

Protecting Children's Rights: What Practitioners Need to Know About Traumatic Stress¹

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I. Introduction

Crime victims, including child-victims, may find themselves called upon to participate in civil and criminal court proceedings arising out of their victimization. Whether the offender is a family member, a friend, or a stranger, for victims already experiencing post-traumatic stress reactions such participation may exacerbate those reactions, resulting in a re-traumatizing experience.²

The words "trauma" and "traumatizing" are used frequently by media, courts, attorneys, mental health professionals, and medical professionals. The meaning of these terms varies greatly, depending on the context. It is critical for legal practitioners representing child-victims to understand psychological trauma and to recognize its manifestations to help ensure that the justice process does not exacerbate trauma reactions. This *Bulletin* provides an overview of the mental health definition of trauma,³ identifies common responses of child-victims to traumatic events, and provides tips on how to use victims' rights to protect child-victims who are experiencing post-traumatic stress during the justice process.

II. Definitions of Trauma

In the mental health context, "[a] traumatic experience is an event that threatens someone's life, safety, or well-being."⁴ Such events can be caused by other people (e.g., war, interpersonal violence), or by nature (e.g., tornado, flood), and may include witnessed events.⁵ What makes an event or experience traumatic "is that it overwhelms a person's existing or previous coping mechanisms, and elicits intense feelings that may include fear, helplessness, hopelessness, terror, or despair."⁶

Whether an event is experienced as traumatic is not dictated solely by the objective reality of the event but also by a person's subjective and neurologic response to the event.⁷ A person's cultural beliefs, developmental stage, and access to social supports all contribute to how that individual experiences events.⁸

The individual's *experience* of these events or circumstances helps to determine whether it is a traumatic event. A particular event may be experienced as traumatic for one individual and not for another (e.g., one child removed from an abusive home may experience this as traumatic, whereas another may not; one refugee may experience fleeing one's country as traumatic, another may not; one military veteran may

experience deployment to a war zone as traumatic, another may simply take this in stride). How the individual labels, assigns meaning to, and is disrupted physically and psychologically by an event will determine whether or not it is experienced as traumatic.⁹

The experience of trauma may also be cumulative, in that persons with prior traumas may be more likely to develop post-traumatic stress symptoms than those with no prior trauma history.¹⁰

III. Responses to a Traumatic Event¹¹

“For reasons that are basic to survival, traumatic experiences, long after they are over, continue to take priority in the thoughts, emotions, and behavior of children, adolescents, and adults.”¹² Although responses may vary, there are a number of ways in which a crime victim’s traumatic stress may present.¹³ Practitioners should be familiar with three common types of trauma reactions, and recognize that many of these reactions are coping mechanisms that may be outside of the child’s awareness.¹⁴

1. *Hyperarousal.* This behavior is the body staying “on alert” for future danger. It can be observed in individuals who are nervous or jumpy, have heightened startle responses, encounter trouble sleeping, are easily irritable or angered, react disproportionately to apparently “minor” anxiety-producing situations, or have trouble concentrating or paying attention.
2. *Re-experiencing.* This occurs when a person experiences unwanted and unexpected sensory memories of the traumatic event, including mental images, sounds, and smells. Re-experiencing may occur while awake or in the form of nightmares during sleep, and it may manifest in young children in the form of play re-enactment. A person who is re-experiencing may have a hard time distinguishing the present safe situation from a past, dangerous situation.
3. *Numbing and Avoidance.* This is demonstrated when a person takes action to avoid any reminders (persons, places, situations) of the traumatic event, or “shuts down” perceptually and emotionally to avoid being triggered.

Although many adults, including attorneys, judges, and juries, might perceive a child-victim’s manifestations of trauma as unpleasant or undesirable, and may even characterize the child as non-cooperative or oppositional, for traumatized children these symptoms are emotional, behavioral, and neurological attempts to cope with the ongoing impacts of a traumatic experience. Thus, “the so-called symptoms [of trauma] are best theorized as survival skills.”¹⁵

IV. Protecting Child-Victims Experiencing Traumatic Stress

“The choice of how, when, and the extent to which one participates in the justice system is important to victims; it is a means by which victims can enhance or regain control over their lives, and it can improve victims’ psychological and emotional well-being.”¹⁶ One way to empower child-victims is through understanding their many statutory and constitutional rights in the justice process, and asserting those rights through motion practice after consultation with the child-victim client.¹⁷ Some potentially impactful ways in which victims’ rights can be used to help child-victims experiencing traumatic stress follow.

1. *Protect the child-victim’s independent voice.* Unlike a guardian ad litem whose role is to protect the child-victim’s best interests, a social services attorney whose role is to protect the child on behalf of the state, or the prosecutor who represents the state, a dedicated crime victims’ rights attorney represents only the child-victim.¹⁸ This unique role can assist the child-victim in navigating the justice system in a way that decreases post-traumatic reactions resulting from lack of control. To effectively achieve this, child-victims’ rights attorneys must guard against assumptions regarding “best interests.” For instance, attorneys should not assume that the child-victim does not want to testify or share his or her story in court. Although research indicates that protracted criminal litigation can be stressful for child-victims, research has also found that even with longer trials children can become less depressed and anxious over the duration of the trial, regardless of outcome. This research also indicates that testifying can be an empowering experience for many child-victims and can reduce stress levels and depression significantly after testimony is given, particularly if the child-victim is well-supported and informed.¹⁹

2. *Fight for privacy.* “[P]rivacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”²⁰ Whether one is discussing a child-victim’s counseling records, Facebook, e-mails, or cell phone records, compelled disclosure of a child-victim’s private information may cause the child to feel vulnerable and unsafe. The general rule is that defendants have no constitutional right to pretrial discovery²¹ and that victims have rights that protect against disclosure of personal or private information.²² Importantly, because choice and control by a child-victim is also critical to child-victims, consulting with the child-victim client to determine whether he or she wants to waive privacy and protection rights and permit disclosure is a crucial part of effective representation. Additionally at times, disclosure of all or portions of a child-victim’s trauma treatment records may be beneficial to the goals of the child-victim client. To effectively advise child-victims about whether to fight for protection or to allow disclosure of private information, attorneys must be familiar with the components of each evidence-based trauma treatment.
3. *Litigate direct and cross-examination in advance, but remain vigilant.* Child-victims’ attorneys can engage in motion practice in advance of testimony to determine the permissible scope of questioning (e.g., rape shield limitations), and in the midst of testimony can work to restrain overly vigorous direct or cross-examinations of child-victim witnesses based on a variety of arguments, including “harassing the witness”²³ and general victims’ rights provisions. Importantly, however, protecting a child may require more than litigating the specific boundaries of permissible questioning. A trauma-informed attorney must also ensure that the court is trauma-informed so that it can closely observe the child and recognize when the adversarial system is causing any of the three types of common trauma reactions discussed above (i.e., hyperarousal, re-experiencing, numbing and avoidance).²⁴
4. *Seek courtroom accommodations.* Each child-victim has unique needs regarding what, if any, courtroom accommodations are necessary to

Sidebar

• **Cautious Victim-Witnesses.** The connection between childhood trauma and later delinquency is well-established. It is particularly pronounced for children in foster care and other out-of-home placements, as well as among girls who are victims of sexual abuse.³¹ When these child-victims testify they are frequently aware of their own credibility issues, particularly if they have coped with their traumatic experiences by engaging in behaviors that resulted in their involvement in the justice system as “defendants” in the past.

• **Word Choice.** Often the words “trauma” and “traumatized” are casually used as a substitute for “harm.” Such usage can diminish or impede the system’s understanding of the mental health consequences and diagnoses caused by trauma. Take every the opportunity to educate others on the differences between the legal and mental health usages of the terms meaning of “trauma” and “traumatized”.

avoid being re-victimized by the experience. Among the accommodations to consider are testimony by closed-circuit television²⁵ and use of support persons or animals.²⁶ Practitioners should spend adequate time with the child-victim, the child-victim’s therapist, and the child-victim’s caregiver to fully understand the child’s needs.

5. *Use experts to explain a child-victim’s trauma-related behaviors.* As noted above, individuals unfamiliar with trauma may perceive a child-victim’s behaviors as non-cooperative or oppositional. Expert witness testimony on child traumatic stress can be a highly effective means of proving serious psychological injury and educating the court and fact-finder to help overcome any existing biases.²⁷
6. *Understand Crawford to best ensure victim voice.* Child abuse prosecutors often must charge and

prosecute vigorously to adhere to their mission of protecting the community;²⁸ and in the wake of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), this often means that they must seek direct testimony from child-victims.²⁹ In child-victim abuse cases this analysis may significantly impact the admissibility of a child-victim's out of court statements about the abuse.³⁰ Thus, effective representation of child-victims requires a thorough understanding of the relevant jurisdiction's applications of *Crawford* and its progeny.

V. Conclusion

A child-victim's attorney must understand traumatic stress to effectively advocate for and support the child-victim's meaningful participation in the justice process. When practitioners understand, empathize with, and accommodate for the impact of traumatic stress, they can better assist their child-victim clients with navigating the justice system.

¹ NCVLI is grateful to Jennifer A. Brobst, JD, LLM, and Jim Clark, PhD, LCSW, for sharing their wisdom and expertise as co-authors with NCVLI on this Bulletin. Jennifer Brobst is the Legal Director at the Center for Child and Family Health in Durham, North Carolina, which focuses on services and training in child traumatic stress, and she is also a professor in the clinical program at North Carolina Central University Law School. Jim Clark is Professor and Director of the School of Social Work, College of Allied Health Sciences, at the University of Cincinnati, and co-author of the *NCTSN Bench Card for the Trauma-Informed Judge*.

² Courts and mental health professionals alike have recognized that court proceedings may be trauma-inducing events. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (discussing the State's interest in protecting the welfare of children and noting the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"); *In re Jam. J.*, 825 A.2d 902, 916 (D.C. 2003) ("There is substantial empirical support for the proposition that a significant amount of trauma and upset experienced by the child witness is due to the presence and proximity of the accused . . .") (internal citation omitted, citing support); Dorothy F. Marsil, Jean

Montoya, David Ross, & Louise Graham, *Children as Victims and Witnesses in the Criminal Trial Process: Child Witness Policy: Law Interfacing with Social Science*, 65 Law & Contemp. Probs. 209, 213 (2002) (noting that "the phenomenon of confrontational stress experienced by children is amply supported by social science evidence" and citing sources).

³ Practitioners should also be familiar with the medical and legal definitions of "trauma." An in-depth discussion of these definitions is beyond the scope of this *Bulletin*. An example of a medical definition of trauma is an injury to the body, such as a broken arm. See <http://www.merriam-webster.com/medlineplus/trauma>. For an understanding of how the term "trauma" is used in the legal context of analyzing testimonial accommodations, see *Confronting the Confrontation Clause: Finding the Use of Closed Circuit Television to be "Necessary" Under Maryland v. Craig*, NCVLI Child-Victims' Rights Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.) (May 2012), available at <http://law.lclark.edu/live/files/11680-confronting-the-confrontation-clause-finding-the-violence-against-women-bulletin-allowing-adult-sexual-assault-victims-to-testify-at-trial-via-live-video-technology>, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), (September 2011), available at <http://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify>.

⁴ Kristine Buffington, Carly B. Dierkhising, and Shawn C. Marsh, *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, available at http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_1.pdf.

⁵ *APA Dictionary of Psychology* 955 (American Psychological Association, 2007).

⁶ Buffington et. al., *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ Substance Abuse and Mental Health Services Administration, *Trauma Definition*, available at <http://www.samhsa.gov/traumajustice/traumadefinition/definition.aspx> (emphasis in original).

¹⁰ See generally, Douglas L. Delahanty and Nicole R. Nugent, *Predicting PTSD Prospectively Based on Prior Trauma History and Immediate Biological Responses*, in 1071 *Annals of the NY Acad. Of Sciences*,

Psychobiology of Post-Traumatic Stress Disorder: A Decade of Progress 27-40 (2006).

¹¹ The potential consequences of traumatic experiences were first formally recognized in 1980 with the introduction of the diagnosis of Post Traumatic Stress Disorder (PTSD) into the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM). This *Bulletin* does not specifically discuss PTSD, which is a psychiatric disorder. Instead the focus is on traumatic stress generally. Importantly, not every individual who experiences a traumatic event will develop PTSD.

¹² *Understanding Child Traumatic Stress*, The National Child Traumatic Stress Network, available at http://www.nctsn.org/nctsn_assets/pdfs/edu_materials/Understanding_Child_Traumatic_Stress_Brochure_9-29-05.pdf.

¹³ *Id.* (observing that: “More than twenty years of studies have confirmed that school-age children and adolescents can experience the full range of posttraumatic stress reactions that are seen in adults.”).

¹⁴ See, e.g., Susan Coates & Theodore J. Gaensbauer, *Event Trauma in Early Childhood: Symptoms, Assessment, Intervention*, 18 *Child & Adolescent Psychiatric Clinics of N. Am.* 611, 611-26 (2009); “Understanding Child Traumatic Stress,” *supra* note 12.

¹⁵ Bonnie Burstow, *Toward a Radical Understanding of Trauma and Trauma Work*, 9 *Violence Against Women*, 1293, 1305 (Nov. 2003), available at http://www.healingattention.org/documents/doc_burstow.pdf.

¹⁶ *Child-Victims’ Independent Participation in the Criminal Justice System*, NCVLI Child-Victims’ Rights Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), (August 2012), available at <https://law.lclark.edu/live/files/12271-childvictims-independent-participation-in-the>.

¹⁷ *Id.* See also *Fundamentals of Victims’ Rights, A Summary of 12 Common Victims’ Rights*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), (November 2011), available at <https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>.

¹⁸ See generally, *Child-Victims: Better Served By A Traditional Attorney Or By A Guardian Ad Litem?*, NCVLI Child-Victims’ Rights Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), (April 2011), available at <https://law.lclark.edu/live/files/8373-childvictimsbetter-served-by-a-traditional> (distinguishing

the roles of guardian ad litem and attorney for child-victims); Marvin Ventrell, *The Practice of Law for Children*, 28 *J. Public Law & Pol’y* 75, 95 (2006) (reprinted from 66 *Mont. L. Rev.* 1 (2005)) (distinguishing the role of the attorney who directly represents children in proceedings from guardians ad litem and child welfare attorneys).

¹⁹ See Desmond K. Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 *J. of Pediatrics* 647, 647 (Oct. 1988); Robert S. Pynoos & Spencer Eth, *The Child as Witness to Homicide*, 40 *J. of Social Issues* 87, 87 (1984, republished online 2010) (“The child’s efforts at mastering the trauma can be either enhanced or impeded by involvement in judicial proceedings.”).

²⁰ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 *Suffolk U. L. Rev.* 467, 473 (2005).

²¹ See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.”).

²² Key rights to use in arguing against discovery of the victim’s private information include the federal constitutional right to privacy, the handful of state constitutional rights to privacy, statutory or rule provisions, and in some states, the explicit right to refuse pretrial discovery. See, e.g., *Ariz. Const. art. II, § 2.1(A)(5)* (“[A] victim of crime has a right . . . to refuse an interview, deposition, or other discovery request by the defendant . . .”); *Cal. Const. art. I, § 28(b)(5)* (“[A] victim shall be entitled to . . . refuse an interview, deposition or discovery request by the defendant . . .”); *Or. Const. art. I, § 42* (granting victims the right “to refuse an interview, deposition or other discovery request by the criminal defendant . . .”).

²³ See, e.g., *State v. Noah*, 162 P.3d 799, 805 (Kan. 2007) (requiring a meaningful opportunity for the defendant to cross-examine a very emotional child sexual abuse victim witness at a preliminary hearing, with the caveat: “[W]e do not grant attorneys license to filibuster, purposely confuse, or harass children or other vulnerable witnesses in an attempt to make an otherwise competent witness unavailable. Nor do we want to give incentive for those same witnesses to be relieved of their obligation to be made ‘available’ by answering only a few questions on cross-examination because it is uncomfortable or intimidating, and thereby defeating a defendant’s right to

confrontation.”). See also David Crump, *Child Victim Testimony, Psychological Trauma, and the Confrontation Clause: What Can the Scientific Literature Tell Us?*, 8 St. John’s J. Legal Commentary 83, 105 (1992) (concluding that surprisingly little is predictable, and explaining why a judge’s determination that a particular child is “tough” and “impervious to harm” may be seriously in error because this child may be “especially vulnerable to harm”).

²⁴ Tools for judicial education on post-traumatic stress in children can be found on the website of the National Child Traumatic Stress Network, www.nctsn.org, as well as through the “Kids in Court” Program sponsored by the American Bar Association, http://www.americanbar.org/groups/child_law/publications/child_law_practiceonline/article_collections0/kids_in_court.html.

²⁵ For a detailed discussion of testimonial accommodations for child-victims see Nat’l Crime Victim Law Inst., *Confronting the Confrontation Clause*, *supra* note 3.

²⁶ For a discussion of a variety of accommodations for child-victims see *Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying*, NCVLI Newsletter of Crime Victim Law (Nat’l Crime Victim Law Inst., Portland, Or.), (2008). Copies of this article will be available on NCVLI’s website, www.ncvli.org, by March 2013, and may also be accessed by contacting NCVLI.

²⁷ Notably, clinicians trained in trauma treatment are often more experienced in giving expert witness testimony than other mental health providers because they regularly work with patients whose traumatic events have become the subject of criminal or civil litigation. A discussion of the issues surrounding admissibility of expert testimony is beyond the scope of this *Bulletin*. If you are considering using a trauma expert to explain a child-victim’s behavior, please contact NCVLI for technical assistance.

²⁸ Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States within 120 Years* (revised and expanded), 28 J. Public Law & Pol’y 1, 43 (2006).

²⁹ An in-depth discussion of *Crawford* is beyond the scope of this *Bulletin*. The core of the Court’s holding in *Crawford* is that protection of a defendant’s Sixth Amendment right to confrontation requires that if a hearsay declarant who has made a testimonial statement

is unavailable to testify in a criminal trial, and there has not been a meaningful prior opportunity for cross-examination, the statement cannot be admitted at trial. Subsequent case law addressing the scope of what is a “testimonial” statement has clarified that if objectively the “primary purpose” of the statement is to address an on-going emergency, rather than being made with an eye toward trial or other legal purpose, then the statement is non-testimonial. This determination is highly fact-specific taking into account the motive of both the interviewer and the interviewee. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Davis v. Washington*, 547 U.S. 813 (2006). See also *State v. Franklin*, 308 S.W.3d 799 (Tenn. 2010), *cert. denied*, 131 S. Ct. 1598 (2011) (providing a cross-jurisdictional discussion of the *Crawford* “objective purpose” standard).

³⁰ Note that if the child appears in court and partially testifies, even if he or she does not recall the key events or even the forensic interview, admission of the interview is more likely not to violate *Crawford*. See *State v. Cameron M.*, 55 A.3d 272 (Conn. 2012) (providing a national comparative jurisdictional analysis).

³¹ Francine T. Sherman, *Reframing the Response: Girls in the Juvenile Justice System and Domestic Violence, in Promise Unfulfilled: Juvenile Justice in America* 187, 188-89 (Cathryn Crawford ed., 2012).

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