NCVLI
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Protecting, Enforcing, & Advancing Victims' Rights

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IN THIS ISSUE

The Use of Video Technology to Aid Testimony of Adult Victims: The Case for Offering this Option to Sexual Assault Victims[1]

by Amy C. Liu, J.D.

Shortly after entering the house one night, she is struck on the back of the head and knocked unconscious. She is beaten and raped, but, remarkably, she survives. She agrees to testify at trial. Days before the trial is scheduled to start, she decides she can't go forward. She still experiences flashbacks. She can't imagine being in the same room as him while she recounts the awful details from that night. Just the thought of doing so makes her feel sick. But the prosecutor says she has to testify at trial or else the case will be dismissed.[2]

Access to justice should not require any victim to suffer needless additional trauma. One option that should be available to victims, such as the one described above, is the use of live closed circuit television (CCTV) or videoconference technology (collectively, "video technology") to allow her to testify at trial outside the physical presence of the defendant. Unfortunately, there is no evidence to suggest that prosecutors are routinely offering these victims the use of video technology to testify or that prosecutors are advocating that courts allow the use of such procedures unless the victims are young enough to fit within the scope of the jurisdiction's child testimony statute[3] or the victims are mentally or developmentally disabled.[4] Notably, however, even in the absence of express statutory provisions providing for such alternative means of testifying, case law and public policy support allowing adult victims to testify via live video technology if the evidence establishes that testifying in the defendant's physical presence would cause the victims to suffer serious emotional

[1] In the coming year, NCVLI will be publishing a white paper on this topic that will provide additional supporting authority.

[2] This scenario is adapted from the facts in *People v. Burton,* 556 N.W.2d 201 (Mich. Ct. App. 1996).

[3] *See, e.g.,* 18 U.S.C.A. § 3509 (allowing child witnesses to testify via CCTV if there is "a substantial likelihood . . . that the child would suffer emotional trauma"); Fl. Stat. Ann. § 92.54 (allowing use of CCTV for witnesses under 16 if "there is a substantial likelihood that the child . . . will suffer at least moderate emotional or mental harm due to the presence of the defendant if the child . . . is required to testify in open court").

[4] *See, e.g.,* 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (protecting adults who are "moderately, severely, or profoundly mentally retarded" or "affected by a developmental disability"); Iowa Code Ann. § 915.38(1) (protecting any "victim or witness with a mental illness, mental retardation, or other developmental disability").

continued on page 3

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Message from the Director

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

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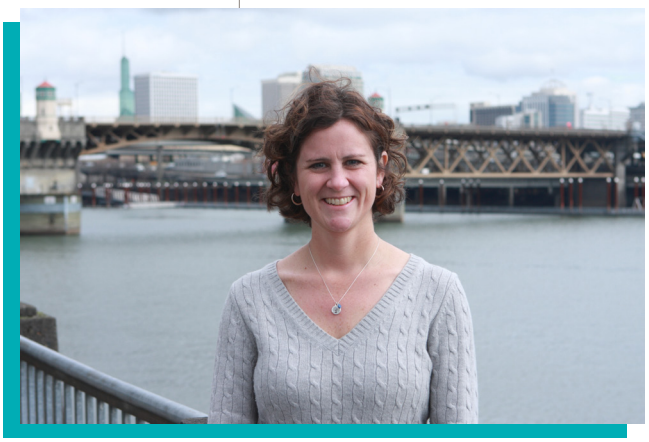

At their core, victims' rights are about ensuring that crime victims are afforded basic human rights in the aftermath of crime, including access to justice, privacy, dignity, and autonomy. This edition of NCVLI's *Newsletter of Crime Victim Law* includes articles addressing these basic rights.

In *The Use of Video Technology to Aid Testimony of Adult Victims: The Case for Offering this Option to Sexual Assault Victims*, Amy Liu tackles the critical issue of access to justice for victims. She challenges the idea that accessing justice requires that victims be re-traumatized by testifying in front of their offender when the use of video technology can, in many cases, avoid this trauma while simultaneously protecting all of a defendant's constitutional rights. She issues a call to action for prosecutors, victim attorneys, and courts to consider the use of video technology as a way to enhance the accessibility of the justice system and otherwise protect victims' rights.

In *The Propriety of Excluding Evidence of Sexual Acts Between the Victim and Defendant Under Rape Shield*, Alison Wilkinson tackles victims' privacy rights by examining the state of rape shield law. The article works to debunk the myth that sexual assault victims who consent to sexual activities (even with the defendant) are more likely to have "consented" to the rape being prosecuted. Recognizing that such a belief undermines a person's dignity and autonomy, she argues that regardless of the relationship between the victim and the defendant, prior or future incidents of consensual sexual activity are irrelevant to the crime being prosecuted. She then identifies the general rules of evidence and rape shield laws that provide the solid legal foundation for excluding such evidence.

In *Protecting the Victims of "Victimless" Crimes*, Rebecca Khalil also tackles the fundamental issue of victim access to justice. She challenges the myth of the "victimless" crime, pointing out that even those crimes that are colloquially spoken about as not having a victim often result in harm to individuals. She then dissects the definition of "victim" in the Crime Victims' Rights Act, and argues that under this definition, even seemingly "victimless" crimes often have legal victims with enforceable rights.

Throughout this edition of the newsletter we also spotlight amazing attorneys and advocates from across the country who are fighting to secure basic rights for victims. Although the articles illuminate the path that each us can take to fight for the legal rights of victims, the people spotlighted provide us with the inspiration to continue that fight. With the law and inspiration on our side, we will move victims' rights forward!

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The Use of Video Technology . . . **continued from page 1**

distress or other trauma and testifying from another room would mitigate that trauma.[5]

Case Example: Compelling Need to Reduce the Trauma Experienced by Adult Sexual Assault Victims

Sexual assault is a "significant social and health problem"[6] in this country, and rape alone[7] affects hundreds of thousands of new victims each year.[8] Less than 20 percent of rapes committed against adults are reported to law enforcement,[9] and less than 40 percent of reported rapes result in criminal prosecution.[10]

A growing body of research documents the trauma suffered by adult sexual assault victims. Post-Traumatic Stress Disorder is a common consequence of sexual assault,[11] especially for rape victims.[12] Rape victims may also experience depression, substance abuse, and suicidal thoughts or behavior,[13] along with a number of other physical problems such as chronic pelvic pain and gastrointestinal disorders.[14] Testifying in court can be particularly traumatic for rape victims.[15] Facing the perpetrator in court and recalling the details of the rape forces the victims to "relive the [crime] mentally and emotionally,"[16] leading some to feel "as though the sexual assault [is] recurring"[17] and to re-experience "a lack of control and terror."[18]

In recent decades, courts and lawmakers have recognized the existence of an important state interest in reducing the trauma experienced by child sexual assault victims, leading courts to reject constitutional challenges to the use of live video testimony at trial.[19] Some states that have codified this practice also protect mentally or developmentally impaired adult victims of sex crimes.[20] Despite this recognition of the need to protect child sexual assault victims and adult victims who are mentally or developmentally impaired from experiencing additional trauma, courts and lawmakers have been largely silent[21]

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[5] This article is not positing that all victims could make such a showing or that all victims who could make this showing should elect this procedure. Testifying from a distance, even where constitutionally permitted, might not be in the victim's best interest. For example, jurors might view the need for the procedure with skepticism and might not find the victim to be as credible as one who is willing to testify in the courtroom. Viewing a victim through the lens of a video monitor might diminish the empathy that jurors might otherwise feel for the victim during his or her testimony. Victims and their counsel must carefully evaluate these potential drawbacks when considering whether to seek use of this procedure.

[6] Patricia Tjaden and Nancy Thoennes, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, 1 (Jan. 2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/210346.pdf; *accord Violence Against Women: The Increase Of Rape In America 1990: Hearing before the S. Judiciary Comm.*, 102d Cong. 1 (1991) (a majority staff report documenting "an epidemic of rape" in this country).

[7] Rape is one of many types of sexual assault. *See* U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *Rape and Sexual Violence,* http://www.nij.gov/nij/topics/crime/rape-sexual-violence/welcome.htm (last visited June 8, 2011).

[8] *See* Tjaden & Thoennes, *supra* note 6, at 1 (summarizing a 1995-96 study that found that over 300,000 women were raped the previous year); *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the S. Comm. on the Judiciary Subcomm. on Crime and Drugs*, 6 (Sept. 14, 2010), *available at* http://judiciary.senate.gov/pdf/10-09-14KilpatrickTestimony.pdf (statement of Dean G. Kilpatrick) (explaining that data from a 2005 study indicates that "over 800,000 adult women in the U.S. were forcibly raped in the [previous] year").

[9] *See, e.g., Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases, supra* note 8, at 11; Tjaden & Thoennes, *supra* note 6, at 33.

[10] Tjaden & Thoennes, *supra* note 6, at 33.

[11] *See, e.g.,* Melissa A. Polusny & Paul A. Arbisi, *Assessment of Psychological Distress and Disability After Sexual Assault in Adults, in Psychological Knowledge in Court* 97, 98 (Gerald Young et al. eds., 2006).

[12] Sarah E. Ullman and Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims*, 14 J. of Traumatic Stress 369, 369-70 (2011).

[13] *See, e.g.,* Polusny & Arbisi, *supra* note 11, at 98-99.

[14] *Id.*

[15] *See, e.g.,* Jim Parsons and Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 183-184 (2010).

[16] Jack A. Panella, *Pennsylvania Sexual Violence Benchbook for Magisterial District Court Judges*, 31 (Pa. Coal. Against Rape, 1st ed., 2011).

[17] Amanda Konradi, *"I Don't Have to be Afraid of You": Rape Survivors' Emotion Management in Court*, 22 Symbolic Interaction 45, 52 (1999).

[18] *Id.*

[19] *See Maryland v. Craig*, 497 U.S. 836, 855 (1990). *See also* 18 U.S.C.A. § 3509 (allowing child witnesses to testify via CCTV if there is "a substantial likelihood . . . that the child would suffer emotional trauma"); Fl. Stat. Ann. § 92.54 (allowing use of CCTV for witnesses under 16 if "there is a substantial likelihood that the child . . . will suffer at least moderate emotional or mental harm due to the presence of the defendant if the child . . . is required to testify in open court").

[20] *See, e.g.,* 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (protecting adults who are "moderately, severely, or profoundly mentally retarded" or "affected by a developmental disability"); Iowa Code Ann. § 915.38(1) (protecting any "victim or witness with a mental illness, mental retardation, or other developmental disability").

[21] One exception is Hawaii, which has a broadly written statute that should allow any adult victim to testify at trial via two-way CCTV. *See* Haw. Rev. Stat. Ann. § 801D-7 ("Victims and witnesses shall have the right to testify at trial by televised two-way

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about the importance of protecting *all* adult sexual assault victims who testify at trial.[22] Examination of this issue is "overdue because of the revolutionary change that has taken place in our society, including changes with respect to the credibility and dignity we extend to adult women and children who are the victims of sexual assault."[23]

The Common Objection to Testimony by Means of Video Technology: Defendant's Right of Confrontation

The Confrontation Clause of the Sixth Amendment provides all criminal defendants with the "right . . . to be confronted with the witnesses against him,"[24] and it applies to all state prosecutions by way of the Fourteenth Amendment.[25] But as recognized by the Supreme Court in its 1990 opinion in *Maryland v. Craig*, the right to a physical "face-to-face" meeting is not absolute, and "'must occasionally give way to considerations of public policy and the necessities of the case.'"[26]

In *Craig,* the Supreme Court upheld a state procedure that permitted child sexual abuse victims to testify from another room via one-way CCTV. During a hearing before the trial court, an expert testified that if the victims were required to testify in the presence of the defendant, one victim "'wouldn't be able to communicate effectively'" due to anxiety, another "'would probably stop talking and . . . withdraw and curl up,'" and a third would either refuse to talk or would talk but not respond to the subject of the questions.[27] The trial court found that the victims would suffer serious emotional distress that would render them unable to reasonably communicate if they were forced to testify in defendant's physical presence.[28] The one-way CCTV procedure allowed the defendant, jury, and judge to see each witness, but the witness could not see the defendant; defense counsel was present with the witness and could contemporaneously communicate with the defendant.[29]

In rejecting defendant's Sixth Amendment challenge, the Court stated that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[30] It concluded that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the denial of such confrontation is *necessary to further an important public policy* and only where the reliability of the testimony is otherwise assured."[31] Applying this standard, the Court held that the Confrontation Clause did not prohibit the one-way CCTV procedure if a proper case-specific finding of necessity has been made.[32]

In *Craig*, the Court found it "significant" that the CCTV procedure at issue "preserv[ed] all of the other elements of the confrontation right," namely: (1) testimony under oath; (2) the opportunity for contemporaneous cross-examination; and (3) the ability for the judge, jury, and defendant to view the demeanor of the witness.[33] The presence of these elements "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."[34] The Court also found that the state's interest in protecting child abuse victims from the trauma that would be caused by testifying in the physical presence of the defendant is sufficiently important to outweigh a defendant's right to face his or her accusers in court.[35]

The Court cautioned, however, that a trial court must conduct an evidentiary hearing and make case-specific findings of necessity.[36] Where the state interest at issue concerns the protection of a child witness's well-being,

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closed circuit video to be viewed by the court, the accused, and the trier of fact."). No reported cases have applied or interpreted this statute.

[22] The few reported cases that have referenced this subject do not resolve this issue. *See, e.g., People v. Murphy,* 132 Cal. Rptr. 2d 688, 693-94 (Cal. Ct. App. 2003) (noting that "in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation," but holding that use of one-way glass during the adult sexual assault victim's testimony violated defendant's confrontation right in this case because the trial court's ruling was expressly not predicated on an interest in protecting adult sexual assault victims but rather "on the state's interest in ascertaining the truth" and the trial court had failed to conduct an evidentiary hearing "to determine whether, and to what degree, the testifying victim's apparent anxiety was due to the defendant's presence" as required by *Maryland v. Craig*). C*f. People v. Green,* No. C057064, 2009 WL 97814, at *6 n.8 (Cal. Ct. App. Jan. 15, 2009) (noting, in a case concerning use of a support person at trial, that "[t]here is no agreement whether the state has a compelling interest in protecting an adult victim of sexual assault while testifying").

[23] *People v. Luna*, 250 Cal. Rptr. 878, 890 (Cal. Ct. App. 1988), *disapproved of on other grounds by People v. Jones*, 792 P.2d 643, 659 (Cal. 1990).

[24] U.S. Const. amend. VI.

[25] *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009).

[26] 497 U.S. at 849 (quoting *Mattox v. United States*, 174 U.S. 47, 243 (1895)).

[27] *Id.* at 842.

[28] *Id.* at 842-43.

[29] *Id.* at 841-42.

[30] *Id.* at 845.

[31] *Id.* at 850 (emphasis added).

[32] *Id.* at 855.

[33] *Id.* at 850.

[34] *Id.* at 851.

[35] *Id.* at 853.

[36] *Id.* at 855.

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the Court explained that a trial court must find the witness would be traumatized by the presence of the defendant (as opposed to trauma caused generally from testifying in open court), and such trauma must be "more than *de minimis*."[37]

The overwhelming majority of courts that have addressed the constitutionality of allowing adult witnesses to testify via live video technology have applied the *Craig* test.[38] Nothing in *Craig* limits its application to cases involving child-victims or one-way CCTV,[39] and courts have extended the *Craig* rule to allow *adult* victims or witnesses of other crimes to testify by way of either one- or two-way video technology where the government has shown that the use of such technology was necessary to further an important state interest or public policy.[40] The interests and policies that have been identified by courts as sufficient to warrant the use of live video testimony include national security, the just resolution of criminal cases, and the physical or mental welfare of ill or mentally challenged witnesses.[41]

With the Proper Showing, Testimony of Adult Sexual Assault Victims by Video Technology is Consistent With *Craig*[42]

Well-established public policies support providing adult sexual assault victims with this option.

At least two important public policies would be served if adult sexual assault victims were given the option of testifying by means of live video technology: (1) encouraging effective prosecution of sex crimes; and (2) protecting sexual assault victims from additional trauma. With regard to encouraging effective prosecution, courts have long recognized the existence of a strong public policy in favor of effective law enforcement and the proper administration of justice.[43] Under circumstances where, for example, requiring the victim to testify in defendant's physical presence would impair the victim's ability to communicate or prevent the victim from

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[37] *Id.* at 856.

[38] Except for the Second Circuit Court of Appeals, every federal circuit that has addressed this issue has concluded that *Craig* supplies the applicable standard. *See, e.g., United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (noting that the Sixth, Eighth, Ninth, and Tenth Circuits agree with the Eleventh Circuit); *Horn v. Quarterman*, 508 F.3d 306, 319 (5th Cir. 2007) (concluding, on a habeas petition, that it was "not unreasonable" for the state trial and appellate courts to extend the *Craig* analysis to protect the welfare of an ill adult witness). *Cf. United States v. Abu Ali,* 528 F.3d 210, 240-42 (4th Cir. 2008) (applying *Craig* in the context of a Rule 15 deposition testimony taken for the purpose of use at trial). A majority of state courts have reached a similar conclusion. *See, e.g., People v. Buie*, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009); *Bush v. State,* 193 P.3d 203, 215-16 (Wyo. 2008); *Harrell v. Florida*, 709 So. 2d 1364, 1368-69 (Fla. 1998). The Second Circuit has opted to follow a less rigorous standard than that articulated in *Craig* when the case involves two-way video technology. For example, in *United States v. Gigante,* 166 F.3d 75 (2d Cir. 1999), the court upheld the use of live two-way CCTV in a racketeering case after applying an "exceptional circumstances" test instead of the "stricter standard" articulated in *Craig.* The court distinguished *Craig* on the ground that two-way CCTV, unlike the one-way CCTV in *Craig*, served as the functional equivalent of in-person face-to-face confrontation because the witness can also view and hear defendant and the others in the courtroom. *Id.* at 81-82. The court concluded the trial court did not abuse its discretion because the facts in that case—a material witness's ill health and secret location (under the federal witness protection program) coupled with defendant's own ill health and inability to participate in a distant deposition in advance of trial—met the exceptional circumstances test. *Id.*

[39] *Cf.* 207 F.R.D. 89, 93 (2002) (Justice Scalia's statement in support of the Supreme Court's decision to not recommend the adoption of a proposed 2002 amendment to the Federal Rules of Criminal Procedure 26(b), which would have essentially codified the *Gigante* "exceptional circumstances" standard for live two-way video testimony for unavailable witnesses) (stating that the proposed amendment "is unquestionably contrary to the rule enunciated in *Craig"* and suggesting that the *Craig* standard should apply to any case involving use of live video testimony at trial).

[40] *See, e.g., Burton*, 556 N.W.2d at 204, 205-06 (finding use of one-way CCTV necessary to further an important interest in "the physical and psychological well-being" of the mentally and psychologically impaired sexual assault victim and in "the proper administration of justice" because "defendant would [have lost] his ability to recross-examine the victim" if she could not continue and the state had to read her preliminary examination testimony to the jury); *Wrotten*, 923 N.E.2d at 1103 ("agree[ing] that the public policy of justly resolving criminal cases while at the same time protecting the well-being of a[n] [ill] witness can require live two-way video testimony" and noting that "[n]owhere does *Craig* suggest that that it is limited to child witnesses or that a 'public policy' basis for finding necessity must be codified"); *Horn,* 508 F.3d at 320 (observing that "*Craig*'s references to 'an important public policy' and 'an important state interest' are reasonably read to suggest a general rule not limited to protecting child victims of sexual offenses from trauma" for "it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness's inability to testify invokes the state's interest in protecting the witness . . . from physical danger or suffering").

[41] *See id. Cf. Abu Ali*, 528 F.3d at 240 (concluding, in a terrorism case, that use of live two-way videoconference to allow defendant to participate in a Rule 15 deposition of witnesses in Saudi Arabia taken to preserve the witnesses' testimony for trial was necessary to further the compelling public interest in national security).

[42] Because meeting the stricter *Craig* test should also satisfy the *Gigante* test adopted by the Second Circuit, this article focuses on the *Craig* standard.

[43] *See Ohio v. Roberts,* 448 U.S. 56, 64 (1980), *overruled on other grounds by Crawford v. Washington,* 541 U.S. 36 (2004) (stating "every jurisdiction has a strong interest in effective law enforcement"); *Martinez v. Court of Appeal,* 528 U.S. 152, 163 (2000) (finding "the overriding state interest in the fair and efficient administration of justice" is significant enough to "outweigh an invasion of the appellant's interest in self-representation").

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testifying altogether, allowing the procedure furthers the state's interest in the effective prosecution of crime and is consistent with the Confrontation Clause's truth-seeking purpose.[44]

With regard to protecting adult sexual assault victims from additional trauma, the rationale that the *Craig* court found persuasive for child-victims is equally applicable to adult victims. In reaching its conclusion that protecting child witnesses from additional trauma is a sufficiently important state interest, the Court relied on several factors: (1) the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"; (2) a task force that reported the seriousness of the child abuse problem in the state; (3) the existence of state statutes aimed at protecting the welfare of child abuse victims; and (4) the First Amendment line of cases in which the Court had previously found a compelling state interest in protecting child sexual abuse victims from "further trauma and embarrassment."[45] Similar factors support the existence of an important public policy to protect adult sexual assault victims from the trauma that would be caused by testifying in the defendants' physical presence.

First, sexual assault is a significant social problem in the United States, and a growing body of literature documents the health problems suffered by adult victims, including the heightened trauma that some experience as a result of testifying in the defendants' physical presence.[46] Second, the increasing numbers of sexual assault victim-oriented programs and task forces that have been created in recent years demonstrate widespread public support for minimizing the emotional and physical suffering of sexual assault victims while improving the effective prosecution of sexual assault crimes.[47] Third, the enactment of rape shield laws by every state and the federal government reflects a national consensus to protect sexual assault victims who participate in the criminal justice system.[48] In this context, the Supreme Court has found that a state's rape shield statute serves "legitimate state interests" in affording rape victims "heightened protection against surprise, harassment, and unnecessary invasions of privacy."[49]

Lastly, the growing crime victims' rights movement in this country has brought dramatic changes to victims' rights in the criminal justice system, and the public policy in favor of these changes also supports a case-specific procedure that would advance victims' access to justice without compromising "the essence of effective confrontation."[50] All states and the federal government now have constitutional or statutory provisions that grant crime victims participatory rights, and most provisions include the right to be treated with fairness, sensitivity, and with respect for the victim's dignity.[51] The existence of these rights supports the use of a procedure that affords criminal defendants a right to confront their accusers but also protects the victims' well-being. Also, many jurisdictions

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[44] *Craig,* 497 U.S. at 857 ("Indeed, where face-to-face confrontation causes significant emotional distress in a . . . witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal") (emphasis in original).

[45] *Craig*, 497 U.S. at 852-55.

[46] *See supra* text accompanying notes 6-18.

[47] *See, e.g.,* Sexual Assault Services Program, U.S. Dep't of Justice, Office of Violence Against Women, http://www.ovw.usdoj.gov/sasp.htm (last visited Jun. 9, 2011) (recognizing that "[t]here is a pressing need to address the national prevalence of sexual assault . . . and the unique aspects of sexual assault trauma from which victims must heal" and stating that this federally funded program provides "advocacy, accompaniment, support services, and related assistance" for all sexual assault victims and "supports efforts to help survivors heal from sexual assault trauma"); *see also* Joye Frost, Op-Ed., *Innovative Partnerships Improve Services for Crime Victims,* PR Newswire, May 23, 2011, *available at* http://news.yahoo.com/s/usnw/20110523/pl_usnw/DC07374_1 (observing that "federal funding and resources, coupled with local, tribal and state innovation, are reshaping our Nation's response to victims of sexual assault" and noting that the creation of rape crisis centers, trained Sexual Assault Nurse Examiners, and multi-disciplinary Sexual Assault Response Teams across the country all "make victims' needs a priority, . . . enhance the quality of victim health care, improve the quality of forensic evidence, and ultimately lead to increased prosecution rates").

[48] *See generally* Marah deMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 148 (2004). *Cf. People v. Cogswell*, 227 P.3d 409, 414-15 (Cal. 2010) (observing that the "California Legislature in 1984 amended Code of Civil Procedure section 1219. . . [to] prohibit[] a trial court from *jailing for contempt* a sexual assault victim who refuses to testify against the attacker . . . . to protect victims of sexual assault from further victimization . . . [and] also to begin to create a supportive environment in which more victims might come forward to report and prosecute [perpetrators of] sexual assault") (emphasis in original).

[49] *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991); *accord State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984) (finding the "[i]mportant policy reasons [that] underlie rape shield laws" include protecting victims' privacy and encouraging the reporting of sex crimes); *Harris v. State*, 362 S.E.2d 211, 212-13 (Ga. 1987) (finding Georgia's rape shield statute serves the "important" or "compelling" state interests in furthering "the truth-finding process by preventing the jury from becoming inflamed or impassioned and deciding the case on irrelevant and prejudicial evidence" and "encourag[ing] the victims to bring the perpetrators of the crimes to justice").

[50] *Craig*, 497 U.S. at 857.

[51] *See, e.g.,* Alaska Const. art. I, § 24 ("the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Md. Const. art. 47(a) ("shall be treated . . . with dignity, respect, and sensitivity during all phases of the criminal justice process."); N.J. Const. art. I, P 22 ("A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."); R.I. Const. art. I, § 23 ("A victim of crime shall, as a matter of right, be treated . . . with dignity, respect and sensitivity during all phases of the criminal justice process.").

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grant crime victims the right to reasonable protection[52] that arguably includes protection from harm that would be caused by testifying in the defendants' physical presence.

Courts would be required to make a case-specific finding of necessity before ordering use of the procedure.

To satisfy *Craig*'s necessity requirement, a trial court must conduct an evidentiary hearing and find that the trauma that the victim will suffer if she or he were to testify in the physical presence of the defendant "is more than *de minimis, i.e.,* more than 'mere nervousness or excitement or some reluctance to testify.'"[53] What constitutes a minimum showing of trauma to meet this standard is unsettled.[54] Until courts rule otherwise, expert testimony that establishes the victim will suffer "serious emotional distress" that would render him or her unable to "'reasonably communicate'" or "impair [his or her] ability to communicate" should be sufficient to satisfy the *Craig* test.[55]

Conclusion

The exercise of a victim's participatory rights should not require that the victim endure additional trauma when reasonable procedures exist to minimize such injury. Despite the nearly complete silence of legislatures and courts on the propriety of allowing adult victims to testify using live video technology, prosecutors and victims' attorneys should consider use of this procedure for such victims when testifying inside the courtroom would cause the victim to suffer serious emotional distress or other trauma.

[52] *See, e.g.,* Ariz. Const. art. II, § 2.1(A)(1) (right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process"); Mo. Const. art. I, § 32(1)(6) ("right to reasonable protection from the defendant or any person acting on behalf of the defendant"); S.C. Const. art. I, § 24 (A)(1) (right "to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process) and (A)(6) (right to "be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process").

[53] *Craig,* 497 U.S. at 856.

[54] *Id.* (declining to reach this question).

[55] *Id.*

The Propriety of Excluding Evidence of Sexual Acts Between the Victim and Defendant Under Rape Shield

by Alison Wilkinson, J.D.

Just over 30 years ago, states began passing rape shield legislation designed to codify the simple truth that a victim who consents to sexual activities is not more likely to have "consented" to the rape being prosecuted. Today, the Federal Rules of Evidence and the rape shield laws of every state accept this truth as it relates to the victim's consent to sexual activities with anyone other than the defendant.[1] Illogically—and harmfully—the understanding that a victim's consensual activity bears no relationship to whether he or she consented to the sexual assault being prosecuted is often ignored when the consented to sexual activities at issue are between the victim and defendant. This article examines the current state of rape shield law, and explains how law and policy support the exclusion of this type of evidence.

What is Rape Shield?

Until the passage of rape shield legislation—a relatively recent phenomenon—a victim of rape could expect to have every aspect of her sexual life thoroughly examined in open court.[2] The theory was that if the victim had consensually engaged in sexual activity before, she might be predisposed to voluntarily submit to similar activity on another occasion.[3] Often, such an examination was no more than a thinly veiled character assassination. Victims, afraid of being re-victimized by the legal system, did not report rapes. The result was that although the incidence of rape was on the rise, it remained one of the most underreported and underprosecuted of crimes.[4]

In the 1960s and 1970s, a movement began to curb the use of evidence of victims' sexual experiences as part of criminal proceedings.[5] The movement focused both on the end result of the use of this evidence—high rates of underreporting and erroneous acquittals resulting in rapists going free—as well as the improper use of such evidence by courts and juries to impugn the character of the victim.[6] General rules of evidence provide that evidence can only be admitted into trial

[1] Marah deMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 148 (2004).

[2] Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 709, 715 (1995) (describing the state of the law pre-rape shield reform in the 1970s).

[3] deMeule, *supra* note 1, at 148.

[4] Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 795 (1986).

[5] *Id.* at 797-801.

[6] *Id.*

continued on page 10

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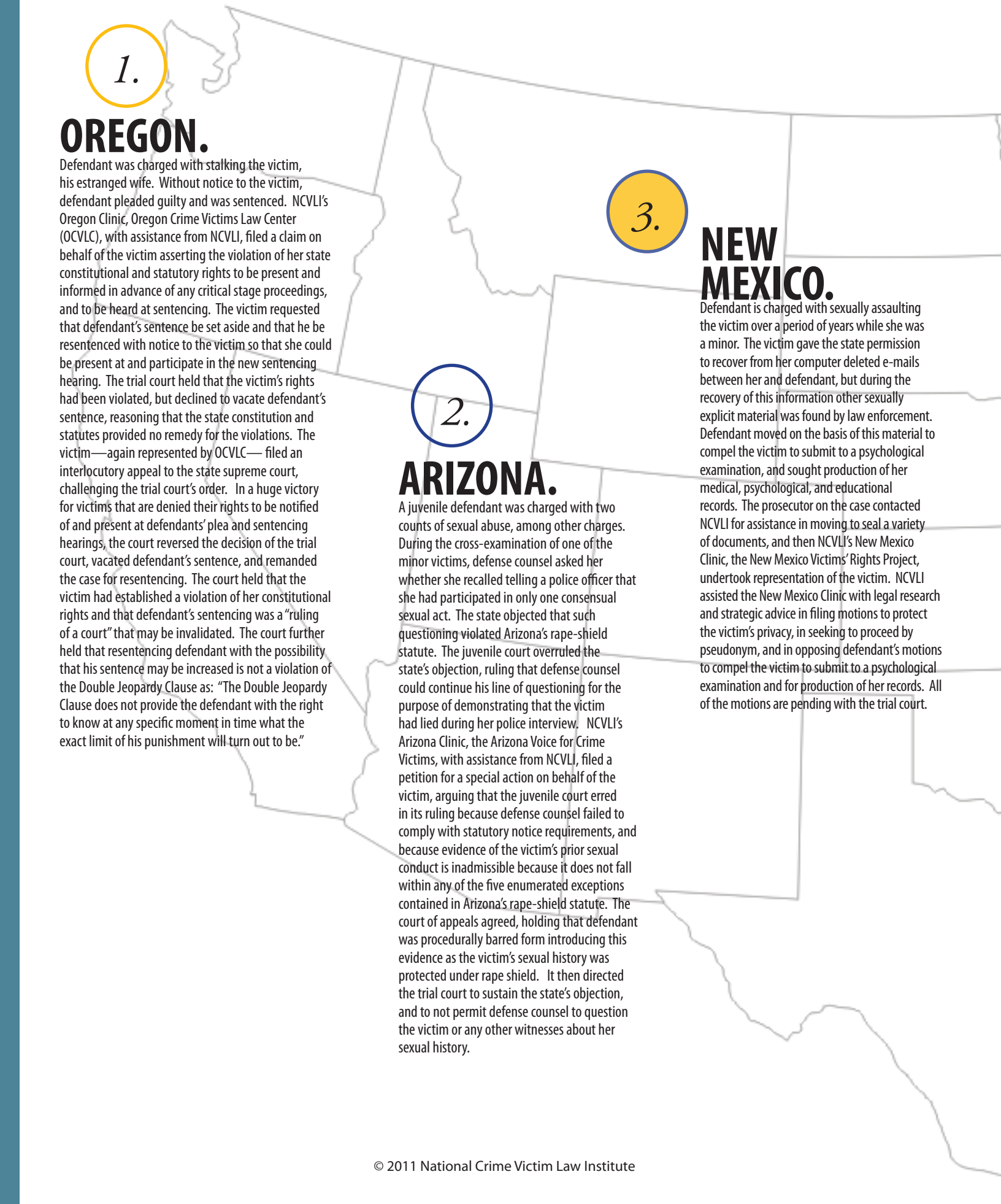

1.

OREGON.

Defendant was charged with stalking the victim, his estranged wife. Without notice to the victim, defendant pleaded guilty and was sentenced. NCVLI's Oregon Clinic, Oregon Crime Victims Law Center (OCVLC), with assistance from NCVLI, filed a claim on behalf of the victim asserting the violation of her state constitutional and statutory rights to be present and informed in advance of any critical stage proceedings, and to be heard at sentencing. The victim requested that defendant's sentence be set aside and that he be resentenced with notice to the victim so that she could be present at and participate in the new sentencing hearing. The trial court held that the victim's rights had been violated, but declined to vacate defendant's sentence, reasoning that the state constitution and statutes provided no remedy for the violations. The victim—again represented by OCVLC— filed an interlocutory appeal to the state supreme court, challenging the trial court's order. In a huge victory for victims that are denied their rights to be notified of and present at defendants' plea and sentencing hearings, the court reversed the decision of the trial court, vacated defendant's sentence, and remanded the case for resentencing. The court held that the victim had established a violation of her constitutional rights and that defendant's sentencing was a "ruling of a court" that may be invalidated. The court further held that resentencing defendant with the possibility that his sentence may be increased is not a violation of the Double Jeopardy Clause as: "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."

2.

ARIZONA.

A juvenile defendant was charged with two counts of sexual abuse, among other charges. During the cross-examination of one of the minor victims, defense counsel asked her whether she recalled telling a police officer that she had participated in only one consensual sexual act. The state objected that such questioning violated Arizona's rape-shield statute. The juvenile court overruled the state's objection, ruling that defense counsel could continue his line of questioning for the purpose of demonstrating that the victim had lied during her police interview. NCVLI's Arizona Clinic, the Arizona Voice for Crime Victims, with assistance from NCVLI, filed a petition for a special action on behalf of the victim, arguing that the juvenile court erred in its ruling because defense counsel failed to comply with statutory notice requirements, and because evidence of the victim's prior sexual conduct is inadmissible because it does not fall within any of the five enumerated exceptions contained in Arizona's rape-shield statute. The court of appeals agreed, holding that defendant was procedurally barred form introducing this evidence as the victim's sexual history was protected under rape shield. It then directed the trial court to sustain the state's objection, and to not permit defense counsel to question the victim or any other witnesses about her sexual history.

3.

NEW MEXICO.

Defendant is charged with sexually assaulting the victim over a period of years while she was a minor. The victim gave the state permission to recover from her computer deleted e-mails between her and defendant, but during the recovery of this information other sexually explicit material was found by law enforcement. Defendant moved on the basis of this material to compel the victim to submit to a psychological examination, and sought production of her medical, psychological, and educational records. The prosecutor on the case contacted NCVLI for assistance in moving to seal a variety of documents, and then NCVLI's New Mexico Clinic, the New Mexico Victims' Rights Project, undertook representation of the victim. NCVLI assisted the New Mexico Clinic with legal research and strategic advice in filing motions to protect the victim's privacy, in seeking to proceed by pseudonym, and in opposing defendant's motions to compel the victim to submit to a psychological examination and for production of her records. All of the motions are pending with the trial court.

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In the Trenches

In this column, NCVLI publishes news from the frontlines of the crime victims' rights movement –information about cases we all want and need to know about but that are not necessarily published in any of the reporters. Several of these cases are pending and will be updated in future columns, as information is available. *If you know of a victims' rights case that should be included in this column, please e-mail us at* ***ncvli@lclark.edu.***

4.

ILLINOIS.

Defendant was charged with criminal sexual abuse. Defense counsel subpoenaed the minor victim's rape counseling records from the Northwest Center Against Sexual Assault ("Northwest CASA"), and Northwest CASA filed a motion to quash the subpoena. The trial court denied the motion to quash, and held Northwest CASA in civil contempt of court for not producing the victim's rape counseling records, and fined it $1,000 a day until those records are produced. Northwest CASA appealed, arguing that the trial court erred in declining to grant the motion to quash the subpoena for the victim's rape counseling records as such records are protected in that state by an absolute privilege. NCVLI, together with co-amici the Illinois Coalition Against Sexual Assault, the Chicago Alliance Against Sexual Assault, and the Victim Rights Law Center, filed an amici curiae brief in support of Northwest CASA, arguing that under clear Illinois law, as well as for sound policy reasons, the records of communications between rape victims and rape crisis counselors must be kept absolutely privileged. The case is pending.

5.

FLORIDA.

Defendant was charged with sexually assaulting the minor victim, his granddaughter. Defense counsel moved to depose the victim pursuant to a state statute providing for criminal depositions of some categories of witnesses, and asked that the court exclude the victim's attorney from the deposition. In support of his argument to exclude the victim's attorney from the deposition, defendant argued generally that the attorney's presence might inhibit or affect the victim's testimony. The victim's attorney contacted NCVLI, which provided legal research in support of arguments that the victim has a right to have counsel present at the deposition—including analysis of the ethical considerations surrounding contact with a represented person. Ultimately, the court denied defendant's request to exclude the victim's attorney from the deposition, but held that the attorney must sit out of the line of sight of the victim during her questioning.

6.

SOUTH CAROLINA.

NCVLI's South Carolina Clinic, South Carolina Crime Victim Legal Network (CVLN), assisted in the representation of a human trafficking victim who sought to return to Mexico to be with her two-year-old son. When the victim attempted to leave the country, she was detained and arrested under a federal material witness warrant. With CVLN's assistance, the victim's immigration counsel moved for her release, and the motion was resolved successfully by consent whereby the victim was released from custody but required to remain in South Carolina pending trial. The defendant pleaded guilty and a plea hearing was held at which time the victim's immigration counsel moved for witness fees to cover the time the victim had been detained. The government objected, and CVLN, with research provided by NCVLI, helped to draft a reply brief. The victim has now returned to Mexico to be with her son and does not intend to return for the sentencing hearing, but she has provided the court with a written victim impact statement. The motion requesting witness fees is pending.

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The Propriety of Excluding Evidence . . . **continued from page 7**

proceedings if: (1) it is relevant; and (2) it is more probative than prejudicial. Reformists argued that evidence of a victim's sexual experiences was neither relevant nor probative because it fell into the category of discredited "propensity" evidence.[7] Propensity evidence is generally inadmissible because courts have determined that as a legal matter the fact that someone did something in the past provides little or no predictive power regarding whether that person did the same thing on the occasion in question.[8]

Although general rules of evidence should have been sufficient, reformists opted to enact specific rules of evidence to target sexual activity. These specific rules are known as Rape Shield legislation. Now, forty years after this reform movement began, rape shield legislation is codified in every state and in the Federal Rules of Evidence.[9] Although states differ in their approaches, the majority of states prohibit the introduction of evidence of a victim's sexual behavior unless it falls within statutorily created exceptions.[10] As is explored in this article, one common exception allows evidence of specific instances of sexual activity between the victim and the defendant.[11] Regardless of the approach adopted by a particular state, if evidence is irrelevant, or if its probative value is outweighed by its potential for prejudice, it must be excluded.[12] Because evidence of a victim's sexual history with the defendant is irrelevant and prejudicial, such evidence should be excluded under both general rules of evidence and rape shield legislation and the common exception of allowing it should be removed.

Why Evidence of Specific Instances of Sexual Activity Between the Victim and the Defendant Should Be Excluded

Courts routinely admit evidence of sexual activity between the defendant and the victim as falling within an exception to rape shield because of the perceived relevance of this evidence to the issue of consent.[13] But a thoughtful reading of rules of evidence and rape shield legislation counsels in favor of excluding such evidence.[14]

Evidence of instances of sexual activity between the victim and the defendant should be excluded because the evidence is not probative and because there is a danger of prejudice.

As discussed above, for evidence to be admitted into proceedings, it must be relevant, and its probative value must outweigh its potential for prejudice. Evidence of the victim's sexual activity with the defendant should thus be inadmissible for the same reason evidence of the victim's sexual activity with third parties is inadmissible: it is propensity evidence.[15] Although not a majority position, a number of courts have recognized that the fact that the victim had a sexual history—even with the defendant—does not make it more likely that she "consented" to the rape.[16] As one court explained: "All that was relevant regarding sexual relations at this trial was whether the victim consented to the shocking abuses visited upon him on [the day in question]."[17]

Even assuming there is some marginal relevance in the existence of a sexual relationship between the victim and the defendant, any probative value can be realized merely by acknowledging the existence of the relationship without allowing admission of the details of the sexual relationship. For instance, one Michigan court allowed generalized evidence of the existence of a sexual relationship between the victim and the defendant, but excluded evidence of specific

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[7] *Id.* at 798-99.
[8] *Id.* at 778.
[9] deMeule, *supra* note 1, at 145.
[10] *Id.* at 153-54.
[11] *Id.* at 154. *See, e.g.,* Mich. Comp. Laws Ann. 750.520j (prohibiting evidence of specific instances of the victim's sexual conduct except for, *inter alia*, evidence of the victim's past sexual conduct with the defendant).
[12] *See, e.g.*, Fed. R. Evid. 402, 403; Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L. J. 827, 836 n. 36 (2008) (stating that forty-two states have adopted rules of evidence patterned after the Federal Rules).
[13] *See, e.g.*, *United States v. Saunders*, 736 F. Supp. 698, 703 (E.D. Va. 1990) (finding defendant's claim that he had a sexual relationship with the victim to be admissible as bearing on the issue of consent); *Minus v. State*, 901 So. 2d 344, 349 (Fla. Dist. Ct. App. 2005) (allowing evidence of the victim's sexual relationship with defendant as probative of consent); *Miller v. State*, 716 N.E.2d 367, 370 (Ind. 1999) (allowing evidence of the victim's sexual relationship with defendant under explicit statutory rape shield exception).
[14] Excluding evidence of specific instances of the victim's sexual activity with the defendant does not, in itself, violate the defendant's Constitutional rights. *Michigan v. Lucas*, 500 U.S. 145, 153 (1991) (finding it was not a *per se* violation of Sixth Amendment rights to exclude evidence of the defendant's sexual relationship with the victim for failure to comply with Michigan's rape shield statute's notice requirements); *Michigan v. Lucas*, 507 N.W.2d 5, 6 (Mich. Ct. App. 1993) (on remand from the Supreme Court's decision in the case, holding that the rape shield statute authorized preclusion of evidence of prior sexual activity between the defendant and the victim in this case).
[15] *See, e.g.*, Fishman, *supra* note 2, at 741 (noting that exclusion of evidence of prior sexual relations with third parties is justified because it has "so little probative value"); Galvin, *supra* note 4, at 778 (noting that the "low probative value of character evidence is outweighed by an array of countervailing considerations").
[16] *See, e.g.*, *Goldman v. State*, 9 So. 3d 394, 398 (Miss. Ct. App. 2008) (excluding evidence of the victim's prior sexual relationship with the defendant); *State v. Stellwagen*, 659 P.2d 167, 170 (Kan. 1983) (explaining that "a rape victim's prior sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of").
[17] *Goldman*, 9 So. 3d at 398 (citing *Fuqua v. State*, 938 So. 2d 277, 283 (Miss. Ct. App. 2006)).

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sexual acts between them, noting that such evidence would be "highly prejudicial" and its probative value would be "nonexistent."[18]

In addition to the fact that evidence of specific sexual activity has proven to have little or no probative value, its introduction creates a great risk of prejudicing the jury against the victim. Introducing evidence of the victim's sexual history may cause the jury to believe that the victim is "unrapeable."[19] As one court stated, introducing evidence of specific acts of sexual conduct could cause the jury to be "unable to comprehend how such a person could be raped."[20]

Policy also counsels in favor of excluding evidence of specific instances of sexual activity between the victim and defendant.

The exclusion of evidence of specific instances of sexual activity between the victim and defendant would reflect the low probative value and high risk of prejudice associated with this type of evidence and would also further the important policy goals that were contemplated during the initial passage of rape shield legislation.

One of the important policy rationales underpinning rape shield legislation is an attempt to counteract the chronic underreporting of rape by victims afraid of being re-victimized by the criminal justice system. This goal is furthered by protecting victims' privacy and minimizing the re-victimization experienced at the hands of the criminal justice system.[21] These rationales would be served by excluding evidence of specific acts as that may increase reporting of non-stranger rape. Non-stranger rape—by far the most common form of rape—is also the most underreported.[22] Victims fear that they will not be believed if they report the rape.[23] Additionally, victims fear that if they do report, they will be subjected to demeaning and harassing questioning

[18] *People v. Adair*, 550 N.W.2d 505, 512-13 (Mich. 1996) (allowing generalized evidence of the existence of a sexual relationship between the victim and the defendant, but excluding evidence of specific sexual acts, noting admission of specific evidence would be "highly prejudicial" and its probative value would be "nonexistent"). *See also United State v. Ramone*, 218 F.3d 1229, 1236 (10th Cir. 2000) (finding it was not error to limit questioning under rape shield to testimony that the victim and defendant had a prior relationship, she was pregnant, and they lived together); *Southward v. Warren*, No. 2:08-CV-10398, 2009 WL 6040728, at *13 (E.D. Mich. Jul. 24, 2009) (concluding that introduction of evidence that the victim and defendant were married was sufficient and that particular sexual acts were not relevant to the issue of consent); *Joyce v. State*, 474 A.2d 1369, 1375 (Md. Ct. Spec. App. 1984) (excluding evidence of prior instances of group sex, including one instance of group sex involving the defendant, because the probative value was so low and its prejudicial potential so high).

[19] Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. Rev. 914, 957 (1994) ("One might sense that . . . the injury of rape depends on how much the woman has been damaged by sexual experience prior to the rape – that virgins are grievously injured, sexually active women have little to complain about, and some women (e.g., wives of the accused and prostitutes) have not suffered at all.").

[20] *In re Pannu*, 5 A.3d 918, 925 (Vt. 2010) (noting that introducing evidence of specific acts of sexual conduct could cause the jury to be "unable to comprehend how such a person could be raped"). *See also Southward*, 2009 WL 6040728, at *14 (noting the great danger of inflaming the jury by introducing evidence of specific acts of sexual conduct).

[21] Many states, and the federal government, have recognized the importance of protecting victims' dignity and privacy in the criminal justice system more generally as evidenced by the statutory and constitutional protections afforded to victims. For instance, under the federal Crime Victims' Rights Act, victims have the right to be treated with fairness, and with respect for their dignity and privacy. 18 U.S.C. § 3771(a)(8). Many states have constitutional or statutory protections extending the same or similar rights to victims. *See* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.19 (cataloguing the states that have constitutional or statutory privacy protections). *See also People v. Stanaway*, 521 N.W.2d 557, 590 (Mich. 1994) (Boyle, J., concurring) (noting "the protection afforded to the privacy of crime victims by [Michigan's] state constitution").

[22] *See* United States Department of Justice, Bureau of Justice Statistics, Selected Findings, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* (August 2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rsarp00.pdf ("The closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault. When the offender was a current or former husband or boyfriend, about three-fourths of all victimizations were not reported to police.").

[23] *See, e.g.*, Jessica D. Khan, Note, *He Said, She said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641, 648 n. 44 (2007) (listing, among other reasons for not reporting rape, the fear of being "disbelieved" and "blamed"); *Adair*, 550 N.W.2d at 509 (noting that admitting evidence of the victim's past sexual activity discouraged victims from testifying "because they knew their private lives [would] be cross-examined") (internal quotation omitted).

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about all of their sexual activity with the defendant.[24] [25] It is this very humiliation that rape shield legislation was designed to prevent, and which exclusion of the victim's sexual history with the defendant would help to minimize.[26]

Another core policy rationale contemplated by the rape shield legislation is the recognition and protection of victims' autonomy. The introduction of propensity evidence conflicts with this rationale because it undermines the victim by failing to take into account that the victim may freely choose to say yes or no whenever she wishes. The fact that she engaged in consensual sexual conduct with the defendant prior to (or even subsequent to) the assault does not mean that she consented on the occasion in question, and to conclude otherwise undermines the victim's autonomy and right of self-determination.[27] As a Mississippi appellate court succinctly put it: "Evidence of a prior sexual relationship was not relevant as to whether [the victim] consented that day . . . ."[28]

Conclusion

The most intimate details of the victim's sexual experiences with the defendant are too often admitted freely during sexual assault trials in most jurisdictions. This occurs routinely, despite the passage of rape shield legislation in every jurisdiction specifically designed to exclude evidence of the victim's sexual history and the existence of evidentiary rules that prohibit propensity evidence and evidence that is more prejudicial than probative. The logic behind the exclusion of the victim's sexual history does not change simply because the victim has had a sexual relationship with the defendant. Similar to evidence of the victim's more general sexual history, evidence of the victim's sexual activity with the defendant has little probative value, can inflame the jury, and will operate to harass and embarrass the victim. Such evidence also threatens to destroy the victim's privacy and wrongfully implies that he or she lacks self-determination. This type of evidence should be recognized for what it is: an attempt to impugn the character of the victim rather than to evaluate what the defendant did on the occasion in question. Beyond the harm to the individual victim, society at large also suffers as the current state of law results in more rapists walking free—both because of underreporting and because of erroneous acquittals.[29] Because evidence of specific acts of other consensual sexual activity between a victim and defendant is, at its base, nothing more than disfavored propensity evidence, and because the policy rationales behind rape shield laws apply equally to it as to evidence of the victim's sexual activity with third parties, such evidence should be routinely excluded.

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[24] Daniel M. Murdock, Commentary, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 Ala. L. Rev. 1177, 1179 (2007) ("While 'a victim is suffering from the severe emotional and physical traumas brought on by the rape, she is also being scrutinized and judged by her community. There is no other crime in which the victim risks being blamed and in so insidious a way.'") (quoting *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997)); Galvin, *supra* note 4, at 764 ("'Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime.'") (quoting 124 Cong. Rec. 34,913 (1978) (statement of Rep. Holtzman)); Megan Reidy, Comment, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?,* 54 Cath. U. L. Rev. 297, 309 (2004) (describing the cross-examination of rape victims as a "second rape").

[25] Unfortunately, this fear is well-justified. As one criminal defense techniques manual clearly lays out: "If the defense [to rape] is consent, counsel is basically portraying the complainant as a liar. Sensitivity is still called for, so as not to offend the jury, but the basic premise is to attempt to show dishonest [sic], lack of judgment, etc. in the complainant's daily life." *Defense of a Rape Case*, 2-53A Criminal Defense Techniques § 53A.01.

[26] *See Adair*, 550 N.W.2d at 509 (stating that the legislative intent behind Michigan's rape shield statute was to thwart the practice of impeaching testimony on the basis of prior consensual activity, which discouraged victims from testifying "because they knew their private lives [would] be cross-examined") (citing House Legislative Analysis, SB 1207, July 18, 1974); *Joyce*, 474 A.2d at 1375 (noting that subjecting the victim to questioning regarding prior instances of group sex, including with the defendant, would subject her to public denigration, which is "precisely the abuse against which the Maryland rape shield statute was designed to protect . . . .").

[27] *See, e.g.*, George E. Panichas, Review Essay: *Rape, Autonomy, and Consent*, 35 Law & Soc'y Rev. 231, 251 (2001) (noting the need to shift attention toward sexual autonomy in rape legislation, which would "guarantee a woman's right of sexual self-determination, which includes appropriately unencumbered decisions concerning when, with whom, and under what circumstances to be sexually intimate"); Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. Rts. L. Rev. 625, 667 (2001) ("Consent is based on the belief that the individual is the ultimate decision maker and is closely connected to the idea that the more intimate the choice, the more robust the right of individuals to be authors of their own fate."). The amendment of every state's statutory definition of rape to include spousal rape reflects this. Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 Stan. L. Rev. 677, 681-83 (1996) (explaining that no state has an absolute marital rape exemption).

[28] *Goldman*, 9 So. 3d at 398 (excluding evidence of the victim's prior sexual relationship with the defendant, noting: "As we have held before regarding the defense of consent, '[a]ll that was relevant regarding sexual relations at this trial was whether the victim consented to the shocking abuses visited upon him on [the day in question]'") (quoting *Fuqua*, 938 So. 2d at 283). *See generally Stellwagen*, 659 P.2d at 170 ("[A] rape victim's prior sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of.").

[29] *See supra* note 6.

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Protecting the Victims of "Victimless" Crimes

by Rebecca S.T. Khalil, J.D.

Introduction to the Concept of the "Victimless" Crime

It is sometimes said that "victimless" crimes are those that violate the ordered functioning of society in general, as opposed to those that directly harm individuals. A wide range of crimes have been talked about at one time or another as "victimless," including such varied offenses as: failing to wear a seatbelt or a helmet, possession or use of illegal substances, gambling, driving while intoxicated or while texting, illegal possession of a firearm, leaving the scene of an accident, bigamy, charging an excessive interest rate, and ticket scalping. Unfortunately, the common use of this terminology fails to account for the injuries to victims that occur in many circumstances and thereby unfairly disadvantages those who have been harmed and seek to enforce their rights.

Debunking the Myth of the "Victimless" Crime

For the victim's advocate, confronting and debunking the myth of the "victimless" crime can seem a daunting task in an era in which such a wide variety of charges are given this designation in public discourse.

The first and perhaps most obvious problem with using the term "victimless" to describe crimes is that it is often inaccurate. Even if it is possible for a felon to merely illegally possess a firearm in the safety and security of a locked cabinet in her bedroom, this scenario is not the norm. Rather, felons are frequently prosecuted for illegal possession of a firearm in cases in which they have used the weapon to harm another person or engage in other crimes. Similarly, although it is possible for someone to get behind the wheel after a long night of drinking and nevertheless manage to drive home without harming people or damaging property, it is often the case that intoxicated drivers cause harm and damage to others. Describing these crimes as "victimless" minimizes the impact they have on the people whose lives are affected by them. Fortunately, the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA), is broad enough to apply to victims of all federal offenses, regardless of whether they are colloquially described as "victimless" crimes.[1]

The definition of "crime victim" under the CVRA does not recognize a particular category or group of offenses as inherently "victimless."

The CVRA, which was enacted in 2004, was intended "to transform the criminal justice system's treatment of crime victims."[2] This legislation ushered in a new era in which crime victims are "full participants in the criminal justice system."[3]

The CVRA defines "crime 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."[4] Senator Kyl, the primary drafter of the CVRA, affirmed the broad scope of this definition: "This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged."[5] It is important to note that the "definition of a 'victim' under the

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[1] This article focuses exclusively on federal law and uses as a primary example the federal felon-in-possession statute, 18 U.S.C. § 922(g), which has been referenced by courts in some contexts as being a "victimless" offense. *See, e.g., United States v. Powell*, 6 F.3d 611, 613 (9th Cir. 1993) (noting in the sentencing context that "[i]t is true that we have held that being a felon in possession of a firearm is a 'victimless crime' because section 922(g) protects society against those determined unqualified to possess firearms"). The problem of "victimless" crimes, however, is not limited to federal jurisdictions, and state courts are also confronting the issues that arise when victims seek to invoke their constitutional and statutory rights in cases involving one of these offenses. *See, e.g., State ex rel. Smith v. Reeves*, 250 P.3d 196, 200 (Ariz. Ct. App. 2011) (holding that although the crime of failing to stop and render aid in an accident involving death or serious physical injury is a "geographical" offense, this does not render the offense "victimless" for victims' rights purposes); *Brand v. Commonwealth*, 939 S.W.2d 358, 360 (Ky. Ct. App. 1997) ("This court is unwilling to label any crime committed to be victimless."); *State v. Vinje*, 548 N.W.2d 118, 120-21 (Wis. Ct. App. 1996) (observing that although "there may be cases in which there is no victim of disorderly conduct, this case is not one of them. The plain language of the disorderly conduct statute does not require a victim. That does not mean, however, that a person may not be a victim of such conduct.").

[2] Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 593 (2005).

[3] *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006).

[4] 18 U.S.C. § 3771(e).

[5] 150 Cong. Rec. 10,912 (daily ed. Oct. 9, 2004) (statement of Senator Kyl); *see also United States v. Sharp*, 463 F. Supp. 2d 556, 561

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CVRA is not limited to the person against whom a crime was actually perpetrated. Rather, the term 'victim' includes *any* 'person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.'"[6]

The CVRA is a relatively new statute, and courts are just beginning to grapple with the task of determining who qualifies as a "victim" with rights under the CVRA.[7] In one of the few cases directly analyzing the scope of the term "crime victim" under the CVRA, the Eleventh Circuit held that determining who qualifies as a crime victim requires a two-step process: "first, we identify the behavior constituting 'commission of a federal offense.' Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA."[8] The Eleventh Circuit noted that the CVRA "does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document."[9] Rather, "a party may qualify as a victim, even though [he or she] may not have been the target of the crime, as long as [he or she] suffers harm as a result of the crime's commission[,]" and as long as "the criminal activity directly and proximately harmed" the individual.[10]

In *United States v. Sharp*, a district court observed that an individual is "directly and proximately harmed as a result of the commission of a Federal offense" and is a victim under the CVRA if the "harm results from 'conduct underlying an element of the offense of conviction.'"[11] Once the conduct underlying the offense is identified (possessing a firearm as a convicted felon, for example), the court will analyze whether the victim was "directly harmed" by this behavior. A "person is directly harmed by the commission of a federal offense where that offense is a but-for cause of the harm."[12] In other words, courts analyze whether the harm to the victim would have occurred "but for" the defendant's illegal conduct. Additionally, a "[d]efendant's conduct need not be the sole cause of the [victim's] loss, but any subsequent action that contributes to the loss . . . must be directly related to the defendant's conduct."[13]

In addition to establishing that the defendant's illegal conduct was a but-for cause of the victim's loss, the court must analyze whether the defendant's illegal conduct is the "proximate cause" of the harm: "Foreseeability is at the heart of proximate harm; the closer the relationship between the actions of the defendant and the harm sustained, the more likely that proximate harm exists."[14] Conduct that is "too attenuated and unrelated to" the defendant's offense will not satisfy this proximate cause requirement.[15] This detailed inquiry is necessarily fact-specific.[16]

(E.D. Va. 2006) (citing the statement of Senator Kyl as the only known legislative history concerning the scope of the term "crime victim" and explaining that the court is to construe the term "broadly").

[6] *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006) (quoting 18 U.S.C. § 3771(e)) (emphasis added).

[7] Although very few cases directly analyze the definition of "victim" under the CVRA, two earlier statutes—the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (MVRA), and the Victim and Witness Protection Act, 18 U.S.C. § 3663 (VWPA)—use a similar definition of victim and can assist courts with the task of interpreting the CVRA. *Compare* 18 U.S.C. § 3771(e) (for purposes of the CVRA, defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense . . . .") *with* 18 U.S.C. § 3663A(a)(2) (for purposes of the MVRA, defining "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered") *and* 18 U.S.C. § 3663(a)(2) (for purposes of the VWPA, same). The definition of "crime victim" contained in the CVRA is broader than that of "victim" in the MVRA and VWPA, however, as its applicability is not limited to specific crimes. *See* 18 U.S.C. § 3663(a)(1)(A), (a)(2) (VWPA applies to specific crimes); 18 U.S.C. § 3663A(a)(2), (c)(1) (MVRA applies to specific crimes).

[8] *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).

[9] *Id.* at 1289.

[10] *Id. See also United States v. Vankin*, 112 F.3d 579, 590 (1st Cir. 1997) (interpreting the VWPA); *see also In re Rendón Galvis*, 564 F.3d at 175 (interpreting the CVRA and the VWPA); *In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir. 2008) (Tymkovich, J., concurring) (interpreting the CVRA); *United States v. Donaby*, 349 F.3d 1046, 1053 (7th Cir. 2003) (interpreting the MVRA); *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002) (interpreting the MVRA); *Moore v. United States*, 178 F.3d 994, 1001 (8th Cir. 1999) (interpreting the MVRA).

[11] *Sharp*, 463 F. Supp. 2d at 564 (quoting *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) and *United States v. Davenport*, 445 F.3d 366, 374 (4th Cir. 2006)). The Supreme Court has contrasted "the offense of conviction" with "conduct unrelated to the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 418 (1990). The Supreme Court has not decided whether the CVRA is subject to the limitations articulated in *Hughey*.

[12] *In re Fisher*, 640 F.3d 645 (5th Cir. 2011) (citing *In re McNulty*, 597 F.3d 344, 350 (6th Cir. 2010)).

[13] *United States v. Gamma Tech Indus.*, 265 F.3d 917, 928 (9th Cir. 2001).

[14] *Sharp*, 463 F. Supp. 2d at 565. The Supreme Court has noted that the purpose of the felon-in-possession statute is to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (internal citation omitted). The very origin of the statute suggests the foreseeability of weapons possessed by convicted felons being used in furtherance of acts of violence.

[15] *Sharp*, 463 F. Supp. 2d. at 564 n.16; *see also In re Rendón Galvis*, 564 F.3d at 175 (concluding that the mother of a young man murdered by a paramilitary affiliated with a terrorist organization in Colombia, was not a "victim" because there was "insufficient evidence of a nexus" between her harm and defendant's criminal conduct).

[16] *See, e.g., In re Rendón Galvis*, 564 F.3d at 175 ("The necessary inquiry is a fact-specific one."); *Vankin*, 112 F.3d at 590 (observing that "what constitutes sufficient causation can only be

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Application of causation principles to "victimless" crimes.

It is occasionally the case that a "victimless" crime generates a clear victim who would be entitled to CVRA rights, even under the narrowest definition of the conduct underlying the offense of conviction. For example, in *United States v. Alvarado-Perez*, the court affirmed a sentencing enhancement for a defendant who was convicted of illegally possessing a firearm.[17] In the context of analyzing the propriety of the sentencing enhancement, the court found that by bringing the loaded firearm into his probation officer's office, the defendant's criminal conduct (the possession alone) caused the probation officer psychological injury.[18] In light of the court's observations in the context of its analysis of the sentencing guidelines, had the probation officer sought to assert her CVRA rights, she would have qualified as a victim of the defendant's felony possession.

But determining whether a victim's harm is directly and proximately caused by a defendant's possession may be more difficult in cases in which the victim was harmed not by the defendant's illegal *possession* of a firearm, but instead by the defendant's *use* of the illegally possessed weapon.

Using the felon-in-possession example to illustrate this process, imagine a convicted felon who is prohibited by law from possessing a firearm[19] who gets into an argument with a neighbor. The fight escalates beyond the initial verbal altercation, and the felon shoots the neighbor. Although the felon could have been charged with additional crimes, he was only charged with and convicted of illegal possession. The neighbor asserts his CVRA rights. If the court makes a narrow determination that the felon's possession of the gun (and not its use) is the conduct underlying the offense, the court must then analyze whether the harm would have been inflicted on the neighbor "but for" this possession. Because the felon clearly could not have shot his neighbor without possessing the gun, the direct but-for causation requirement is satisfied. With regard to whether the shooting was sufficiently related to the possession of the weapon (the "proximate cause" analysis), the court would likely find that the felon's act of shooting the neighbor using the firearm is both factually (the illegally possessed weapon was used by the defendant to injure the victim) and temporally (the possession and the injury occurred at the same time) related to the possession. Because the conduct underlying the offense of conviction is both a but-for and proximate cause of the neighbor's injuries, the neighbor is a "crime victim" under the CVRA who is entitled to all of his rights.[20]

Courts engaging in the direct and proximate cause analysis have consistently affirmed the principle that an individual "may qualify as a victim, even though [he or she] may not have been the target of the crime, as long as [he or she] suffers harm as a result of the crime's commission" and as long as "the criminal activity directly and proximately harmed" the individual.[21]

Conclusion

Despite the colloquial use of the term "victimless" to describe some crimes, the CVRA does not recognize a particular category or group of offenses as inherently "victimless." To the contrary, under the plain language of the CVRA, *any* crime may be associated with victims who have been directly and proximately harmed by a defendant's criminal conduct. Victims face many challenges in enforcing their rights—from learning that they have rights to overcoming procedural hurdles to ensure that their rights are honored by the multitude of actors in the criminal justice system. Courts should not put another obstacle in the path of victims who seek to assert their rights by failing to apply the plain language of the CVRA when determining who qualifies as a victim, regardless of how the particular crime at issue is described in public discourse.

determined case by case, in a fact-specific probe").

[17] 609 F.3d 609 (4th Cir. 2010) (addressing the propriety of a defendant's sentence).

[18] *Id.* at 616.

[19] 18 U.S.C. § 922(g).

[20] Note that the Fourth Circuit, in two unpublished cases, *United States v. Crow*, No. 07-4552, 2007 WL 3390943, at *1 (4th Cir. Nov. 14, 2007) and *United States v. Hawkins*, No. 99-4429, 2000 WL 1507436, at *2 (4th Cir. Oct. 6, 2000), failed to engage in the necessary process of analyzing both but-for and proximate causation when determining that the individuals in those cases were not entitled to restitution as victims of the defendant's felon-in-possession conviction.

[21] *In re Stewart*, 552 F.3d at 1289. *See, e.g., United States v. De La Fuente*, 353 F.3d 766, 768, 773 (9th Cir. 2003) (finding that, under the MVRA, where the crime was the sending of a threat to injure using the mail, the harm caused when the letter leaked a dangerous-looking powder was a direct and proximate result of the offense); *Donaby*, 349 F.3d at 1051-52 (holding that a defendant's bank robbery was the direct and proximate cause of a high-speed chase that resulted in property damage to the victim under the MVRA); *United States v. Hackett*, 311 F.3d 989, 992-93 (9th Cir. 2002) (analyzing the MVRA and finding that the destruction of the house where the manufacture of methamphetamine took place was a direct and proximate result of the crime, where the offense was aiding and abetting the manufacture of methamphetamine by purchasing or stealing items to be used in the manufacture); *Moore*, 178 F.3d at 1001 (holding that a bank customer at whom the defendant pointed an apparent weapon was a victim of attempted bank robbery under the MVRA). *See also United States v. Reed*, 80 F.3d 1419, 1421 (9th Cir. 1996) (holding that restitution ordering a defendant to pay for damage to several vehicles was inappropriate under the VWPA where the police chase that led to the damage was a consequence of the defendant's theft of the vehicle he was driving and not the illegal possession of a firearm charge for which he was convicted).

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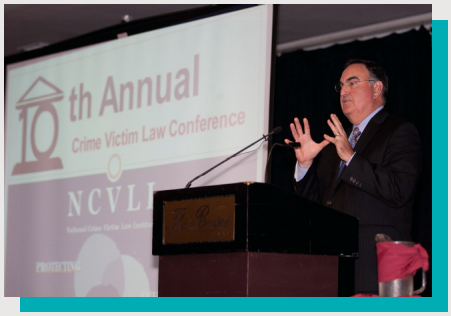

The Honorable Paul J. De Muniz, Chief Justice, Oregon Supreme Court, was the featured speaker of the luncheon plenary on the second day of the Conference, in which he discussed the evolution of the victims' rights field from the standpoint of the judiciary.

10th Annual Crime Victim Law Conference a Success!

Thank you to Conference Sponsors and Supporters

NCVLI's Crime Victim Law Conference took place in Portland, Oregon from June 14-15, 2011. NCVLI was honored to welcome many amazing speakers, including Susan Levy, mother of Chandra Levy whose murder drew national media attention, and her attorney Jani Tillery of the D.C. Crime Victims' Resource Center; Chief Justice of the Oregon Supreme Court Paul J. De Muniz; author and lecturer Irvin Waller; victims' rights icons Paul Cassell and Doug Beloof; former United States Attorney Diane Humetewa; and many more. More than 175 attendees came from 20 states, the District of Columbia, Guam, and Canada as we celebrated 10 years of litigation successes and discussed how to advance rights during the years ahead.

NCVLI would like to extend a heartfelt thank you to the many volunteers and sponsors who helped make the Conference a success. Sponsors contributing financial support for the Conference this year were Office for Victims of Crime, Office of Justice Programs, United States Department of Justice, Lewis & Clark Law School, the Washington Coalition of Crime Victim Advocates, and the Crime Victims' Services Division of the Oregon Department of Justice. Community sponsors were the National Organization for Victim Assistance, the Crime Victim Assistance Network, Parents of Murdered Children, and the Oregon Attorney General's Sexual Assault Task Force. Our fabulous Conference volunteers included Susan Bexton, Sylvia Golden, Sarah Hays, Shara Jones, Lissette McIlmoil, Fumi Owoso, Zachary Pollock, Bob Robison, Jacqueline Swanson, Hayley Weedn, and Chris Wilson.

Also, on June 14, NCVLI hosted its third annual Crime Victims' Rights Reception in the beautiful Crystal Ballroom of the Benson hotel, with more than 120 Conference faculty and attendees, victims' rights community members, NCVLI Board and staff, and friends of NCVLI in attendance. Once again, Portland band Mister Fisk donated the live musical performance, and this year, guests enjoyed local, biodynamic wine donated by Pacific Rim Winemakers. Prizes at the Reception were donated by the Benson Hotel, HairM Grooming, the Marriott, Elissa Mendenhall, ND, Moonstruck Chocolate, New Avenues for Youth's Ben & Jerry's Ice Cream Store, Oregon Wines on Broadway, Peju Province Winery, Rock Bottom Brewery, Pacific Rim Winemakers, Team Quest MMA, and the Board of Directors and staff of NCVLI.

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