic Interviewing with Ale Levi and Diane Siegel*. <http://www.mrcac.org/course/the-prepare-and-predict-model-of-forensic-interviewing-with-ale-levi-and-diane-siegel/>. See also Telephone Interview with Ale Levi, Forensic Interview Specialist, U.S. Dep't of Homeland Security (July 1, 2013).

³⁶ See, e.g., Am. Prof'l Soc'y on the Abuse of Children. *Practice Guide*. <http://www.apsac.org/practice-guidelines>; CornerHouse. *Basic Forensic Interview Training*. <http://www.cornerhousemn.org/forensicinterview.html>; Nat'l Children's Advocacy Ctr. *Forensic Interviewing of Children Training*. <http://www.nationalcac.org/events/bfi-training.html>; NICHD Protocol. *International Evidence-Based Investigative Interviewing of Children*, available at <http://nichdprotocol.com/>. Accessed February 24, 2014.

³⁷ 18 U.S.C. § 3771 (2013).

³⁸ 42 U.S.C. § 10607 (2013).

by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative” (i.e., in cases where the perpetrator/defendant is the child’s caregiver).³⁹ At least one court found that rights under the CRVA extended to victims in cases involving the distribution of child pornography, on the basis that distribution of the images exacerbates the harm caused by the creation of the images.⁴⁰

The VRRRA defines a victim as “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including...in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court.”⁴¹

Implementation of these and other statutory rights for federal crime victims is addressed through the Attorney General’s Guidelines on Victim and Witness Assistance (AG Guidelines).⁴² The AG Guidelines apply to all Department of Justice employees involved in the investigative, prosecutorial, correctional, and parole components in the treatment of victims of and witnesses to crime. The AG Guidelines specifically provide that “[c]hildren who are depicted in child pornography that has been advertised, transported, distributed, received, accessed, or possessed are presumed to have been directly and proximately harmed as a result of those crimes for purposes of determining whether they are a victim under the VRRRA or CVRA.”⁴³

The Child Victims and Child Witnesses Rights statute (CVCWR) provides additional safeguards for minors in the federal justice system.⁴⁴ This statute was amended by the Adam Walsh Act of 2006 to provide further protections in child pornography cases.⁴⁵ The federal criminal code also contains other provisions relating to the rights of victims in child pornography cases, particularly recovery of damages, in a chapter entitled Sexual Exploitation and Other Abuse of Children.⁴⁶

Victims’ Rights at the State Level

States also provide legal rights to victims of child pornography crimes.

Every state has a set of basic legal rights for crime victims, and 32 states guarantee victims’ rights in their state constitutions. However, the definitions of “crime” and “victim” to which or whom those

³⁹ 18 U.S.C. § 3771(e) (2013).

⁴⁰ *United States v. McElroy*, 353 Fed. App’x 191, 193-94 (11th Cir. 2009).

⁴¹ 42 U.S.C. § 10607 (2013); see *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 461-64 (D.N.J. 2009) (explaining the differences in CVRA and VRRRA’s definition of “victim”).

⁴² Office for Victims of Crime, U.S. Dep’t of Justice, *supra* note 11.

⁴³ *Id.* at 9.

⁴⁴ 18 U.S.C. § 3509 (2013).

⁴⁵ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 620 (2006) (codified as amended in scattered sections of 8, 18, 21, 28, and 42 U.S.C.)

⁴⁶ 18 U.S.C. §§ 2251 – 2260A (2013).

rights apply vary across the states. Currently, the basic victims' rights laws at the state level include victims of the following crimes:

- 19 states, any felony or misdemeanor;
- 5 states, any felony or violent misdemeanor;
- 7 states, any felony or listed misdemeanor;
- 1 state (New Hampshire), any felony;
- 7 states, violent felonies or violent misdemeanors;
- 1 state (Mississippi), violent felonies or listed misdemeanors;
- 10 states, listed felonies or listed misdemeanors; and
- 2 states (Florida and Rhode Island) do not have any specific definition of crime, but presumably cover victims of any crime.

Further examination shows the basic victims' rights laws in forty states explicitly apply to victims in cases involving the production, distribution, and possession of child pornography.⁴⁷ One state, Delaware, covers the production and distribution, but not the possession of child pornography. The District of Columbia and Kentucky include only the production of child pornography. The remaining eight states do not include specific child pornography offenses within the applicable definitions of crime or victim, but the statutes likely encompass many victims of child pornography production, since child pornography production charges are commonly accompanied by sexual abuse charges.

In addition to the basic rights of victims, many states have a range of other special rights, including privacy rights for victims of sexual crimes, special procedural rights for child victims, and other protections.

The implementation of crime victims' rights at the state level is straight forward in cases involving the production of child pornography: those cases are often coupled with charges of child sexual abuse, and the victim and family are closely involved in the investigation and prosecution of the case. However, the provision of victims' rights is more complicated in cases involving child pornography distribution and possession. Unlike the federal system, where the AG Guidelines explicitly include rights and services to victims of child pornography, few states have taken steps to ensure the implementation of victims' rights in such cases. While the state victims' rights laws generally apply in such cases, no guidance has been given or procedures defined to ensure victims are identified and provided their rights in child pornography possession cases.

⁴⁷ See comparison chart, Appendix G.

Furthermore, in many cases of child pornography possession or distribution, collections of images are large, but only a few victims within those collections have been identified and, thus, could be afforded legal rights. Relatedly, some of those identified victims of child pornography may find their images are involved in large numbers of cases that are the subject of prosecutions at the federal, state, and local levels.

The Right to Be Notified

Before victims of child pornography can exercise their rights in a criminal case, they must first be notified about that case. In federal cases, the CVRA gives crime victims the right to “reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.” Under the VRRRA, victims are also to be informed of the status of the investigation, the arrest and filing of charges against the accused, the scheduling of court proceedings, the release or detention status of the accused or convicted offender, the acceptance of a plea or the conviction of an offender, and the sentence imposed on an offender. Victims whose child pornography images have been identified are entitled to rights and notification in cases where offenders are charged with possessing or distributing their images. For some victims whose images are distributed widely online, this can involve multiple federal CP possession/distribution cases.⁴⁸

Managing victim notification across multiple cases can be burdensome to federal law enforcement agencies. Such ongoing notification relating to multiple cases also carries the risk of additional trauma to victims.⁴⁹ The federal Child Pornography Victim Assistance (CPVA) program was developed in large part to streamline victim notification and help victims manage the notifications they receive.⁵⁰

The CVPA works in tandem with the Child Victim Identification Program (CVIP), a clearinghouse of images maintained by the National Center for Missing and Exploited Children (NCMEC). When images of child pornography are discovered in a federal, state, or local law enforcement investigation, officers may submit those images to the CVIP, which automatically compares the images to those in the database

⁴⁸ See *United States v. Lundquist*, No. 06-4105, 2013 U.S. App. LEXIS 18734 (2d Cir. Sept. 9, 2013) (noting victims have a right to notice of each instance of possession).

⁴⁹ *Id.* (explicitly recognizing that receiving these notices can aggravate victims’ injuries, which may necessitate further therapy).

⁵⁰ See Fed. Bureau of Investigations. *Child Pornography Victim Assistance*. http://www.fbi.gov/stats-services/victim_assistance/overview/child-pornography-victim-assistance. Accessed October 28, 2013. The creation of this program also stems from provisions in the AG Guidelines charging officials at the Department of Justice to take steps to minimize the trauma that child victims may experience when they are asked to relive the crime during the investigation and prosecution of offenses. Office for Victims of Crime, U.S. Dep’t of Justice, *supra* note 11, at 14. In 2011, the Department of Justice’s Office for Victims of Crime, through an Interagency Agreement (IAA) with the Criminal Division’s Child Exploitation and Obscenity Section (CEOS), began support for a Victim Specialist who provides additional direct victim assistance and support to the U.S. Attorney’s Offices and their victim/witness coordinators in cases involving identified child exploitation victims. This Victim Specialist is also responsible for developing resources and training materials to help federal prosecutors and victim/witness coordinators strengthen their response to the victims’ needs.

and issues a report regarding any series of images associated with a known victim. The report includes an official point of contact—usually the law enforcement investigator from the initial production case.⁵¹

Law enforcement agencies are also encouraged to submit images of known victims identified through local cases to the CVIP.⁵² As part of the CPVA, when an international, federal, state, or local law enforcement agency submits images of a newly identified victim to the CVIP, NCMEC notifies the FBI's Office of Victim Assistance (OVA). OVA then sends a request to the investigating agency that submitted the image, asking them to obtain information from the victim about his or her notification preferences using a special form. The victim notification preference form, available in English and Spanish, allows victims to opt in or out of future notifications regarding federal investigations and court proceedings involving their images.⁵³ If victims opt in, they may designate an alternate contact to receive the notifications. The form states that if victims opt out of notifications they may not have the opportunity to exercise their rights as victims, including their right to request restitution or their right to make a statement at various proceedings. Victims are also informed that they may change their notification preference at any time. After the form is signed by the victim or, where appropriate, the victim's parent or guardian, it is forwarded to the OVA, where the information and notification preference are entered into the CPVA database.⁵⁴ The FBI's OVA acts as the central repository for victim contact information and victim statements of preference regarding future notification of federal proceedings.

When the CVIP program at NCMEC issues a report regarding the images that are linked to a known victim, it sends a copy of the report to the CPVA. If the report was issued for a federal agency, it is run through the CPVA database of victim notification preferences. If the victim has not requested notification, the CPVA will provide the federal agency only the name of the image series, the victim name, the victim's date of birth and, if the victim is a minor, his or her guardian's name.⁵⁵ If the victim has requested notification, CPVA will provide contact information for the victim or the victim's

⁵¹ This system was designed in part to help authorities prove in court that the subject images are of a real child, not images of younger-looking adults or computer simulations, in response to a Supreme Court decision that child pornography that did not involve a real child was protected speech *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Information about the law enforcement investigator in the original production case is provided to other agencies so that the investigator can then be contacted if needed to provide evidence of the child's identity in the court case. Testimony of Michelle Collins, Vice President, Exploited Children Div., Nat'l Ctr. for Missing & Exploited Children, before the U.S. Sentencing Commission (Feb. 15, 2012), available at <http://www.missingkids.com/Testimony/02-15-12>.

⁵² In addition, when a child has disclosed that exploitive images were taken but law enforcement has been unable to locate the images, law enforcement may submit a photo of the child at the age the images were created for comparison to the CVIP database, requesting a "Look Familiar" report.

⁵³ Fed. Bureau of Investigation. *Child Pornography Victim Assistance*. http://www.fbi.gov/stats-services/victim_assistance/overview/child-pornography-victim-assistance.

⁵⁴ Fed. Bureau of Investigation. *Child Pornography Victim Assistance Program Database*. http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0065/n1-065-12-001_sf115.pdf.

⁵⁵ Phone Interview with Paul Flood, Child Pornography Victim Assistance, Fed. Bureau of Investigations (Oct. 30, 2013).

designated third party.⁵⁶ The victim or alternate contact will then receive all regular notices related to the case.⁵⁷

The CPVA notification system empowers victims to make an individual decision about their notification of and participation in future cases. Victims are informed that they may change their notification preference at any time. Such flexibility is important, as illustrated by the handful of adult survivor survey respondents who reported opting to be notified (n=7). When asked what they would tell other people who have to decide whether or not to be notified they had a range of responses, many of them indicated that being informed provided a sense of freedom and peace of mind, one said that it only increased worry, and two noted that it is up to the individual to make the decision. Similarly, one-third of parents of child pornography victims interviewed had signed notification forms opting to be notified. Some of these parents indicated that their ability to know if and how often the images were being traded was a way of feeling some degree of control over the situation.⁵⁸ Victim advocates, forensic interviewers, and social workers responding to our survey also listed reasons victims and families chose to receive notification, which included keeping track of images, wanting to know if images were shared, being part of future prosecutions, and knowing what would happen to offenders. Professionals also identified reasons victims and families may decline notification, such as being concerned that this would impede the victim's ability to recover from the trauma and not wanting to be notified at present but realizing they can change their notification preference later. Law enforcement respondents also listed reasons for the victim/family notification decision, such as choosing notification to know everything possible about the case and distribution or wanting to have a voice; or choosing not to be notified because they didn't care who had the images, the victim or family did not feel like they had been harmed, or the family supported the perpetrator.

State level cases are far less consistent with victim notification in child pornography possession and distribution cases. As with federal law, state victims' rights statutes give victims the right to be notified of court proceedings relating to the case as well as other information and events. Unlike the federal system, however, there is no mechanism to facilitate the notification of victims whose images appear in

⁵⁶ The involvement of child pornography victims in multiple cases over many years raises another special issue. In cases involving minor victims, as noted above, rights are exercised by the victim's parent or guardian. The AG Guidelines note that once a child victim turns 18, the Department is obligated to provide that victim with notice in cases that occurred when the victim was a minor, including in cases involving images of a child's sexual abuse. Because of the potential impact on the victim, the Guidelines urge Department personnel to develop special procedures to obtain the victim's notification preference upon reaching the age of majority. The Guidelines encourage officials to contact a parent or guardian before the child turns 18 to determine whether the child is aware of the crime and any other special considerations that may be helpful in providing notice. Office for Victims of Crime, U.S. Dep't of Justice, *supra* note 11, at 32.

⁵⁷ If the victim has requested notification, once the victim contact information is provided to the federal agency the victim receives case information through the general Victim Notification System (VNS) of the Department of Justice. As part of this system, victims generally receive notices of case events through the mail or, if requested, by email. For more information, see brochure, "The Department of Justice Victim Notification System," http://www.justice.gov/usao/ma/vwa/VNS_Brochure.pdf. Accessed February 6, 2014.

⁵⁸ See parent interview discussion, p 84.

multiple cases across many states. The federal CPVA notification procedures described above do not permit victim contact or notification preference information to be shared with state or local investigators or prosecutors. Federal authorities have expressed hesitation about allowing the contact information for victims to be shared with local authorities due to concerns regarding uneven confidentiality protections at the state level.⁵⁹ Therefore, when a state or local investigator submits a set of child pornography images to the CVIP, and the CVIP matches a submitted image to an identified child, the investigator only receives contact information for the original criminal justice contact who can verify that the image belongs to a real child. No contact information for the victim is provided, and there is no mechanism to determine whether the victim has requested notification. Thus, there is no real ability to notify the child of the state or local criminal case.⁶⁰

Florida is the only state that has addressed this problem, developing a system similar to that at the federal level. Florida recognized that victims of child pornography did not routinely receive information about their rights as crime victims and were not notified about criminal cases involving their images.⁶¹ In 2008, the state adopted a law requiring law enforcement officers who recover images of child pornography to submit those images to the CVIP at NCMEC, and to request law enforcement agency contact information for any images which contain an identified victim. Any Florida law enforcement officer submitting a child pornography case for prosecution is required to give the prosecutor the law enforcement agency contact information received from the CVIP for any identified victims. The law then requires the prosecutor to enter certain information about the case involving an identified victim into the Victims in Child Pornography Tracking Repeat Exploitation (VICTRE) database maintained by the Florida Office of the Attorney General.

In addition, the Office of the Florida Attorney General receives a quarterly spreadsheet from NCMEC concerning cases in which victims have been identified. If those are newly identified victims, a staff person reaches out to the law enforcement contact identified in the report and asks for a copy of the police report or other document from which they can contact the victim and inform them about the VICTRE program. Victims are provided an anonymous ID and password for the program's website that they can use to find information about past and pending cases. This method of access is designed to allow victims to receive the information whenever they are ready and interested.⁶²

⁵⁹ Telephone Interview, focus group of federal agencies (Aug. 28, 2013).

⁶⁰ Contact information is provided for the initial investigating officer who can identify the child. The question of whether that officer has any responsibilities regarding victim notification in future cases is not always understood by law enforcement officers participating in the CVIP. One respondent to the project's online survey stated that he did not understand his obligations to the victim if he receives notice of any future case involving the victim's images. See *supra* page 34.

⁶¹ See Victim Servs. Unit, Office of the Attorney Gen. of Fla. 2008. *Victims of Child Pornography Deserve Voice in Court, Civil Damages* (statement regarding the history of the Florida law). <http://www.victre.com/VICTRE.nsf/Law>.

⁶² For more information, visit the Victim Services Unit, Office of the Attorney General of Florida at <http://www.victre.com/>.

The Right to Be Heard at Sentencing

Like other crime victims, victims of child pornography may have an interest in being heard at sentencing through written or verbal victim impact statements. The purpose of these statements is to allow victims the opportunity to inform the court of the harm they have suffered from the crime. The court or jury considers the statement in weighing the seriousness of the defendant's conduct, and in determining appropriate sentencing options such as ordering a defendant to pay restitution to the victim.

The right of victims in child pornography cases to be heard at sentencing is well established under federal law. The CVRA gives victims a right to "be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." Federal case law consistently upholds the right of victims of child pornography to give a victim impact statement (VIS) at sentencing under the CVRA, including in cases involving only possession of their image.⁶³

Along with the victim's right to be heard in court, federal law provides that the presentence report must contain "information that assesses any financial, social, psychological, and medical impact on any victim."⁶⁴ Federal rules of criminal procedure further provide that "[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."⁶⁵ This rule, too, has been followed in cases involving creation, distribution, or possession of child pornography.⁶⁶ In addition, victims in child pornography cases in which a guardian ad litem (GAL) was appointed are also entitled to have the GAL obtain and report "information that accurately expresses the child's and the family's views concerning the child's victimization" using child-friendly and age-appropriate forms.⁶⁷

The federal CPVA program, which streamlines victim notification, also facilitates the right of victims in multiple cases involving their image to share an impact statement with the courts. As part of the victim notification preference form, victims are given the option to share their victim impact statement with

⁶³ See *United States v. Quincoces*, 503 Fed. App'x. 800 (11th Cir. 2013); *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012) (possession and distribution); *United States v. Matthew*, 449 Fed. App'x. 542 (8th Cir. 2011) (allowing VIS from parents of a possession victim); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *United States v. Clark*, 335 Fed. App'x. 181 (3d Cir. 2009); *United States v. McElroy*, 353 Fed. App'x 191 (11th Cir. 2009) (victims in child pornography possession case afforded right to submit VIS as per victims' right to be reasonably heard. Court also noted that common law provides for victim's right to be heard as "sentencing judges 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" (citing *United States v. Rodriguez*, 765 F.2d 1546, 1555 (11th Cir. 1985))); see also *United States v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008); *United States v. Severs*, No. 3:09-00091, 2012 U.S. Dist. LEXIS 38937 (M.D. Tenn. Mar. 22, 2012).

⁶⁴ Fed. R. CRIM. PRO. 32 (d)(2)(B) (2013).

⁶⁵ FED. R. CRIM. PRO. 32(i)(4) (2013).

⁶⁶ But see *United States v. Burkholder*, 590 F.3d 1071, 1077 (9th Cir. 2010) (allowing the District Court to strike a VIS from presentence report, because Rule 32 was satisfied as victims could submit their statement for the courts review and the court had authority to strike the statements that concerned conduct unrelated to the defendant's possession of child pornography).

⁶⁷ 18 U.S.C. § 3509(F) (2013).

any federal prosecutor in a child pornography possession or distribution case involving their images, or to share a redacted version of their statement—from which all identifying information has been removed—with state or local prosecutors. The form states that if they check the box indicating they would like to share an impact statement, they will be contacted by a victim/witness coordinator at a U.S. Attorney’s Office.⁶⁸ Once a U.S. Attorney’s Office receives the statement, it can be uploaded into an Intranet database maintained by the Child Exploitation and Obscenity Section of the Criminal Division (CEOS).

At the state level, the right of crime victims to make a statement at sentencing is also firmly established.⁶⁹ However, few states have statutes that specifically address this right in cases involving child pornography possession or distribution. Florida again provides an exception. Its VICTRE program requires prosecutors, in cases involving an identified victim, to enter information into the state database regarding whether the prosecutor has a victim impact statement and whether that statement will be used in sentencing.⁷⁰ In addition, victims are permitted to submit an impact statement to VICTRE for use in cases involving the distribution or possession of their images.

In some cases, state and local authorities are able to access a victim impact statement from the federal database collected through the federal CPVA program. Access depends on whether the victim preference form filed by the victims consenting to the use of the impact statement in other cases was limited to federal and military cases or included state and local cases.⁷¹ The system by which state or local officials learn of the existence of this statement is simple: when an investigatory agency submits images from a child pornography case to the Child Victim Identification Program of the National Center for Missing and Exploited Children, they receive information about whether any of the images, or series of images involving the same victim, are of an identified child victim.⁷² That information includes the name of the law enforcement contact that identified the child and images by file name (such as the “X Name Series”), whether the victim has agreed to share a victim impact statement, and, if so, whether one is on file. Local or state officials can then request a redacted copy of the statement, which does not contain contact or identifying information about the victim.

⁶⁸ The form is available online at http://www.fbi.gov/stats-services/victim_assistance/notification-preference.

⁶⁹ For a discussion of this right, see “About Victims’ Rights,” *VictimLaw*, <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp>. Accessed February 6, 2014.

⁷⁰ FLA. STAT. § 847.002 (2013). The Florida database has contact information for victims depicted in more than 207 image series. More than 60 victims have submitted victim impact statements. Phone Interview with Pamela M. Bennett, Program Adm’r, Div. of Victim Servs. & Criminal Justice Programs, Office of the Attorney Gen. (Jan. 13, 2013).

⁷¹ The original version of the form was limited to the use of impact statements in federal cases; the form was later revised to include state and local cases. Telephone Interview, focus group of federal agencies (Aug. 28, 2013).

⁷² By law, only child pornography offenses involving a real child (as opposed to a computer-generated image) can be prosecuted. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Thus, agencies must be able to assert that a collection of child pornography included one or more real children. The CVIP program provides this verification.

Although the federal CPVA gives identified victims the option to share a redacted version of their victim impact statement with state and local prosecutors, prosecutors may not be aware that such a statement could be available. Furthermore, unlike federal courts, state and local courts do not appear to have squarely faced the question of the admissibility of a general victim impact statement that is not explicitly focused on the actions of the individual defendant.⁷³

The Right to Privacy

Privacy and the protection of sexual abuse images from disclosure are important to victims of child pornography. When victim information is not confidential, victims may become the subject of negative media attention.⁷⁴ Victims are also concerned about the security of their images within the justice system. Although less than 20 percent of the adult survivors we surveyed indicated that the crimes against them were reported to police or child welfare authorities, over 70 percent of those respondents said they felt embarrassed about police, social workers, and others seeing the images. Many professionals surveyed agreed that victims are often concerned and upset that the child sexual abuse images will be shown to judges and juries.⁷⁵

Federal law contains many provisions to protect the privacy and dignity of victims in child pornography cases. The CVRA gives victims the “right to be treated with fairness and with respect for the victim’s dignity and privacy.”⁷⁶ Federal courts have relied on this provision to allow victims in child pornography cases to have their names redacted or to be referred to by their initials.⁷⁷ At least one court has relied on this provision to protect a child’s non-pornographic images from being given to the defendant. In upholding the trial court’s denial of the defendant’s request for the images, the appellate court cited the CVRA’s privacy protections and noted that the images of the victim could be altered and used to harass the victim.⁷⁸

The CVCWR statute also provides protections for the privacy of victims and their images. It prohibits the copying of child sexual abuse images to provide them to the defendant—as long as the federal prosecutors make those images “reasonably available” to the defense attorneys, providing

⁷³ Interview with Sasha N. Rutizer, Fellow/Senior Attorney, National District Attorneys Association, National Center for Prosecution of Child Abuse, June 11, 2013.

⁷⁴ In our survey of professionals, in cases that came to media attention, 17 percent of prosecutor respondents and 23 percent of victim advocate respondents indicated the media attention of the case had a negative impact on victims and families. Importantly, 50 percent of prosecutor respondents and 47 percent of advocate respondents in cases that came to media attention said they did not know the impact.

⁷⁵ 71 percent of prosecutor respondents, 35 percent of victim advocate respondents, and 48 percent of mental health provider respondents agreed that victims in their most recent case had this concern.

⁷⁶ 18 U.S.C. § 3771 (2013).

⁷⁷ See *United States v. Clark*, 335 Fed. App’x 181, 183 (3d Cir. 2009) (allowing redaction of child pornography victim’s name in VIS); *United States v. Spensley*, No. 09-CV-20082, 2011 U.S. Dist. LEXIS 5024 (C.D. Ill. Jan. 19, 2011) (allowing child pornography victim to be called by her initials or “victim”).

⁷⁸ *United States v. Rand*, No. 11-60088-CR-COHN/SELTZER, 2011 U.S. Dist. LEXIS 120266 (S.D. Fla. Oct. 18, 2011).

opportunities for the defense attorneys or expert witnesses to view or inspect the material.⁷⁹ The statute also requires that in any case involving a child victim, the prosecution, the court, the defense, and the jury must maintain the confidentiality of any documents containing the name of the child or other information about the child. Any such documents filed with the court must be filed under seal.⁸⁰ The same statute also allows a court to issue a protective order prohibiting public disclosure of the child's name or other information, which may include an order closing the courtroom during certain testimony to prevent the public disclosure of such information.⁸¹ An intentional or knowing violation of the privacy provisions in the CVCWR is criminal contempt, punishable by up to one year's imprisonment, a fine, or both.⁸²

Federal trial courts have applied the CVCWR in child pornography cases to protect child victims and their images. One court restricted the showing of images only to the jury, rather than the gallery, during trial.⁸³ Another court relied on both the CVRA and CVCWR in upholding a protective order concealing the identities of three child pornography victims, even though one victim was no longer a minor at the time of the trial. The court found that the victims' privacy rights outweighed first amendment considerations.⁸⁴

Federal law also provides that, if the prosecution files a motion to protect the information, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor depicted in child pornography, that information "shall not be admissible and may be redacted from any otherwise admissible evidence."⁸⁵

The AG Guidelines further stress privacy protections for all child victims, stating that Department personnel should "scrupulously protect children's privacy." The Guidelines state that Department personnel should protect the dignity of victims, particularly those who have been exploited or are particularly vulnerable, such as children. "Motions in limine, protective orders, and other means should

⁷⁹ 18 U.S.C. § 3509(m) (2013). This provision was added as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 620 (2006). See *United States v. Jarman*, 687 F.3d 269 (5th Cir. 2012) (examining privacy requirements for child pornography victims under CVCWR, such as keeping evidence in a government controlled facility and monitoring defendant's access); *United States v. Wright*, 625 F.3d 583, 615 (9th Cir. 2010) (describing contents of a protective order in child pornography case, including that images be accessed by defendant during "normal business hours" and that the hard drive be returned to an authorized government employee to be placed in a secured location).

⁸⁰ See *United States v. C.R.*, 792 F. Supp. 2d 343, 387-89 (E.D.N.Y. 2011) (noting that sealing and clearing of the courtroom may be used to protect the victim, particularly where child pornography is involved).

⁸¹ This procedure is explicitly provided in 18 U.S.C. § 3509(d)(3) (2013).

⁸² 18 U.S.C. § 403 (2013); see *United States v. Broussard*, 767 F. Supp. 1536 (D. Or. 1991) (denying defendant's argument that the contempt provision violated first amendment rights in child abuse case).

⁸³ See *United States v. Troup*, No. 3:12-CR-36 JD, 2012 U.S. Dist. LEXIS 124945 (N.D. Ind. Aug. 31, 2012) (action was taken to protect victim's privacy); see also *United States v. Graham*, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013).

⁸⁴ *United States v. Graham*, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992, at *3 (W.D.N.Y. Jan. 8, 2013).

⁸⁵ 18 U.S.C. § 2259(A) (2013).

be used to prevent evidence impacting a victim's dignity from unnecessarily being viewed or disclosed in open court or otherwise revealed to the public at large, unless necessary for legitimate evidentiary purposes or to ensure compliance with court rules or rulings." In addition to strongly encouraging the protection of information, the AG Guidelines also urge protecting the victim's dignity by informing and preparing victims for the evidence and testimony expected.

As with other areas of victims' rights, state laws are not uniform in their protection of crime victim privacy, even in cases involving child pornography. Like the federal law, many states' constitutions and statutes provide crime victims a right to privacy or a right to be treated with dignity. Seven states have constitutional amendments broadly protecting a victim's right to privacy.⁸⁶ Texas' victims' rights amendment, as an example, gives victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process."⁸⁷ Other states provide these protections through statutory law. Massachusetts, for example, gives victims a "right to request confidentiality in the criminal justice system" and allows the court to enter orders to limit the disclosure of the victim's personal information.⁸⁸ Florida law exempts certain victim-related records and documents from disclosure under its Open Records Act. Some of the Florida provisions apply explicitly to victims of child pornography, including any criminal investigation evidence that may reveal the identity of a victim of child pornography and any information that might reveal the identity of a minor victim of child pornography that is contained in a videotaped statement of that minor.⁸⁹ Some states also protect the privacy of child pornography victims by allowing them to use a pseudonym in court filings.⁹⁰

Along with general privacy protections, several states have enacted laws to provide for the secure storage and limited use of child pornography images used in evidence. California law prohibits the display of child pornography images unless specifically permitted by the court after a hearing showing of good cause.⁹¹ Florida law exempts any photograph, videotape, or image of any part of the body of a victim of child pornography from its general laws requiring public disclosure of records.⁹² Idaho's court

⁸⁶ CAL. CONST. art. I, § 28; IDAHO CONST. art. I, § 22; ILL. CONST. art. 1, § 8.1; MICH. CONST. art. I, § 24; N.M. CONST. art. II, § 24; TEX. CONST. art. I, § 30; WIS. CONST. art. I, § 9m.

⁸⁷ TEX. CONST. art. I § 30.

⁸⁸ MASS. GEN. LAWS ch. 258B, § 3 (2013).

⁸⁹ FLA. STAT. §§ 119.071(2)(h)(b), 119.071(j)(2)(a). An individual may petition the court for access to this confidential information, but Florida law permits the prosecution to block such access if it can demonstrate that: (1) The identity of the victim is not already known in the community; (2) the victim has not voluntarily called public attention to the offense; (3) the identity of the victim has not otherwise become a reasonable subject of public concern; (4) disclosure of the victim's identity would be offensive to a reasonable person; and (5) disclosure of the victim's identity would: Endanger the victim, cause severe emotional or mental harm to the victim, make the victim unwilling to testify, or be inappropriate "for other good cause shown." FLA. STAT. § 92.56 (2013).

⁹⁰ See, e.g., FLA. STAT. § 92.56 (2013); NEB. REV. STAT. § 25-21, 294 (2013); TEX. CODE CRIM. PROC., art. 57.01 (West 2013). Oregon allows any victim of a felony offense to use a pseudonym. OR. REV. STAT. § 147.510 (2013). Nevada also allows the use of pseudonyms for victims of sexual offenses, which include some offenses against children, but does not seem to include pornography charges. NEV. REV. STAT. ANN. § 200.3771-72 (2013).

⁹¹ CAL. PENAL CODE § 1054.10 (2013).

⁹² FLA. STAT. § 119.071(h)(a).

rules provide that child pornography images included as attachments to a presentence report must be placed in a separate, specially marked envelope, and access to those images will be restricted to those specifically allowed by the trial court. The rule also provides that, on appeal, those images are to be excluded from the file unless necessary to the appeal.⁹³ Illinois provides that any recordings or evidence obtained in the investigation of child pornography, aggravated child pornography, or sexual exploitation of a minor be reviewed *in camera* with notice to all parties by the court presiding over the criminal case for a ruling of admissibility. Otherwise, the evidence is not admissible.⁹⁴ Other states provide blanket prohibitions against making child pornography images part of the public record and place child pornography under the seal of the court after the conclusion of the proceedings. Some of those laws also permit the destruction of child pornography images used in evidence.⁹⁵

State law is varied with regard to allowing a defendant to receive copies of child pornography images used in evidence. The Adam Walsh Child Protection and Safety Act of 2006 provisions preventing the reproduction of images only extend to federal cases.⁹⁶ Certain states follow the federal model, prohibiting the copying of child pornography on the request of a defendant, so long as the prosecutor makes the evidence reasonably available to defense counsel. In those states, if the defendant is acting *pro se*, the court will make arrangements for the defendant to be supervised. If the material needs to be sent to an expert, the material must be sent directly to the expert.⁹⁷

⁹³ IDAHO CRIM. R. 32 (2013).

⁹⁴ 720 ILL. COMP. STAT. 5/24-2 (2013).

⁹⁵ See ARIZ. REV. STAT. ANN. § 13-3553 (2012); 720 ILL. COMP. STAT. 5/11-20.1-5 to 11-20.1-5(B) (2013); KY. REV. STAT. ANN. § 531.080 (West 2013) (allowing for destruction of child pornography images); LA. REV. STAT. ANN. § 46:1845 (2013) (allowing for a hearing on child pornography evidence to decide on limitations to access or destruction); OKLA. STAT. tit. 21, § 1024 (2012) (requiring destruction upon final conviction); TEX. CODE CRIM. PROC. 38.48 (West 2013); WASH. REV. CODE § 9.68A.180 (2013) (sealing pictures at close of trial); WASH. REV. CODE § 9.68A.190 (2013) (permitting destruction or return of evidence given to defense or experts at close of trial and requesting that child pornography images used in proceedings before 2007 (the year the state's revised privacy laws came into effect) be returned to court custody); *In re Rules of Supreme Court & Court of Appeals*, 2008 Ark. 448 (2008) (requiring that if the record contains child pornography, a motion to seal the record must accompany the record).

⁹⁶ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 620 (2006) (discovery provision codified at 18 U.S.C. § 3509(m)). See also Nat'l Ctr. for the Prosecution of Child Abuse, Nat'l Dist. Attorneys Ass'n. 2013. "Morris v. State." *Tech. Facilitated Crimes against Children Blog* (Dec. 5, 2013). <http://ocacb.wordpress.com/2013/12/05/morris-v-state-2013-wl-6038048-ga-app-november-2013/> (noting that Defense Counsel continue to argue that they should be able to receive separate copies of child sexual abuse images for trial preparation instead of reviewing them at Government Offices. While at the federal level the Adam Walsh Act will normally protect those images from being copied and provided separately, the issue is less clear at the state level).

⁹⁷ See ALASKA R. CRIM. PRO. 16 (B)(9) (2013); FLA. STAT. § 92.561 (2013); IND. CODE § 35-36-10-3 to -5 (2013) (if defendant shows good cause to view, must do so under a protective order from the court that limits access and prevents direct access by defendant); MICH. COMP. LAWS § 750.145c (2013); MISS. CODE ANN. § 99-1-29 (2012); WASH. REV. CODE § 9.68A (2013). The Washington State legislature passed its law in response to a string of cases holding that defendants were entitled to copies of child pornography evidence. See *State v. Boyd*, 158 P.3d 54 (Wa. 2007); *State v. Grenning*, 234 P.3d 169 (Wa. 2009) (affirming the *Boyd* decision).

New Jersey’s Supreme Court recently outlined a template for allowing defendants access to child pornography images during discovery.⁹⁸ In *New Jersey v. Scoles*, the Court held that defense counsel is not required to access images from a state facility. Instead, if the defense requests copies, a case management conference is held where the defense must demonstrate its ability to comply with the court’s protective order. The court’s protective order must require that 1) defense not make further copies of the images; 2) defense use a dedicated computer that is not connected with the internet to view the images and that is locked when not in use; 3) images be conveyed to experts by hand-to-hand delivery and returned to the state after trial; 4) the defendant cannot view materials outside the presence of defense counsel; 5) any expert viewing the materials must be furnished with a copy of the protective order and abide by it; and 6) specific procedures must be put in place to ensure the materials are “completely and irretrievably” deleted from any computers on which they were viewed.⁹⁹ Judges are allowed some flexibility in the creation of these protective orders and are encouraged to create additional safeguards based on the unique circumstances of a particular case. If the defense attorneys cannot satisfy the requirement of the protective order, they must view the images at a state facility.¹⁰⁰

The Right to Protection

Protection of victims can be important in cases involving child pornography, where victims or their parents may be intimidated or harassed.¹⁰¹ Intimidation can occur not only through the intentional acts of the accused or another person, but from the process of participation in court proceedings. Many mental health clinicians interviewed noted negative impacts on child pornography victims from participating in the criminal justice process, including victims’ anxiety concerning testifying in court. Victims in child pornography cases may have a general right to protection as well as rights to use special procedures to minimize the trauma they may face from participating in the criminal justice process—particularly during in-court testimony.

At the federal level, the CVRA gives victims the right to be “reasonably protected from the accused.”¹⁰² The VRRRA provides that a responsible official must “arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender.” The VRRRA also requires responsible officials to ensure that during court proceedings a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses.¹⁰³

⁹⁸ *New Jersey v. Scoles*, 69 A.3d 559 (N.J. 2013).

⁹⁹ *See id.* at 573-74.

¹⁰⁰ *Id.*

¹⁰¹ Phone Interview with Pamela M. Bennett, Program Adm’r, Div. of Victim Servs. & Criminal Justice Programs, Florida Office of the Attorney Gen., (Jan. 13, 2013).

¹⁰² 18 U.S.C. § 3771(a)(1) (2013).

¹⁰³ 42 U.S.C. § 10607(c)(2) (2013); *see United States v. C.R.*, 792 F. Supp. 2d 343, 388-89 (E.D.N.Y. 2011) (noting that additional precautions can be put into place to protect victims, such as allowing written or video transmission of VIS, especially in cases of child pornography).

The CVCWR statute provides for various in-court protections to prevent further trauma to a child victim or witness and to ensure that a prosecution can continue. Under this law, a court may allow a child to testify via closed-circuit television if it finds that the child is unable to testify in open court in the presence of the defendant for any of the reasons listed in the statute, including fear or the substantial likelihood that the child would suffer emotional trauma from testifying.¹⁰⁴ The statute sets out other protections for the child, such as permitting the closing of the courtroom during a child's testimony or the appointment of a guardian ad litem (GAL) to represent the best interests of a child.¹⁰⁵ These provisions have been applied to protect a victim of child pornography.¹⁰⁶

Like the federal system, many states give crime victims a general right to protection from the accused. Sixteen states include the right of victims to be reasonably protected from the accused or the right to be "free from intimidation, harassment, or abuse, throughout the criminal justice process" in their state constitutions.¹⁰⁷ Another 20 states and the District of Columbia provide this right by statute.¹⁰⁸ Washington State, for example, provides for a victim's right "[t]o receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available."¹⁰⁹

States also commonly permit a court to issue a no contact order or protection order as a condition of a defendant's pretrial release.¹¹⁰ In many of those states, issuance of such an order is within the court's discretion. For those states, it is unclear how often orders are being issued in cases involving child pornography, or even child sexual abuse. Colorado law, on the other hand, requires criminal courts to issue a protective order in any criminal case, effective from the time of arraignment to the conclusion of the case. Such orders are to "restrain the person charged from harassing, molesting, intimidating,

¹⁰⁴ 18 U.S.C. § 3509(b) (2013).

¹⁰⁵ 18 U.S.C. § 3509 (2013); *United States v. Goodwin*, 287 Fed. App'x 608 (9th Cir. 2008) (affirming child pornography victim's right to GAL but noting that victim is not required to exercise this right).

¹⁰⁶ See *United States v. Fee*, 491 Fed. App'x 151 (11th Cir. 2012) (allowing closed circuit transmission in child pornography case after counselor testified victim was scared and anxious to be in the same room as defendant).

¹⁰⁷ ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, §2.1; CAL. CONST. art. I, § 28; CONN. CONST. AMEND. art. XXIX; ILL. CONST. art. 1, § 8.1; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.M. CONST. art. II, § 24; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 43; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WIS. CONST. art. I, § 9m.

¹⁰⁸ ARK. CODE ANN. § 16-21-106 (2013); COLO. REV. STAT. § 24-4.1-302.5 (2013); D.C. CODE ANN. § 23-1901 (2013); HAW. REV. STAT. § 801D-4 (2013); KAN. STAT. ANN. § 74-7333 (2013); KY. REV. STAT. ANN. § 421.500 (West 2013); LA. REV. STAT. § 46:1844 (2013); MISS. CODE ANN. § 99-36-5 (2013); NEB. REV. STAT. § 81-1848 (2013); NEV. REV. STAT. § 178.5692 (2013); N.H. REV. STAT. ANN. § 21-M:8-k (2013); N.J. STAT. ANN. § 52:4B-36 (2013); N.Y. CRIM. PROC. LAW § 530.13 (McKinney 2013); N.C. GEN. STAT. § 15A-825 (2013); S.D. CODIFIED LAWS § 23A-28C-1 (2013); TENN. CODE ANN. § 40-38-102 (2013); WASH. REV. CODE § 7.69.030 (2013).

¹⁰⁹ WASH. REV. CODE § 7.69.030 (2013).

¹¹⁰ See IOWA CODE § 811.2 (2013); MD. CODE ANN. CRIM. PROC. § 5-201 (2013).

retaliating against, or tampering with any witness to or victim of the acts charged.”¹¹¹ Such routine issuance ensures such protections are available to every victim.

Protective procedures specifically for child victims are also common at the state level, especially in cases involving sex offenses. These can include allowing a child to testify via closed circuit television, allowing special arrangements in the courtroom, and similar protections.¹¹² They can also involve the appointment of a GAL.¹¹³

Most prosecutors responding to our online survey did not believe GALs should usually be appointed by the court for victims of child pornography. Many offered reasons, including that a GAL is not necessary because the victims have advocates or victim/witness coordinators for support, or supportive families; that the victim is not a party to the criminal case (which is between the defendant and the government); and that the introduction of another stranger may be worrisome for the child. Approximately 30 percent of prosecutor respondents did think a GAL should usually be appointed, and reasons included that the defendant is often related to the victim; the family may fail to support or believe the victim or may support the perpetrator; parents cannot always be objective, whereas a GAL can serve as a neutral party; the GAL can make sure the victim’s rights are considered and the victim’s interests come first; and prosecutors cannot always completely support the victim.

The Right to Prompt Disposition of Proceedings

The long duration of criminal cases can have a negative effect on vulnerable victims, especially children. Mental health providers interviewed spoke of the negative impact of participation in court proceedings, particularly the length of time involved in those proceedings.¹¹⁴

At the federal level, the CVRA gives all crime victims “[t]he right to proceedings free from unreasonable delay.” The AG Guidelines provide guidance to prosecutors on implementing this right, urging them to consult with victims regarding the detrimental effects of any delay, and to inform the court of the victim’s reasonable concerns. Prosecutors may also raise this right of victims when discussing trial dates or responding to a defendant’s motion for a continuance (delay of proceedings), and should consider the victim’s interests when making their own requests for a continuance.¹¹⁵

¹¹¹ COLO. REV. STAT. § 18-1-1001 (2013).

¹¹² The National Center for the Prosecution of Child Abuse has created summaries of some of these protections under state law, including the use of closed circuit television for child testimony and the admissibility of out-of-court video statements. See Nat’l Ctr. for the Prosecution of Child Abuse, Nat’l Dist. Attorneys Ass’n. *State Statutes*. http://www.ndaa.org/ncpca_state_statutes.html. Accessed January 13, 2014.

¹¹³ The extent to which GALs are used in child pornography cases is unclear.

¹¹⁴ For more on this important issue, see Walsh & Steelman, 2013. This study considered case processing time in Arizona, and found that the average processing time for child sexual abuse cases was two-and-a-half times the processing time for other felonies.

¹¹⁵ Office for Victims of Crime, U.S. Dep’t of Justice, *supra* note 11, 47, Art. V(l).

The CVCWR statute also urges the speedy resolution of cases involving child victims and witnesses. Under that statute, the prosecutor, the guardian ad litem, or the court itself may make a motion that the case be designated “as being of special public importance.” Once such a designation is made, the court is required to expedite the proceeding and give it precedence over other cases. “The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child’s well-being.” Furthermore, when granting a continuance in cases involving a child, the court is required to make written findings of fact and conclusions of law supporting that decision.¹¹⁶

At the state level, more than half the states provide victims a right to a speedy trial or a prompt disposition of the case, with 12 including this right in their state constitution. The precise language varies with regard to strength and specificity. For example, the Arizona Constitution gives victims a right to “a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence,”¹¹⁷ and the state code requires that “[i]n any criminal proceeding the court, prosecutor and law enforcement officials shall take appropriate action to ensure a speedy trial for the victim.”¹¹⁸ The state’s rules of criminal procedure further instruct courts that “where special circumstances relating to the victim so warrant, the court may accelerate the trial to the earliest possible date that is consistent with the defendant’s right to a fair trial.”¹¹⁹ Utah’s statute places the victim’s right on a par with that of the accused. “In determining a date for any criminal trial or other important criminal or juvenile justice hearing, the court shall consider the interests of the victim of crime to a speedy resolution of the charges under the same standards that govern the defendant’s or minor’s right to a speedy trial.”¹²⁰

Approximately one-quarter of all states also have laws giving special consideration to cases involving child victims, either by giving those cases docket priority or by providing for expedited proceedings.¹²¹ Arkansas and Missouri are among the states requiring that criminal cases involving a child victim or witness be given priority on the court docket or schedule of proceedings.¹²² Other states provide for special consideration in cases involving child victims or witnesses. For example, Delaware law states that in every criminal proceedings in Superior Court involving a child victim or witness, “the Court and the prosecution shall take appropriate action to ensure a prompt trial in order to minimize the length of time a child victim or witness must endure the stress of the victim's or witness' involvement in the proceedings. In ruling on any motion or other request for a delay or continuance of proceedings, the

¹¹⁶ 18 U.S.C. § 3509(j) (2013).

¹¹⁷ ARIZ. CONST. art. II, § 2.1.

¹¹⁸ ARIZ. REV. STAT. § 13-4435 (2013).

¹¹⁹ ARIZ. R. CRIM. P. 8.7 (2013).

¹²⁰ UTAH CODE ANN. § 77-38-7 (2012).

¹²¹ Nat’l Ctr. for the Prosecution of Child Abuse. 2011. *Speedy Trial Statutes in Cases Involving Child Victims and Witnesses* (May). <http://www.ndaa.org/pdf/NCPCA%20Speedy%20Trial%202011.pdf>.

¹²² ARK. CODE ANN. § 16-80-102 (2013); Mo. REV. STAT. § 491.710 (2013).

Court shall consider and give weight to any adverse impact such delay or continuance might have on the well-being of any child victim or witness.”¹²³

Each of these approaches recognizes the importance of prompt proceedings in cases involving child victims; they are designed to ensure the court considers the interests of the child victim in a resolution of the case free from unreasonable delay, particularly when repeated continuances are requested. Despite the recognition of the importance of prompt proceedings involving child victims of pornography and other sexual abuse, it is unclear whether laws promoting speedy proceedings are being used to limit delays in the resolution of such cases. A small body of research has examined the time to disposition for child sexual abuse (not specific to child victims of pornography). Generally, this research finds that child sexual abuse cases take longer than a year to reach a criminal disposition and often take longer to resolve than other types of felonies.¹²⁴ In-depth interviews with judges, court administrators, defense attorneys, and prosecutors suggest that there is wide variation in disposition even in jurisdictions with speedy trial statutes.¹²⁵ It is also unclear whether states or the federal courts are making any effort to monitor the length of time it takes to resolve cases involving child victims.

The Right to Prompt Return of Property

Victims of child pornography may have their personal property seized as evidence as part of the investigation and prosecution. Victims and families may lose personal photos, even non-pornographic images.¹²⁶ They may also be deprived of computers or cell phones for long periods of time.¹²⁷ Personal technology may hold important evidence relating to the crime such as the victim’s communication with the offender, the dissemination or storage of images, or other important evidence. The property may belong solely to the victim, or may be family property used by the offender as well as nonoffending family members.

Crime victims, including victims of child pornography, are generally given a right to the prompt return of personal property. At the federal level, the VRRP provides that “[a]t all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.”¹²⁸

At the state level, this right exists in at least forty states. For some of these, such as California, the right is guaranteed in the victims’ rights amendment to the state constitution.¹²⁹ In others, such as Florida, it is contained in the statutes. Florida law provides that “Law enforcement agencies and the state attorney

¹²³ DEL. CODE ANN. tit. 11, § 5133 (2013).

¹²⁴ Martone, Jaudes & Cavins, 1996; Smith & Elstein, 1993; Stroud, Martens & Barker, 2000; Walsh, Jones & Swiecicki, 2014; Walsh et al., 2008; Walsh & Steelman, 2013.

¹²⁵ Walsh & Steelman, 2013; Walsh et al. 2013.

¹²⁶ Telephone Interview with Steve Kelly, Crime Victims’ Attorney (Sept. 19, 2013).

¹²⁷ See law enforcement online survey, recommendations, *supra* page 40.

¹²⁸ 42 U.S.C. § 10607(c)(6) (2013).

¹²⁹ CAL. CONST. art. I, § 28.

shall promptly return a victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining it.”¹³⁰

These laws were originally designed to address the issue of stolen property, such as jewelry, televisions, automobiles, or tools. In many cases, photographs of the item could be used in evidence, with physical possession of the property returned to the victim.¹³¹ Most of these laws were adopted prior to the explosion in the use of personal technology, such as cell phones or computers, which may contain the evidence internally. Specific protocols to address the retention of technological evidence while returning the physical device to the victim’s possession could help law enforcement apply this right in cases involving child pornography.

Financial Recovery

Financial recovery is important to victims in child pornography cases. Many victims of child pornography are likely to have high counseling costs, particularly where images have been distributed. Forty-seven percent of the clinicians interviewed believed there were differences in how victims of child pornography production responded to treatment, as compared to other victims of child sexual abuse. Differences included staying in a heightened trauma state longer, having more difficulty transitioning from victim to survivor, returning to treatment more frequently, and suffering ongoing anxiety from the circulation of images. Where images have been distributed, clinicians reported that clients had much more difficulty establishing closure. Similarly, sixty-eight percent of adult survivors responding to our survey indicated they had wanted additional help to deal with the images and their effects that they did not get, including money to pay for therapy. As one victim stated, “There needs to be funding to help people to heal who are not able to prosecute the perpetrators. This funding needs to be for the survivor to choose what therapist or specialist they want to work with and not be limited to a specific agency.”

Victims may have additional long-term costs, including the cost of school assistance when they are unable to concentrate on classes or unable to sit in a crowded classroom, lost earnings over a lifetime when the trauma of the crime limits the victim’s ability to work regularly, and other expenses. Attorneys representing child pornography victims have attempted to quantify these losses using experts such as economists and forensic psychologists.¹³²

Parents, too, may incur financial harm related to the offense. These can include the cost of therapy for the victim, the parent, or other children in the family. They can also include lost time from work and transportation costs to travel to appointments and court proceedings.¹³³

¹³⁰ FLA. STAT. § 960.001 (2013).

¹³¹ *President’s Task Force on Victims of Crime, Final Report* (Dec. 1982), 59-60.
<http://www.ovc.gov/publications/presdntstskforcrprt/welcome.html>.

¹³² Telephone Interview with Steve Kelly, Crime Victims’ Attorney (Sept. 19, 2013); Telephone Interview with James Marsh, Crime Victims’ Attorney (Nov. 25, 2013).

¹³³ Parent survey, *supra* pages 73, 75, and 78.

Victims of child pornography seeking financial recovery have three avenues: crime victim compensation programs; court-ordered restitution from a criminal defendant; or civil suits against the creators, distributors, or possessors of child pornography or others who bear responsibility for the crime. Each of these routes to financial recovery has its own limitations.

Crime Victim Compensation

Crime victim compensation programs exist in every state to reimburse victims for many of the out-of-pocket expenses related to a crime that resulted in personal injury or death. Such expenses typically include the costs of counseling, medical treatment, lost wages, and other costs as enumerated by each state's law. Victim compensation programs are "payors of last resort," only paying where expenses are not otherwise covered by insurance or any other payor. Federal crime victims are entitled to apply for compensation in the state where the crime occurs.

In order to be eligible for victim compensation, victims must ordinarily report the crime within a certain time period (most commonly 72 hours after commission of the crime), cooperate in the investigation and prosecution of the offense, and file a claim for compensation within a certain time period (typically 30 days after the crime is reported). Many states have "good cause" exceptions for one or more of these requirements. Also, most states extend the time limitations for reporting and filing for child victims, but generally only until the victim turns 18 or 21. A compensation program may deny or reduce payment to a victim who is found to have contributed to the crime – such as by breaking the law. Each state sets a maximum amount that can be awarded in any case; for many states, the maximum is \$25,000.¹³⁴

Of the 13 parents of victims in child pornography production cases interviewed, 85 percent knew about crime victim compensation funds and about half had received some compensation. Several parents had suggestions for improving victim compensation, including paying for counseling of the parent to address the parent's trauma (in addition to counseling focused on helping the parent support the child victim), broadening the expenses that can be covered, and making it easier to apply for compensation. Only nine percent of adult survivors responding to the survey had applied for victim compensation, and only half of those had actually received victim compensation after applying. Adult survivors recommended better public awareness of the availability of crime victim compensation, fewer restrictions on awards, allowing compensation to be claimed even when people have insurance, and making compensation more accessible and quicker.

While few state compensation programs explicitly cover victims of child pornography, they do cover victims of child sexual abuse, and most state victim compensation programs would consider the child pornography as evidence that the crime of child sexual abuse was committed.¹³⁵ Thus, victims of child pornography that depicts sexual contact with the child are likely to be found eligible for victim

¹³⁴ An overview of state victim compensation laws is available at www.nacvcb.org.

¹³⁵ Telephone Interview with Dan Eddy, Exec. Dir., Nat'l Ass'n of Crime Victim Comp. Boards (Oct. 1, 2012).

compensation. Because many compensation programs limit payment to crimes involving death or personal injury, coverage is less clear when the images do not show contact sexual abuse.

Two states have specifically included victims of child pornography in their victim compensation laws. Florida amended its law in 2008 to provide that a victim in a child pornography or child sexual exploitation case “who suffers psychiatric or psychological injury as a direct result of the crime, and who does not otherwise sustain a personal injury or death” is entitled to victim compensation.¹³⁶ This change has been called “very beneficial” to victims of child pornography, who now have greater access to counseling.¹³⁷ Nevada’s compensation law includes victims of child pornography production in its definition of “victim.”¹³⁸

Victims of child pornography may delay reporting the crime or seeking help for many years, which may make them ineligible for victim compensation. While many states will extend those time limits for a child victim, extensions are typically only until the child reaches 18 or 21.¹³⁹ Indiana extends the time limit till the victim reaches age 31.¹⁴⁰ Kansas sets no firm time limit for child victims of sex crimes, but instead requires that a compensation claim be filed within two years from the time the crime is reported to law enforcement.¹⁴¹ A few states, however, have no set time limit for applying for compensation, or have no time limits for those who were victimized as children.¹⁴²

Some victims in child pornography cases may have higher compensation needs than other victims due to the ongoing nature of the crime. Fear of distribution, or the actual discovery of their images in case after case, may trigger additional trauma requiring counseling. Many states explicitly permit supplemental compensation awards for additional expenses, including counseling, when the compensation already awarded to the victim has not yet reached the maximum payable.¹⁴³

Along with the direct victims of child pornography, victims’ parents and siblings may also need counseling. Coverage for counseling of parents, siblings, and other family members is available in thirty-four state compensation programs for cases involving child sexual abuse.¹⁴⁴ Some of these states limit

¹³⁶ FLA. STAT. § 960.197 (2013).

¹³⁷ Telephone interview with Pamela M Bennett, Program Adm’r, Div. of Victim Servs. & Criminal Justice Programs, FL Office of the Attorney Gen., (Jan. 13, 2013).

¹³⁸ NEV. REV. STAT. § 217.070 (2013).

¹³⁹ See Nat’l Ass’n of Crime Victim Comp. Boards. *Program Directory*. www.nacvcb.org; see e.g., NEV. REV. STAT. § 217.210 (2013).

¹⁴⁰ IND. CODE § 5-2-6.1-16 (2013.).

¹⁴¹ KAN. STAT. ANN. § 74-7305 (2013).

¹⁴² UTAH CODE ANN. § 63M-7-509; VT. STAT. ANN. tit. 13, §§ 5351, 5358a (2013).

¹⁴³ As examples, see 37 PA. CONS. STAT. § 411.18(f) (2013); R.I. GEN. LAWS § 12-25-21 (2013).

¹⁴⁴ ALA. ADMIN. CODE r. 262-X-4-.07 (2013); ARIZ. ADMIN. CODE § R10-4-101 (2013); ARK. CODE ANN. § 16-90-703 (2013); CAL. GOV’T CODE § 13951 (2013); COLO. REV. STAT. § 24-4.1-102 (2013); DEL. CODE ANN. tit. 11, § 9002 (2013); IDAHO CODE ANN. § 72-1019 (2013); 740 ILL. COMP. STAT. 45/2 (2013); IND. CODE § 5-2-6.1-21 (2013); IOWA CODE § 915.86 (2013); KAN. ADMIN. REGS. § 20-2-3 (2013); LA. ADMIN. CODE tit. 22, § XIII.503 (2013); ME. REV. STAT. tit. 5, § 3360-B (2013); MD. CODE ANN. CRIM. PROC. § 11-811 (2013); MICH. COMP. LAWS § 18.361 (2013); MINN. R. 3050.3400 (2013);

coverage to family counseling sessions or to sessions that are necessary to support the recovery of the primary victim. In other states, family members may be reimbursed for counseling necessary for their own recovery.

Victims in child pornography cases may also have expenses relating to transportation, particularly if they travel to other jurisdictions to exercise their rights to be present and heard, and to seek restitution, in criminal cases. These expenses appear to be compensable in at least 13 states.¹⁴⁵

Restitution from the Offender

Victims may also be compensated for the financial impact of child pornography through courts ordering convicted defendants to pay restitution as part of their sentence. Of the 13 parents of victims of child pornography production interviewed during this project, 77 percent had heard of restitution, and restitution had been ordered in about half the cases. Some restitution had been paid in half of the cases where it was ordered. Many noted the difficulty in getting money from the defendant, either because he was in jail or because assets were protected or had been dissipated prior to sentencing. Only one percent of the adult survivors responding to our survey stated that a court had ordered the perpetrator to pay restitution.

At the federal level, courts must order a convicted defendant to pay restitution to the victim in any case involving a violent crime, and certain property crimes, and may order restitution in any other case.¹⁴⁶ In addition, victims in cases involving child pornography have special right to court-ordered restitution for the full amount of the victim's losses.¹⁴⁷ The statute defines those losses as

24-1 MISS. CODE R. §200 (2013); MO. REV. STAT. § 595.010 (2013); MONT. CODE ANN. § 53-9-128; MONT. ADMIN. R. 23.15.306 (2013); NEV. REV. STAT. § 217.310 (2013); N.H. CODE ADMIN. R. ANN. JUS. 602.23 (2013); N.J. ADMIN. CODE § 13:75-1.28 (2013); N.Y. EXEC. LAW §§ 624, 626 (McKinney 2013); OHIO REV. CODE ANN. § 2743.01 (2013); OKLA. STAT. tit. 21, § 142.13 (2013); OR. REV. STAT. § 147.035 (2013); 18 PA. CONS. STAT. § 11.707 (2013); S.C. CODE ANN. § 16-3-1340 (2013); TENN. CODE ANN. § 29-13-105 (2013); TEX. CODE CRIM. PROC. ANN. art. 56.01 (West 2013); UTAH ADMIN. CODE r. 270-1-4 (2013); VT. CODE ANN. tit. 13, § 5351 (2013); WASH. REV. CODE § 7.68.080 (2013); W.VA. CODE §14-2A-3 (2013). In addition, Connecticut's victim compensation website states that it will compensate for counseling for relatives of victims of sexual assault and child abuse, though there is no specific provision in the law. See http://www.jud.ct.gov/crimevictim/#Crime_Victim_Compensation. The law does allow counseling for "any other loss ... resulting from the personal injury... which the [compensation program] determines to be reasonable." CONN. GEN. STAT. § 54-210 (2013).

¹⁴⁵ ALA. ADMIN. CODE r. 262-X-4-.04 (2013); DEL. CODE ANN. tit. 11, § 9002 (2013); D.C. CODE § 4-501(7)(A) (2013); MISS. CODE ANN. § 99-41-5 (2013); N.J. ADMIN. CODE § 13:75-1.28 (2013); N.Y. EXEC. LAW § 631 (McKinney 2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 525.26 (2013); 37 PA. CONST. STAT. § 411.42 (2013); S.D. ADMIN. R. 67:55:04:05 (2013); TENN. CODE ANN. § 29-13-106 (2013); TEX. CODE CRIM. PROC. ANN. art. 56.32 (West 2013); UTAH ADMIN. CODE r. 270-1-10 (2013); W.VA. CODE § 14-2A-3 (2013). Several other states, including Arkansas, Vermont, and Wyoming, have stated that they cover travel expenses for criminal justice proceedings, but appear to do so under their general legislative authority to cover "other related expenses."

¹⁴⁶ 18 U.S.C. §§ 3663, 3663A (2013).

¹⁴⁷ 18 U.S.C. § 2259 (2013). This law applies to a range of child sexual exploitation crimes, including the production, dissemination, or possession of child pornography.

- (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.

Federal courts have differed in their interpretation of this statute—specifically, whether the qualifying language “suffered as a proximate result of the offense” applies to all of the categories of losses enumerated in subsections (A) – (E) or whether it is limited to subsection (F) – “any other losses.”¹⁴⁸ This issue has arisen in cases involving possession of a victim’s image, with courts differing in whether the victim must show a particular degree of harm, or particular expenses, tied to the defendant’s actions in possessing the image. This interpretation is particularly relevant because courts, while recognizing that child pornography possession causes harm to the victim whose images are possessed, have found it difficult to apportion the amount of harm caused any individual possessor.¹⁴⁹ This question is currently under consideration by the U.S. Supreme Court.¹⁵⁰

At the state level, few laws require restitution specifically for victims of child pornography. However, victims in child pornography cases are likely to be encompassed under the general restitution statutes in many states. For example, Washington state law mandates that “[r]estitution shall be ordered whenever. . . an offense result[s] in injury to any person. . .”¹⁵¹ Similarly, Iowa law requires that “. . . the sentencing court shall order that restitution be made by each offender to the victims of the offender’s criminal activities.”¹⁵² There have been a few reported cases of restitution to victims of child pornography ordered in state courts under these general restitution provisions. For example, Wisconsin’s law, requiring restitution be paid to “victim of any crime” unless court finds “substantial reason not to do so,” has been applied in a child pornography possession case.¹⁵³

¹⁴⁸ See *United States v. Lundquist*, No. 06-4105, 2013 U.S. App. LEXIS 18734 (2d Cir. Sept. 9, 2013) (holding proximate cause is required for all enumerated elements of 18 U.S.C. § 2259); see also *Amy v. United States*, 710 F.3d 985 (9th Cir. 2013). But see *United States v. Unknown*, 701 F.3d 749 (5th Cir. 2012) (proximate cause only applies to subsection (F) of 18 U.S.C. § 2259).

¹⁴⁹ See U.S. Sentencing Comm’n. 2010. *Federal Child Pornography Offenses*, 117.

http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf.

¹⁵⁰ *United States v. Unknown*, 701 F.3d 749 (5th Cir. 2012), cert. granted sub nom., *Paroline v. United States*, 2013 WL 497856 (June 27, 2013) (No. 12-8561).

¹⁵¹ WASH. REV. CODE § 9.94A.753 (2013).

¹⁵² IOWA CODE § 910.2 (2013).

¹⁵³ WIS. STAT. § 973.20 (2013); see *State v. Simonetto*, 606 N.W.2d 275 (Wis. Ct. App. 1999) (approving restitution in a child pornography possession case under Wisconsin law).

Along with the general right of crime victims to restitution, a few states provide a specific right to restitution for victims of child pornography crimes or other forms of child sexual exploitation. Virginia law requires mandatory restitution for victims of the creation, distribution, and possession of child pornography.¹⁵⁴ In a case tried under this new law, the court ordered a man convicted of possession of child pornography to pay \$1,000 each to two identified victims.¹⁵⁵

Louisiana's law requires courts to order restitution in pornography cases for "reasonable costs of counseling that result from the offense." However, this law is limited to those cases involving incest.¹⁵⁶ Florida's conditional release program requires those who have been convicted of certain sexual offenses and crimes against children—including the creation, distribution, or possession of child pornography—to make restitution to the victim upon being released "for all necessary medical and related professional services relating to physical, psychiatric, and psychological care."¹⁵⁷

States are also beginning to address the need for restitution in other sexual exploitation cases, such as human trafficking; some of these statutes are written broadly enough to encompass some victims in cases involving the creation of child pornography, if not possession or distribution. For example, Delaware requires mandatory restitution under its trafficking law for "sexual servitude," defined as when defendant "recruits, entices, harbors, transports, provides or obtains by any means, a minor under 18 years of age, knowing that the minor will engage in commercial sexual activity, a sexually explicit performance, or *the production of pornography*."¹⁵⁸ Other state trafficking restitution laws could also apply to certain victims of child pornography.¹⁵⁹

While two-thirds of child pornography possession or distribution cases are charged at the state level,¹⁶⁰ the extent to which victim restitution is being ordered in those cases is unclear. Given the lack of a mechanism to provide notice to identified victims regarding state and local level prosecutions, victims' ability to exercise their rights, including the right to request restitution, is severely limited.

At the federal level, restitution is being ordered for some victims in child pornography possession cases. However, there appear to be limitations on the ability of restitution orders to meet the needs of victims.

¹⁵⁴ VA. CODE ANN. § 19.2-305.1(E1) (2013) (restitution is to be made "in an amount as determined by the court").

¹⁵⁵ Smith, Portia. 2001. "Convicted Man Ordered to Pay Restitution: Hanover Man Convicted in Child Pornography Case Will Have to Pay Restitution to Young Victims." *Free Lance-Star* (Sept. 17). <http://fredericksburg.com/News/FLS/2011/092011/09172011/652552>.

¹⁵⁶ LA. REV. STAT. ANN. § 14:78.1 (2013).

¹⁵⁷ FLA. STAT. § 947.1405(7)(a) (2013).

¹⁵⁸ DEL. CODE ANN. tit. 11, § 787 (2013) (emphasis added).

¹⁵⁹ See also 9 GUAM CODE ANN. § 26.02 (2013) (defining "sexually-explicit performance" as an act or show, intended to arouse, satisfy the sexual desires of, or appeal to the prurient interests of patrons or viewers, whether public or private, live, *photographed, recorded, or videotaped*) (emphasis added); 720 ILL. COMP. STAT. 5/10-9 (2013) (including pornography under "involuntary sexual servitude"); OKLA. STAT. tit. 21, § 748 (2013) (listing participation in pornography under "commercial sex activity").

¹⁶⁰ Wolak, Finkelhor & Mitchell, 2012a.

One problem concerns the financial status of many federal defendants at the time of sentencing. A recent examination of the assets of defendants in federal child pornography cases revealed that slightly less than half of the offenders in possession cases, and slightly more than half of offenders in production cases, reported a negative net worth during the presentence investigation.¹⁶¹ Importantly, only 15 percent were unemployed (other than because of a disability or retirement) at the time of their arrests for their child pornography offenses. It appears, therefore, that many defendants had a significantly higher net worth at the time of arrest than at the time of sentencing. Two explanations for this reduction have been offered: first, the offender may have lost his employment as the result the arrest, particularly if he was denied bail.¹⁶² Second, some offenders retained private counsel and spent significant assets on attorneys' fees. It appears, therefore, that the percentage of offenders reporting negative net worth at the time of the presentence report was higher than those with negative net worth at the time of arrest.¹⁶³ Because individual defendants may be unable to pay significant amounts of restitution, it may be necessary for victims to seek restitution from multiple defendants in many separate cases.

Victim access to restitution in cases involving their images at the federal level may be further limited by the uneven rates of prosecution for child pornography across federal districts. Reports from state ICACs indicate a wide range of federal prosecution levels for child sexual exploitation, including child pornography. For example, in FY 2010, of 19 cases referred to federal authorities by the ICAC headed by the Massachusetts State Police, only two were referred for prosecution, and neither of those was prosecuted. The ICAC Task Force headed by the Illinois Attorney General's Office, by contrast, referred 28 cases to federal authorities, of which 19 were submitted for federal prosecution and 17 were accepted for federal prosecution.¹⁶⁴ Similarly, an examination by the U.S. Sentencing Commission found that in federal prosecutions for non-production child pornography cases, seven districts, including the Eastern District of Missouri, accounted for just over 20 percent of all such cases in 2010.¹⁶⁵ While there may be many differences between jurisdictions that account for the disparity, the rates of federal prosecution of child pornography clearly vary between districts.

Civil Actions for Recovery

Victims may also recover for their financial harm by bringing civil actions against the creators, distributors, or possessors of child pornography, or against others bearing responsibility for the offense. While no solid data exist, our interviews of parents and civil attorneys indicate this avenue for recovery is not widely used. While nearly half of the parents of victims of child pornography production knew

¹⁶¹ See U.S. Sentencing Comm'n, *supra* note 121, at 100, 258.

¹⁶² *Id.* at 258 (as 93 percent of production offenders and 57 percent of non-production offenders were in fiscal year 2010).

¹⁶³ *Id.* at 162-63.

¹⁶⁴ Office of Juvenile Justice and Delinquency Programs, Office of Justice Programs, U.S. Dep't of Justice. 2012. *Review of the Internet Crimes Against Children Task Force Program: Interim Report to the Attorney General Fiscal Years 2010 and 2011, A-20.* <http://www.ojjdp.gov/pubs/240146.pdf>.

¹⁶⁵ U.S. Sentencing Comm'n, *supra* note 121, at 128.

abusers could be sued in civil court, only one had retained an attorney for that purpose. One parent stated that she was too exhausted after the criminal proceedings to think about a civil suit. Of adult survivors responding to our survey, only three percent had retained a civil attorney to sue for damages.

Federal law provides an avenue of civil recovery for child victims of sexual exploitation. This includes a general right to bring a civil action for victims of child pornography creation, distribution, or possession. Courts may award injunctive relief, compensatory and punitive damages, and costs and fees for attorneys or expert witnesses.¹⁶⁶ “Masha’s Law” provides an additional civil remedy for victims of federal crimes of child sexual exploitation, including the creation, distribution, or possession of child pornography.¹⁶⁷ That law sets a presumptive amount of damages of \$150,000 plus costs and attorneys’ fees.¹⁶⁸ Cases must be filed within six years of the date the victim suffered personal injury from the underlying offense or within three years of the victim turning 18.¹⁶⁹ Several suits are currently being brought under this provision.¹⁷⁰

Several states have created civil causes of action for victims of child pornography crimes or other forms of child sexual exploitation. Many of these are similar to the federal “Masha’s Law.” Florida was the first, passing the Exploited Children’s Civil Remedy Act, which allows victims of child pornography to bring a civil suit against the producer, promoter, or possessor of their images.¹⁷¹ The act provides that a prevailing plaintiff shall recover the actual damages sustained and the cost of the suit, including reasonable attorney’s fees. If a victim is awarded damages, he or she will be deemed to have sustained

¹⁶⁶ 18 U.S.C. § 2252A (2013).

¹⁶⁷ 18 U.S.C. § 2255 (2013).

¹⁶⁸ Federal courts have been split on whether the civil recovery statute provides guidance for the ordering of criminal restitution. Some have found the presumptive amount of damages set in Masha’s Law as a standard for the amount of restitution to be ordered; others have held that it would not apply in a case that did not involve creation of the images. See *United States v. Cheenu Yang*, No. 1:09-CR-00168 AWI, 2010 U.S. Dist. LEXIS 54925 (E.D. Cal. May 18, 2010) (using § 2252 as a formula to help determine criminal restitution amounts in a child pornography case); *United States v. Baker*, 672 F. Supp. 2d 771 (E.D. Tex. 2009) (using Masha’s law as guidance, the court found restitution in the amount of \$97,900 per victim well below the statutorily mandated amount. The court stated that “[b]ecause Congress deemed \$150,000 to be the minimum amount of damages sustained by a victim of child sexual exploitation, any restitution amount below \$150,000 will fall short of making these minor victims whole.”). But see *United States v. Cantrelle*, No. 2:11-cr-00542-GEB, 2013 U.S. Dist. LEXIS 53767 (E.D. Cal. Apr. 15, 2013) (holding that government did not adequately prove that § 2255 should apply in a criminal restitution case for distribution of child pornography); *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009) (arguing that *Baker* clearly applies to child pornography production cases, but not necessarily possession cases. The court states that Masha’s Law “is largely unworkable in the context of criminal restitution.”).

¹⁶⁹ 18 U.S.C. § 2255 (2013).

¹⁷⁰ See Sterman, Joce. 2013. “Mother Sues 200+ “Pedophiles” Who Viewed Child Porn Featuring Her Children.” *ABC2 News* (May 29). http://www.abc2news.com/dpp/news/local_news/investigations/mother-sues-100-pedophiles-who-viewed-child-porn-featuring-her-children; Martin, John, P. 2013. “Victim of Child Pornography Sues Her Exploiters.” *Philly.com* (Aug. 28). http://articles.philly.com/2013-08-28/news/41500826_1_mancuso-defendants-lawyers; Campisi, John. 2013. “Inspiration for “Masha’s Law” Files Class Action Suit Against Viewers of Child Porn Images.” *The Pa. Rec.* (Aug. 28). http://articles.philly.com/2013-08-28/news/41500826_1_mancuso-defendants-lawyers.

¹⁷¹ FLA. STAT. § 847.01357 (2013).

damages of at least \$150,000. The act also authorizes the attorney general to pursue these cases on behalf of the victim at the victim's request. Actions must be brought within three years after the later of (a) the conclusion of the criminal case; (b) the notification to the victim by law enforcement of the creation, possession, or promotion of images; or (c) the victim reaching the age of 18.

Kansas, Nebraska, and Nevada enacted similar laws, all with a presumptive damages amount of \$150,000. ¹⁷² Nebraska's law also explicitly allows for injunctive relief and allows parents of the victim to bring suit. The Nebraska law excludes those victims 16 years of age and older who voluntarily participate in the creation of the images. New Jersey law allows for a civil action to be brought by the child victim, their guardian, or a child advocacy organization. The act allows victims to recover three times the financial gains made by those who exploit them and authorizes injunctive relief to halt the making and distribution of child pornography.¹⁷³

A few states have created civil causes of action for victims of child pornography crimes that allow the recovery of punitive, or exemplary, damages—an award designed to punish a defendant for willful acts that are especially malicious, violent, or otherwise worthy of punishment—in addition to economic damages. For example, Louisiana law allows a court to order exemplary damages if there is “proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles.” Such civil actions do not require the prosecution of the defendant.¹⁷⁴ Oklahoma allows the recovery of the actual, special, and punitive damages and the cost of the suit, including reasonable attorney fees.¹⁷⁵ South Dakota allows the recovery of exemplary damages and pain and suffering, along with economic damages such as costs of treatment or loss of productivity, and attorney fees.¹⁷⁶ Such actions can be brought by the child, the child's parent, legal guardian, or sibling; any entity that funds a treatment program for the child or provided services to the child; or any other person injured by the conduct.¹⁷⁷ South Dakota's law states that actions must be brought within six years of the time the plaintiff knew or had reason to know of any injury caused by the offense. The time period is tolled while the plaintiff is a minor.¹⁷⁸

Interviews with civil attorneys representing victims of child pornography helped illustrate the potential benefits and limitations of civil justice in these cases. Many suits end quickly, as defendants default—fail to contest cases—or settle to avoid publicity. Civil suits have the advantage of reaching individuals who have not yet been criminally convicted, increasing the possibility that the defendant will have assets available to pay a judgment.

¹⁷² KAN. STAT. ANN. § 60-5001 (2013); NEB. REV. STAT. § 25-21, 290 to 296 (2013); NEV. REV. STAT. ANN. § 41.1396 (2013).

¹⁷³ N.J. STAT. ANN. § 2A:30B (2013).

¹⁷⁴ LA. CIV. CODE ANN., art. 2315.3 (2013).

¹⁷⁵ OKLA. STAT. tit. 21, § 1040.56 (2013).

¹⁷⁶ S.D. CODE § 22-24A-10 (2013).

¹⁷⁷ S.D. CODE § 22-24A-8 (2013).

¹⁷⁸ S.D. CODE § 22-24A-13 (2013).

Civil suits are also a flexible remedy, allowing victims to pursue a wide spectrum of potential defendants under a multitude of legal theories. Even when no statutory cause of action exists, civil attorneys can pursue claims under general theories of liability, often against others who might have reliable assets, such as 3rd party defendants. One civil attorney reported success pursuing civil conspiracy claims against multiple defendants involved in child pornography trading. Employers can be reached under the doctrine of *respondeat superior*, which holds that employers are responsible for the actions of their employees during the scope of their employment. For example, a child pornography victim was able to recover damages after suing the perpetrator's employer for negligence and failure to report after the perpetrator used a work computer to store pornographic images of the victim.¹⁷⁹ Other entities, such as schools and religious institutions can also be reached under vicarious liability claims. One civil attorney respondent referenced recovering \$120,000 from a police department for failure to investigate the crime; there was no recovery from the perpetrator due to lack of income.¹⁸⁰

Civil suits have their limitations as well; often these suits do not recover adequate damages to ensure the victim is properly recompensed. Individual defendants may have insufficient funds to cover the victim's losses.¹⁸¹ One civil attorney interviewed described his client's attempt to obtain full financial recovery by bringing a civil claim reverse class action against every known viewer of the series of images involving two young victims.¹⁸² The attorney is proceeding under a theory of joint and several liability; he and his clients intend to collect damages from as many individual viewers as possible until the full amount of damages has been reached. However, given the large number of separate filings against defendants across the country, this case has been costly to administer.

Attorneys interviewed noted other barriers to civil justice, including victims' lack of awareness of the existence of civil remedies, victims' lack of knowledge about where to find attorneys, short statutes of limitation for civil suits,¹⁸³ inability of civil attorneys to be admitted in various federal courts where possessors of their client's images are being charged, emotional barriers that victims and families have in coming forward to bring suit, and interfering institutions. Civil attorneys also noted reluctance from

¹⁷⁹ *Doe v. XYZ Corp.*, 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005).

¹⁸⁰ Telephone Interview with Steve Kelly, Crime Victims' Attorney (Sept. 19, 2013).

¹⁸¹ While homeowners' insurance formerly provided a source of funds for recovery against individual perpetrators for crimes committed in the home, those policies now typically exclude coverage for crimes. See Williams, Marian, R. et al. 2010. *Policing for Profit* (March).

http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

¹⁸² Telephone Interview with Steve Kelly, Crime Victims' Attorney (Sept. 19, 2013).

¹⁸³ Some states include child pornography possession under statutes that eliminate or extend the civil statute of limitations period for cases of child sexual abuse; however, this occurs in a minority of states. See, e.g., COLO. REV. STAT. § 13-80-103.7 (2013); CONN. GEN. STAT. § 52-577e (2013); N.M. STAT. ANN. § 37-1-30(A)(1) (2013); N.D. CENT. CODE § 28-01-25.1 (2013). A vast majority of states either have no specific statutes of limitation for child sexual abuse, see, e.g., ALA. CODE § 6-2-38(l) (2013), or the applicable statute does not include child pornography possession within the definition of child sexual abuse. See, e.g., D.C. CODE § 12-301(11) (2013). Additionally, most states have a tolling provision for minors under their general tort statute, but these provisions range in their scope, usually from 1-5 years after the victim reaches the age of majority. See e.g., MICH. COMP. LAWS § 600.5851 (2013); MASS. CODE ANN. § 15-1-59 (2013).

some prosecutors to share case information, and competition for the defendant's resources where the government seeks forfeiture of the defendant's assets and the victim wants to bring a civil action for damages.¹⁸⁴

Recommendations to Improve the Justice System Response to Victims Depicted in Child Pornography

Although the criminal justice system is taking significant steps to address the problem of child pornography, criminal justice proceedings often have a negative impact on victims. More can be done to promote a victim-sensitive approach to these crimes, to ensure and protect victims' exercise of their rights, to improve the investigation and prosecution of these crimes through continued training of law enforcement professionals, and to expand knowledge on all these issues. We recommend the following:

- The Office of Juvenile Justice and Delinquency Prevention (OJJDP) should work with stakeholders to develop victim service standards for Internet Crimes Against Children (ICAC) task forces. Such standards should include the use of trained child forensic interviewers, linking victims and families to supportive services, and training requirements in victimology and victims' rights for ICAC members;
- Policymakers and criminal justice officials should improve CP victim notification by: developing a system to allow victims to request notice by state and local criminal justice agencies in cases of CP dissemination or possession involving their images, building on the currently existing system for federal notification; modifying the federal victim notification system to give victims a choice of receiving notice of ALL case events and proceedings, or only MAJOR events and proceedings; and notifying victims of their right, in federal cases, to be represented by an attorney and where to seek assistance;
- National prosecutor organizations, or nonprofits dedicated to victim related training of prosecutors, should provide training and technical assistance to state and local prosecutors to promote the use of victim impact statements in cases involving dissemination or possession of the victims' images;
- Federal funders should support research regarding the current application of state laws that give victims—especially child victims—a right to a speedy disposition of proceedings, to guide future work to shorten the length of time children must endure the criminal justice process;
- Policy experts should assess the scope and implementation of state laws to protect child victims—including protecting the confidentiality of their personal information and CP images—to guide efforts to reduce the risk of trauma to child victims participating in the criminal justice process; and
- Federal and state law makers should pass legislation to provide a presumptive minimum amount of restitution to be ordered to every identified victim in a case involving their image.

¹⁸⁴ Telephone Interview with Leto Copley, Crime Victims' Attorney (Nov. 5, 2013).

