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Feature

***12 ENHANCING THE LEGAL PROFESSION'S RESPONSE TO VICTIMS OF CHILD ABUSE**

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The Criminal Justice Section has long supported the fair treatment of child witnesses, and in 1985 enacted policies urging the adoption of procedural reforms that have become commonplace in courtrooms around the country and in the federal Victims of Child Abuse Act of 1990 (VCAA, [18 U.S.C. § 3509](#)). (See ABA Policy, *Child Witnesses in Abuse Cases*, available at <http://www.abanet.org/child/abuse-neglect.shtml>.) However, recognizing that children could still be better served by the criminal justice system, the Criminal Justice Section recently obtained a grant from the Department of Justice to enhance the response of legal professionals to child abuse victims. The Section proposed several policies that were recently adopted at the ABA Midyear Meeting in February 2009 to facilitate this result. (ABA Policy 101D.) The policies urge jurisdictions to ensure that child victims of criminal conduct have access to specialized services and protections such as those provided by child advocacy centers, as well as prompt access to legal advice and counsel. The resolutions also urge support of legislation to provide that child victims of criminal conduct have independent attorneys who can assist them in obtaining applicable victims' rights such as those provided by [18 U.S.C. § 3771](#), and age-appropriate accommodations such as those provided by [18 U.S.C. § 3509](#), if the court makes a finding that the child's interests are not otherwise adequately protected. In addition, the resolutions urge that pilot programs be established in which rights and protections for child victims of criminal conduct are protected and enforced, including the appointment of attorneys on a pro bono or compensated basis. Finally, bar associations, law schools, victim rights organizations, child rights organizations, and courts are urged to collaborate to develop procedures for courts to appoint attorneys for child victims of criminal conduct and to adopt standards of practice and training requirements for those attorneys who clarify their roles and responsibilities. While these American Bar Association (ABA) policies are designed to assist all child victims, this article will concentrate on sexual abuse victims, who compose a large and particularly vulnerable category of children who interact with the criminal justice system.

Throughout this article I refer to child complainants as victims, in recognition that the filing of charges establishes the person's status as a victim for purposes of victim rights legislation. (See, e.g., [42 U.S.C. § 10607\(b\)](#).) *13 While there will be incidents of false accusations by children and their manipulation by adults, there is no reason to believe that the vast majority of their accusations are untrue. Indeed, given underreporting of sex crimes, the converse may well be likely, that most claims are based in fact. As discussed below, the use of child advocacy centers and best interviewing practices assist prosecutors in identifying false claims and determining which cases to bring. Generally, the objective of this article is to encourage legal professionals to improve their interactions with abused children, which will in turn provide children with more positive and less stressful legal experiences. It is important to understand that the legal experience of child abuse victims can be enhanced without impacting the constitutional or evidentiary rights of criminal defendants. Obviously, evidentiary rules concerning hearsay, experts, prior sexual acts of defendants, and privilege, as well as Confrontation Clause interpretation can improve the likelihood that the defendant will be convicted, but most of these do not directly affect how children are treated by the criminal justice system. The system can become more just as well as more effective if children's rights as crime victims are respected by appointing guardians ad litem (GALs) or lawyers to advise them and participate on their behalf to the extent permitted by law

when the court finds their interests are not otherwise adequately protected. In addition, I will briefly address other issues concerning the facilitation of child testimony, such as the use of child victims' advocates, preparing children to testify; child-friendly courtrooms and alternatives to live in-court testimony.

Child Abuse Prosecutions

The routine presence of child victims as witnesses in criminal cases is largely attributable to the 1974 enactment of the Child Abuse Prevention and Treatment Act (CAPTA). ([42 U.S.C. §§ 5101-5007](#).) Before CAPTA very few child sexual abuse cases were investigated, let alone prosecuted, but that changed once CAPTA required states to mandate the reporting of child sexual abuse and demonstrate the existence of specific programs and procedures in order to qualify for federal grants. By 1997, the Federal Bureau of Investigation National Incident-Based Reporting System reported that child victims made up 12 percent of all crime victims known to police, including 71 percent of all sex crime victims and 38 percent of all kidnapping victims. (David Finkelhor and Richard Ormrod, *Characteristics of Crimes Against Juveniles*, OJJDP Juvenile Justice Bulletin, June 2000, available at http://www.ncjrs.gov/html/ojjdp/2000_6_4/contents.html.) A survey of 153 district attorneys' offices nationwide revealed that the most common cases in which children testify are overwhelmingly child sexual assault/incest cases. (Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 *PSYCHOL. PUB. POLY & L.* 255, 264 (1999).)

It is difficult to accurately predict the number of child sexual abuse victims, in part because the FBI crime statistics do not differentiate sexual assaults against juveniles from those against adults, and because the surveys are all retrospective. Survey data collected in the late 1990s provide estimates that vary greatly. The National Violence Against Women surveys identify 90,000 sexually abused children per year. (*See, e.g.*, U.S. Dep't of Health and Human Svcs., *Child Maltreatment 2003*, available at <http://www.acf.hhs.gov/programs/cb/publications/cm03/cm2003.pdf>.) In contrast, a more targeted 1999 "National Incidence Study of Missing, Abducted, Runaway, and Thrownaway Children" estimated a population of more than 285,000 child victims. (David Finkelhor et al., U.S. Dep't of Justice, *Sexually Assaulted Children: National Estimates and Characteristics 2* (Aug. 2008), available at <http://www.ncjrs.gov/pdffiles/ojjdp/214383.pdf> (hereinafter NISMART).) NISMART identified another 35,000 children who were subjected to sex crimes not involving assault, and generally cautioned that its statistics may understate child sexual abuse. According to NISMART, nearly half of the child victims experienced an act of sexual penetration, and sexual assault victims were disproportionately female. (*Id.* at 5 (89 percent female).) More recent statistics from the Department of Health and Human Services establish that in 2006, approximately 78,000 children were found to be victims of sexual abuse after investigation by child protective services agencies. (U.S. Dep't of Health and Human Svcs., *Child Maltreatment 2006*, ch. 3, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm06/chapter3.htm#types>.) Obviously, this excludes cases in which family members are not alleged to be responsible for the abuse or for endangering the child.

***14** While child sexual abuse appears to have declined since the 1990s (*see* David Finkelhor and Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?* 62 *J. SOCIAL ISSUES* 685 (2006) (noting from 1990 through 2004, sexual abuse substantiations were down 49 percent)), the number of children who may be required to testify still remains significant. Like all reporting of sexual crimes, the approximation of victims is likely to be understated, since sexual assault is often identified as the least likely type of crime to be reported to police. For example, it is estimated that the police were contacted in only 30 percent of the child abuse cases. (NISMART, at 2.) Nearly 60 percent of the nonreporting was attributed to older children not wanting the caretaker to find out about the assault or telling the caretaker too long after the assault. (*Id.* at 8.) However, NISMART interviews suggested other reasons for underreporting of young children who are sexually abused by family members: ongoing intimidation and family loyalty. (*Id.* at 9.) Even when the abuser is not a family member, children are often sworn to secrecy by their abusers with threats of personal or family harm, or may not realize the criminality of the behavior, or may feel responsible for or ashamed of the abuse, or may be emotionally attached to their abuser. (*See, e.g.*, Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 *IND. L.J.* 1009, 1014 (2007).) Unlike the media's preoccupation with child abduction by strangers, which is un-

doubtedly tragic, most young children and adolescents are raped by someone they know. Strangers account for less than 20 percent of child rapes. (NISMART at 2.) Similarly, a third of child victimizers in state prison had committed their crime against their own child and half had a relationship with the victim as a friend, acquaintance, or other relative. (LAWRENCE A. GREENFIELD, U.S. DEPT OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 10 (1996), available at <http://www.usdoj/bjs/pub/pdf/cvvoat.pdf>.) Thus, the unwillingness of many children to disclose abuse and their distress about facing abusers in court must be understood in the context of their relationship with the abuser and the pressure that family members may exert to end any proceeding in dependency, criminal, or juvenile court. Moreover, offenders were arrested in only 19 percent of the sexual assaults of children under age six in the 1990s. (Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 11 (Bureau of Justice Statistics, NCJ 182990, July 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrl.pdf>.)

The fear of secondary traumatization by the criminal justice system is often cited as another reason for underreporting of sexual crimes. Not only do children face the skepticism and disbelief that women often confront when reporting rape, but they also encounter insensitivity to their age and developmental stage throughout the criminal process. Unintelligible questions are often posed by intimidating authority figures, including doctors, social workers, police, prosecutors, defense counsel, and judges who treat them as little adults. It is no wonder that many children freeze when testifying or are easily led into inconsistencies. Indeed, pre-*Crawford*, (*Crawford v. Washington*, 541 U.S. 36 (2004)), it was often prosecutors, not only parents, who felt that the best way to protect children from being retraumatized was to keep them from testifying. In reality, the empirical support for this position is mixed. Ironically, regardless of whether or not children testify, the outcome of the case appears to be a factor in their long-term dissatisfaction with the legal system and negative feelings about the effects of the legal case on their lives. (See Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 88 (No. 2, 2005).) In other words, if children did not testify and cases were dismissed or resulted in reduced sentences, some children suffered long-term consequences, just as some children reacted badly to the experience of testifying. Professor Myers, a well-respected child abuse expert, has suggested, “despite the difficulty, most children are able to testify in the traditional manner, especially when they are prepared and supported through the process.” (JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 3.01 (2007) (hereinafter MYERS ON EVIDENCE).) Similarly, the psychological literature appears to recognize that children are resilient. (*Id.*) In addition, commentators who view procedural justice as an important component of the judicial system, argue that children want to participate in *15 judicial proceedings to obtain a voice in decisions that affect them and provide them with accurate information about the proceedings and their outcomes. (See Victoria Weisz et al., *Children and Procedural Justice*, 44 COURT REV. 36, 41 (Spring/Summer 2008).) However, the criminal justice system can be more child-friendly to promote more child testimony, as well as better mental health outcomes for the children who testify. For example, the recently promulgated Attorney General's Crime Victim's Guidelines specifically reminds assistant U.S. attorneys “of the trauma child victims and witnesses experience when they are forced to relive the crime during the investigation and prosecution of a criminal case, particularly while they are testifying in court.” (AG Guidelines at 48, available at <http://www.usdoj.gov/olp/final.pdf>.) The guidelines also make reduction of the trauma to child victims and witnesses caused by their contact with the criminal justice system a primary goal. (*Id.*)

Rights of Crime Victims Relevant to Child Abuse Victims

As a result of the victims' rights movement, crime victims have been accorded rights that appear in at least 33 state constitutions as well as federal and state statutes. (See <http://www.ojp.usdoj.gov/ovc/ncvrv/1999/amend.htm>.) While many of these rights do not specifically target children, they apply to children as well as adults, and may have evidentiary and trial practice consequence that might not be immediately obvious. Most of the following discussion will reference the Federal Crime Victim's Rights Act (CVRA) passed in 2005, but it should be understood that constitutional and statutory provisions in many states will permit similar arguments. The CVRA includes the right to be reasonably protected from the accused. (18 U.S.C. § 3771(a)(1).) The ABA report accompanying the proposed resolutions points out that to avoid pressure on children from family members testifying for the defendant, children

should be placed in separate, private waiting areas, something that may not occur if they are unrepresented. Another safety issue may arise when rape complainants are faced with pro se litigants who stand near them and intimidate them during direct examination. Several courts have restricted the manner of such questioning under rules such as [Federal Rule of Evidence 611](#), which give the court substantial control over the mode of interrogating witnesses. (See Tom Lininger, *Bearing the Cross*, 74 [FORDHAM L. REV.](#) 1353, 1411-14 (2005).) Moreover, a recent Arizona decision required that a pro se defendant's advisory counsel conduct cross-examination of a rape victim despite a claim that this violated the defendant's constitutional right to self-representation. (*Jane Doe, Crime Victim, Petitioner, v. Honorable Raymond P. Lee*, 2007 WL 4939462 (Arizona 2007).) Similarly, [18 U.S.C. § 3509\(c\)\(7\)](#) prohibits judges from letting pro se litigants directly question a child in a competency hearing, and the U.S. Supreme Court has specifically affirmed the exclusion of the defendant from the competency hearing, so long as the defendant is represented and the child is not questioned about the merits of the case. (*Kentucky v. Stincer*, 482 U.S. 730, 744-46 (1987).)

Victims in federal court also have a right to attend proceedings “unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” (See [18 U.S.C. § 3771\(a\)\(3\)](#).) Such provisions have also been interpreted as giving discretion to the trial court to allow a minor victim's mother, who was a witness, to remain in the courtroom while the victim testified. (See *State v. Billsie*, 131 P.3d 239, 242 (Utah 2006); cf. *Clark v. Com.*, 2008 WL 4692347 (Ky. 2008) (compare majority opinion that reversed on other grounds and indicated a finding should be made on remand to show the mother's presence was essential, with concurring and dissenting opinion of Justice Scott that surveyed the national case law and found no abuse of discretion in allowing the mother to be present.)) Similarly, older children might want to attend the entire trial. Recently, advocates have argued more broadly that victims should have an unqualified right to attend trials without sequestration. (See generally Douglas E. Beloof & Paul G. Cassell, *The Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 [LEWIS & CLARK L. REV.](#) 481 (2005).) Concerning children, this should be the accepted approach, except in situations raising due process concerns, such as when the presence of one or more young children would elicit undue sympathy when it is unlikely that the children understand the proceedings. The remedy for an unsequestered child or parent hearing the testimony of other witnesses would be the same as permitted when the defendant is the last to testify: It can be pointed out in closing as a factor to be considered in assessing credibility. (See *Portuondo v. Agard*, 529 U.S. 61 (2000).)

Federal victims also have the right to confer with the attorney for the government in the case, and to be treated with fairness and with respect for the victim's dignity and privacy. ([18 U.S.C. § 3771\(a\)\(5\) & \(a\)\(8\)](#).) In accord with these rights, the Justice Department's victims' guidelines disfavor administering polygraph examinations to sexual assault complainants. (AG Guidelines, at 20.) However, victims' rights may come into conflict with the prosecutor's strategy in a particular case. For example, when the judge rules that evidence is not protected by the rape shield, should the prosecutor counsel the witness to testify or respect the victim's desire not to? This is not an *16 academic issue. Young children are particularly subject to claims that the rape shield does not protect evidence of an alternative source of injury or semen or the child's precocious sexual knowledge, while adolescents may face claims that evidence of the complainant's other sexual encounters fit statutory exceptions or are required by the Sixth Amendment Confrontation Clause. *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), a decision involving restitution, states “the Court refuses to adopt an interpretation of (a)(8) that prohibits the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation.” (*Id.* at 428.) Therefore, it is reasonable to expect such conflicts will arise. The AG's Guidelines clearly recognize that because victims are not clients, they can become adverse to prosecutors and may disclose whatever they have learned. As a result, consultations may be limited to gathering information from victims and conveying only nonsensitive data and public information. (AG Guidelines at 29-30.) Thus, [18 U.S.C. § 3771\(d\)\(6\)](#) provides the victim's right to confer, “shall not be construed to impair prosecutorial discretion,” although federal prosecutors should be available to consult with victims about major case decisions, such as dismissals, release of the accused pending judicial proceedings (when such release is for noninvestigative purposes), plea negotiations, and pretrial diversion. Obviously, when the victim is a child, exercising these rights is virtually impossible unless an adult who understands the system acts on the child's behalf. Victims also have a right at sentencing to make a victim impact statement, which again in the case of young children is not feasible without representation. Particularly, since other relatives may want a lenient sentence for the

abuser who is a family member, only a GAL or lawyer would be suited to decide what victim impact statement is appropriate.

Victims' rights specifically directed at children appear in the United Nations Optional Protocol on Sale of Children; Child Prostitution, and Child Pornography, *available at* <http://www2.ohchr.org/english/law/crc-sale.htm>. Article 8 requires signatories to “adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process” and in particular to:

- (a) Recognize the vulnerability of child victims and adapt procedures to recognize their special needs, including their special needs as witnesses;
- (b) Inform child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- (c) Allow the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- (d) Provide appropriate support services to child victims throughout the legal process;
- (e) Protect, as appropriate, the privacy and identity of child victims and take measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- (f) Provide, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and
- (g) Avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

Article 8 also requires the best interests of the child to be a primary consideration in the criminal justice system's treatment of children who are sexual exploitation victims. The United States has ratified this protocol and in reservation 6 asserts that the federal government will implement the protocol to the extent that the government exercises jurisdiction over the matters covered therein, and otherwise it will be implemented by the state and local governments. The reservation also provides that to the extent state and local governments exercise jurisdiction over such matters, the federal government has agreed that it shall, as necessary, take appropriate measures to ensure the fulfillment of the protocol. Thus, in addition to existing federal and state support for the rights of child victims, as a nation we have committed to notifying children of their rights and facilitating their testimony in the context of child pornography and trafficking of children for prostitution.

Vindicating the Rights of Child Abuse Victims

Currently, many victims' advocates are frustrated that rights exist that cannot practically be asserted. Federal victims must be told that they “can seek the advice of an attorney with respect to the rights” in the CVRA, [18 U.S.C. § 3771\(c\)\(2\)](#), but do not typically receive appointed counsel. As a result, victims' advocates are now arguing for lawyers to assist victims in exercising their rights, including participation in courtroom hearings or at trial. In child abuse prosecutions this may arise in the context of rules patterned on [Federal Rule of Evidence 412\(c\)](#), which requires notice to the “alleged victim” or the victim's “guardian or representative,” who is entitled to attend the in camera hearing and be heard. The rule does not provide an explicit right to have separate counsel *17 argue on the victim's behalf, to exercise an appeal if the defense motion is granted, or if the judge does not seal the motion, related papers, and the record of the hearing. Similarly, *Rubin* noted that the CVRA does not accord formal party status to victims, nor even intervenor status as in a civil action, but simply gives them standing to vindicate their rights. ([558 F. Supp. 2d at 417.](#)) *Rubin* emphasizes that “there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or *in limine* orders entered by the Court whether they be upon consent of or over the objection of the government.” (*Id.* at 418; compare Erin C. Blondel, Note, [Victims' Rights in an Adversary System](#), 58 DUKE L.J. 237 (2008) (arguing that courts should interpret CVRA narrowly to reflect victims' non-party status by simply requiring institutional courtesy toward crime victims with Mary L. Boland and Russell Butler, *Crime Victims' Rights--From Illusion to Reality*, published in this issue of CRIMINAL JUSTICE (noting under CVRA, courts are recognizing standing in several contexts).)

In contrast, rape shield complainants have been permitted to sue to protect their privacy, and the CRVA now explicitly provides its rights “shall be asserted in the district court” and if denied, the movant may petition for review by a writ of mandamus. ([18 U.S.C. § 3771\(d\)\(3\)](#).) [Doe v. United States](#), 666 F.2d 43 (4th Cir. 1981), an early rape shield case recognized a crime victim's standing to sue, finding it “implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard.” *Doe* found jurisdiction existed to entertain the victim's appeal from an order in the [Rule 412](#) proceeding. Similarly, in [United States v. Stamper](#), 766 F. Supp. 1396 (W.D.N.C. 1991), another rape case, the court appointed counsel for the complainant at her request to protect her privacy interests in a dispute over the admission of psychological reports that the defendant claimed would demonstrate her motive and plan to make false allegations of sexual abuse. Her counsel was allowed to participate in the hearings on this issue, cross-examine witnesses, and submit briefs. Appellate review is necessary because the promise of a judicial limiting instruction as a way of limiting the prejudice of sexual history evidence offers little consolation, since the disclosure violates the complainant's privacy and compromises accurate fact-finding. A few other cases regulating courtroom procedures have also permitted suit by complainants. (See, e.g., [Jane Doe, Crime Victim, Petitioner, v. Honorable Raymond P. Lee](#), 2007 WL 4939462 (Arizona 2007) (standing to limit manner of pro se defendant's cross-examination).) Recently [United States v. Hunter](#), 548 F.3d 1308 (10th Cir. 2008), which rejected the post-judgment appeal of a non-party in a criminal case under the CVRA, explained that all of the cases permitting non-party appeals related to specific trial issues and did not disturb a final judgment. Practically, the absence of appointed counsel renders obtaining any statutory review unrealistic in most cases.

Professor Beloof, director of the National Crime Victim Law Institute at Lewis & Clark Law School, has recently argued that the anti-rape victims' advocates have “been asleep at the procedural switch” by failing to lobby that rape victims should be granted direct enforcement in trial level hearings and on pretrial review. (Douglas E. Beloof, [Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights](#), 38 SUFFOLK U. L. REV. 291, 297-300 (2005).) In federal court, [18 U.S.C. § 3771\(d\)\(1\)](#) arguably supports this position by stating that not only the prosecutor, but the “crime victim or the crime victim's lawful representative” may assert these rights. In fact, victims' rights advocates are now arguing more broadly that victims should generally be given standing and the right to be heard in the trial and appellate process. (See, e.g., Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255.) Professor Lininger has boldly proposed that trials should be reconceptualized as trilateral with victims having separate representation by counsel who would object to improper questions and argue on their behalf. (*Bearing the Cross*, at 1394-1400.) While this would require financial support, advocates believe that funding might be available under Violence Against Women Act (VAWA) grants or that pro bono lawyers might be a solution. Such procedures are extremely controversial, and appear to return to a form of private prosecution, as existed prior to the advent of public prosecution, which is unlikely to occur in the near future.

To the extent that the next frontier for child victims' rights advocates is an attempt to obtain representation at counsel table, it will likely be met with hostility by judges, as well as by prosecutors and defense counsel. Judges do ***18** not want the orderly trial process interrupted by lawyers who are not focused on resolution of the criminal case but on protecting the child. Prosecutors are particularly concerned that a lawyer will erect a barrier between them and children who are complainants and witnesses, because this interferes with the prosecutor's ability to obtain the trust of the children and also to make informed decisions about their credibility. Some prosecutors argue that child advocacy centers (CACs), rather than lawyers, better protect the privacy, therapeutic, and legal interests of children while also helping prosecutors to weed out cases in which the claim of sexual abuse is false. Indeed, some prosecutors are concerned that in criminal cases, child attorneys or GALs would come from the defense bar, and be predisposed not to cooperate with the prosecutor. In contrast, child advocates point out that CACs are part of the prosecution for purposes of [Brady](#). ([Brady v. Maryland](#), 373 U.S. 83, 86-87 (1963) (requiring disclosure of material exculpatory information).) Children need their own attorneys to protect their interests without being subject to *Brady* obligations.

In individual cases, the presence of attorneys for children may either prove a help or a hindrance to the defense, but the specter of a GAL appointed by the judge sitting at counsel table and acting as a second prosecutor was viewed as “dangerously erod[ing] the defendant's presumption of innocence.” ([State v. Harrison](#), 24 P.3d 936, 945 (Utah,

2001).) However, *Harrison* recognized that appointment of a GAL did not interfere with the presumption of innocence, (*id.* at 941), and the court's view of other limitations on participation was dictated by the absence of any statutory authorization for the GAL to question witnesses. (*Id.* at 945-46). A separate issue raised by the concurring opinion in *Harrison* is whether the office of the guardian ad litem should be subject to supervision by the judiciary or the executive branch of government. The concurring opinion argued that it could erode confidence of both the defendant and the public if the judge appointed an employee of the court to act as a GAL. (*Id.* at 947-48).

Ultimately, the prosecution cannot abdicate its responsibility to try the case to a victim's attorney. (*See, e.g., Hall v. Florida*, 579 So. 2d 329, 330-31 (Fla. App. 1 Dist. 1991) (prosecution cannot avoid race-neutral criterion for peremptory challenges by explaining that victim's relatives made decision to exclude); *East v. Scott*, 55 F.3d 996, 1000-02 (5th Cir. 1995) (allowing discovery in habeas proceeding where it was claimed that private prosecutor hired by family of victim controlled the prosecution in violation of defendant's due process rights; *but see* Douglas E. Be-loof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135 (2007) (arguing that the current constitutional approach does not adequately weigh victims' interests in the balance because victims' interests, as well as victims' rights, are now relevant considerations in judicially crafted procedures).) One does not have to resolve the debate about what level of trial participation by attorneys for child victims is appropriate to recognize that children cannot exercise their existing rights without assistance, and that an independent attorney should be appointed when the court makes a finding that the child's interests are not otherwise adequately protected.

In other words, appointment of GALs or lawyers for children is not dependent on any reconceptualization of legal practice. Children are not only more vulnerable than adults, but also are unlikely to know their rights or be able to exercise them. Moreover, federal victims' rights legislation concerning children already authorizes counsel and provides funding. Federal prosecutors are required under the CVRA to advise child victims or their representatives that they can seek the advice of an attorney with respect to their rights. (18 U.S.C. § 3771(c) (2).) Section 18 U.S.C. § 3771(e) includes as possible representatives for children "any other persons appointed as suitable by the court." In addition, the VCAA, 18 U.S.C. § 3509(h)(1), specifically permits the court to appoint a GAL for a child who was a victim of, or a witness to, a crime involving abuse or exploitation, and the statute was recently amended to specifically authorize reasonable compensation of GALs. Pursuant to the VCAA, GALs may attend all of the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. (18 U.S.C. § 3509(h)(2).) The GAL may also gain access to all reports, evaluations, and records that are necessary to advocate effectively for the child, except attorney's work product and grand jury materials. While GALs are not required to be attorneys, the VCAA provides that "[i]n making the appointment, the court shall *19 consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues." (18 U.S.C. § 3509(h)(1).) Given the indicated statutory duties of GALs, lawyers are typically appointed. However, it must be understood that a GAL acts in the best interest of the child, while an attorney acts in the child's stated interest, which may be different. (*See generally* Annette Ruth Appell, *Representing Children Representing What? Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008); *see also* Marcia M. Boumil, *Ethical Issues in Guardian Ad Litem Practice*, 86 MASS. L. REV. 8 (2001).)

A number of provisions in state codes and constitutions also codify the rights of child victims to obtain legal representation. (*See* report supporting the adoption of ABA policies enhancing legal services for children; *see also* *Arizona Revised Statutes § 13-4401(C)*.) In addition, states receiving CAPTA funding are supposed to "insure the appointment of a guardian *ad litem* or other individual to represent and protect the rights and best interests of the child." (45 C.F.R. § 1340.3(g).) The Uniform Law Commissioners Act encouraging alternative methods for children to testify, which has been adopted by a few states, permits "an individual determined by the presiding officer to have sufficient standing to act on behalf of the child" to initiate the process, which would include GALs or attorneys. (*Uniform Child Witness Testimony by Alternative Methods Act § 4(a)* (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/ucwtbama/2002final.htm>.) Maryland provides that an attorney for child victims may participate in several of its criminal procedure statutes. (*See* *Md. Crim. Proc. § 11-303* (closed-circuit TV) and § 11-304 (child hearsay).) A Maryland judge appointed an attorney to represent a child victim in a criminal court proceeding with respect to the child's psychotherapist-patient privilege in *Fisher v. State*, 128 Md. App. 79 (1999). Si-

imilarly, Wisconsin permits an “adviser to assist the questioner, and upon permission of the judge, to conduct the questioning” of children in videotaped depositions. ([Wis. Stat. 967.04\(8\)\(b\)\(6\)](#) (the provision of the statute that eliminates a showing of unavailability for admission at trial would be unconstitutional after *Crawford*.) While this provision was probably intended for questioning by a child psychologist, rather than a child's GAL, it opens the door to lawyer participation in the proceedings. The ABA policy encourages pilot projects appointing counsel, and urges bar associations to develop procedures for appointment and training of such counsel.

The ABA report, at <http://www.abanet.org/crimjust/policy/my09101d.pdf>, includes a number of examples demonstrating why GAL or counsel is necessary. For example, sexual abuse charges involving multiple defendants in several jurisdictions required coordinated services and minimization of duplicate pretrial questioning. In a case in which the child was unable to testify, the GAL was able to provide a compelling victim impact statement based on conversations with the child and its investigation. Another case involved an attorney who was able to ensure an in camera review of subpoenaed school records. The report also explains that an attorney should be appointed in the investigative stage of the proceeding, not only to ensure appropriate services, but to reveal possible threats that may require a protective order. Similarly, other confidentiality issues may arise that require an attorney rather than any other type of representative. Finally, [18 U.S.C. § 3509\(b\)](#) provides that the child's attorney or a guardian ad litem may apply for an order that the child's testimony be taken outside the courtroom and be televised by two-way closed circuit television or by a videotaped deposition. Unless children receive similar assistance in state courts, they are dependent on the prosecutor's decision about their manner of testifying. The ability of a lawyer to request and argue for alternative methods of testifying may be key to the child's mental health if the prosecutor believes that winning the case is more likely if the child testifies in person.

Competency Hearings

Successful prosecutions of child abuse cases are difficult for a number of reasons: The abuse often takes place in secret; there may be no physical evidence of molestation; the crime is often reported well after it occurred; inconsistencies are common in a child's description of the abuse; leading questions by a family member, doctor, psychologist, or police officer may be perceived as producing unreliable answers; and children often recant their accusations due to family pressure. Jurors typically are concerned about child suggestibility, manipulation, coaching, or confusing fact with fantasy, whether or not children testify, because hearsay is a dominant feature of child abuse litigation. Virtually every state has a child hearsay exception, or uses a catchall to permit child hearsay that would otherwise be barred. Statements of children are also often introduced through expansive interpretations of excited utterances and statements for medical diagnosis or treatment. (*See, e.g.*, TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N CRIMINAL JUST. SECTION, THE CHILD WITNESS IN CRIMINAL CASES 40-42 (2002).) Several states also adopted exceptions requiring the videotaping of child interviews typically by law enforcement, psychologists, social workers, or others employed by the local child services agency. This approach was designed to show juries that the child has not been misled by suggestive questioning techniques when the child does not testify, but post-*Crawford* most of those interviews would be prohibited unless the child testifies. Yet, even pre-*Crawford*, reversals based on the admission***20** of child hearsay were more frequent than hearsay reversals in other types of cases. (John E.B. Myers et al., [Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science](#), 65 LAW & CONTEMP. PROBS. 3, 44-45 (2002).) Thus, ensuring that children testify offers the best possibility of obtaining a conviction that will survive an appeal.

Essentially, *Crawford's* rejection of the earlier Confrontation Clause reliability-based framework has caused a role reversal in the posture of prosecutors concerning child competency. Pre-*Crawford*, prosecutors focused on protecting children from the trial process because their statements would routinely be admitted as reliable hearsay that survived any confrontation clause challenge. Therefore, prosecutors did not necessarily want to produce the child witness, or argue that the child was competent, given concerns about retraumatization. In contrast, today when admission of child hearsay is critical, in order to avoid producing the child at trial, the testimonial approach dictates that prosecutors will first argue that the statements are nontestimonial, even claiming that because young children do not understand the trial process, they cannot utter testimonial statements. (*See, e.g.*, Rebecca K. Connally, *Out of the*

Mouth(s) of Babes: Can Young Children Even Bear Testimony? ARMY LAW. 1 (Mar. 2008).) If this fails, and statements by the child are deemed to be testimonial, the competency hearing becomes crucial, because the hearsay can only be admitted if the child is cross-examined at trial, or if he or she is unavailable at trial and the defendant previously had an opportunity to cross-examine. (See Myrna S. Raeder, [Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation](#), 82 IND. L.J. 1009 (2007); and Myrna S. Raeder, *Confrontation Clause Analysis after Davis*, CRIM. JUST. 10 (Spring 2007).)

The VCAA presumes children to be competent and requires a compelling reason to obtain a hearing. ([18 U.S.C. § 3509\(c\)\(3\)](#).) In addition, age alone is not sufficient to obtain a competency hearing in federal court. ([18 U.S.C. § 3509\(c\)\(4\)](#).) Similarly, a psychological evaluation of the child must be justified by a compelling reason. ([18 U.S.C. § 3509\(c\)\(9\)](#).) There have been calls to ban such examinations entirely, both for adult and child complainants. (See, e.g., Gregory M. Bassi, Comment, [Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court-Ordered Psychological Examinations in Child Sexual Abuse Cases](#), 102 NW. U. L. REV. 1441 (2008); Oriana Mazza, Notes *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 ST. JOHN'S L. REV. 763 (2008).) While these statutory rights might be considered as making it easier for children to testify, because [Federal Rule of Evidence 601](#) virtually eliminates competency requirements except as required by Rule 403 (undue prejudice), their presence in the law appears to provide a model for states, rather than enhancing federal procedures for children.

One of a child's most lasting impressions of the criminal justice process will revolve around testifying, which can be a stressful experience, particularly if the child has accused a family member of sexual abuse. Many states permit very young children to testify, raising the question of whether they are developmentally capable of understanding the oath. However, sensitive questioning should be able to qualify many children as young as four years old, since young children can often distinguish true statements from false statements, even if they cannot define the nature of the difference. Similarly changing the words of the oath for younger children who do not understand the concept of "promise" in relation to telling the truth may also qualify more children. (See generally Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017 (2000); Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001); see also Paul Wagland & Kay Bussey, *Factors That Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUM. BEHAV. 639 (2005) (suggesting ways to facilitate truth telling by children who are afraid to speak after adults have sworn them to secrecy).) [Title 18 U.S.C. § 3509\(c\)\(7\)](#) dictates that direct examination of the child at the hearing should normally be conducted by the court on the basis of questions submitted by the attorney for the government and the attorney for the defendant, including a party appearing pro se. The court may also permit an attorney, but not a party appearing pro se, to examine a child directly on competency, if it is satisfied *21 that the child will not suffer emotional trauma as a result of the examination. ([18 U.S.C. § 3509\(c\)\(5\)](#).)

As previously mentioned, *Kentucky v. Stincer* permits the exclusion of the defendant from the competency hearing, so long as the defendant is represented and there is no questioning about the merits of the case. Although the child is likely to be more comfortable testifying in chambers where he or she is not intimidated by the defendant's presence, having legal assistance for the child may be even more significant in this setting, since the lawyer understands the child's mental state, has the trust of the child, and is best suited to ask age-appropriate questions that will facilitate the child being found competent to testify. A few states do not even require abused children to take an oath while others declare them competent, but less than 20 percent of jurisdictions authorize these approaches. (Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1023 (2000); see, e.g., [N.Y. CRIM. PROC. L. § 60.20\(2\)](#).)

Child Advocacy Centers and Interviewing Child Victims

Prosecutors now routinely argue that statements are not testimonial when made to individuals with dual roles, such as doctors and social workers. However, this argument is problematic concerning forensic interviews taken by multidisciplinary teams, typically in child advocacy centers (CACs). (See, e.g., [State v. Hooper](#), 176 P.3d 911 (Idaho, 2007); but see [State v. Krasky](#), 736 N.W.2d 636 (Minn. 2007) (Child sexual assault victim's statements to nurse em-

ployed by children's resource center at children's hospital were nontestimonial, even though referral to resource center was a joint decision made by a police officer and a child protection worker.) The Department of Justice has encouraged the use of CACs for the last decade as a way to include “[s]ocial workers, physicians, therapists, prosecutors, judges, and police officers” to limit the amount of questioning of children and encourage their appropriate questioning. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Law Enforcement Response to Child Abuse 3* (reprint 2001) (1997), available at <http://www.nejrs.gov/pdffiles/162425.pdf>.) Similarly, the ABA was an early supporter of multidisciplinary teams. (ABA policy, *Child Witnesses in Abuse Cases* (July 1985), available at <http://www.abanet.org/child/abuse-neglect.shtml>.) The current AG's Victims' Guidelines even encourage the development of such teams if one does not exist in the location. In addition, the guidelines specifically state that the forensic interview should not be confused with a therapeutic interview that is conducted for the purpose of designing and providing treatment to a child. (AG Guidelines, at 50.) Thus, competency becomes critical to ensure the admission of forensic interviews. (See, e.g., [Frei v. State, 934 So. 2d 318, 322-23 \(Miss. App. 2006\)](#) (affirming conviction despite challenges to competency of child who was four at trial, and three at time of sexual abuse, and to admission of child's statements to forensic interviewer and social worker); see also [State v. Borden, 986 So. 2d 158. \(La. App. 5th Cir. 2008\)](#) (affirming introduction of videotape of forensic interview containing leading questions, where child victim testified).)

More than 40 states have legislation concerning joint investigation and cooperation between law enforcement and social services and authorizing multidisciplinary teams. (*Legislation Mandating or Authorizing the Creation of Multidisciplinary/ Multi-Agency Child Protection Teams* (Nov. 5, 2004), available at http://www.ndaa-apri.org/pdf/statutes_legislation_mandating_multidisciplinary_teams_2004.pdf.) It has routinely been assumed that such teams are instrumental in improving the skills of interviewers and reducing the number of interviews. (See, e.g., John E.B. Myers et al., [Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony](#), 28 PAC. L.J. 3, 17 (1996).) CACs have only recently been evaluated with some surprising results, including findings that they did not reduce the number of interviews or produce different rates of prosecutions and convictions, and that children treated at CACs were removed more frequently from their homes than in comparison communities. (Theodore P. Cross et al., *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse 2* (NCJ 218530, August 2008), available at <http://www.ncjrs.gov/pdffiles/ojdp/218530.pdf>.) The findings also indicated children were only interviewed once or twice in all communities, possibly because professionals had criticized redundant interviews for many years. The rate of disclosure of abuse during the interview was also similar. However, CACs had greater law enforcement involvement in child sexual abuse investigations, more evidence of coordinated investigations, better child access to medical exams, more referrals for child mental health treatment, and greater caregiver satisfaction with the investigation process. Videotaping of child interviews was also significantly higher in CACs. (*Id.* at 3 (52 percent versus 17 percent).) Because *Crawford* has turned these best practices into a blueprint for creating testimonial statements, most children who are interviewed at CACs will have to testify for those statements to be admitted. It is my belief that even after *Crawford*, prosecutors have an incentive to videotape children in CACs so that when they testify the videotape will bolster their credibility by showing the interview was nonsuggestive. In addition, empirical evidence indicates that jurors in actual trials rated the videotaped interview as important for their believing the child victim/witness at trial. (See John E. B. Myers et al., *22 [Jurors' Perception of Hearsay in Child Sexual Abuse Cases](#), 5 PSYCHOL. PUB. POL'Y & L. 388, 409 (1999).)

While the CAC helps children who testify in that it limits attacks on their suggestibility and decreases inconsistencies, more can be done to help children to testify accurately and effectively. Professor Lyon and others have conducted studies that indicate the type of questioning that will reveal whether young children are competent. (See, e.g., Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1023 (2000); Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001) (Professor Lyon's articles are all available at <http://works.bepress.com/thomaslyon/>.) Similarly, progress has been made in identifying how best to ensure accuracy of child testimony, including the finding that a promise to tell the truth may increase true disclosures without increasing false allegations. (Thomas D. Lyon & Joyce S. Dorado, *Truth Induction in Young Maltreated Children: The*

Effects of Oath-Taking and Reassurance on True and False Disclosures, 32 CHILD ABUSE & NEGLECT 738 (2008); Thomas D. Lyon et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEVELOPMENT 914 (2008); see also Amy Russell, [Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions](#), 28 HAMLINE J. PUB. L. & POL'Y 99 (2006) (summarizing research); Paul Wagland & Kay Bussey, *Factors That Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUM. BEHAV. 639 (2005) (suggesting ways to facilitate truth-telling by children who are afraid to speak after adults have sworn them to secrecy). Attention has only recently been focused on appropriate questioning of child victims of domestic sex trafficking. (See Allison Turkel and Suzanna Tiapula, *Strategies for Interviewing Child Victims of Human Trafficking*, available at http://www.ndaa.org/publications/newsletters/update_vol_21_no_5_2008.pdf.)

Debate about the prevalence of child suggestibility and false accusations is long-standing. (Compare Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 34 (2000) with Thomas D. Lyon, [Applying Suggestibility Research to the Real World: The Case of Repeated Questions](#), 65 LAW & CONTEMP. PROBS. 97 (2002) and Thomas D. Lyon, *The New Wave of Child Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999). See also Livia L. Gilstrap, [Child Witnesses: Common Ground and Controversies in the Scientific Community](#), 32 WM. MITCHELL L. REV. 59 (2005); Michael R. Keenan, [Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape](#), 26 DEV. MENTAL HEALTH L. 100 (2007).) Similarly, controversy exists about whether children are reluctant to disclose child abuse. (Compare Kamala London et al., [11 PSYCHOL. PUB. POL'Y & L. 194 \(2005\)](#) (questioning frequency of denials of abuse and recantations) with Thomas D. Lyon, *Abuse Disclosure: What Adults Can Tell*, in CHILD VICTIMS, CHILD OFFENDERS: PSYCHOLOGY AND LAW (B.L. Bottoms et al., eds. 2008) (arguing nondisclosure and delayed disclosure of abuse is frequent, particularly concerning intra-familial abuse).) Therefore, it is critical for psychologists to share their insights with lawyers and law enforcement about best interviewing practices that facilitate truth-telling. More communication between psychologists and lawyers will also lead to less stressful cross-examinations. (See, e.g., Michael E. Lamb et al., *Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201 (2007), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2180422#id398384>; Thomas D. Lyon, *Speaking with Children: Advice from Investigative Interviewers*, in HANDBOOK FOR THE TREATMENT OF ABUSED AND NEGLECTED CHILDREN 65 (P. F. Talley, ed., 2005).)

Indeed, such communication may inure to the benefit of both children and defendants. For example, defense attempts to impeach children may sometimes backfire, in part because the jurors react sympathetically to the child. However, despite validation by a jury verdict, the child's trial experience in light of such questioning will be quite unpleasant, and potentially have short-or long-term negative mental health consequences for them. Yet, a recent empirical study found that contrary to prediction, more complex questions asked by the defense were associated with convictions, not acquittals. (Angela D. Evans et al., *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials* (forthcoming, LAW AND HUM. BEHAV., available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=thomaslyon>.) In other words, jurors are more likely to convict when defendants ask questions that are inappropriate for the age and developmental stage of the child. Such a finding should encourage defense counsel to abandon this strategy, which does not appear to work, and is also stressful to children.

Facilitating Child Testimony

Because children who have given testimonial statements will need to be cross-examined, prosecutors are more likely to argue for use of protective devices such as screens, or remote TV links, pursuant to [Maryland v. Craig](#), 497 U.S. 836, 852 (1990), where they previously might not have called the child at all. Of course, jurors have always been more likely to convict when they can evaluate the child, but *23 post-*Crawford* in many cases prosecutors have lost their strategic choice to proceed without the child. Undoubtedly, *Craig* is not a complete panacea since the child must

be “traumatized, not by the courtroom generally, but by the presence of the defendant.” (*Id.* at 856.) Thus, several cases have reversed where dual reasons for the fear existed. (See [United States v. Bordeaux](#), 400 F.3d 548, 553-54 (8th Cir. 2005) (post-*Crawford*) (also noting confrontation via a two-way closed circuit television is not constitutionally equivalent to face-to-face confrontation); [United States v. Turning Bear](#), 357 F.3d 730, 736 (8th Cir. 2004) (pre-*Crawford*.) Similarly, courts vary significantly about the type of showing necessary to justify in-court regulation of testimony, as well as who can establish it. (See, e.g., [State v. Marlyn J.J.](#), 2007 WL 610938, at ¶¶ 46-53 (Wis. App. March 1, 2007) (testimony of therapist in combination with evidence that child was so frightened at preliminary hearing that she had to be removed from courtroom was sufficient); [State v. Paulson](#), 2007 WL 461323, at *6 (Table) (Iowa App. Feb. 14, 2007) (trained child abuse investigator's conclusion that child would be traumatized by testifying in the presence of the defendant was sufficient).) Prosecutors must also recognize that obtaining expert input regarding trauma may waive any existing privilege for the child's mental health records. (See [State v. Ruiz](#), 34 P.3d 630, 639 (N. Mex. App. 2001) (psychotherapist-patient privilege was waived by request that victim be allowed to testify by videotape, although child's mental health records were not otherwise germane to the sexual assault charges against defendant).) Finally, prosecutors may be skeptical of remote or shielded testimony because some studies indicate that despite an increase in accuracy of shielded child testimony, jurors find such children less credible than those who testify openly in their presence. (See Jean Montoya et al., [Child Witness Policy: Law Interfacing with Social Science](#), 65 LAW & CONTEMP. PROBS. 209, 238-39 (2002).)

Recent attacks on *Craig*, claiming its balancing approach is inconsistent with *Crawford*, have failed. (See, e.g., [State v. Vogelsberg](#), 724 N.W.2d 649, 654 (Wis. App. 2006).) Similarly, [United States v. Pack](#), 65 M.J. 381, 385 (U.S. Armed Forces 2007), “join[ed] the weight of authority in holding that *Craig* ‘continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional.’” All states have provided for the taking of remote testimony. Similarly, the federal government enacted [18 U.S.C. § 3509\(b\)](#). In 2002, the Uniform Law Commissioners attempted to harmonize the state variations through its Uniform Child Witness Testimony by Alternative Methods Act, but this has not been widely adopted. (See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucwtbama.asp.) To the extent that some of these laws permit pretrial proceedings to be substituted for trial testimony without any showing of unavailability, or limit or deny cross-examination, they run afoul of *Crawford*. Generally, *Craig* provides a sensible solution for an intractable problem: providing cross-examination of abused children who are traumatized. Similarly, an order closing the courtroom may be made when the child testifies if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. ([18 U.S.C. § 3509\(e\)](#).) However, it should be noted that some existing statutes, including the federal act, should be amended to reflect the current constitutional norms. In other words, [section 3509\(b\)](#) applies if the child is unable to testify because of fear, rather than *Craig*'s requirement that the fear is related to testifying in front of the defendant, not simply the fear of testifying. Federal law includes a provision permitting an alternative to live testimony when conduct by the defendant or defense counsel causes the child to be unable to continue testifying. (*Id.* at [§ 3509\(b\)\(1\)\(B\)\(iv\)](#).) Other states and the Uniform Rule should adopt this approach, which is consistent with forfeiture of Confrontation Clause rights pursuant to [Giles v. California](#), 128 S. Ct. 2678 (2008).

While the child's testimony usually solves the testimonial problem, on occasion it will not be deemed sufficient for purposes of providing an adequate opportunity to cross-examine. (See *In re T.T.*, 892 N.E.2d 1163, 1171 (Ill. App.1 Dist. 2008).) This can happen when the child is too young to answer questions, or freezes when asked to recount the alleged incidents of sexual assault. Discomfort with testifying can be lessened significantly by better preparation of child witnesses and education of judges and lawyers who interact with children in the courtroom. For example, the VCAA encourages multidisciplinary teams to provide training services for judges, litigators, court officers, and others in handling child victims and child witnesses. (See [18 U.S.C. § 3509\(g\)\(2\)\(G\)](#).) In addition, the use of experts identified by the court to interview children and make recommendations about their competency should be mandated. Many prosecutors attempt to familiarize children with the courtroom and testifying; this should be a standard practice. The American Prosecutors' Research Institute has published a valuable resource on the Web entitled *Finding Words: Half a Nation by 2010: Interviewing Children and Preparing for Court*, and available at http://ndaa.org/pdf/finding_words_2003.pdf.

Ultimately, it is the responsibility of the judge to ensure that children are treated appropriately in court. Federal and state rules give judges the ability to control the nature of questions posed to children to avoid harassment. Such power extends beyond standard practices expanding the *44 use of leading questions and requiring counsel to ask age-appropriate questions. (*See generally* MYERS ON EVIDENCE § 3.02.) For example, regarding discovery and cross-examination for bias, the VCAA stays any civil action concerning the abuse during the pendency of the criminal action, and prohibits any mention of a pending civil action during the criminal proceeding. (*Id.* at § 3509(k).) Judges also have power to take measures to make children comfortable in the courtroom. (*See, e.g.*, [18 U.S.C. § 3509](#).) The VCAA provides a comprehensive model for a child-friendly courtroom that many states have adopted, and is in accord with the 1985 ABA policy on Child Witnesses in Abuse Cases. As previously mentioned, the legislation addresses competency hearings, psychological evaluations, the use of videotaped depositions and two-way TV at trial, privacy protection, courtroom closure, multidisciplinary child abuse teams, and expediting the trial. The court may also permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device it deems appropriate to assist a child in testifying. ([18 U.S.C. § 3509](#)(1).) The VCAA also includes a number of provisions that directly affect the manner in which children testify, such as permitting adult attendants to stay in close proximity or contact when the child testifies. ([18 U.S.C. § 3509](#)(j).) Similarly, Utah's Supreme Court has recognized that the practice of allowing a victim's advocate to accompany and sit near a minor during trial testimony in a criminal case is not inherently prejudicial to the defendant. ([State v. Harrison](#), 24 P.3d 936, 941 (Utah 2001).)

Finally, enhancing child testimony may require the creation of specialized child abuse courts in urban locations, similar to domestic violence courts that have helped to increase successful prosecutions and assist victims. Just as victim advocates are now commonplace in domestic violence cases, specialized child advocates should be routinely available to help children and their families cope with the trial process in child abuse cases. (*See, e.g.*, Mark K. Cavins and Lori Smith, [Keeping Kids on Your Side: An Innovative Approach to Child Sex Abuse Victims](#), 37 PROSECUTOR 20 (Apr. 2003) (discussing Cook County State Attorney's Office's employment of a child sexual abuse specialist.) However, the increasing use of victims' advocates by prosecutors raises the previously mentioned issue of whether such advocates who talk to complainants are part of the prosecution team for *Brady* purposes. Turning them into government agents places victim advocates in the awkward position of potentially aiding the defense, and causing rather than calming trauma experienced by the children they assist. Even if not specifically part of the prosecution's team, discoverability issues may arise. Currently, 13 states have a specific victim advocate's privilege. (Paul M. Schimpf, [Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military](#), 185 MIL. L. REV. 149, 183 (2005).) Such a privilege makes it more difficult to subpoena the records of advocates, although [Pennsylvania v. Ritchie](#), 480 U.S. 39, 56 (1987) (plurality opinion), held that a defendant charged with sexual offenses was denied due process because he was prohibited from obtaining discovery of child welfare records that were subject to a qualified privilege. *Ritchie* provides that the trial judge should conduct an in camera investigation to determine if the files contain matters material to guilt or punishment. Other privilege questions may surface regarding child statements to social workers. The U.S. Supreme Court extended the psychotherapist privilege in federal court to a social worker acting as a psychotherapist in [Jaffee v. Redmond](#), 518 U.S. 1 (1996). (*See generally* Clifford S. Fishman, [Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records](#), 86 OR. L. REV. 1 (2007); U.S. Dep't of Justice, Legal Series Bulletin No. 8: *Privacy of Victims' Counseling Communications*, (NCJ-192264, Nov. 2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin8/ncj192264.pdf>.) Most states have similar privileges for psychotherapists, but their definition of mental health providers vary substantially.

Conclusion

The criminal justice system can enhance the experience of child abuse victims in court to facilitate their ability to testify and obtain justice in a manner that also promotes their mental well-being. The panoply of victims' rights that apply to such children can best be accessed if they obtain prompt legal advice, and courts should appoint independent lawyers when children's interests are not otherwise adequately protected. Pro bono programs should also be established to supply such attorneys. Legal technical assistance requests (such as pairing victims with lawyers) can be made

by email to ncvli@lclark.edu or on the Web-- www.ncvli.org by clicking on the technical assistance link, or by calling 503-768-6919.

Facilitating child testimony also confines *Crawford's* impact on prosecuting child sexual abuse to the testimonial statements of extremely young children, given a more concerted effort to make children comfortable testifying in open court, or while shielded. In other words, if more children testify, prosecutors will avoid the testimonial ban and continue to introduce testimonial hearsay, including videotapes of forensic interviews taken in CACs. This evidence combined with appropriate expert testimony and/or admissible prior sexual acts of the defendant should ensure that prosecutors are able to obtain convictions of individuals who prey on vulnerable young children.

[\[FN1\]](#). **MYRNA S. RAEDER** is the 2008-2009 Marshall F. McComb Professor of Law at Southwestern Law School in Los Angeles, as well as a former chair of the Criminal Justice Section and a member of Criminal Justice magazine editorial board. This article was written under Grant No. 2007-VF-GX-K001 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, and relies on her articles "Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?" from *International Commentary on Evidence* (volume 6, forthcoming 2009, at www.bepress.com/lice), and "Comments on Child Abuse Litigation in a 'Testimonial' World: The Intersection of Competency, Hearsay, and Confrontation," from the *Indiana Law Journal* (volume 82, page 1009 (2007)). Points of view are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

24-SPG Crim. Just. 12

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