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Volume 127 | Issue 1

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Fall 12-18-2022

## Accommodating Victims with Mental Disabilities

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### Recommended Citation

Danielle Shelton, *Accommodating Victims with Mental Disabilities*, 127 DICK. L. REV. 163 (2022).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol127/iss1/5>

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# Accommodating Victims with Mental Disabilities

Danielle M. Shelton\*

## ABSTRACT

The #MeToo movement has brought the voices of victims of sexual assault into the public's eye and, in turn, into the legal system. As its name suggests, the movement's strength lies in numbers—it is, after all, hard to ignore the collective voices of a group of considerable size and visibility. This Article argues that another group of victims—namely, victims who have mental disabilities—also are desperately in need of their own movement to raise public awareness and bring about reform. However, because of their cognitive and communication impairments, this group of victims is unlikely to effectuate reform itself. Instead, these victims rely on the criminal justice system to effectuate change on their behalf. Their needs are great: More vulnerable to crime, this group is victimized at a rate at least four times greater than the general population. Yet crimes against this group rarely are referred for prosecution, let alone successfully prosecuted. Instead, this group faces myriad barriers to participation throughout the criminal justice process, starting from the time at which they attempt to report a crime. Designed to meet the needs and capabilities of typically functioning victims, the system does little to meet the cognitive and communication needs of those with mental disabilities. This Article proposes that the criminal justice system take ownership of this problem by providing much-needed accommodations to victims with mental disabilities.

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## INTRODUCTION

The criminal justice system relies on victims as much as victims rely on it. From the initial reporting of a crime through testifying at trial, victims are crucial to the successful prosecution of many crimes. So, what happens when a victim's mental impairments preclude her from meaningfully participating in the criminal justice system? Far from hypothetical, this question reflects the long-standing reality for not just one victim but for an entire group of victims.

To say that victims with mental disabilities do not fare well in the criminal justice system is an understatement.<sup>1</sup> As a group, they are far more likely to be victims of crime, yet far less likely to have those crimes prosecuted.<sup>2</sup> The crux of the problem lies in the fact that the criminal justice system is designed around the capabilities and needs of victims who do not have mental impairments.<sup>3</sup> Thus, the system is ill-suited for victims who think, communicate, and behave in ways that differ, often drastically, from those without such mental impairments.<sup>4</sup> As a result, the fundamental premise of the

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1. The term "victim" is used throughout this Article to describe the complaining witness to a crime. The use of the term does not imply guilt on the part of a particular defendant, nor does it necessarily imply that a particular crime has been committed. Instead, unless noted otherwise, this Article uses the term consistently with its use in law enforcement and legal proceedings, including typical jury instructions. See Michael Conklin, *Victim or Complaining Witness: The Difference Between Guilty and Not Guilty*, 57 SAN DIEGO L. REV. 423, 427 (2020) ("The term 'victim,' to law enforcement officers, is a term of art synonymous with 'complaining witness.' Moreover, the term 'victim' is also used in the indictment in this case as it is routinely in criminal charges which are read to the jury."); see also Nat'l Crime Victim L. Inst., *Use of the Term "Victim" in Criminal Proceedings*, 11 NCVLI NEWS 1, 1 (2014).

In the criminal justice system, the term "victim" no longer merely describes a witness who the prosecution holds out to have suffered harm due to defendant's criminal conduct. . . . [T]he term "victim" denotes a person's legal status and defines the level and extent of participation that the individual is entitled to in the criminal case.

*Id.*

2. Lucy A. Henry et al., *Children with Intellectual Disabilities and Developmental Disorders*, in 2 CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 252 (Lamb et al. eds., 2011).

3. See ABIGAIL GRAY ET AL., COGNITIVE IMPAIRMENT, LEGAL NEED AND ACCESS TO JUSTICE 1 (2009), <https://bit.ly/3JVfalB> [<https://perma.cc/SEH7-V9RJ>].

4. "Mental disabilities" is used to "refer collectively to intellectual, developmental, and psychiatric disabilities that result in cognitive impairment affecting comprehension, communication, or learning. Such disabilities may be present from birth or acquired through illness or accident." Janine Benedet & Isabel Grant, *Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases*, 50 OSGOODE HALL L.J. 1, 3 n.4 (2012) (noting, as well, that the term "mental disabilities" is "not used by any of these groups as a descriptor" but instead is used as "collective reference"). Thus, persons with intellectual disabilities, autism, Down syndrome, and more fall under this umbrella term.

criminal justice system—that a victim can and will meaningfully participate in that system—is highly unrealistic for this group.<sup>5</sup>

Moreover, these victims' communicative and cognitive impairments are what make them “easy” targets in the first place and explain why they are victimized at such extraordinary rates.<sup>6</sup> In addition to their inherent vulnerability, they are less likely to report crimes against them. Even when reporting is attempted, they are less likely to have their reports acted on.<sup>7</sup> It is a vicious circle indeed: victimized at a high rate because of their mental disabilities, yet because of those very mental disabilities, unlikely to be protected by the criminal justice system, which further exacerbates their vulnerability. As one commentator opined, “If this were any other population, the world would be up in arms.”<sup>8</sup>

But the world is not up in arms. Instead, scant attention has focused on this problem.<sup>9</sup> Despite some awareness of this problem,<sup>10</sup> the criminal justice system has done little to acknowledge, let alone ensure, the meaningful participation of victims with mental disabilities.<sup>11</sup> It is as if the problem is viewed as one that lies with

5. The primary predictor of whether a crime is prosecuted, let alone solved, is the presence of complete and accurate statements from an eyewitness. Mark R. Kebbell & Chris Hatton, *People with Mental Retardation as Witnesses in Court: A Review*, 37 MENTAL RETARDATION 179, 179 (1999); Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 J. C.R. & ECON. DEV. 225, 225 (1992). Eyewitness testimony takes on heightened importance in sexual abuse cases. See Bette L. Bottoms et al., *Jurors' Perceptions of Adolescent Sexual Assault Victims Who Have Intellectual Disabilities*, 27 L. & HUM. BEHAV. 205, 205 (2003) (“Physical evidence and corroborating witnesses are often unavailable in child and adolescent sexual assault trials, leaving jurors struggling to make decisions on the basis of little evidence other than an alleged victim's word.”).

6. See Thomas D. Lyon & Julia A. Dente, *Criminal Law: Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1223 (2012) (“[M]ental disabilities are targeted because they are viewed as more vulnerable to threats and coercion, and less like to be able to due to their age and immaturity.”).

7. See Erika Harrell, *Crime Against Persons with Disabilities, 2009–2015 - Statistical Tables*, BUREAU OF JUST. STAT. 1 (July 2017), <https://bit.ly/3OyYSAm> [<https://perma.cc/VE9B-62Y6>].

8. Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018, 5:00 AM), <https://n.pr/3uchilW> [<https://perma.cc/DX9J-ZVTC>].

9. See, e.g., Peter Blanck et al., *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 825 (2004); Mary Elizabeth Wood et al., *Reasonable Accommodations for Meeting the Unique Needs of Defendants with Intellectual Disability*, 47 J. AM. ACAD. PSYCHIATRY & L. 310, 310 (2019).

10. See *infra* Part I.B. for a discussion of existing measures and their limitations.

11. Denise C. Valenti-Hein & Linda D. Schwartz, *Witness Competency in People with Mental Retardation: Implications for Prosecution of Sexual Abuse*, 11 SEXUALITY & DISABILITY 287, 291 (1993) (“[A]ssumptions, or societal myths

the victims, who must somehow overcome their impairments and participate, rather than with the system itself that does nothing to accommodate these impairments so victims can participate. It is not only unrealistic to expect this group of victims to participate in a system that was not designed to meet their needs and abilities, but it is also futile. The very impairments that impede this group's participation also impede their ability to somehow overcome those impairments, let alone to call for reform in this area.

It need not be this way. Victims with mental disabilities can meaningfully participate in the criminal justice system but only if the system itself is reformed.<sup>12</sup> However, that reform must come from within the criminal justice system. Reform must not only acknowledge the impact mental impairment has on victims' participation but must also, based on that knowledge, enact measures to facilitate participation. Fortunately, social scientists and disability advocates have laid much of the groundwork for such reform.<sup>13</sup> For decades, social scientists and disability advocates have quietly studied and addressed this problem, such that much is already known about what barriers to participation exist and what accommodations are needed.<sup>14</sup> For example, research shows when victims with mental disabilities attempt to report crimes against them, their reports are often dismissed as not credible or not specific enough to act on.<sup>15</sup> Thus, appropriate accommodations would include a requirement that first responders screen for victims' mental disabilities and, based on such screening, adjust the interview process.<sup>16</sup> These, and other evidence-based accommodations, are necessary for the system to be inclusive of this group of victims.

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about people with [intellectual disabilities] constrain their participation as witnesses in the legal system, and serve to devalue crimes against them.”); NORA J. BALADERIAN, VICTIMS WITH DISABILITIES: COLLABORATIVE, MULTIDISCIPLINARY FIRST RESPONSE: TECHNIQUES FOR FIRST RESPONDERS CALLED TO HELP CRIME VICTIMS WHO HAVE DISABILITIES 1 (2011), <https://bit.ly/3QGAs8S> [<https://perma.cc/YU9D-VJ2T>].

12. See William Paul Deal & Viktoria Kristiansson, *Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault*, VOICE (The Nat'l Ctr. for the Prosecution of Violence Against Women, Alexandria, Va.), 2007, at 2, <https://bit.ly/3a0xP1U> [<https://perma.cc/Y3YF-XWNC>].

13. See *infra* Part I.B. for a discussion of existing measures and their limitations.

14. See *infra* Part II.B.

15. See GRAY ET AL., *supra* note 3, at 7.

16. See *id.*; *New Crime Victims with Disabilities Toolkit*, CMTY. POLICING DISPATCH (July 2021), <https://bit.ly/3u95LjF> [<https://perma.cc/L7GB-WUAF>]; see also Christina Rainville, *Interviewing Children with Disabilities in Child Abuse Cases: A New Approach*, 31 CHILD L. PRAC. 49, 53–57 (2012).

While such reform may sound extreme against the status quo of doing nothing in this area, the criminal justice system has adopted such reform before for another group of vulnerable victims, namely, victims who are children.<sup>17</sup> While the needs and abilities of persons with mental disabilities are not identical to those of children, reform related to child victims demonstrates that the criminal justice system can and should ensure the participation of vulnerable groups of victims.<sup>18</sup> Indeed, several countries, including Great Britain and Israel, have adopted comprehensive reform to accommodate victims with mental disabilities.<sup>19</sup> Like child victim laws, these mental disability-specific laws provide guidance on what measures can and should be adopted. Further adding to the urgency of this problem is that it is not only victims with mental disabilities that suffer when the problem goes unaddressed. Instead, the criminal justice system suffers when a large group of victims, desperately in need of its protection, are precluded from equal participation and equal justice.<sup>20</sup>

This Article deconstructs the ways in which the criminal justice system has failed victims with mental disabilities and proposes a rebuilding through accommodations. Part I provides an overview of the problem, juxtaposing the norms and demands that the criminal justice system imposes on victims with the characteristics of persons with mental disabilities that make meeting these demands all but impossible. It also considers why, despite its pervasiveness, this problem has been overlooked and, relatedly, why the Americans with Disabilities Act (ADA) has not been a useful tool in solving this problem.

In Part II, this Article breaks down the problem by illustrating the specific barriers to inclusion and participation faced by victims with mental disabilities. These specific barriers are examined within each stage of the criminal justice system.

In Part III, this Article shows why accommodations for victims with mental disabilities are an appropriate and necessary response to this problem. After making the case for accommodations, this Article addresses key features essential to any reform as well as a

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17. See *infra* Part III.B.

18. See *id.*

19. See *infra* Part III.C.

20. See ARC OF UNITED STATES, THE ARC'S JUSTICE ADVOCACY GUIDE: AN ADVOCATE'S GUIDE ON ASSISTING VICTIMS AND SUSPECTS WITH INTELLECTUAL DISABILITIES 6 (2006) [hereinafter JUSTICE ADVOCACY GUIDE], <https://bit.ly/3w3FYdR> [<https://perma.cc/F8HR-RLGS>]; Harrell, *supra* note 7, at 1.

proposed model law to accommodate victims with mental disabilities in the criminal justice system.

## I. THE STATUS QUO FOR VICTIMS WITH MENTAL DISABILITIES

The criminal justice system is inaccessible for victims with mental disabilities. This group of victims is chronically underserved by the criminal justice system, despite being victimized at a rate much higher than the general population.<sup>21</sup> At the same time, this group of victims is less likely to report crimes, less likely to have crimes against them pursued, and less likely to have their perpetrator successfully prosecuted.<sup>22</sup> The result is that a group of victims that most needs the criminal justice system to work for it is instead chronically underserved. This Catch-22 quickly becomes a societal problem, as the perpetrators of these crimes go unprosecuted and correspondingly undeterred.<sup>23</sup>

This Part begins by describing the overall nature of the problem, followed by a discussion of the limited responses to this problem. Next, it discusses why this problem cannot be solved, as one might expect, by the ADA. Finally, this Section concludes by examining why more is not being done to assist this group of victims.

### A. *Overrepresented as Victims, Underrepresented in the Criminal Justice System*

Crime rates against persons with disabilities “far exceed rates of crime against individuals” without disabilities.<sup>24</sup> In particular, children and adults with mental disabilities are four to ten times more likely to be victims of crime than persons without such disabilities.<sup>25</sup> Higher rates exist not only for crime in general but specifically for violent crimes.<sup>26</sup>

The higher rate of victimization for this group is not coincidental. Rather, it reflects the fact that persons with mental disabilities are inherently “more vulnerable to abuse of various types . . . than

21. Harrell, *supra* note 7, at 1.

22. Nancy Smith et al., *How Safe Are Americans with Disabilities?*, VERA (Vera Inst. of Just., New York, N.Y.), Apr. 2017, at 13, 16–25, <https://bit.ly/3AkJiUj> [<https://perma.cc/D8ZZ-4G43>].

23. See Gegan & Rodriguez, *supra* note 5, at 226 n.4.

24. BALADERIAN, *supra* note 11, at 1.

25. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 6; see Harrell, *supra* note 7, at 1.

26. See Harrell, *supra* note 7, at 1 (“During 2011–15, persons with cognitive disabilities had the highest [victimization] rates . . . among the disability types measured [for total violent crime (57.9 per 1,000 persons aged 12 or older with disabilities)].”).



other care groups or the general population.”<sup>27</sup> These rates of victimization reflect the fact that perpetrators recognize that persons with mental disabilities provide “an opportunity, a safe opportunity to victimize people.”<sup>28</sup> This recognition arises because victims with mental disabilities tend to be more isolated, more dependent on others to meet their needs,<sup>29</sup> and may thus be unable to “fight or flee, or to notify others and testify about the victimization.”<sup>30</sup> Other contributing factors include “the social powerlessness of these individuals, communication skills deficits, impaired mobility, frequent lack of privacy, social isolation, and lack of sex education.”<sup>31</sup>

One might think that this high rate of victimization combined with this group’s inherent vulnerabilities would mean that the criminal justice system has thought deeply about how to ensure this group’s access. In fact, the opposite is true.<sup>32</sup> Historically, the legal system deemed persons with mental disabilities to be per se incompetent and were excluded from being witnesses to the crimes against them.<sup>33</sup> Victims with mental disabilities were thus precluded from any participation in the criminal justice system.<sup>34</sup> The fact that such persons with mental disabilities are now allowed to testify has not resulted in true access and participation.<sup>35</sup> Rather, this group has continued to “struggle[ ] for meaningful participation in our legal system.”<sup>36</sup> As one court surmised, “Mentally disabled victims do

27. Tessa Beckene et al., *Experiences of Going to Court: Witnesses with Intellectual Disabilities and Their Carers Speak Up*, 33 J. APPLIED RSCH. INTELL. DISABILITIES 67, 67 (2017); see also Valenti-Hein & Schwartz, *supra* note 11, at 291 (“Estimates of sexual victimization of this population range from 14–96%, or 4–10 times the rate of the non-disabled population.”).

28. Shapiro, *supra* note 8.

29. *Commonwealth v. Despres*, 875 N.E.2d 864, 869 (Mass. App. Ct. 2007).

It is well recognized that some people with mental disabilities may be especially vulnerable to physical and sexual abuse by virtue of their reliance upon others to meet their daily needs. Their reports of abuse should not be discounted merely because they have a mental disability unconnected to their capacity to perceive, remember, and articulate events.

*Id.*

30. Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, OVC ARCHIVE (1998), <https://bit.ly/3OS7amF> [<https://perma.cc/LHZ7-MH9K>].

31. Valenti-Hein & Schwartz, *supra* note 11, at 291.

32. See Blanck et al., *supra* note 9, at 825.

33. Valenti-Hein & Schwartz, *supra* note 11, at 287–88.

34. *Id.*

35. See, e.g., *C.S. v. Commonwealth*, No. 2019-CA-1574-DG, 2021 WL 406311, at \*3 (Ky. Ct. App. Feb. 5, 2021) (reversing the district court because “[i]t appears that the district court erroneously equated the standard of capacity to consent with competency to testify. We agree with the Commonwealth that competency to testify is not dispositive of whether or not the victim has an ‘intellectual disability’ under [Kentucky law]”).

36. Blanck et al., *supra* note 9, at 825.

not fare well in our verbally based adversarial processes that demand[ ] mental agility, a good memory, quick responses, and a facility to readily employ a rich vocabulary to accurately describe or slyly obfuscate truth.”<sup>37</sup>

The harsh reality of this struggle becomes clear when looking at case outcomes.<sup>38</sup> Cases involving victims with mental disabilities are not likely to be adjudicated.<sup>39</sup> And, for those that are reported and prosecuted, convictions are rare:

Research indicates that only three percent of cases of sexual abuse involving people with developmental disabilities are reported to authorities. The lack of reporting makes it difficult to accurately assess the incidence of such crimes. Of those allegations that are reported . . . although the offender was known in 95.6% of the cases, only 22.2% of the alleged offenders were charged, and 8.5% convicted.<sup>40</sup>

While these statistics speak for themselves, they beg the underlying question of why victims with mental disabilities are so chronically underserved by the criminal justice system. Are victims with mental disabilities by virtue of their impairments simply unable to participate in the system? And if not, what needs to change to allow their meaningful participation? The answer to these questions lies in examining the nearly countless barriers to participation these victims face when attempting to engage in different parts of the criminal justice system.<sup>41</sup> Before addressing those common barriers in Part II, *infra*, the status quo for this group of victims is further explored.

### *B. What Is Being Done to Help Victims with Mental Disabilities?*

One might think that the criminal justice system has looked deeply at how to rectify this problem. After all, victims with mental disabilities are not outliers but rather comprise a core group of victims.<sup>42</sup> Yet this problem is rarely addressed, even within the context of criminal justice reform.<sup>43</sup> Instead, the scant attention to this

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37. Benedet & Grant, *supra* note 4, at 2.

38. See Tyiska, *supra* note 30.

39. Bottoms et al., *supra* note 5, at 206.

40. Valenti-Hein & Schwartz, *supra* note 11, at 292; see also Tyiska, *supra* note 30 (“Disability advocates report that crimes against people with disabilities are often not reported to police. Of those that lead to an investigation and an arrest, very few are prosecuted.”).

41. See *infra* Part II.

42. See Harrell, *supra* note 7, at 1.

43. See Beckene et al., *supra* note 27, at 68.

problem consists of laws aimed at raising awareness of the crime rate against persons with disabilities generally.<sup>44</sup> While such statistics are useful as a foundational matter, these efforts to raise awareness—now decades old—have not elicited reform in the criminal justice system.

For example, despite being passed almost 25 years ago, the Crime Victims with Disabilities Awareness Act<sup>45</sup> has not resulted in meaningful change. Its purpose was to collect and study data relating to crime against victims with disabilities.<sup>46</sup> The Act mandated a large-scale study of crimes against victims with disabilities and required questions in the National Crime Victim's Survey relating to "the nature of crimes against individuals with developmental disabilities" and "the specific characteristics of the victims of those crimes."<sup>47</sup> The information would then "be useful in developing new strategies to reduce the incidence of crimes against those individuals."<sup>48</sup> While decades of data have been collected, it is not clear what, if any, strategies have evolved from that mountain of data. Crime rates against the victim group have not declined.<sup>49</sup>

Other smaller federal initiatives exist, primarily involving voluntary training for those in the criminal justice system who encounter victims with mental disabilities. The Department of Justice's Office of Victims of Crime created a "First Responders Training," which provides training to those who serve victims with disabilities based on research-based best practices.<sup>50</sup> Its stated goal is worthy: "to *present . . . knowledge* to professionals who may need to provide first response services to crime victims who have cognitive or communicative disabilities."<sup>51</sup> The training includes a "specific set of guidelines for first responders (e.g., law enforcement officers, paramedics, victim advocates, forensic interviewers) who have been called to the scene of a crime in which the victim has a disability."<sup>52</sup>

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44. See, e.g., Blanck et al., *supra* note 9, at 825; Wood et al., *supra* note 9, at 310; Crime Victims with Disabilities Awareness Act of 1998, Pub. L. No. 105-301, 112 Stat. 2838, 2838 (1998).

45. Crime Victims with Disabilities Awareness Act of 1998, Pub. L. No. 105-301, § 1, 112 Stat. 2838, 2838 (1998).

46. *Id.* § 2.

47. *Id.*

48. *Id.*

49. See, e.g., *Breaking the Silence on Crime Victims with Disabilities*, NAT'L COUNCIL ON DISABILITY (May 21, 2007), <https://bit.ly/3c1sGHQ> [<https://perma.cc/5AKG-ZT7R>] ("Unfortunately, efforts to fully implement CVDA [Crime Victims with Disabilities Awareness Act] have not been successful.").

50. See generally BALADERIAN, *supra* note 11.

51. *Id.* at v (emphasis added).

52. *Id.* at 1.

In 2019, a federal grant supported the creation of an online toolkit to train first responders, which was designed to be more user-friendly than prior efforts.<sup>53</sup> Unfortunately, the voluntary nature of these training efforts greatly limits their impact. Like many voluntary programs, people who least need it are most likely to access this training, namely those first responders who already are aware of the problems faced by this group of victims. This situation is particularly problematic because typical training for first responders includes practices and protocols that are incompatible with the needs of victims with mental disabilities.<sup>54</sup>

Absent systemic reform, the criminal justice system relies, at best, on individual lawyers to advocate for the needs of individual victims with mental disabilities.<sup>55</sup> This is no small task.<sup>56</sup> One disability rights lawyer has provided the following advice to fellow advocates, entitled “Preparing the Witness Who is Disabled”:

Preparation of the disabled witness requires you to draw on information and practices from a wide variety of sources, including the witness and his or her closest associates, his or her professional caregivers, the relevant disability community, allied areas of medicine, psychology and social work, legal ethics, and the statutes and case standards of your own jurisdiction. You must shed stereotypes and habits of language, delve into the strengths and limitations of your witness, advocate for full access to the courts, and tread a fine line between preparation and coaching, all the while remaining sensitive to the witness’s personal needs and the often extraordinary stresses of court proceedings.<sup>57</sup>

What can be gleaned from that advice? That even in the best-case scenario—a situation in which the person with a mental disability (1) gets past screening and is asked to give testimony and (2) is represented by counsel—the resources and efforts required to facilitate meaningful participation for a witness with mental disabilities are overwhelming. The lawyer must become an expert in all things disability-related to achieve the goal of “advocat[ing] for full access to the courts” notwithstanding the well-known “extraordinary stresses of court proceedings” for such clients.<sup>58</sup> Even then, it is unclear exactly how an individual lawyer can “advocate for full

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53. See generally *New Crime Victims with Disabilities Toolkit*, *supra* note 16.

54. See JUSTICE ADVOCACY GUIDE, *supra* note 20, at 14.

55. See, e.g., William S. Friedlander, *Preparing the Witness Who Is Disabled*, FRIEDLANDER & FRIEDLANDER, <https://bit.ly/3ulS3dq> [<https://perma.cc/2V7M-898P>] (last visited Aug. 14, 2022).

56. See *id.*

57. *Id.*

58. *Id.*

access to the courts” when the courts are not designed to facilitate such participation. Kudos to the lawyers that can make a difference for their clients, but individual efforts and heroics are not a solution to a systemic problem.

Finally, some states have attempted to address the problem of participation by victims with mental disabilities, most commonly by folding such victims into the protections of existing child victim laws.<sup>59</sup> Child victim laws, as discussed in more detail in Part III.B., *infra*, exist to facilitate participation by children and are based on the *perceived* needs of children. Victims with mental disabilities are sometimes included as a tagalong to these laws. While well-intentioned, this approach falls short because it conflates the needs and capabilities of these two groups. While overlap exists between these groups, as discussed in Part II.B., *infra*, research shows that persons with mental disabilities think, speak, and act in ways that differ from typically developing children.<sup>60</sup> For example, persons with certain mental disabilities typically “require[ ] more questioning to elicit information” than their mental-age peers.<sup>61</sup> Moreover, the “court setting[ ] may be particularly problematic” for those with mental disabilities, even as compared to children of a similar mental age.<sup>62</sup> Further, victims with mental disabilities, unlike children, are not self-identifying. Laws geared around the needs of children fail to account for this difference insofar as they have no mechanism for screening.

Florida passed a law in 2017 pertaining to testimony by those with mental disabilities.<sup>63</sup> While the law represents progress insofar as it recognizes that this victim group has unique needs, it does little to meet the broad needs of this group.<sup>64</sup> Instead, its measures, such as “the use of a therapy animal or facility dog,” offer minimal accommodations to a group that needs seismic shifts to equally participate.<sup>65</sup> In 2017, a task force in Georgia created a comprehensive guide, *Access to Justice for People with Disabilities: A Guide for Georgia Courts*.<sup>66</sup> The guide provides guidance to courts on ways,

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59. See *infra* Part III.B.

60. See Henry et al., *supra* note 2, at 260.

61. *Id.*

62. *Id.*

63. See Fla. Stat. § 92.55(1)(b) (2022).

64. See *id.* § 92.55(4)–(5).

65. *Id.* § 92.55(5).

66. JUD. COUNCIL OF GA., *ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES: A GUIDE FOR GEORGIA COURTS* (2017) [hereinafter *ACCESS TO JUSTICE*], <https://bit.ly/3QrnsEu> [<https://perma.cc/4YD3-VX7T>].

consistent with the ADA, to help persons with disabilities of all varieties access courts.<sup>67</sup>

A few states have stock jury instructions to use when a witness with a mental disability testifies.<sup>68</sup> California, for example, has an instruction that tells jurors “not [to] discount or distrust the testimony of a person with a [mental disability] solely because he or she has such a [disability].”<sup>69</sup> Such an instruction may be useful to overcome bias that arises from jurors’ negative stereotypes about persons with mental disabilities. But this instruction and similar ones are inadequate because they fail to explain why traditional indicia of credibility—e.g., eye contact, conversational speaking without long pauses, ability to remember certain information—are not good measures to assess the credibility of persons with mental disabilities. Given the research that shows that jurors tend to equate atypical communication with unreliable information,<sup>70</sup> a jury instruction needs to do more than say “don’t be biased.” Instead, it needs to educate jurors on the ways in which witnesses with mental disabilities communicate and think differently than typical persons, lest jurors judge such witnesses by the communicative and cognitive standards appropriate for a typical witness.

The lack of measures to assist victims with mental disabilities stands in contrast to the attention focused on the participation needs of victims with physical disabilities.<sup>71</sup> It also stands in stark contrast to the attention paid to the participation needs of defendants, as opposed to victims, with mental disabilities.<sup>72</sup> While reasons

67. *Id.*

68. *See, e.g.*, CALCRIM No. 331 (JUD. COUNCIL OF CAL. 2022).

69. *Id.*

70. *See* JUSTICE ADVOCACY GUIDE, *supra* note 20, at 10 (noting that “[s]ome victims with intellectual disabilities are considered as not being credible due to having difficulty in communicating their experiences to law enforcement and others”).

71. In Iowa, for example, the court system’s ADA notice simply states: “To request or discuss your need for an accommodation for a disability, contact the Disability Access Coordinator for the judicial district where you wish to obtain the accommodation. . . . If you have a hearing impairment and need telephone relay services, call Relay Iowa TTY (1-800-735-2942).” *Disability Accommodation*, IOWA JUD. BRANCH, <https://bit.ly/3OaKVrE> [<https://perma.cc/5DBQ-88V2>] (last visited Aug. 14, 2022). The notice does not explain what disabilities are protected or how the accommodation process works. *See id.* To the extent any specific accommodations are listed, the sole example (“telephone relay services”) would suggest that the accommodations are intended for physical disabilities. *See id.*

72. *See* DEP’T. OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT 2 (2017) [hereinafter EXAMPLES AND RESOURCES]. While acknowledging that “Title II of the Americans with Disabilities Act (ADA) protects individuals with mental health disabilities and developmental disabilities (I/DD)

likely exist for this, see *infra* Part I.D., the reality is that the plight of those who are victims *and* have mental disabilities garners little attention, perpetuating their marginalization.<sup>73</sup>

In stark contrast to the United States, other countries have recognized this problem and have enacted comprehensive laws to help overcome the participation problems faced by victims with mental disabilities.<sup>74</sup> These laws attempt to overcome “the insurmountable barriers” victims with mental disabilities “face throughout their encounter with the justice system” by providing accommodations.<sup>75</sup> These laws recognize the need for extensive accommodations in order for persons with mental disabilities to participate throughout the criminal justice process.<sup>76</sup> Such laws have been enacted to varying degrees in Australia, Singapore, Israel, and the United Kingdom.<sup>77</sup> The accommodations mandated in these laws include allowing the use of Support Persons to provide emotional support and information about the victim’s impairment to the questioner.<sup>78</sup> They also allow for modifications to the setting for the testimony.<sup>79</sup>

These laws significantly adjust how attorneys must ask questions of this group of victims. Both Australia and Great Britain<sup>80</sup> permit an “intermediary” who may intervene and redirect the questioning to ensure “the interviewee understands the questions asked.”<sup>81</sup> An intermediary’s duty is to the court—specifically, “to ensure that the communication process is as complete, coherent and

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from discrimination within the criminal justice system,” this DOJ publication focuses almost entirely on the rights of defendants with mental disabilities. *Id.* To be clear, this Article does not posit that criminal defendants with mental disabilities should not be accommodated; they should. And, indeed, scholarship has begun to focus on such reform. See, e.g., Wood et al., *supra* note 9, at 316; Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 69 (2017).

73. See Shapiro, *supra* note 8.

74. See *infra* notes 333–425 (discussing these laws and the research on which they are based).

75. Neta Ziv, *Witnesses with Mental Disabilities: Accommodations and the Search for Truth—The Israeli Case*, 27 DISABILITY STUD. Q., Fall 2007, <https://bit.ly/3QsdJ0s> [<https://perma.cc/BNG6-W4V3>].

76. See *infra* notes 333–425 (discussing these laws and the research on which they are based).

77. JULINDA BEQIRAJ ET AL., INT’L BAR ASS’N, SPECIFIC BARRIERS TO ACCESS TO JUSTICE IN LEGAL PROCEEDINGS, ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES: FROM INTERNATIONAL PRINCIPLES TO PRACTICE 29–38 (2017).

78. *Id.* at 18.

79. *Id.* at 27.

80. See CRIM. JUST. SYS. OF N. IR., ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS (2012) (noting that Northern Ireland has adopted similar guidelines, although some portions differ relating to admissibility of video recordings).

81. BEQIRAJ ET AL., *supra* note 77, at 31.

accurate as possible.”<sup>82</sup> Israel’s law goes even further, and provides that interviews must be conducted by “special investigators,” who are “psychologists, social workers, clinical criminologists, or professionals with a background in special education” and “who have undergone special training to fulfill this role,” rather than a forensic or police investigator.<sup>83</sup> Special investigators follow interview protocols designed around the needs of persons with mental disabilities.<sup>84</sup>

Israel’s law, in particular, is recognized as a transformative shift in what otherwise would be deemed to be the “exclusive and core role of the judiciary” and typical court procedures.<sup>85</sup> It “challenge[s] assumptions about what is considered ‘normal’ behavior and speech, and about the meaning of such communicative measures.”<sup>86</sup> It upends the assumption that truth is best obtained “through the unmediated impression of human behavior and oral communication.”<sup>87</sup> Various “procedural and evidentiary rules and practices” are adjusted:

These experts can point to the way a witness should be addressed, what questions she may or may not be asked, how to frame the questions, what her responses mean (or do not mean), what her body language insinuates, etc. In general, these experts provide a type of interpretation to the testimony, by casting it against distinctive behavioral patterns of persons with similar disabilities.<sup>88</sup>

While none of these laws would be a perfect fit within the United States’ legal system, these laws nonetheless demonstrate the extent to which other adversarial systems have recognized and addressed this problem.

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82. *Special Measures*, CPS, (Apr. 19, 2021), <https://bit.ly/3OWBltw> [<https://perma.cc/P5EP-NDH5>] (noting that the intermediary fulfills their role by making recommendations to the court about what sorts of special measures, including accommodations, are needed). For example, in one case in which the witness’s testimony had been inconsistent in the absence of special measures, the intermediary recommended, and the court adopted, measures including a pretrial session to help the witness become familiar and comfortable with the setting and process, with breaks and modifications to questioning (e.g., 30-minute intervals, use of short questions, required use of names and not pronouns, and markers based on specific events, like a birthday, to assist the witness in answering questions about “when” something had happened). *See id.*

83. BEQIRAJ ET AL., *supra* note 77, at 31.

84. *Id.*

85. Ziv, *supra* note 75.

86. *Id.*

87. *Id.*

88. *Id.*



C. *The (Limited) Role of the Americans with Disabilities Act*

One might think that the answer to this problem in the United States lies with the ADA. After all, the ADA's purpose is to promote "equality of opportunity" and "full participation" in society by those with disabilities.<sup>89</sup> The ADA is not simply an anti-discrimination law; it creates affirmative obligations for state actors to "remov[e] impediments to full participation, even when those impediments are not the product of a discriminatory animus."<sup>90</sup>

In *Tennessee v. Lane*, the Supreme Court made clear that Title II of the ADA applies to persons with disabilities accessing "court houses and court proceedings":

Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their disabilities. A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs,

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89. Blanck et al., *supra* note 9, at 827–29 (quoting the statute at § 12101(a)(8)).

90. Martha Lee Walters & Suzanne Bradley Chanti, *When the Only Way to Equal Is to Acknowledge Difference: PGA Tour, Inc. v. Martin*, 40 BRANDEIS L.J. 727, 729–30 (2002); *see also* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 1–2 n.2, *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600 (2015) (No. 13-1412); 42 U.S.C. § 12112(b)(5)(A) (defining disability discrimination in employment to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the accommodation would impose an undue hardship); 28 C.F.R. § 35.130(b)(7) (2022) (noting that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless such modification would be a fundamental alteration); 42 U.S.C. § 12182(b)(2)(A)(ii) (defining disability discrimination in public accommodation to include "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless such modification would be a fundamental alteration").

including failure to make courtrooms accessible to witnesses with physical disabilities.<sup>91</sup>

Although *Lane* involved a person with a physical disability, the Court listed “examples of the exclusion of persons with disabilities” within the legal system, including the “failure to permit the testimony of adults with development disabilities.”<sup>92</sup>

Given this pronouncement by the Supreme Court, why has the ADA not played a pivotal role in ensuring victims with mental disabilities can reasonably participate in the criminal justice system? Multiple reasons, both practical and theoretical, answer this question. First, the ADA is only as effective as its reach, and its reach is not widely understood to apply to all parts of the criminal justice system.<sup>93</sup> Critical initial stages of a victim’s participation—reporting a crime and being interviewed—are not typically regarded as within the purview of the ADA.<sup>94</sup> As such, no notice of one’s ADA rights is provided at that stage, let alone any mechanism by which a victim could request accommodations. Given that many victims’ cases will never move past that initial stage without accommodations,<sup>95</sup> this practical gap in the ADA’s reach greatly limits its utility.

In addition, even for those aspects of the criminal justice system squarely understood to be within the ADA’s purview (such as in-court testimony), the ADA is an ineffective tool. The ADA is not self-enforcing.<sup>96</sup> Successful application of the Act requires a person who may not know their rights, and who does not have counsel, to advocate for those rights.<sup>97</sup> It is unrealistic to expect that any vic-

91. *Tennessee v. Lane*, 541 U.S. 509, 510–11 (2004) (emphasis added).

92. *Id.* at 511 (listing examples from task force findings).

93. *But see, e.g.*, EXAMPLES AND RESOURCES, *supra* note 72, at 2 (noting that “interviewing and questioning witnesses, victims, or parties” is a covered service under Title II of the ADA); *see also* Wendy Murphy, *Traumatized Children Who Participate in Legal Proceedings Are Entitled to Testimonial and Participatory Accommodations Under the Americans with Disabilities Act*, 19 ROGER WILLIAMS UNIV. L. REV. 361, 364 n.15 (2014) (noting that even so, it is the prevailing viewpoint, such that state and local justice systems not only do not provide accommodations at that juncture but they also do not provide notice of the right to accommodations at that juncture).

94. *See* Examples and Resources, *supra* note 72, at 2.

95. Bottoms et al, *supra* note 5, at 222–23.

96. Marc Charnatz & Antoinette McRae, *Access to the Courts: A Blueprint for Successful Litigation Under the Americans with Disabilities Act and the Rehabilitation Act*, 3 MD. L.J. RACE, RELIGION, GENDER & CLASS 333, 343–44 (2003) (describing ways in which litigants are forced to bear the costs of remedying violations of their ADA rights).

97. ACCESS TO JUSTICE, *supra* note 66, at 29 (noting that it is well-understood that “many people with cognitive impairments may not be able to request accommodations effectively on their own and may need assistance in constructing appropriate accommodation requests”). *See also In re McDonough*, 930 N.E.2d 1279

tim, let alone one with cognitive and communication impairments, would be well-positioned (1) to recognize the need for accommodations; (2) to recognize that they had a right to accommodations for mental disabilities, as opposed to physical ones;<sup>98</sup> (3) to request and advocate for specific accommodations; and (4) to do all of this at the earliest stage of a case when it is critical.<sup>99</sup> The case law reflects the ADA's sparse use in this area: The ADA appears to have only been rarely invoked by victims with mental disabilities and, even then, only at the testimonial stage.<sup>100</sup>

Moreover, even if individual victims were positioned to request accommodations from their initial interaction, the process of obtaining ADA accommodations would nonetheless be inefficient as a tool to address what is a systemic problem. The ADA process is an individualized inquiry, in which a person who needs accommodations is required to initiate a request for individual accommodations and advocate for such individual accommodations.<sup>101</sup> However, this case-by-case approach makes little sense when an entire group of victims shares mental impairments that call for the same set of accommodations.<sup>102</sup> Moreover, to the extent the requested accommodations would affect the legal proceedings themselves, the court, not an ADA coordinator, must decide the issue. The court's involvement would create further inefficiencies, such as the need for a hearing and even the solicitation of expert testimony.<sup>103</sup> Even

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(Mass. 2010) (noting that even at the testimonial stage, and even with the benefit of their own counsel, victims face an uphill battle obtaining ADA accommodations).

98. See, e.g., *In re McDonough*, 930 N.E.2d 1279 (discussing access to justice in terms of physical impairments). Further, there is nothing wrong with focusing on physical impairments—unequal access for that group of victims is indeed challenged. This is not simply a blind spot that victims possess. The prevailing viewpoint when discussing access to courts in the United States is overwhelmingly focused on physical impairments and does not address mental impairments. The problem is that there is no concurrent discussion acknowledging the unequal access faced by victims with mental impairments.

99. See ACCESS TO JUSTICE, *supra* note 66, at 29.

100. See *In re McDonough*, 930 N.E.2d at 1283.

101. See *id.* (exemplifying at the testimonial stage, and even with the benefit of their own counsel, that victims face an uphill battle obtaining ADA accommodations); see also ACCESS TO JUSTICE, *supra* note 66.

102. GRAY ET AL., *supra* note 3, at 1.

103. See *ADA Request for Accommodations*, ELEVENTH JUD. CIR. FLA., <https://bit.ly/3C5Z8U8> [<https://perma.cc/MAN7-C2FF>] (last visited Aug. 15, 2022) (explaining that “the courts cannot administratively grant, as an ADA accommodation, requests that impact court procedures within a specific case” and explaining the steps that litigants must take). Even in jurisdictions that are more advanced in providing adequate ADA notices, it quickly becomes clear from such notices that the process of obtaining the types of accommodations needed by those with mental disabilities is complex and uncertain.

then, individual victims would be saddled with proving that the requested accommodations are not unduly burdensome and/or would not fundamentally alter the nature of the service.<sup>104</sup> Such an individualized process is inefficient and unnecessary.

Finally, even if all the above constraints of the ADA could somehow be eliminated, a fundamental problem would nonetheless exist. Namely, victims with mental disabilities, who need accommodations to participate meaningfully, would somehow have to be able to, without such accommodations, participate to obtain accommodations. This chicken-and-egg problem—a person needs accommodations to obtain accommodations but cannot obtain accommodations without such accommodations in the first place—illustrates why the ADA ultimately cannot address this systemic problem.

#### D. *Why Isn't More Being Done?*

Given this problem's persistence and magnitude, it is fair to ask why reform has not yet occurred.<sup>105</sup> After all, if a large group of victims who desperately need the protections of the criminal justice system are routinely not receiving those protections, that should raise red flags. This Section explains reasons why this problem has not garnered the attention it deserves. It starts by examining a foundational problem, which is that the criminal justice system has not identified and perceived victims with mental disabilities as their own victim group. In addition, reform is stymied by the fact that this group of victims is relatively powerless to collectively bring this issue to others' awareness. Assumptions at both ends of the spectrum about these victims' capabilities and needs also hinders reform.<sup>106</sup> Whether viewed as equally capable or wholly incapable, these extreme views fail to account for a middle ground in which victims are capable but only if the legal system adapts to their needs. Finally, reform is thwarted by exaggerated and ill-defined

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104. ACCESS TO JUSTICE, *supra* note 66; Murphy, *supra* note 93, at 64 n.15 (noting Confrontation Clause challenges raised by defendants when ADA accommodations are sought by a victim).

105. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 2 (noting that the leader of an organization dedicated to persons with developmental disabilities bluntly summed up the status quo as follows):

How many numbers does research[ ] . . . have to give us before we recognize—really *recognize* that the persons we care about are more often beaten, molested, manipulated, raped, wrongly convicted, ridiculed, laughed at, set up for failure, denied equal justice, and shoved to the fringes of the in-groups than the rest of us?

*Id.*

106. Deal & Kristiansson, *supra* note 12, at 2.

concerns about how reform would be impossible, mostly because it would interfere with the rights of criminal defendants.

First, victims with mental disabilities are not “recognized and identified as [their own] victim group within the criminal justice system.”<sup>107</sup> Rather, individual victims’ challenges to participate are viewed as individual problems, rather than one part of a systemic problem.<sup>108</sup> This is unfortunate because while mental disabilities are varied, core needs and impairments exist across the spectrum of such mental disabilities.<sup>109</sup> Indeed, these shared needs are recognized by policy makers outside of the criminal justice system, when victims with mental disabilities are recognized as a group for purposes of education and social service policies.<sup>110</sup> The criminal justice system’s failure to recognize victims with mental disabilities as a unique group has impeded reform by allowing this problem to be viewed not as one that is systemic and pervasive but rather as a series of one-off problems.<sup>111</sup>

Second, the relative powerlessness of this group has allowed this problem to remain hidden and unrecognized. The public is largely unaware of this problem.<sup>112</sup> Victims with mental disabilities tend to be more socially isolated than other groups.<sup>113</sup> And, on its own, this group lacks the kinds of self-advocacy skills that other groups possess. These factors converge to render this group ill-equipped to itself bring this issue to the public’s forefront. While

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107. BEQIRAJ ET AL., *supra* note 77, at 32.

108. *Id.*

109. See GRAY ET AL., *supra* note 3, at 1 (“[T]he similar symptoms that arise from these [mental] disabilities appeared to contribute to the types of legal problems people with cognitive impairment experienced and the barriers they faced in accessing legal help and participating in legal processes.”).

110. See, e.g., Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001–15115 (exemplifying a law grounded in the special needs of persons with developmental disabilities). The Act recognizes the unique needs that individuals with developmental disabilities face in gaining access to “community services, individualized supports, and other forms of assistance.” 42 U.S.C. § 15001(a)(7). However, it does not address such needs in the context of the criminal justice system. The Act organized and funded state councils focused on education, research, and services for persons with developmental disabilities. However, neither the Act nor any of the current initiatives under it focuses on either crime victims or the legal system. See generally *id.*

111. *Special Measures*, *supra* note 82 (explaining that “[t]he CPS [Crown Prosecution Service] understands the social model of disability to mean that the prejudice, discrimination and social exclusion experienced by many disabled people is not the inevitable result of their impairments or medical conditions, but rather stems from specific barriers they experience on a daily basis”).

112. See Shapiro, *supra* note 8 (“These crimes go mostly unrecognized, unprosecuted and unpunished. And the abuser is free to abuse again.”).

113. Billy C. Fogden et al., *Crime and Victimization in People with Intellectual Disability: A Case Linkage Study*, 16 BMC PSYCHIATRY 1, 1 (2016).

many have noted the relative powerlessness of victims in the criminal justice system in general, the powerlessness is exacerbated for those with mental disabilities.<sup>114</sup>

Third, this problem persists because of assumptions, perhaps well-intentioned, about the relative needs and abilities of persons with mental disabilities. Specifically, victims with mental disabilities are assumed to be capable of equal participation if they are not subject to discrimination.<sup>115</sup> Thus, it is presumed that the goal is to remove discriminatory animus and to treat such victims the same as everyone else.<sup>116</sup> It is not hard to see from where such a mindset arises; this anti-discrimination mindset permeates much of equality law.<sup>117</sup> However, as the ADA and other laws that facilitate equal access by persons with disabilities such as the Individuals with Disabilities Education Act (IDEA) make clear, setting aside biases is not enough.<sup>118</sup> Rather, accommodations to facilitate access are necessary to achieve equal footing.<sup>119</sup> Ignoring differences in the name of “equal treatment” does not make those differences go away but instead operates to uphold a status quo that is not working for this group of victims.<sup>120</sup>

While the assumption that victims with mental disabilities are hindered by biases rather than actual barriers is damaging, so too is the opposite assumption: that such victims are simply not capable of meaningful participation. Under this view, victims’ mental impairments are acknowledged and then quickly deemed as a reason they cannot reliably participate.<sup>121</sup> Until recently, this was the pervasive view of the legal system, and it resulted in victims with mental disabilities being excluded from providing testimony on grounds of incompetency.<sup>122</sup> Even today, this view operates to limit meaningful participation because it tacitly assumes the problem lies with the

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114. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11.

115. *Commonwealth v. Despres*, 875 N.E.2d 864, 869 (Mass. App. Ct. 2007) (exemplifying a court espousing this “equal treatment” approach, with the solution of eliminating bias rather than accommodating mental disabilities).

It is well recognized that some people with mental disabilities may be especially vulnerable to physical and sexual abuse by virtue of their reliance upon others to meet their daily needs. Their reports of abuse should not be discounted merely because they have a mental disability unconnected to their capacity to perceive, remember, and articulate events.

*Id.*

116. *See, e.g., id.*

117. Walters & Chanti, *supra* note 90, at 727.

118. *See* 20 U.S.C. §§ 1400–1482.

119. Walters & Chanti, *supra* note 90, at 727.

120. *Id.*

121. Kebbell & Hatton, *supra* note 5, at 179.

122. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11.

victims' impairment.<sup>123</sup> In doing so, it fails to consider the criminal justice system's role in the problem and thus its role in the solution. Indeed, as described in Part III.C., when appropriate accommodations are in place, victims with mental disabilities can meaningfully and reliably participate.<sup>124</sup>

Finally, to the extent the problem is recognized in its full force and effect, it is deemed to be a problem without a solution. Potential reform is viewed as untenable, in part because of an exaggerated belief that any solution would unduly infringe on the rights of criminal defendants.<sup>125</sup> As a general matter, the criminal justice system emphasizes the rights of defendants over those of victims.<sup>126</sup> Thus, "the needs and concerns of victims [are] subordinate[d] to those of the offenders."<sup>127</sup> So great is this imbalance that as far back as 1982, a presidential task force concluded there "was a serious imbalance between the rights of criminal defendants and the rights of crime victims" and recommended a constitutional amendment that has never been passed.<sup>128</sup> Whatever imbalance of rights existed then and now, it is exacerbated for those victims with mental disabilities.

Further, considerations of the impact of victims' rights on defendants' rights often conflates those defendants' rights that are grounded in the Constitution versus those rights that are statutory or even customary.<sup>129</sup> Not all of those rights can or should receive equal deference. For the latter, no reason exists to categorically strike the policy balance in favor of defendants' rights over victims' rights, particularly when doing so results in the injustice of certain victims being effectively precluded from meaningful participation.<sup>130</sup> The criminal justice system has relegated victims' rights as subordinate to defendants' rights to the extent legislatures, courts, and lawyers assume that victims' rights are less important than the rights of defendants.<sup>131</sup> In any event, summarily dismissing the accommodation needs of victims with mental disabilities without as-

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123. *Id.*

124. Deal & Kristiansson, *supra* note 12, at 3–4; *see also* Deidre D. Brown et al., *Narrative Skill and Testimony Accuracy in Typically Developing Children and Those with Intellectual Disabilities*, 32 *APPLIED COGNITIVE PSYCH.* 550, 550 (2018).

125. Gegan & Rodriguez, *supra* note 5, at 225–27.

126. *Id.*

127. *Id.* at 225–26.

128. DEAN G. KILPATRICK ET AL., U.S. DEP'T. OF JUST., *THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE?* 1 (1998), <https://bit.ly/3dvPYpE> [<https://perma.cc/93SA-E8WF>].

129. Gegan & Rodriguez, *supra* note 5, at 225–27.

130. *Id.*

131. *Id.*

serting what specific right of defendants would be infringed upon by a given accommodation is not only unfair to these victims but also poor public policy.<sup>132</sup>

Whether through defendants' rights or victims' rights, the criminal justice system's goal is fairness and justice.<sup>133</sup> Those goals can hardly be achieved if a large group of victims is not afforded the accommodations its members need to meaningfully participate. Viewing the matter from that perspective, perhaps far more attention should be directed to the consequences of not addressing this problem, rather than presuming addressing this problem would create unfairness.<sup>134</sup>

## II. BARRIERS TO PARTICIPATION BASED ON VICTIMS' MENTAL DISABILITIES

To address this problem requires that it be broken down. While the overall problem of a lack of meaningful participation is clear, the specific reasons that underlie the problem are less so. Identifying those specific reasons not only helps explain the problem, but it also sheds light on workable solutions. This Part analyzes those specific reasons, namely the widespread barriers to participation that exist for victims with mental disabilities.<sup>135</sup> These barriers illustrate the ways in which the criminal justice system, designed around the needs and capabilities of typically functioning victims, fails to meet the needs of those victims who have mental impairments.<sup>136</sup>

This Part first discusses the common characteristics and needs of victims with mental disabilities. Having laid this groundwork, it then examines the specific barriers to participation that arise when these characteristics and needs go unaddressed.

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132. KY. REV. STAT. ANN. § 26A.140 (West 2022) (expressing that while many child victim laws treat defendants' rights as generally unassailable, Kentucky's child victim law expressly requires courts to balance "the special needs of children" in a way that is "not unduly burdensome to the rights of . . . defendant[s]").

133. See James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, J. LEGAL ANALYSIS 119 (2009).

134. See Phoebe Bowden et al., *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37 MELBOURNE UNIV. L. REV. 539 (2014) (discussing the need to balance these rights in the context of cross-examination within an adversarial system).

135. Gisli H. Gudjonsson & Theresa Joyce, *Interviewing Adults with Intellectual Disabilities*, 5 ADVANCES MENTAL HEALTH & INTELL. DISABILITIES 16, 16 (2011).

136. Gegan & Rodriguez, *supra* note 5, at 225.



### A. *The Nature of Mental Disabilities*

To better understand the challenges that victims with mental disabilities face, it is helpful to understand who this group is, as well as its common characteristics. It also is helpful to understand who this group is not, in terms of common misconceptions.

#### 1. *Cognitive and Communicative Impairments in Persons with Mental Disabilities*

Victims with mental disabilities are defined as “the category of people whose intellectual, development, and psychiatric disabilities . . . result in cognitive impairment affecting comprehension, communication, or learning.”<sup>137</sup> This group consists primarily of those with developmental disabilities, which are present at birth and, to a lesser extent, of those with later-acquired disabilities, which are the result of injury or illness.<sup>138</sup> Prevalent development disabilities include intellectual disabilities (formerly called “mental retardation”),<sup>139</sup> autism, and Down syndrome. Prevalent later-acquired mental disabilities include traumatic brain injury, dementia, and schizophrenia.<sup>140</sup>

Although mental disabilities come in many forms, baseline characteristics exist for all members of this group based upon impairments in their cognition and communication.<sup>141</sup> Understanding these baseline impairments is critical to understanding the challenges these persons face in their role as victims in the criminal justice system.

A defining characteristic of mental disability is that the person is cognitively impaired.<sup>142</sup> Cognitive impairments negatively “af-

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137. Benedet & Grant, *supra* note 4, at 3 n.4.

138. *See id.* (noting, as well, that the term “mental disabilities” is “not used by any of these groups as a descriptor” but instead as a “collective reference”); *see also* Harrell, *supra* note 7, at 1.

139. DULCAN’S TEXTBOOK OF CHILD AND ADOLESCENT PSYCHIATRY 105 (Mina K. Dulcan ed., 2d ed. 2016) [hereinafter DULCAN] (noting that in 2010, Rosa’s Law was enacted, which changed all reference in federal law from “mental retardation” to “intellectual disability”); *see* Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (codified as amended in scattered sections of 20 U.S.C. and 42 U.S.C.). That law “reflect[ed] a change in terminology that had already taken place in research, medical, and educational professions as well as advocacy groups,” beginning in 2007. DULCAN, *supra*.

140. *See* Benedet & Grant, *supra* note 4, at 3.

141. Gudjonsson & Joyce, *supra* note 134, at 17 (noting, as an example, studies that indicate that the vulnerabilities arising out of a person’s intellectual disability “overlap to a certain extent with those of people with autism spectrum conditions and attention deficit hyperactivity disorder”).

142. Fogden, *supra* note 113, at 1.

fect[ ] comprehension, communication, or learning.”<sup>143</sup> Those with mental disabilities, most notably those with intellectual disabilities, have reduced cognitive abilities relative to their chronological age, resulting in a “mental age” that is below their chronological age. Such cognitive impairments impact how they “register (encode) events, store, recall (retrieve) and describe” events.<sup>144</sup> Put bluntly, these “deficits” “mean they are poorer at encoding, storing, and retrieving memories and are particularly likely to be adversely influenced by inappropriate questioning styles that are frequently used in court.”<sup>145</sup>

They “may have trouble learning new things, making generalizations from one situation to another, inferring information from social cues and body language, and/or expressing themselves through spoken or written language.”<sup>146</sup> Time, in particular, is a challenging concept for many with mental disabilities.<sup>147</sup> So, too, are repeated questions: A person with cognitive impairments may be conditioned to view their first answer as “wrong” if the question is re-asked and thus change their answer.<sup>148</sup> It is surmised that this group is less able to reliably answer leading questions for reasons relating to “memory capacity, the ability to cope with uncertainty, and the pressure associated” with being questioned.<sup>149</sup>

Even so, evidence shows that the memory capabilities relating to personal experience for people with intellectual disabilities are in many ways comparable to those of typical persons.<sup>150</sup> While accessing and communicating information may be constrained, the core underlying information typically is stored, albeit sometimes not for as long of a period and not with the same memory markers.<sup>151</sup> Thus, when questioned about events from the past, these individuals

143. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 591–645 (5th ed. 2013) [hereinafter DSM-5].

144. Ziv, *supra* note 75.

145. Georgina Stobbs & Mark Rhys Kebbell, *Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence*, 16 J. APPLIED RSCH. IN INTELL. DISABILITIES 107, 107 (2003).

146. ACCESS TO JUSTICE, *supra* note 66, at 29.

147. Deal & Kristiansson, *supra* note 12, at 2; Brown et al., *supra* note 124, at 2.

148. Deal & Kristiansson, *supra* note 12, at 2.

149. *Id.*; Kelly Anne Barnes et al., *Two Forms of Implicit Learning in Childhood ADHD*, 35 DEVELOPMENTAL NEUROPSYCHOLOGY 494, 494 (2010) (describing challenges with storing and retrieving information sequentially).

150. Valenti-Hein & Schwartz, *supra* note 11, at 291 (noting that “[e]mpirical evidence suggests that long-term memory capacity is not associated with intelligence level, and several studies have found that people with mental retardation forget at a rate that is very similar to nonretarded persons”).

151. *Id.*

likely cannot provide as complete an account as an individual without cognitive limitations.<sup>152</sup>

In addition, and separate from their cognitive deficits, victims with mental disabilities are impaired in their communication.<sup>153</sup> Such communication deficits exist “over and above what we might expect based on [a person’s] mental age,”<sup>154</sup> and “cannot be explained by low cognitive ability.”<sup>155</sup> Communication impairments exist both in terms of expressive language difficulties and receptive language difficulties.<sup>156</sup> On the expressive side, impairments manifest themselves in various ways. The following list was created to give guidance to professionals on how such impairments manifest themselves:

- Not responding to people in a way that is understandable
- Interrupting others during conversation
- [Not using] gestures such as waving and pointing
- Difficulty expressing feelings and emotions
- Changing the topic or losing track of what is being discussed
- Difficulty using words as needed to make conversation
- Trouble making friends and maintaining friendships
- Delays in speech or language development which can even include disinterest in talking<sup>157</sup>

On the receptive side, such persons often struggle to comprehend what is being asked of them, a problem that is exacerbated by the complexity and style of questioning.<sup>158</sup> When questions are asked in a leading way, this group has a “tendency for *suggestibility*: providing the answer believed to be required by the questioner” and a “tendency to *acquiesce*: saying yes to yes/no questions.”<sup>159</sup>

And, while cognitive and communication impairments often exist in tandem, that is not necessarily the case. A recent diagnosis, social (pragmatic) communication disorder (SCD), illustrates the

152. *State v. Milbradt*, 756 P.2d 620, 623 (Or. 1988) (“[The victims with mental disabilities] were unable to relate any specific time of the alleged assaults, although they did remember certain places and other activities going on at the time. In fact, they could not tie down any time period within a year of any particular event.”).

153. Fogden, *supra* note 113, at 1.

154. Henry et al., *supra* note 2, at 256.

155. *Social (Pragmatic) Communication Disorder*, AM. PSYCHIATRIC ASS’N (2013), <https://bit.ly/3dkGgXa> [<https://perma.cc/ZLV9-RT8R>].

156. Avivit Ben-Aharon, *Social Pragmatic Disorder vs. Autism: What’s the Difference?*, GREAT SPEECH (Feb. 19, 2021), <https://bit.ly/3bGmJQ9> [<https://perma.cc/3LVY-F6KF>].

157. *Id.*

158. *See* DSM-5, *supra* note 143.

159. Ziv, *supra* note 75.

distinction between cognitive versus communication impairments.<sup>160</sup> SCD is characterized by a persistent difficulty with verbal and nonverbal communication unrelated to cognitive ability.<sup>161</sup> A person with SCD will have “difficulty in the acquisition and use of spoken” communication (finding and using words to express thoughts), “as well as problems with inappropriate responses in conversation.”<sup>162</sup>

A person’s particular communication impairment will vary based on her mental disability. For example, persons with intellectual disabilities “often cannot speak or their speech is not well-developed. They are generally taught from childhood up to be compliant, to obey, to go along with people.”<sup>163</sup> Similarly, persons with Down syndrome often have “difficulties with articulating ideas, comprehending questions, and producing easily understandable speech.”<sup>164</sup> People with autism spectrum disorder (ASD) “tend to have communication deficits, such as responding inappropriately in conversations” and “misreading nonverbal interactions.”<sup>165</sup> They tend to process information literally, void of the practical context that typically functioning individuals read into the literal language.<sup>166</sup> Finally, persons with schizophrenia tend to have “disorganized speech.”<sup>167</sup>

Because of these communication deficits, these persons process, retrieve, and present information “in a way that people without disabilities are not used to.”<sup>168</sup> The end result is that such persons are perceived as less credible. As one commentator summarized, “Because of the intellectual disability, people tend not to believe them, to think that they are not credible or that what they [are] saying, they are making up or imagining.”<sup>169</sup>

## 2. *Misconceptions about Persons with Mental Disabilities*

Two misconceptions exist about persons with mental disabilities. The first is that this group is the functional equivalent of chil-

160. See Ben-Aharon, *supra* note 156.

161. See *id.*

162. AM. PSYCHIATRIC ASS’N, *supra* note 155.

163. Shapiro, *supra* note 8.

164. Henry et al., *supra* note 2, at 256.

165. *Autism Spectrum Disorder*, AM. PSYCHIATRIC ASS’N (2013), <https://bit.ly/3xdDqdA> [<https://perma.cc/F2N6-SGV6>].

166. See Christina R. Carnahan et al., *Linking Cognition and Literacy in Students with Autism Spectrum Disorder*, 43 *TEACHING EXCEPTIONAL CHILD.* 54, 54 (2011).

167. DSM-5, *supra* note 143, at 88.

168. BEQIRAJ ET AL., *supra* note 77, at 30.

169. Shapiro, *supra* note 8.

dren, and whatever accommodations work for children are sufficient for this group.<sup>170</sup> Social science research shows that people with mental disabilities differ “qualitatively” from their non-disabled peers who possess the same developmental age.<sup>171</sup> Thus, an adult who has an intellectual disability and developmental age of eight will share some characteristics and level of impairment with a child with a developmental age of eight, but that overlap will not be absolute.<sup>172</sup> This variation between one’s developmental age and level of functioning is more pronounced for persons with “more severe levels of cognitive impairment.”<sup>173</sup> In addition, because of their impairments, persons with mental disabilities will have additional needs from developmentally matched children, including the need for less stimulation, fewer interruptions, additional relationship building, more signposts especially in reference to time, and more precision in the style and content of questions.<sup>174</sup>

The other misconception is that persons with mental disabilities are a wholly monolithic group. That this group shares common characteristics that form this group’s identity does not mean that each victim’s needs are identical.<sup>175</sup> Indeed, a major shift in thinking about disabilities brought about by the ADA was the recognition of “the wide variation in the abilities and needs” of people with disabilities.<sup>176</sup> Such “variation in the abilities and needs” exists within the various subgroups of victims with mental disabilities.<sup>177</sup> Thus, while it is important to recognize the shared needs of this group to rectify a systemic problem,<sup>178</sup> it is also important to recog-

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170. See Valenti-Hein & Schwartz, *supra* note 11, at 291.

171. Deidre A. Brown et al., *Preserving the Past: An Early Interview Improves Delayed Event Memory in Children with Intellectual Disabilities*, 86 *CHILD DEV.* 1031, 1031–32 (2015).

172. See, e.g., *State v. Jones*, No. W2013-00335-CCA-R3-CD, 2014 WL 3002808, at \*3 (Tenn. Crim. App. Jan. 29, 2014) (noting in expert testimony that “in modern psychology, experts use statistical scores like IQ and adaptive level scores rather than equate a person to a specific developmental age”).

173. Brown et al., *supra* note 171, at 1032.

174. See Scott J. Modell & Marcie Davis, *A Law Enforcement Guide for Working with Children with Autism, Intellectual and Communication Disabilities*, N.M. COAL. SEXUAL ASSAULT PROGRAMS, INC. 8 (2010), <https://bit.ly/3AnREdO> [<https://perma.cc/8PH7-73CL>].

175. See Benedet & Grant, *supra* note 4, at 3 (“While recognizing that this is not a homogenous group of women, we can say that women with mental disabilities may require various kinds of assistance to have full access to police services and services offered to victims of sexual assault.”).

176. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

177. *Id.*; see Benedet & Grant, *supra* note 4, at 3.

178. See GRAY ET AL., *supra* note 3, at 1.

nize that persons in this group may have additional needs that require individualized attention.<sup>179</sup>

### B. *An Examination of the Specific Barriers to Participation*

Given the characteristics inherent to their disabilities, it is not surprising that persons with mental disabilities are “at a disadvantage when coming into contact with the criminal justice system.”<sup>180</sup> These “disadvantage[s] relate[ ] to all components of the criminal justice system”<sup>181</sup> and arise from “a confluence of factors: factors relating to the individual and their circumstances, the interactions between individuals and legal systems, and the nature of the law and legal system itself.”<sup>182</sup> Moreover, these “overarching barriers often manifest themselves in very specific—but very common—ways.”<sup>183</sup>

Not surprisingly, a typical point at which barriers arise is the trial stage, in which the legal system expects a victim with mental disabilities to, without accommodation, participate in both direct and cross examination.<sup>184</sup> While the challenges of testifying without accommodation are a significant barrier, arguably more significant barriers exist long before a case has a chance to go to trial. Because of the barriers at the most “crucial” initial stages, most cases involving victims with mental disabilities never make it to trial.<sup>185</sup> Below, the specific barriers that strain the meaningful participation of this group of victims are explored.

#### 1. *Barriers from Lack of Screening and Early Identification*

When a person with a mental disability reports wrongdoing, such reporting is often ineffective.<sup>186</sup> Standard intake protocols do not include screening for disabilities, which is particularly problematic given the number of hidden mental disabilities, such as autism and intellectual disabilities.<sup>187</sup> Commentators have noted the “lack

179. See Benedet & Grant, *supra* note 4, at 3.

180. Gudjonsson & Joyce, *supra* note 135, at 16.

181. *Id.*

182. GRAY ET AL., *supra* note 3, at 5.

183. BEQIRAJ ET AL., *supra* note 77, at 29.

184. Deal & Kristiansson, *supra* note 12, at 4–7. See also Rogal, *supra* note 72, at 88 (detailing the difficulties those with intellectual disabilities may face when questioned by authorities).

185. See BEQIRAJ ET AL., *supra* note 77, at 29 (“The pre-trial stage is a crucial moment in the criminal procedure that often strongly influences and may even determine the outcome of the entire judicial proceedings.”).

186. See JUSTICE ADVOCACY GUIDE, *supra* note 20, at 10.

187. See BEQIRAJ ET AL., *supra* note 77, at 29 (noting this lack of recognition “is even more the case for other so-called ‘hidden disabilities’ or ‘invisible ill-

of specific training on the part of the professionals who are responsible for providing first response services to them.”<sup>188</sup> Without such training, first responders on their own “have trouble identifying an intellectual disability.”<sup>189</sup> Thus, at the time wrongdoing is reported, “the reporting agency often fails to note that the victim had a disability, especially if the crime is reported by someone other than the victim.”<sup>190</sup>

Without identification of a victim’s mental disabilities, first responders are ill-equipped to make necessary adjustments to their protocols and expectations.<sup>191</sup> They may deem the report to be incomplete, incoherent, or untrustworthy.<sup>192</sup> And, without a “credible” report, the case is never pursued.<sup>193</sup> The criminal investigation ends before it begins.

Thus, screening can play a key role: It is well-documented that “the outcome of the proceedings may change substantially depending on whether the individuals concerned are adequately screened and these disabilities recognised in time.”<sup>194</sup> Moreover, screening is easily conducted; the interviewer must simply ask direct and indirect questions (e.g., whether the victim has any diagnoses; whether they have ever had an Individualized Education Plan; whether they receive Social Security Disability Insurance; and whether they live in a group home or other supervised living setting).<sup>195</sup> This measure alone leads to better outcomes.<sup>196</sup>

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nesses[.]’ such as autism, Asperger syndrome[.] or psychological disorders, including Post-Traumatic Stress Disorder”).

188. BALADERIAN, *supra* note 11, at v.

189. Beckene et al., *supra* note 27, at 67; *see* GRAY ET AL., *supra* note 3, at 6.

190. Tyiska, *supra* note 30.

191. *See* BEQIRAJ ET AL., *supra* note 77, at 30 (noting that victims with mental disabilities think, communicate, and act “in a way that people without disabilities are not used to”).

192. *See id.*

193. *See id.*

194. *Id.* at 29–30.

195. An Arc guide lists ways that first responders can be alerted to the fact that a victim may have a mental disability, including whether the victim:

*Refers to a caseworker/staff/friend at a center or group home;*

*Receives SSI;*

*Has an ID that provides a phone number to call;*

*Appears too open to being led by others or too eager to agree or please the questioning officer;*

*Has difficulty communicating events in his or her own words (without parroting or mimicking responses);*

*Seems overly awed or intimidated by the police uniform, badge, gun, etc.;*

*Seems to agree to everything asked of him or her.*

JUSTICE ADVOCACY GUIDE, *supra* note 20, at 14–15.

196. *See id.*

## 2. *Limitations Among Prosecutors*

However, screening alone is not sufficient. Even when mental disabilities are recognized, that does not equate with better outcomes unless changes are made considering victims' cognitive and communication impairments.<sup>197</sup> Communication challenges reach in both directions.<sup>198</sup> Because of their impairments, victims have "difficulties in telling their stories" and understanding what is being asked of and told to them.<sup>199</sup> At the same time, those difficulties are confounded and communication further strained when those asking the questions lack understanding of "the person's level of communication and comprehension."<sup>200</sup>

As gatekeepers to the criminal justice system, prosecutors play a key role, such that a prosecutor's assessment of a victim is often outcome-determinative.<sup>201</sup> "When there is an arrest, prosecutors become a key ingredient in the victim rights system and in the victim's life."<sup>202</sup> However, challenges arise, which can quickly derail the prosecution of the crime.<sup>203</sup> First, "[p]rosecutors are rarely trained in disability issues and, therefore, frequently lack the ability to communicate with the victim effectively."<sup>204</sup> As such, they are unlikely to obtain meaningful and necessary information from victims. Thus, prosecutors "may incorrectly assume that a victim with impaired cognition is legally incompetent to testify," or simply not credible.<sup>205</sup> Either way, they will be reluctant to bring charges.

Even when a prosecutor believes a victim is competent to testify, they nonetheless are often reluctant to bring charges in cases involving victims with mental disabilities for other reasons. These cases tend to be more complex and resource-intensive to prosecute, and obtaining reliable information from the victim takes additional time and skill, as does effectively conveying such information to a jury.<sup>206</sup> Given the crucial role that a victim's testimony plays in abuse cases, the prosecutor may decide that there is simply too much to overcome, especially when considering the tendency of ju-

197. See GRAY ET AL., *supra* note 3, at 7.

198. See JUSTICE ADVOCACY GUIDE, *supra* note 20, at 10.

199. GRAY ET AL., *supra* note 3, at 6.

200. *Id.*

201. See JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11.

202. *Id.*

203. See Deal & Kristiansson, *supra* note 12, at 1.

204. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11.

205. Deal & Kristiansson, *supra* note 12, at 2; see Lyon & Dente, *supra* note 6, at 1219 ("Prosecutors are less likely to file charges when the child is young, exhibits reluctance or inconsistency in reporting, and the family is unsupportive.").

206. See Murphy, *supra* note 93, at 363.



rors to view such victims' testimonies as not credible.<sup>207</sup> Relatedly, the unlikelihood of a plea bargain given the evidentiary issues may discourage prosecutors.

Even when prosecutors decide to pursue charges, doing so requires that they continue to "overcome a number of challenges."<sup>208</sup> As noted above, perhaps the biggest challenge is eliciting admissible and credible testimony from a victim with communication and cognitive impairments.<sup>209</sup> The prosecutor "must understand the diagnostics involved" and be knowledgeable about "specific strategies to assist the victim in providing accurate and credible testimony."<sup>210</sup>

When prosecutors fail to grasp the impact of a victim's mental disabilities, "they are unable to prosecute the case in a way that would deliver justice."<sup>211</sup> In addition, such prosecutors are unlikely to be effective at requesting and defending the need for accommodations.<sup>212</sup>

### 3. *Barriers in Testifying*

Victims with mental disabilities face a variety of barriers when testifying, ranging from barriers arising from the setting and context for testimony to barriers from the type of questioning, which "impede accurate communication."<sup>213</sup> First, the setting and context of testimony is highly significant for victims with mental disabilities.<sup>214</sup> Of course, testifying is stressful for any victim, but for those with mental disabilities, "the experience can range from bewildering to terrifying."<sup>215</sup> In addition, such victims lack "equal access to preparation information because it is not given in a way they can understand it."<sup>216</sup> Persons with mental disabilities also need more time to process new situations and have a higher need for familiarity, such that preparing to testify requires a high degree of information, exposure, and practice.<sup>217</sup> Yet, notwithstanding these challenges for this population, heightened preparation is not the norm.

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207. See *id.* at 378 (noting that "primary responsibility should not rest exclusively with the prosecutor given that the state's interests and those of a child victim may not always align").

208. Deal & Kristiansson, *supra* note 12, at 1.

209. See *id.*

210. *Id.*

211. Beckene et al., *supra* note 27, at 76.

212. See *id.*

213. Rogal, *supra* note 72, at 70.

214. See JUSTICE ADVOCACY GUIDE, *supra* note 20, at 10–12.

215. GRAY ET AL., *supra* note 3, at 8.

216. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 12.

217. See *id.* at 10–12.

Further, the presence of the defendant may inhibit the victim from being able to communicate to give testimony.<sup>218</sup> While this is true for victims of all types, the impact on victims with mental disabilities generally is more profound. Victims may be “overwhelmed” to the point that they cannot testify.<sup>219</sup>

Second, the type of questioning, along with related expectations about how the victim should be able to respond, erect barriers for victims with mental disabilities. It is well-known among experts that because of their mental disabilities, these victims’ answers likely will be “less complete” and more disjointed.<sup>220</sup> Certain details of victims’ statements also may be confused, particularly as they relate to spatial and temporal components.<sup>221</sup> These deficiencies, while not ideal, do not equate with an overall lack of reliability.<sup>222</sup> Indeed, although memory for peripheral details is less complete, this group of witnesses demonstrates overall good recall for the central details of an event.<sup>223</sup> Even so, jurors perceive such victims as far less credible if not incapable of providing competent testimony.<sup>224</sup> These perceptions are “likely to be exacerbated in cross-examination,” in which victims’ memory and ability to provide detail are challenged.<sup>225</sup>

Cross examination presents other challenges. Because victims with intellectual disabilities “generally have more difficulties following court proceedings,” they “are more likely to acquiesce, to be compliant and suggestible.”<sup>226</sup> This is particularly problematic because typical cross-examination techniques “enhance suggestibility” for persons with mental disabilities.<sup>227</sup> All of this “make[s] it easy for lawyers to make them appear unreliable in cross-examina-

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218. *See id.* at 12.

219. *See, e.g.,* *People v. Rajner*, No. 4-18-0505, 2021 Ill. App. LEXIS 76, at \*15 (Mar. 3, 2021) (noting the fact that K.R., the victim, “was able to discuss the sexual abuse via closed-circuit television and with the forensic interviewer does not subtract from the opinion that requiring K.R. to testify in front of defendant inside the courtroom would cause her to become so overwhelmed that she would not be able to communicate”).

220. Stobbs & Keibell, *supra* note 145, at 108.

221. *See* Gudjonsson & Joyce, *supra* note 135, at 19.

222. *See* Stobbs & Keibell, *supra* note 145, at 108.

223. *See id.*

224. *See id.* at 107.

225. *Id.* at 108.

226. Beckene et al., *supra* note 27, at 76.

227. *Id.* at 68 (studying trial transcripts and reporting that “high numbers of leading questions, yes/no questions, negative and multiple questions[,] and repeated questions” all “tend to enhance suggestibility”).

tion.”<sup>228</sup> In fact, the information obtained during the cross examination is likely to be less reliable.<sup>229</sup>

Specifically, it is understood that persons with mental disabilities have a heightened risk for falsely agreeing to statements posed.<sup>230</sup> This risk arises because the use of “modern interrogation practices” on persons with mental disabilities “increase[s] suggestibility and impede[s] accurate communication.”<sup>231</sup> Despite, or perhaps because of this risk, “[d]uring complex questioning, particularly under cross-examination, professionals do not appear to make allowances for those with [intellectual disabilities].”<sup>232</sup> It should not be surprising that attorneys, in their zealous advocacy of their clients, do not voluntarily make accommodations for victims with mental disabilities. Cross-examination is an adversarial process by which the questioning attorney gains advantage through tactical questioning, often designed to reveal (or at least appear to reveal) inconsistencies in the witness’s direct testimony and a lack of credibility.

#### 4. *Barriers Arising from Credibility and Reliability Assumptions*

Misconceptions about this group of victims also hinders their ability to provide credible testimony and reliable information.<sup>233</sup> And, even before a victim testifies, their credibility and the reliability of their testimony are doubted by professionals within the system.<sup>234</sup> These negative assumptions about the capabilities of victims with mental disabilities impedes this group’s participation: “Commonly held perceptions of people with intellectual disability (for example, that they do not make credible witnesses, myths about sexuality) reduce the likelihood of charges actually being laid. Victims or witnesses may be seen as stupid, untruthful, and inconsistent in their recounting of events and easily flustered.”<sup>235</sup>

These assumptions are an overstated response to the reality that the quantity, and to a lesser extent, quality of information provided by those with mental disabilities will almost certainly be

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228. *Id.*

229. *See id.*

230. *See* Rogal, *supra* note 72, at 66 (noting that “[m]ental disabilities render individuals particularly vulnerable to the methods and pressures of police interrogation”).

231. *Id.* at 70.

232. Henry et al., *supra* note 2, at 260.

233. *See* Gegan & Rodriguez, *supra* note 5, at 225–26.

234. *See* JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11 (“One reason is to learn how to interview crime victims with disabilities before a court appearance.”); *see also* Deal & Kristiansson, *supra* note 12, at 2.

235. GRAY ET AL., *supra* note 3, at 7.

lesser than that which can be provided by typically developing persons.<sup>236</sup> While persons with mental disabilities can often provide information about what happened, they cannot do so with the same detail or consistency as other witnesses given their cognitive and communication impairments.<sup>237</sup> “Some of the central elements upon which rules of evidence are based, such as memory and recollection, credible behavior and reliable conveyance of information, may differ when offered by persons with mental disabilities; hence the need to articulate ‘special norms’ for this situation.”<sup>238</sup> Without such adjustment to what is considered “normal,” a victim with mental disabilities will be judged by standards that are neither accurate nor fair based on their cognitive and communication needs:

What is considered “reliable” testimony often depends on clear memory and recollection, “non-erratic” behaviour on the stand and consistent, straightforward communication of a narrative. Yet, persons with disabilities—particularly those with cognitive or mental disabilities—often receive and provide evidentiary information in a way that people without disabilities are not used to.<sup>239</sup>

A victim’s perceived lack of credibility often arises from the victim’s inability to provide expected details. In one case, a victim with a mental disability was “unable to recall the name of the street on which he lived.”<sup>240</sup> And “[w]hen asked what city he lived in, the victim responded, ‘Tennessee.’”<sup>241</sup> Missing and inaccurate details such as these can create an impression that the victim is incapable of providing credible information about what happened. Indeed, a victim’s ability to provide details about some matters, but not for others, may cause some to suspect the witness had been coached. Yet, such credibility concerns are misplaced because, for better or worse, victims with mental disabilities tend to have uneven capabilities depending on the topics and contexts.<sup>242</sup>

For example, in the case in which the victim could neither name the street on which he lived nor his city, he was able to provide more details about what had happened to him:

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236. *See id.*

237. *See Ziv, supra* note 75.

238. *Id.*

239. BEQIRAJ ET AL., *supra* note 77, at 30.

240. *State v. Jones*, No. W2013-00335-CCA-R3-CD, 2014 WL 3002808, at \*3 (Tenn. Crim. App. Jan. 29, 2014). Still, the victim was able to provide some information about the crime, which was corroborated by the defendant’s confession. *See id.* at \*4–5.

241. *Id.* at \*3.

242. *See Gudjonsson & Joyce, supra* note 135, at 19.

- Q. [T]ell me—  
 A. Uh-huh (affirmative response).  
 Q. —what room of your house something happened in?  
 A. Okay. Well, we were in—in the—in the living room.  
 Q. In the living room?  
 A. You know, watching TV. She had told me something—I had to turn my head around. She had told me something. Uh—ooh, I hate this. Uh—she was going to let me—  
 Q. What did she say? What words did she say?  
 A. That she want me eat down there (indicating).  
 Q. Eat down there?  
 A. Uh-huh (affirmative response).  
 Q. And for the record, you're pointing. Where—where are you pointing when you say “down there”? Can you show us?  
 A. Well, she had pulled down-her clothes down.  
 Q. She pulled her clothes down?  
 A. Yeah.  
 Q. What else happened?  
 A. She had came into my—she had came into my room—uh—to get down on my knees. Uh—she hold her legs wide open and I started doing it.  
 . . . .  
 Q. —did she ask you to put any part of your body to touch any part of her body?  
 A. She was telling me to touch her body.  
 . . . .  
 Q. What did you touch her with?  
 A. With my tongue.  
 Q. Did your tongue touch down there?  
 A. Uh-huh (affirmative response).  
 Q. Were her legs wide open?  
 A. Yeah.  
 Q. Did she ask you to do that?  
 A. Yeah.  
 Q. . . . [H]ow did that make you feel?  
 A. Feel sad.<sup>243</sup>

Notably, in the case described above, the defendant had admitted the sexual contact, although claiming it was consensual.<sup>244</sup> Thus, under the unique facts of that case, the statements of the perpetrator corroborated the victim's statement about what happened.<sup>245</sup> Had no corroboration been available, as is the case most of the time, the reliability of this victim's testimony about the abuse al-

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243. *Jones*, 2014 WL 3002808, at \*4.

244. *See id.* at \*5.

245. *See id.*

most certainly would have been called into question based on the victim's inability to recall expected information about where he lived.<sup>246</sup>

This case also demonstrates that while key details may be confused or inconsistent, that does not mean a victim's overall testimony is not credible. Here, the victim was inconsistent about a key part of the crime, namely where and when the abuse occurred.<sup>247</sup> He initially said the abuse occurred in the living room and later implied it occurred in his bedroom.<sup>248</sup> The victim also was wildly inconsistent and inaccurate about when the abuse occurred; at some points, he was unable to provide any answer about when it happened, at other points signaled a rough period of time, and at other points stated—quite erroneously—that the abuse had occurred just a few days before the interview.<sup>249</sup> (In fact, the abuse had occurred several months earlier.)<sup>250</sup>

When courts do not instruct factfinders on different expectations for victims with mental disabilities, factfinders likely will apply the “truth markers” used for typical victims. When typical “truth markers” are applied, a victim whose testimony contains atypical inconsistencies and errors will be viewed as lacking credibility. Yet, as the case example shows, that assumption would be wrong.<sup>251</sup> Indeed, the victim in the case was remarkably accurate in describing what had happened (again, as corroborated by the perpetrator) in terms of the actual sexual abuse.<sup>252</sup> But jurors' perceptions, not the accuracy of those perceptions, are what matter, and studies show that jurors are less likely to convict a defendant when the victim has a mental disability.<sup>253</sup>

In addition, the questioning in this case shows the key role of minimal prompts in eliciting testimony from a victim with mental disabilities.<sup>254</sup> Certain details would not have been forthcoming without the prompts, such as when the attorney asked the victim, “[D]id she ask you to put any part of your body to touch any part of her body?” and “Were her legs wide open?” and “Did she ask you to do that?”<sup>255</sup>

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246. *See id.* at \*3.

247. *See id.* at \*4–5.

248. *Id.* at \*4.

249. *See id.* at \*5.

250. *See id.*

251. *See id.* at \*4–5.

252. *See id.*

253. *See Stobbs & Kebbell, supra* note 145, at 111.

254. *See Jones*, 2014 WL 3002808, at \*4.

255. *Id.*

Aside from the content of a victim's testimony, "[v]erbal and behavioral 'truth signs'—such as accuracy, fluency, rational and logic[al] behavior, consistency (in substance, time[,] and place descriptions), poised body language, lax stature[,] and confident appearance—are all considered indicators of reliability and trustworthiness."<sup>256</sup> Yet these "truth signs" may "have a different meaning when persons with disabilities express them or do not express them."<sup>257</sup> For example, a victim's cognitive disabilities may manifest themselves through delayed response times in answering questions due to slower or non-linear processing of information.<sup>258</sup> To the untrained eye, such delays may be interpreted as the victim being non-responsive, evasive, or generally not credible.<sup>259</sup> It is thus not surprising that the perception exists that people with mental disabilities are unable to provide reliable testimony.<sup>260</sup>

In sum, factfinders not educated about the atypical ways in which victims with mental disabilities communicate and think will assess a victim's credibility using the regular markers: Did the victim make eye contact? Did they provide expected details, including who, what, where, and when the crime occurred? Did they seem evasive? Did they communicate information in a straightforward and linear fashion? Was their affect serious and appropriate for the setting? Because these traditional markers of credibility are ill-suited for victims with mental disabilities, their use results in an inaccurate determination of credibility that undermines the ultimate determination of truth.

##### 5. *Barriers from Lack of Services and Protocols Specific to Mental Disabilities*

Further limiting victims' meaningful participation is the lack of services based on their unique needs. Whether with or without accommodations, this group requires additional services through the criminal justice process.<sup>261</sup> Because of their cognitive impairments, some victims in this group may be unaware that what has occurred constitutes an actionable crime.<sup>262</sup> Likewise, they may be unaware of the steps they must take to report a crime.<sup>263</sup> And, while failure to disclose certain kinds of abuse is a widespread problem in the

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256. Ziv, *supra* note 75.

257. *Id.*

258. See Beckene et al., *supra* note 27, at 74–76.

259. *See id.*

260. Kebbell & Hatton, *supra* note 5, at 179.

261. See Beckene et al., *supra* note 27, at 76.

262. See Deal & Kristiansson, *supra* note 12, at 2.

263. *See id.*

legal system, it is heightened for crimes against persons with mental disabilities.<sup>264</sup> This group of victims tends to be more isolated than others and more dependent on others to care for their basic needs. Thus, they often disclose the abuse to a family member or friend, who the system relies on to report it.<sup>265</sup> However, because many crimes against this group are committed by those entrusted with their care,<sup>266</sup> the system of reporting often breaks down when the victim's abuser is her "caretaker."<sup>267</sup> While the criminal justice system cannot fix these problems, it can provide critical services, such as a victim advocate, at the earliest point possible.

Many of the protocols of the criminal justice system disadvantage those with mental disabilities. Because of their diminished functioning, victims with mental disabilities are particularly susceptible to being re-traumatized by telling their story and overwhelmed when participating in the legal system.<sup>268</sup> Their impairment makes processing new information, new people, and new settings confusing and distressing.<sup>269</sup> Thus, having to engage in multiple interviews can result in the victim shutting down and being unable to participate further.<sup>270</sup> Delays between when the crime occurred and when a victim is expected to give testimony also uniquely disadvantage those with mental disabilities who have long-term memory impairments.

In addition, these victims need protocols regarding the environment to be designed around their needs, which differ from those of typical victims. To feel secure enough to meaningfully participate, such victims may be reliant on certain support persons, animals, or objects.<sup>271</sup> When standard interview protocols do not allow for these things, the victim may feel insecure and thus incapable of

264. Lyon & Dente, *supra* note 6, at 1209.

265. Beckene et al., *supra* note 27, at 67.

266. Regarding child victims, "[i]nstances of abuse allegations in relation to children with disabilities are more likely to concern parents or parent figures." Henry et al., *supra* note 2, at 260; *see, e.g.*, State v. Jones, No. W2013-00335-CCA-R3-CD, 2014 WL 3002808, at \*5-7 (Tenn. Crim. App. Jan. 29, 2014) (noting sexual abuse by caretaker despite extensive training of staff and oversight in place).

267. *See* Lyon & Dente, *supra* note 6, at 1223 ("The efficacy of the defendant's exploitation is evinced by nondisclosure, delays in disclosure, and inconsistencies in willingness to disclose over time.").

268. *See* Rainville, *supra* note 16, at 54.

269. *See id.*; Lyon & Dente, *supra* note 6, at 1209.

270. *See, e.g.*, Jones, 2014 WL 3002808, at \*6 (After testifying, "it took approximately two weeks for the victim to stop discussing the incident. He had become preoccupied with the events. Because of this 'spike' in the victim's fixation on the incident, they made a referral for him to obtain additional counseling.").

271. *See* Lyon & Dente, *supra* note 6, at 1219-20; Rainville, *supra* note 16, at 54-55.



participating.<sup>272</sup> Furthermore, a room with multiple, unfamiliar people may overwhelm a victim with mental disabilities, whose ability to process complex stimuli is impaired. And, while professionals may recognize these needs and desire to accommodate them, existing procedures and protocols—designed around the needs and capabilities of victims without mental disabilities—limit what even the most well-intentioned professionals may do.<sup>273</sup>

#### 6. *Barriers in Accessing Services*

Unlike defendants, victims are not represented by counsel, nor do they have an advocate whose job it is to apprise them of their rights and help enforce those rights.<sup>274</sup> This difference creates not only an advocacy deficit but an information deficit. Victims cannot access available services unless they are aware of them and know how to request them.<sup>275</sup> This lack of awareness alone presents a significant obstacle for victims with mental disabilities because of their cognitive and communication impairments. Further, there is a difference between having a right and exercising a right. The latter requires the victim to not only be aware of the right, but to be able to pursue and have the right enforced in the criminal justice system. That is the bigger challenge.<sup>276</sup> As noted in Part I.C., *supra*, the ADA is not self-enforcing. Even in situations in which the ADA's requirement is undisputed, violations continue to exist because of a lack of enforcement.<sup>277</sup>

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272. See Lyon & Dente, *supra* note 6, at 1219–20; Rainville, *supra* note 16, at 54–55.

273. See GRAY ET AL., *supra* note 3, at 8.

274. See Gegan & Rodriguez, *supra* note 5, at 225–27.

275. KILPATRICK ET AL., *supra* note 128, at 10.

276. See *id.* (In a study on the efficacy of victims' rights statutes, “[s]everal mediating factors were identified as influencing the provision of victims’ rights, beyond the strength of the statute or State constitutional amendment. The first among these is knowledge of victims’ rights. . . . Criminal justice officials are not likely to enforce victims’ rights laws if they are unaware they exist.”).

277. See Charmatz & McRae, *supra* note 96, at 343–44. The authors explain the lack of enforcement:

Even today, there are a number of state laws that directly contradict the ADA by permitting the assessment of interpreter fees as court costs—placing an impermissible surcharge on deaf litigants. A defendant found guilty in a criminal case, after being ordered to pay a fine, should not also have to shoulder the costs of being able to understand the proceedings against him/her. A potential plaintiff in a civil case should not have to decide whether to bring suit based on the costs in communicating with a judge, but rather solely on the merits of a particular case. These blatantly discriminatory state laws are a particularly egregious example of the need for civil rights enforcement under Title II.

*Id.*

Moreover, the lack of their own representation, whether by legal counsel or a guardian ad litem (GAL),<sup>278</sup> is especially problematic for this group of victims: These victims' cases contain certain complexities because of their mental disabilities, yet the victims themselves are less able to recognize, navigate, and advocate for their needs to be addressed.<sup>279</sup> In addition, victims with mental disabilities face additional hurdles in understanding even those limited rights they may have under the ADA.<sup>280</sup>

While one might think prosecutors themselves would fill this role, that is not the case. Prosecutors represent the state or federal government; thus, by definition, they do not represent victims.<sup>281</sup> Particularly when prosecutors are exercising their discretion in whether to pursue charges, their interests may well vary from those of victims. When prosecutors doubt the veracity of a victim, or doubt that a jury will believe the victim, they will be unlikely to prosecute a reported crime.<sup>282</sup> And, because prosecutors typically have heavy caseloads and only spend limited time with victims, it is rare for them to consider the impact of a victim's disabilities on her ability to participate, let alone what accommodations are needed.<sup>283</sup> Instead, when assessing a victim's ability to provide reliable and credible testimony, prosecutors tend to do so without consideration of any accommodations to facilitate a victim's participation.<sup>284</sup> In contrast, the role of a victim's lawyer or GAL would explicitly include understanding the victim's barriers to participation, educating others on those barriers, and advocating for appropriate accommodations.<sup>285</sup>

In theory, victim advocates could help overcome some of these barriers in services. But their role and expertise are more limited.<sup>286</sup> While victim advocates are expected to assist victims in navigating the criminal justice system, it is not their role to advocate for vic-

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278. See Sarah Martinson, *Victims' Voices Left Out of Criminal Justice Reform*, LAW360 (Apr. 18, 2021, 8:02 PM), <https://bit.ly/3zW5rZw> [<https://perma.cc/AYH7-SS8V>] (describing the lack of attention to the needs of victims in current criminal justice reform efforts).

279. See Gegan & Rodriguez, *supra* note 5, at 225–27.

280. See Deal & Kristiansson, *supra* note 12, at 2.

281. See Gegan & Rodriguez, *supra* note 5, at 229–30.

282. See *id.* at 232–34.

283. See Murphy, *supra* note 93, at 363–64.

284. Counsel could be funded through public monies. See generally *Budget Unit Brief*, LEGIS. SERVS. AGENCY, <https://bit.ly/3QLxUaj> [<https://perma.cc/A949-Q5YX>] (Sept. 2, 2016). In Iowa alone, over \$57.6 million in state funds was spent in 2017 on court-appointed counsel for indigent criminal defendants. See *id.*

285. See Murphy, *supra* note 93, at 374–75.

286. See *Section 5: Building Partnerships*, NAT'L INST. OF CORR., <https://bit.ly/3u3N6Wz> [<https://perma.cc/5PWP-E7HK>] (last visited Aug. 15, 2022).

tims within the criminal justice system, such as by pursuing accommodations on their behalf.<sup>287</sup> The victim advocate's role is typically relegated to relaying information and ensuring the victim is kept informed of legal proceedings, rather than acting as an advocate within the legal system.<sup>288</sup> Even if victim advocates were tasked with advocating for victims, they lack training about the special needs of victims with mental disabilities and would be ill-suited to advocate for specific accommodations.<sup>289</sup>

Moreover, even if victims had their own advocates, accessing available services would still be costly and resource-intensive. For example, requesting and obtaining existing testimonial accommodations under the ADA requires an individualized showing—namely, showing the need for accommodations, justifying specific accommodations, and proving the reasonableness of those accommodations.<sup>290</sup> Represented or not, it is burdensome to require individual victims to go through an individualized process to obtain accommodations that are needed by an entire victim group.

### III. THE CASE FOR ACCOMMODATIONS FOR VICTIMS WITH MENTAL DISABILITIES

It is unrealistic to expect that a criminal justice system designed around typically functioning persons will effectively serve victims with mental disabilities. Instead, it is necessary that the system recognize the divergent needs of victims with mental disabilities and accommodate those needs.

#### A. *Beyond Anti-Discrimination: The Role of Accommodations in Disability Law*

Conceptually, the need for accommodations—not simply the absence of overt discrimination—lies at the core of disability laws.<sup>291</sup> Most notably, the ADA is premised on access and opportu-

287. *See id.*

288. *See* Friedlander, *supra* note 55.

289. *See* Tyiska, *supra* note 30.

290. *See* Keri K. Gould, *And Equal Participation for All. . .The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123 (1993).

291. *See* Walters & Chanti, *supra* note 90, at 729. The authors stated: Indeed, people with disabilities could not achieve equality based on the identical arguments made by racial minorities and women. They could not assimilate into the unstated, able-bodied norm by only breaking down impediments to inclusion caused by prejudice and stereotyping. A remedy limited to a prohibition against different treatment based on disability would not further the goal of equal opportunity in the way it has for women and racial minorities. Our civil rights legislation prohibiting discrimination against individuals with disabilities recognizes this.

nity through accommodations, whether in the workplace, in public services, or in housing.<sup>292</sup> Likewise, the IDEA rests on the principle of equal access to educational services, which is understood as requiring accommodations to the typical services.<sup>293</sup> These and other laws generally reflect a societal understanding of the crucial role that accommodations play in ensuring equal participation for persons with disabilities.<sup>294</sup>

Even so, the legal system has almost entirely turned a blind eye to the need to accommodate participation by those with disabilities.<sup>295</sup> This itself is curious given that the legal system is instrumental in enforcing accommodations on other systems, including the education system (via the IDEA), workplaces (via the ADA), and public housing and transportation (via Title II of the ADA). It is further curious because almost 20 years ago, the Supreme Court of the United States in *Tennessee v. Lane* recognized, in a case involving a defendant with mental disabilities, the challenges faced by persons with mental disabilities due to their limited “capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>296</sup>

### B. *Accommodating Other Vulnerable Victims: The Example of Child Victim Laws*

A model for accommodating vulnerable victims to facilitate participation already exists in the form of child witness laws, which have been widely adopted throughout the United States.<sup>297</sup> Although these laws apply to children, not persons with mental disabilities, they provide an example of how the criminal justice system accommodates the needs of vulnerable victims. Child victim laws illustrate that: (1) the criminal justice system can and does provide baseline accommodations to a group of victims, as opposed to requiring individual showings of need; and (2) accommodations exist

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*Id.*

292. See *supra* Part I.C. (discussing how the ADA is inadequate to effectuate meaningful participation in the legal system by victims with mental disabilities).

293. See generally *About IDEA*, U.S. DEP'T OF EDUC., <https://bit.ly/3uPuB8U> [<https://perma.cc/2V6S-XUB8>] (last visited Aug. 15, 2022).

294. See generally *id.*

295. See, e.g., Blanck et al., *supra* note 9, at 825; see also Wood et al., *supra* note 9, at 310–11.

296. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

297. See *Survey of Select State and Federal Laws Providing Victims' Rights and Protections that Are Specific to Children*, NAT'L CRIME VICTIM L. INST. [hereinafter *Survey*], <https://bit.ly/3HPPrWkP> [<https://perma.cc/2F84-N47U>] (Oct. 2016).

that are tailored to a group's needs and serve to foster participation and increase the reliability of such participation.<sup>298</sup>

First, child victim laws illustrate that it is not only possible, but judicious, to provide accommodations at the group level.<sup>299</sup> Such laws are premised on the belief that because children as a group have shared needs and capabilities, accommodations can and should be provided to all individuals in that group.<sup>300</sup> These benefits of accommodations based on one's membership in a group exist even though there is some variation among the needs of individuals in that group.<sup>301</sup> For example, it is understood that considerable variation exists in the way information is encoded and communicated by children:

Many influences have an impact on a child's experience of abuse and on his or her ability to encode and communicate information. These influences interact in a uniquely individual manner, such that no two children will ever engage or relate their experiences in the same way or with the same level of detail and clarity.<sup>302</sup>

Despite such variation, child victim laws nonetheless are premised on the belief that individual children have enough overlapping needs that it is possible to provide baseline accommodations at the group level.<sup>303</sup> Like children, victims with mental disabilities are not a wholly homogenous group yet share sufficient features such that providing baseline accommodations at the group level makes sense.<sup>304</sup>

In addition to child victim laws providing a precedent for accommodating a group of victims, child victim laws suggest some types of accommodations that can be made for vulnerable victims within the criminal justice system.<sup>305</sup> The purpose of such accom-

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298. *See generally id.*

299. *See New Directions for Child Victims*, OVC ARCHIVE 382, <https://bit.ly/3y19gq3> [<https://perma.cc/F9FW-LZWC>] (last visited Aug. 15, 2022).

300. *See id.* at 387–91.

301. *See id.*

302. Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, U.S. DEP'T OF JUST. 3 (Sept. 2015), <https://bit.ly/3xWLTBp> [<https://perma.cc/QEB3-2VAS>].

303. *See id.* For example, before describing the best practices for interviewing child victims, the federal government's guide set forth “the major influences on children's memory, language abilities, and motivation to converse.” *Id.*

304. *See Brown et al.*, *supra* note 171, at 1031–32.

305. *See New Directions for Child Victims*, *supra* note 299, at 383–87.

modations is to increase the reliability of children’s participation.<sup>306</sup> Child victim laws achieve this purpose through accommodations that alter the ground rules for child victims’ participation. A groundbreaking feature of child victim laws is that they provide accommodations in the way that children are interviewed. Rather than subjecting children to a series of interviews with different professionals, interviews are coordinated and conducted by regional child protection centers (RCPCs).<sup>307</sup> In addition, those interviews follow a protocol designed around the characteristics and capabilities of children.<sup>308</sup> Child victim laws also provide accommodations at the testimonial stage. Accommodations include allowing attorneys to question child victims outside of the courtroom, such as in a room separate from the defendant via a two-way closed-circuit television, or even in a deposition setting with testimony preserved for use at trial.<sup>309</sup>

In addition to those core accommodations, some states’ laws and federal law include additional accommodations.<sup>310</sup> Federal law provides that the court may appoint “and provide reasonable compensation and payment of expenses for” a GAL for the child.<sup>311</sup> The GAL’s duties are extensive:

A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The

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306. See Newlin et al., *supra* note 302, at 4–5. For example, when “a child does not understand the question, the answer that he gives will not further the overriding objective of criminal procedure.” Henry et al., *supra* note 2, at 252.

307. Federal law mandates the use of RCPCs when “feasible.” See 18 U.S.C. § 3509(g).

308. See Newlin et al., *supra* note 302, at 3–5.

309. The federal “Child Victims’ and Child Witnesses’ Rights Act” is, similar to state laws, a comprehensive statute addressing the needs of child victims as witnesses. Like most state laws, it provides alternatives to live in-court testimony. See 18 U.S.C. § 3509(b).

310. Kentucky’s Child Witness Law is one of the more protective child witness laws, allowing for a wide range of accommodations. See KY. REV. STAT. ANN. § 26A.140 (West 2022). While it specifies certain accommodations, it posits that the law is not limited to those accommodations listed. See *id.* Among the accommodations included are appointing “[t]rained guardians ad litem or special advocates, if available” to each child victim to provide “consistency and support to the child and to represent the child’s interests where needed.” *Id.* The law further provides for modifications to the courtroom, including “the use of small chairs, frequent breaks, and the use of age appropriate language.” *Id.* It requires the prosecution to prepare the child for the courtroom with assistance from the GAL or special advocate. See *id.* Finally, the law provides that “upon a statement by the victim or her advocate showing need,” the court will institute procedures to “shield children from visual contact with alleged perpetrator.” *Id.*

311. 18 U.S.C. § 3509(h)(1).

guardian ad litem may have access to all reports, evaluations, and records, except attorney's work product, necessary to effectively advocate for the child . . . . A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding . . . .<sup>312</sup>

This federal law allows the child to have an "adult attendant" be present during testimony or while "attending a judicial proceeding."<sup>313</sup> It also allows child witnesses to use "[t]estimonial aids" such as anatomical dolls, drawings, etc. to help the child testify.<sup>314</sup> It also has a provision that allows the court to expedite proceedings and to give priority to the case.<sup>315</sup> This provision exists to "minimize the length of time the child must endure the stress of involvement with the criminal process."<sup>316</sup> Relatedly, the law also requires the court in deciding whether to grant a continuance to "take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being."<sup>317</sup>

State laws also vary in terms of the types and extent of accommodations provided. Some states, although listing certain accommodations, make clear that the list is not exclusive and other accommodations may be necessary.<sup>318</sup> Other states use model jury instructions that direct jurors, when evaluating a child's testimony, to consider the child's mental age and cognitive abilities.<sup>319</sup> Specifically, jurors are instructed:

In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development.

When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate.

While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable

312. *Id.* § 3509(h)(1)-(2).

313. *Id.* § 3509(i).

314. *See id.* § 3509(l).

315. *See id.* § 3509(j).

316. *Id.*

317. *Id.*

318. *See* KY. REV. STAT. ANN. § 26A.140 (West 2022).

319. *See* CALCRIM NO. 330 (JUD. COUNCIL OF CAL. 2022); *see also* *People v. Gilbert*, 7 Cal. Rptr. 2d 660, 672-74 (Cal. Ct. App. 1992) (instructing the jury to make credibility determinations based on child's age, level of cognitive development, and other factors surrounding child's testimony; does not inflate testimony of child witness and thereby lessen prosecutor's burden of proof and deny defendant due process and equal protection).

than the other. You should not discount or distrust the testimony of a witness just because he or she is a child.<sup>320</sup>

This instruction expressly tells jurors not to view a child who testifies and/or behaves differently than an adult as less credible.<sup>321</sup> In addition, child victim laws vary in terms of whether and the extent to which they allow for accommodations in how attorneys may question a child.<sup>322</sup> Some child victim laws require that “young witnesses [are] questioned in a manner and a language that is developmentally appropriate.”<sup>323</sup> Similarly, some states mandate that a child witness be permitted a presumptive break after every hour of testimony.<sup>324</sup> The federal law, while setting no limits on questioning at trial, does constrain questioning during pretrial competency hearings to only those questions that are “appropriate to the age and developmental level of the child.”<sup>325</sup>

While child victim laws provide a useful example of when, why, and how the legal system can provide accommodations, caution must be used so that these laws are not uncritically used as a proxy for what victims with mental disabilities need. First, the accommodation needs of victims with mental disabilities differ from the needs of children.<sup>326</sup> Most notably, screening is required to identify victims with mental disabilities who, unlike children, may not be known to be part of a vulnerable victim group.<sup>327</sup> Likewise, specific training for professionals on the characteristics and needs of those with mental disabilities is necessary, whereas such training is less necessary for those interacting with children. It is within the common knowledge of most professionals that, for example, a four-year-old child is likely to communicate and think in ways that differ from that of the typical adult. In contrast, how a person’s mental

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320. CALCRIM, *supra* note 319.

321. *See id.*; *see also* Gilbert, 7 Cal. Rptr. 2d at 672–74 (instructing the jury to make credibility determinations based on child’s age, level of cognitive development, and other factors surrounding child’s testimony; does not inflate testimony of child witness and thereby lessen prosecutor’s burden of proof and deny defendant due process and equal protection).

322. *See* Survey, *supra* note 297, at 12–64.

323. *See* 18 U.S.C. § 3509(h).

324. *See generally* CALCRIM, *supra* note 319.

325. 18 U.S.C. § 3509(b)(F)(c)(8). No doubt accommodations geared toward children’s needs and capabilities are necessary. A recent California appellate court decision aptly illustrates this need. *See* People v. Giron-Chamul, 200 Cal. Rptr. 3d 159, 167 (Cal. Dist. Ct. App. 2016) (describing testimony of five-year old, who was on the stand for four hours total over three days).

326. *See* Rainville, *supra* note 16.

327. *See id.*



disabilities impact their communication and cognition is not common knowledge for many professionals.<sup>328</sup>

In addition, child victim laws should not be blindly followed because those laws are, in their own respect, in need of reform. Most notably, such laws fail to adequately address the necessary accommodations in questioning styles.<sup>329</sup> They also fail to acknowledge the distinct needs, beyond simply being children, that children with mental disabilities may have.<sup>330</sup> As a result, children's needs that arise from their mental disabilities, as opposed to simply their age, go unaddressed.<sup>331</sup> The implication by omission is that children's mental disabilities do not require any additional accommodations. Given the prevalence of mental disabilities among child victims, the failure of child victim laws to acknowledge the additional needs arising from such mental disabilities is problematic.<sup>332</sup>

### C. *Expert Evidence on Accommodations for Victims with Mental Disabilities*

Accommodations allow persons with mental disabilities to participate in a process from which they may otherwise be excluded.<sup>333</sup> For decades, social scientists have studied the impact that mental disabilities have on persons' communication and cognitive capabilities.<sup>334</sup> The research supports the use of accommodations to allow meaningful participation.<sup>335</sup> Namely:

The empirical literature regarding the actual abilities and performance of individuals with diagnoses of mental retardation in

328. See U.S. DEP'T OF JUST., VICTIMS WITH DISABILITIES: THE FORENSIC INTERVIEW: TECHNIQUES FOR INTERVIEWING VICTIMS WITH COMMUNICATION AND/OR COGNITIVE DISABILITIES 9 (2011).

329. See, e.g., KY. REV. STAT. ANN. § 26A.140 (West 2022).

330. This limitation in child victim laws is mirrored in research on testimonial needs of child victims. For a description of this blind spot, see Margaret K. Michel et al., *The Abilities of Children with Mental Retardation to Remember Personal Experiences: Implications for Testimony*, 29 J. CLINICAL CHILD & ADOLESCENT PSYCH. 453, 453 (2000) (noting that "the vast majority of investigations have focused on normally developing children" with "little attention . . . directed to testimony of children with mental retardation").

331. See Rainville, *supra* note 16.

332. As noted in *supra* Part I.B., some child victim laws include adults with mental disabilities as persons to which the child victim protections apply.

333. See BEQIRAJ ET AL., *supra* note 77, at 29–42.

334. See Gudjonsson & Joyce, *supra* note 135, at 19 (emphasizing the need for support during forensic interviews); see also Rainville, *supra* note 16.

335. See Ziv, *supra* note 75; see also BEQIRAJ ET AL., *supra* note 77, at 30–31 ("It is necessary to be aware of and accommodate these differences, to ensure that persons with disabilities can participate equally and effectively in testifying during a trial.").

legal contexts suggest that, with appropriate accommodations, individuals with [mental disabilities] can accurately recall events, provide reliable and valid testimony, and resist suggestive or leading questions.<sup>336</sup>

Based on this research, experts have developed best practices on when and how to accommodate victims with mental disabilities.<sup>337</sup> These best practices represent consensus among subject-area experts as to what accommodations are most effective in reducing barriers to participation.<sup>338</sup> The Section below describes best practices in detail. Because these best practices are unknown to many in the criminal justice system and, in any event, merely voluntary, they represent what is possible and not what now exists.

**Mandatory Screening:** Because not all mental disabilities are apparent, mandatory screening should occur from the moment of a person's first contact with the legal system. This means that a person should be directly asked if they have any mental disabilities that might impact their participation.<sup>339</sup> But asking the question is not enough, and the information may have to be sought out in indirect ways.<sup>340</sup> People may be adept at attempting to "hide" their mental disabilities and/or unaware of how their mental disability may impact their participation.<sup>341</sup> And, a person's mental disability may itself impede her ability to answer that direct question.<sup>342</sup> Among other things, the person may be unable to understand what is being asked of her, may be unable to express and articulate her answer, or simply may be unable to function in the setting in which the questioning is occurring.<sup>343</sup> A record of their answers should be kept so that other professionals can reference it.<sup>344</sup>

**The Use of Victim Support Persons:** Support Persons are important, not only to assist in the screening process but also to help questioners better understand the victim's special needs.<sup>345</sup> Support Persons are in the best position to provide information about "the person, about the people in their lives, about their preferred activi-

336. Deal & Kristiansson, *supra* note 12, at 2.

337. See Gudjonsson & Joyce, *supra* note 135, at 19 (emphasizing the need for support during forensic interviews).

338. See *id.* at 18–19.

339. See *id.* at 19.

340. See discussion *supra* Part II.B.1.

341. See Gudjonsson & Joyce, *supra* note 135, at 19.

342. See *id.*

343. See *id.*; see also Rainville, *supra* note 16.

344. See Gudjonsson & Joyce, *supra* note 135, at 19.

345. See *id.*

ties, and about the best way of communicating with them.”<sup>346</sup> Because those with mental disabilities have neurological impairments, they can have sensitivities to sounds, lights, interruptions, and more that, if unknown, may impede their participation. It may be, for example, that the victim is alarmed and becomes anxious due to one-way mirrors or from an interviewer briefly having a private conversation with someone out of earshot of the victim. It may be that the victim needs more than one interview to develop the comfort and trust to share meaningful information. It may be that the individual likes to play with toys and move around while talking. Individual needs will vary, so it is necessary for an interviewer to attempt to understand individual needs before engaging in the interview.

Support Persons should play a role at all stages of victims’ participation in the criminal justice system. In addition to providing information, a Support Person should be permitted to be nearby during testimony.<sup>347</sup> The Support Person may “assist the person by explaining court proceedings in simple terms, explaining paperwork or follow-up obligations, or identifying signs of confusion or misunderstanding.”<sup>348</sup> The latter is particularly important, as much unreliable or unresponsive testimony arises from such confusion and misunderstanding.<sup>349</sup>

While a Support Person shares some overlap with a Victim Advocate, the two roles are not the same.<sup>350</sup> A Support Person, unlike a Victim Advocate, is tasked with understanding the victim’s needs and thus can communicate information to and from the victim.<sup>351</sup> Guidance issued by two federal agencies supports the concept that “it may be necessary to ‘provide an aide or other assistive services’ in order for a person with a disability to participate fully in a court event.”<sup>352</sup>

**The Use of Mental Disability-Informed Protocols for Interviews:** Interviews of victims with mental disabilities should follow protocols designed to elicit accurate and reliable information.<sup>353</sup> Such protocols already exist, including an extensive guide created by the Department of Justice entitled “Victims with Disabilities: Collaborative, Multidisciplinary First Response Techniques for First Responders Called to Help Crime Victims who Have Disabili-

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346. *Id.*

347. See ACCESS TO JUSTICE, *supra* note 66, at 31–36.

348. *Id.* at 32.

349. See Gudjonsson & Joyce, *supra* note 135, at 19.

350. See Beckene et al., *supra* note 27, at 76.

351. See *id.*

352. See ACCESS TO JUSTICE, *supra* note 66, at 33.

353. See Ziv, *supra* note 75.

ties.”<sup>354</sup> Screening is recommended to identify potential mental disabilities.<sup>355</sup> Various communication techniques designed around the needs and capabilities of persons with mental disabilities are recommended.<sup>356</sup> “Once the presence of a disability is known, [the first responder] can use simple accommodations in order to improve communication.”<sup>357</sup> A great deal of research has been done about how to interview victims with mental disabilities, and these interview techniques should be utilized.<sup>358</sup>

Questioning a witness with mental disabilities requires an understanding of their impairment because how the interviewer conducts the interview is likely to influence whether the case is ultimately pursued. Victims with mental disabilities typically need “rapport-building” sessions before being questioned about the crime itself.<sup>359</sup> Forensic interviewers must also adjust their questioning style.<sup>360</sup> Open-ended questions are favored.<sup>361</sup> Thus, questions such as, “What happened?” or “What did he look like?” are likely to result in more accurate answers than asking more specific questions that assume certain information, such as, “Tell me what happened when you were alone with John,” or “Describe his face.”<sup>362</sup> Researchers surmise that “open questions leave more space for the witness to tell her version, while closed questions carry the risk that the witness will say what she thinks her questioner wants to hear.”<sup>363</sup> Even so, after asking open-ended questions to obtain “as many spontaneous responses as possible,” “yes/no questions are necessary to obtain complete information.”<sup>364</sup>

One researcher describes how a small assumption on an interviewer’s part can result in an unreliable interview:

For example, the witness might say “It was a man.” An inexperienced interviewer might ask “What colour hair did he have?” A person without intellectual disability might reply saying, “Oh, he didn’t have any hair, he was bald.” A person with intellectual

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354. BALADERIAN, *supra* note 11, at 1, 7–17.

355. *See* Rainville, *supra* note 16.

356. *See id.*

357. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 10.

358. *See id.* at 11.

359. *See* Gudjonsson & Joyce, *supra* note 135, at 19; *see also* LINDA CORDISCO STEELE, RAPPORT IN CHILD FORENSIC INTERVIEWS, A RESEARCH-TO-PRACTICE SUMMARY 3 (2015), <https://bit.ly/3HTvTVA> [<https://perma.cc/AA4K-T6TS>].

360. *See* Ziv, *supra* note 75.

361. *Id.*

362. *Id.*; Stobbs & Kebbell, *supra* note 145, at 107.

363. Stobbs & Kebbell, *supra* note 145, at 107.

364. *See* Michel et al., *supra* note 330, at 461.

disabilities might think that he should answer the question as it stands, and reply with a hair colour. A more experienced interviewer might ask “Can you tell me anything about what he looked like?” or ask a question about his head, and then go to a question such as hair/no hair.<sup>365</sup>

Best practices extend beyond how interviewers ask questions and include other aspects of the questioning.<sup>366</sup> For example, interviewers “need to speak more slowly,” “need to allow extra time to enable the person with intellectual disabilities to take in what is being said,” “need to allow time for the person with intellectual disabilities to think about how they are going to answer the question,” need “not [to] rush the questions,” need to “avoid interrupting,” and “need to be patient.”<sup>367</sup> Of equal importance, yet perhaps less intuitive, interviewers should “give the witness appropriate breaks,”<sup>368</sup> and should “not move on to new topics without explanation” or “ask abstract questions.”<sup>369</sup>

Questions about time can be particularly challenging for those with mental disabilities, and interviewers must be sensitive to how they ask such questions.<sup>370</sup> For example, “[w]hen asking time of day, it may be necessary to try and help the person remember a ‘concrete’ time marker, for example, was it before or after lunch, was it a day when you go to work/college/centre or a day you are at home?”<sup>371</sup> Relatedly, witnesses with mental disabilities should be allowed to “tell their own story” even though aspects of it may not seem to make sense based on the interviewer’s assumptions, recognizing that “there may be a valid explanation for any apparent confusion (e.g., the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).”<sup>372</sup>

365. Gudjonsson & Joyce, *supra* note 135, at 19.

366. *Id.* at 18–19 (explaining that “[t]hese basic communication principles are ‘well-known,’ yet are often not implemented in interviews” including: Give some thought to the questions you will need to ask before the interview starts: “Keep the language clear and simple[;] Try to keep to one idea per sentence[;] Keep the sentences short[;] Try to use the same word for the same thing[;] Find out what the person’s own words are for specific things (this can often be culturally-based)[;] Be supportive”); *see also* Modell & Davis, *supra* note 174, at 18.

367. Gudjonsson & Joyce, *supra* note 135, at 18–19; *see also* Modell & Davis, *supra* note 174, at 18.

368. Stobbs & Kebell, *supra* note 145, at 111; Gudjonsson & Joyce, *supra* note 135, at 19.

369. Ziv, *supra* note 75.

370. Gudjonsson & Joyce, *supra* note 135, at 19.

371. *Id.*

372. Ziv, *supra* note 75.

The physical setting greatly impacts the participation of persons with mental disabilities.<sup>373</sup> Questioning should occur in a place that is private and free of distractions.<sup>374</sup> Indeed, best practices call for a victim (and/or their Support Person or advocate) to fill out a form describing things the interviewer should or should not do to facilitate the victim's participation.<sup>375</sup>

**Accommodations in Testimony:** Just as interview protocols need to accommodate mental disabilities, so too does testimony. To equally participate at trial, accommodations are needed to ensure that a victim's "testimony is heard and fairly considered."<sup>376</sup> Just as interviewers must adjust their questioning style to be effective for this group of victims, so too must prosecutors.<sup>377</sup> Although the accused has a right to cross-examination, these victims are more likely to need protection from "excessive cross examination."<sup>378</sup> That need arises because "when witnesses are cross-examined in court, they are often asked leading and complex questions and are accused of lying," all of which "disadvantage persons with intellectual disabilities."<sup>379</sup> While no easy solution exists, courts should be alert to this potential problem and be willing to exercise discretion at the front end in terms of the questioning allowed.<sup>380</sup> The court's overarching goal should be to oversee the trial such that the evidence and testimony presented are reliable. And, because cross-examination tactics produce less-than-reliable testimony,<sup>381</sup> judges should exercise their discretion to not only protect the witness but also to protect the integrity of the proceedings.<sup>382</sup> Judges, who through training and experience are aware of the impact that certain questioning strategies have on a witness's reliability, will be better positioned to exercise their discretion.<sup>383</sup>

While specific questions will vary, broadly speaking, persons with mental disabilities cannot meaningfully participate unless interviewers structure and ask questions in a way that takes their

373. ACCESS TO JUSTICE, *supra* note 66.

374. *Id.*

375. *Id.*

376. *Criminal Justice System: Position Statement*, ARC (2014), <https://bit.ly/3yUbmX6> [<https://perma.cc/LG92-GTWH>].

377. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11 ("One reason is to learn how to interview crime victims with disabilities before a court appearance.").

378. Beckene et al., *supra* note 27, at 77.

379. Gudjonsson & Joyce, *supra* note 135, at 19.

380. *Id.* at 20.

381. *See supra* Part II.B.3.

382. Beckene et al., *supra* note 27, at 76; Stobbs & Kebbell, *supra* note 145, at 112.

383. Stobbs & Kebbell, *supra* note 145, at 112.

mental disabilities into account.<sup>384</sup> Because a person with an intellectual disability will have difficulty understanding information, questioning of such persons should consist of easy-to-understand questions using simple language.<sup>385</sup> Additional time should be given to allow the victim time to absorb the question.

In addition, accommodations to enhance meaningful participation include modifying the type of questioning, such as how interviewers pose or frame questions.<sup>386</sup> For example, questions can be “framed in a way that assists recollection and the provision of more qualitative information.”<sup>387</sup> While the presumed gold standard for questioning a witness is to use open-ended questions, for witnesses with mental disabilities, the gold standard is more nuanced.<sup>388</sup> While persons with cognitive disabilities give more accurate answers “when open-ended questions are used (e.g., ‘What happened?’ rather than ‘Tell me what you saw that night[,] [and] ‘What did he look like?’ rather than ‘Describe his face’), [these] answers may be less complete.”<sup>389</sup> Thus, follow-up questions that may seek to clarify or be more directive are recommended.<sup>390</sup>

Other accommodations in the environment are useful.<sup>391</sup> Courthouse facility dogs are particularly helpful in building a sense of security for persons who, due to mental disabilities, experience confusion, stress, or anxiety in legal proceedings.<sup>392</sup> Likewise, accommodations can be made to the environment, including “limiting distractions and conducting warm-up interviews in a quiet room or location where the person feels safe.”<sup>393</sup> The trial schedule also may need to be adjusted to include breaks and shorter days.<sup>394</sup>

Because victims with mental disabilities face steep challenges in testifying, they should only have to do so once. Early testimony, either in trial or through a deposition for the purpose of preserving trial testimony, is better due to the risk of memory loss.<sup>395</sup> Discov-

384. ACCESS TO JUSTICE, *supra* note 66.

385. *Id.*

386. Ziv, *supra* note 75.

387. *Id.*

388. See, e.g., State v. Walker, 935 N.W.2d 874, 880 (Iowa 2019) (noting with favor that doctor that questioned child victim “asked open-ended questions”).

389. Ziv, *supra* note 75.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. Wood et al., *supra* note 9, at 313 (stating accommodation for criminal defendant with an auditory processing disorder and borderline intellectual disability was “modifying [the] trial schedule[ ] and day-to-day courtroom procedures to make the proceedings more accessible” to the defendant).

395. Valenti-Hein & Schwartz, *supra* note 11, at 291.

ery depositions, which by definition would require testifying more than once, should not be allowed.<sup>396</sup> There is no constitutional right to a discovery deposition, and indeed the vast majority of states do not permit them in criminal cases.<sup>397</sup>

Finally, safeguards should be in place so that the victim need not see or hear the criminal defendant. Such safeguards are allowed for child victims, and for similar reasons should be allowed for victims with mental disabilities.<sup>398</sup> Given the vulnerability of victims with mental disabilities, there should be a presumption that such face-to-face confrontation would “further traumatize” the victim.<sup>399</sup> Such a presumption puts the onus on the criminal defendant to offer proof that such contact would not be traumatic and eliminates the barrier that a victim who does not have an expert who could readily testify on her behalf would otherwise face.

**Mandatory, Mental-Disability Informed Training for Professionals:** All professionals who interact with victims with mental disabilities should undergo training specific to the needs of this victim group.<sup>400</sup> Such training recognizes the shared needs by this group of victims and places the responsibility on the criminal justice system, rather than individual victims, to “educate” professionals about how mental disabilities impact participation.<sup>401</sup>

And, because the criminal justice system entails a wide range of professionals with and upon whom victims interact and rely, training should be provided for “attorneys (prosecution and defense), judges, law enforcement personnel, first responders, forensic evaluators, victim advocates, court personnel, correctional personnel, criminal justice policy-makers, and jurors.”<sup>402</sup> Training for first responders is especially important:

To provide services in a safe and successful manner to a person with a disability, the service provider must have information

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396. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 20.2(e) (4th ed. 2021). Less than a dozen states allow for the use of depositions as a basic discovery procedure. In the vast majority of the states and in the federal system, the deposition is available in criminal cases primarily for the purpose of preserving the testimony of a witness likely to be unavailable at trial.

*Id.*

397. *Id.*

398. Ziv, *supra* note 75.

399. See Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant’s Confrontation Rights*, UNC ADMIN. JUST. BULL. 1, 5 (2013).

400. *Criminal Justice System: Position Statement*, *supra* note 376.

401. ACCESS TO JUSTICE, *supra* note 66; see, e.g., WASH. ST. BAR ASS’N, ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS (2011), <https://bit.ly/3RqWJO0> [<https://perma.cc/DGM2-HM8K>].

402. *Criminal Justice System: Position Statement*, *supra* note 376.



about how a specific disability may affect an individual and how trauma and stress may bring out or exacerbate certain characteristics. Professionals must be able to adjust their normal interaction procedures accordingly, in order to ensure that victims with cognitive or communication disabilities have the opportunity to provide input into their own care, express their needs, share what happened to them in their own way, and participate in the criminal justice process to the same extent as victims without such disabilities.<sup>403</sup>

Because of the importance of a victim's initial contact with the criminal justice system, extensive training materials have been developed for first responders.<sup>404</sup> Prosecutors, too, need training.<sup>405</sup> "To effectively prosecute crimes which victimize individuals with developmental disabilities, prosecutors must understand the diagnostics involved, community resources, and specific strategies to assist the victim in providing accurate and credible testimony."<sup>406</sup> As it is, a prosecutor may choose to educate themselves on best practices for questioning a victim with mental disabilities, but nothing requires them to do so.<sup>407</sup> And, while it may seem in their self-interest to do so to achieve a better case outcome, the reality is that interviewing a victim with mental disabilities requires the prosecutor to not only learn new skills but to deviate from their typical interviewing mindset. These techniques take patience and time, the latter of which may be in short supply for a prosecutor with a heavy caseload.<sup>408</sup> Training is also needed for the judges, the jury, and all the other court staff.<sup>409</sup>

**GALs for Victims with Mental Disabilities:** Victims with mental disabilities need their own advocates to ensure and enforce the rights afforded to them.<sup>410</sup> Such advocates are needed "if people with intellectual disabilities are to receive equal access to justice once inside the criminal justice system."<sup>411</sup> On their own, "many people with cognitive impairments may not be able to request ac-

403. BALADERIAN, *supra* note 11, at 1.

404. The DOJ has created training manuals and videos for this purpose. *Id.* See also U.S. DEP'T OF JUST., *supra* note 328. Similarly, the State of Georgia's manual recommends, but does not require, training for all professionals. ACCESS TO JUSTICE, *supra* note 66.

405. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11 ("Prosecutors must receive training on disability issues on a more consistent basis.")

406. Deal & Kristiansson, *supra* note 12, at 1.

407. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11.

408. Ziv, *supra* note 75.

409. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 9-10.

410. *Id.* at 5.

411. *Id.*

commodations effectively . . . and may need assistance in constructing appropriate accommodation requests, whether from the court or from their legal representatives.”<sup>412</sup> It also is the case that this group of victims requires more time and attention from professionals in the criminal justice system than their counterparts without mental disabilities.<sup>413</sup>

It is not realistic to expect that prosecutors will, or even should, play this role. While prosecutors’ interests and victims’ interests are frequently aligned, it is fair to say that prosecutors in general have done little to advocate for the needs of victims with mental disabilities.<sup>414</sup> Additionally, a prosecutor operating on limited resources might not elect to pursue a prosecution that requires involvement and advocacy beyond what is typical. Thus, GALs serve a critical role on behalf of this group of victims by providing an advocate whose sole purpose is to advocate for the victim.<sup>415</sup>

Ideally, if sufficient baseline protections and accommodations are mandated, the GAL primarily will function in a supervisory role to ensure the victim’s rights are safeguarded.<sup>416</sup> A GAL can facilitate participation in other seemingly mundane ways, which are noted by disability advocates as critical:

- Preparing the victim by methodically going over and over the court process (going to the courtroom and explaining who sits where and what each person’s job is);
- Explaining in simple terms what is going to take place, in order to prepare the person as much as possible;
- Role playing and rehearsing how to give testimony; and
- Exposure to the setting.<sup>417</sup>

**The Use of a Jury Instruction to Educate Jurors on Victims with Mental Disabilities:** Research also shows the value of providing information through expert testimony and/or jury instructions to assist jurors in more accurately assessing the credibility and reliability of testimony from victims with mental disabilities.<sup>418</sup> Similar to the jury instructions used in some jurisdictions when a child victim testifies, a model jury instruction for victims with mental disabilities is a low-cost, consistent way to educate jurors without the need for expert testimony. Such an instruction is necessary because

412. ACCESS TO JUSTICE, *supra* note 66.

413. *Id.*

414. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11–12.

415. ACCESS TO JUSTICE, *supra* note 66.

416. KY. REV. STAT. ANN. § 26A.140 (West 2022).

417. JUSTICE ADVOCACY GUIDE, *supra* note 20, at 11–12.

418. Stobbs & Kebbell, *supra* note 145, at 111–12.

persons with mental disabilities process, retrieve, and present information “in a way that people without disabilities are not used to.”<sup>419</sup> Jurors need to know this to have appropriate expectations.<sup>420</sup> Put differently, “[w]hilst witness accuracy is clearly important, it is also essential that jurors are able to correctly determine accuracy.”<sup>421</sup>

Thus, jurors need to understand the predictable ways in which the testimony of victims with mental disabilities will differ from others. Expert testimony can serve this role by providing jurors “insight and understanding of a witness with intellectual disabilities, which potentially increases the likelihood of achieving justice.”<sup>422</sup> The use of jury instructions should negate the need for costly and resource-intensive expert testimony in many cases.

However, when the impact of a victim’s mental disabilities is such that expert testimony would assist the factfinders, expert testimony should be allowed.<sup>423</sup> For example, an expert on autism could usefully explain differences in the cognitive and temporal attributes well-known among persons with autism. Such expert testimony would help the finder of fact more accurately determine “the extent to which inconsistency in time and place reporting indicates untrustworthiness” on the part of the witness above and beyond what a jury instruction might do. Because expert testimony can be necessary, victims with mental disabilities need access to such experts. Courts can and should, when needed, use court-appointed experts to fill this role rather than imposing that burden on individual victims.<sup>424</sup>

#### IV. A BLUEPRINT FOR REFORM

Taken together, the research on the barriers to participation, see *supra* Part II.B., as well as the expert evidence on specific accommodations, see *supra* Part III.C., create a blueprint for what reform in this area should entail. Thus, this Section describes these key attributes before setting forth a proposal for a model law.

##### A. *Removing Barriers to Participation: Key Features of Reform*

First, the barriers arising from the lack of screening and early identification indicate the need for reform at the earliest point of a

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419. BEOIRAJ ET AL., *supra* note 77.

420. *Id.*

421. Stobbs & Kebbell, *supra* note 145, at 108.

422. *Id.* at 112.

423. Ziv, *supra* note 75.

424. *Criminal Justice System: Position Statement*, *supra* note 376.

victim's involvement in the criminal justice system.<sup>425</sup> If a victim cannot meaningfully report a crime, then the likelihood of that crime being pursued is greatly diminished, rendering accommodations later in the process meaningless.<sup>426</sup> Related to the need for accommodations from the start is the need for early screening for mental disabilities.<sup>427</sup> Such screening is essential given the invisible nature of many mental disabilities.<sup>428</sup>

Second, the barriers in accessing services indicate that any reform should be self-effectuating, meaning it should not require the victim to request such services, pay for such services, or, generally speaking, advocate for such services.<sup>429</sup> Rather, the criminal justice system should be set up in a way that recognizes these victims' special needs and is proactive in addressing them.<sup>430</sup>

Third, the barriers that arise from credibility problems as well as from a lack of services and protocols suggest that reform should include training and/or information for all professionals who encounter victims, ranging from first responders to triers of fact.<sup>431</sup> Understanding the impact a victim's mental disabilities have on their communication and cognition is critical.<sup>432</sup> For too long, the criminal justice system has not sought to adjust its processes and expectations to be inclusive of victims with mental disabilities. Training is essential to create understanding of, and buy-in for, the need for inclusive practices, as well as to assist in implementing such practices.<sup>433</sup>

Relatedly, reform should assist those passing judgment on a victim's credibility and reliability—whether first responders, prosecutors, judges, or jurors—to more accurately interpret the words and actions of victims with mental disabilities. The goal is, of course, that factfinders correctly assess the reliability of a witness's testimony. For witnesses with mental disabilities, factfinders need specific guidance to “be able to correctly determine accuracy.”<sup>434</sup> Without this explicit guidance, factfinders routinely discredit vic-

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425. See *supra* Part III.C. at pages 63–65.

426. See Gudjonsson & Joyce, *supra* note 135, at 19 (emphasizing the need for support during forensic interviews).

427. See *supra* Part III.C. at pages 63–65.

428. *Id.*

429. See *supra* Part III.B. at pages 43–47.

430. *Id.*

431. See *supra* Part III.C. at pages 72–73.

432. *Id.*

433. *New Crime Victims with Disabilities Toolkit*, DISPATCH (July 2021), <https://bit.ly/3ItsBIL> [<https://perma.cc/6MBJ-LC34>].

434. Stobbs & Kebbell, *supra* note 145, at 108.

tims in this group due to a lack of understanding about the atypical ways in which they store, process, and communicate information.<sup>435</sup>

Fourth, the barriers in testifying suggest that reform should also address modifications and accommodations in how victims with mental disabilities are questioned.<sup>436</sup> This includes questioning content, format, and style in forensic interviews, in depositions, and in the courtroom.<sup>437</sup> Because a victim's ability to report and describe what happened to them is crucial if prosecutors are to successfully prosecute crimes against them, it is imperative that interviewers make significant adjustments based upon a victim's mental disabilities.<sup>438</sup>

Fifth, reform should distinguish the needs of victims with mental disabilities as distinct from those of children.<sup>439</sup> While overlap exists, victims with mental disabilities have unique needs from non-disabled children.<sup>440</sup> And, to put a finer point on it, children with mental disabilities have unique needs because of their mental disabilities, which are additive to the needs they have due to being children. Thus, meaningful reform must do more than insert "persons with mental disabilities" into child victim laws as a tagalong.<sup>441</sup>

Finally, all of the barriers taken together suggest that any reform should provide flexibility, particularly for victims' needs for accommodation that go beyond core, baseline protections that should be afforded to all victims with mental disabilities.<sup>442</sup> While

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435. See *id.* at 107 ("Expert evidence can provide jurors with a certain degree of insight and understanding of an individual witness with intellectual disabilities that potentially increases the likelihood of achieving justice.").

436. See *supra* Part III.C. at pages 65–68.

437. *Id.*

438. See Gudjonsson & Joyce, *supra* note 135, at 19 (emphasizing the need for support during forensic interviews).

439. See *supra* Part II.B. These differences help explain empirical findings that the statements of children with mental disabilities are perceived as less credible than those of their same mental age peers. *Id.*

440. See Wood et al., *supra* note 9, at 316. In describing modifications in context of treatment for defendants with intellectual disabilities, researchers describe one treatment model that is highly effective yet has not been widely utilized because it "requires one-on-one sessions, tailored to the unique needs of each patient, with ongoing assessment throughout the training," which providers are "often under-equipped and understaffed to deliver." *Id.* As an alternative, the researchers posit that certain "modifications and adjustments to this program that can be implemented in cost-effective ways" including providing "directives from the training manual [which] provide recommendations for interviewing and providing treatment to this population, derived from the collective understanding of the impairments inherent in [intellectual disabilities]." *Id.*

441. See *supra* Part II.B. These differences help explain empirical findings that the statements of children with mental disabilities are perceived as less credible than those of their same mental age peers. *Id.*

442. Wood et al., *supra* note 9, at 316.

victims with mental disabilities share common characteristics and common barriers from which baseline protections can be ascertained, such victims are not a monolithic group.<sup>443</sup> Therefore, reform needs to provide an avenue for victims to request and receive additional, individualized accommodations and modifications.

### *B. Proposed Model Law for Victims with Mental Disabilities*

What follows is a proposed model law that incorporates the key features described above. This law begins with a preamble, which broadly sets forth why this law is needed. Next, the law defines the key terms in the law. Finally, the law sets forth the specific accommodations and protections to which victims with mental disabilities are entitled throughout the criminal justice system.

#### Preamble

Victims with mental disabilities, while overrepresented as victims of crime, face barriers to equal participation in the legal system. These barriers result in wrongdoing against them not being reported, pursued, prosecuted, or successfully tried as compared to wrongdoing against those without mental disabilities. To overcome these barriers that arise from their mental disabilities, accommodations are necessary to ensure equal participation and, ultimately, to deter and thus reduce crimes against these victims.

#### 1. Definitions

“Best Practices” means those practices developed and/or certified by persons and organizations who are knowledgeable about mental disabilities and the impact such disabilities have on persons’ ability to participate in the criminal justice system.

“Mandatory Screening” means asking and gathering information, either directly or indirectly, to assess, consistent with Best Practices, whether it is likely the Victim has mental disabilities and may include asking the Victim or anyone with her about her living arrangements, disability benefits, accommodations at school through an Individualized Education Plan, or other indicators of a possible mental disability.

“Mental Disabilities” means intellectual, developmental, and/or psychiatric disabilities that result in significant impairments affecting comprehension, communication, or learning.

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443. See *supra* Part II.B. These differences help explain empirical findings that the statements of children with mental disabilities are perceived as less credible than those of their same mental age peers.

“Multidisciplinary Team” means a team whose members provide collaborative services on behalf of Victims in their professional roles, including forensic and investigative personnel, medical and psychological providers, victim Support Persons (“SPs”), Guardian Ad Litem (“GALs”), and prosecutors and their staff.

“Support Person” means a person selected by the Victim to accompany them and provide information about them throughout their participation in the criminal justice system, such as, for example, information about the Victim’s preferred activities, the best way of communicating with them, and triggers to avoid.

2. To facilitate and ensure meaningful and equal participation by victims with mental disabilities in the criminal justice system, the following measures shall be implemented within a reasonable time, and no later than one year from the effective date of this Act:
  - (a) General Provisions
  - (b) Mandatory Training consistent with Best Practices for all professionals who are involved with Victims with Mental Disabilities, including First Responders, Law Enforcement Officials/Prosecutors, Court-Appointed Defense Counsel, Judges and Other Court Personnel, Guardians Ad Litem, and Victim Advocates;
  - (c) Allowance of Victim Support Person (SP): Victims with Mental Disabilities may at all times, including during interviews and testimony, have a SP who may sit with them on the stand or while being interviewed and may provide physical contact and request a break on the Victim’s behalf. In addition to a SP, victims may at all times have any emotional support objects and/or an emotional support animal that either the victim or the SP believes would be beneficial;
  - (d) Appointment of Guardian Ad Litem (GAL): A GAL shall be appointed at the first opportunity to ensure victims are afforded the rights provided by this statute and related court rules; to ascertain and advocate for additional special measures, including additional accommodations based on a victim’s specific needs and/or expert assistance; to work with the Multidisciplinary Team; and to fulfill all other roles and responsibilities consistent with protecting and advocating for the needs and interests of the victim. A GAL shall have background and training specific to victims with mental disabilities and shall be paid reasonable compensation by the court. A GAL shall be presumed to be acting in good faith and shall be immune from civil or criminal liability based on their appointment.

- (e) Mandatory Notice of Rights: Victims will be provided with notice of their rights under this law, as well as under the ADA, at the point at which they first interact with the criminal justice system.
  - (f) This law expressly applies to all victims with mental disabilities, including children, and provides rights and protections in addition to those provided to children through separate laws.
  - (g) Expert testimony to support the measures set forth in this law is permitted but is not necessary or required in order to obtain the practices and accommodations herein.
- (1) Pretrial measures shall be instituted as follows:
    - (a) Mandatory Screening of all victims, both adults and children, by First Responders for mental disabilities;
    - (b) Use of Best Practices for forensic and police interviews including but not limited to use of Multidisciplinary Teams designed for victims with mental disabilities;
    - (c) No discovery depositions of Victims;
    - (d) Right to a speedy trial by Victims;
    - (e) Development and use of a model jury instruction for witnesses with mental disabilities, which explains differences in the witness's communication and cognitive capabilities; and
    - (f) Any other provision requested on behalf of any Victim and approved by the court.
  - (2) Trial measures:
    - (a) Accommodations shall be provided during trials as follows:
      - (1) Victims shall be afforded protections upon request of the prosecutor, the GAL, the Victim, or the Court:
        - (i) to shield Victims from contact of any kind, whether visual or auditory, with the alleged perpetrator, as long as (ii) the defendant has the ability to see and hear the Victim and lawyers during such Victim's testimony and to communicate in some form with his lawyer during the Victim's testimony.
      - (2) Testimony may be provided through any of the following options as decided by the lawyer handling the case in conjunction with the Victim and her GAL: live courtroom testimony; live remote testimony; or a recorded deposition taken in lieu of trial testimony with the purpose to preserve the Victim's testimony.
    - (b) Accommodations in questioning the Victim shall include:
      - (1) In all cases involving a victim with mental disabilities, the court shall exercise heightened discretion over the type of questioning, including cross-examination, in order to enhance the Victim's ability to provide reliable testimony;



- (2) The court shall, at a reasonable time before testimony of the Victim occurs, and no later than five days before the start of a trial, preliminarily decide what special measures necessary for judicial control over the questioning of the Victim will be exercised; and
  - (3) The Victim expected to testify shall be prepared in advance for such testimony by the lawyer handling the case in conjunction and with input and assistance from the Victim's GAL.
- (c) The court may provide any additional accommodations as requested on behalf of the Victim that it reasonably believes will facilitate the Victim's ability to testify.

### C. *Benefits of Model Law and Areas of Future Reform*

This model law will facilitate the equal participation of victims with mental disabilities in the criminal justice system and thus improve outcomes for this group of victims. Such widespread reform is long overdue given the systemic barriers to participation that are well-known to exist for this group. Just as child victim laws are in place to address systemic barriers to participation that would otherwise exist for child victims, a similar law is needed for victims with mental disabilities.

This model law, however, is not a panacea for the challenges this group of victims faces in the criminal justice system. Instead, it should be viewed as a baseline of protection on which other, more individualized accommodations may need to be added on a case-by-case basis. Indeed, this proposed reform provides a process by which additional measures can be requested and provided. Certainly, room exists for additional reform that would further enhance these victims' participation. As described in *supra* Part I.B., other countries' laws go further than this model proposal, such as the use of intermediaries to help elicit and explain victims' statements. While these measures would represent somewhat of a paradigm shift from current assumptions in the United States legal system about what evidence and testimony is reliable, as well who decides issues of reliability and credibility, resistance to new concepts should not preclude exploring the pros and cons of such measures.

Further reform should also be considered in the context of the rules of evidence, such as adjusting the hearsay exceptions for statements by victims with mental disabilities.<sup>444</sup> Again, if reliability is

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444. For example, in Kentucky, a rule was proposed that would exclude as hearsay any "out of-court statement that was made by a child with a physical,

the goal, the criminal justice system must examine its current rules and their application to determine whether they are working to let in reliable testimony or evidence, or if the opposite may be true. Given the barriers such victims face in testifying—even with the myriad accommodations in the proposed model law—the legal system should be especially attuned to assessing alternative ways that a victim’s voice can be heard. Existing hearsay rules, for example, may be used, such as the exceptions for excited utterances and for statements made in furtherance of medical diagnoses, just as they are for statements made by children.<sup>445</sup> Any changes to hearsay rules should be mindful of criminal defendants’ rights to confrontation.<sup>446</sup> Reform in terms of the rules of evidence can operate in tandem with the changes proposed in this Article.

Regardless of the reform considered, it is critical to keep in mind that a status quo designed around the needs of typical victims is ill-suited to meet the needs of victims with mental disabilities. The choice is not between a system that works versus a new and improved system. It is between a system that is fundamentally broken, such that millions of victims routinely and predictably fall through its cracks, and a system that attempts to fix that brokenness.

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mental, emotional, or developmental age of twelve (12) years or less at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child . . . .” S.B. 137, 2018 Leg., Reg. Sess. (Ky. 2018) (modifying Rule 804). While the rule ultimately was not adopted by the Kentucky Supreme Court, it nonetheless illustrates the type of hearsay rule that should be considered to meet the needs of vulnerable witnesses. And while the rule proposed in Kentucky was drafted to include only statements by children, such a rule should logically be extended to include adults with a “mental, emotional, or developmental age of twelve (12) or less.” See also John Myers, *Children’s Disclosure Statements as Evidence in the United States Legal System*, CHILD’S TESTIMONY 309, 318–22 (2011).

445. Certain exceptions, such as excited utterances and statements made in furtherance of medical diagnoses, already are established. See, e.g., *State v. Walker*, 935 N.W.2d 874 (Iowa 2019); but see *State v. Skahill*, 966 N.W.2d 1 (Iowa 2021).

446. While the admission of such out-of-court statements in criminal cases has been limited by *Crawford* in criminal cases, statements that are not testimonial in nature or statements for which a defendant has waived or forfeited his right of confrontation are not precluded by *Crawford*. Christopher Y. Bouquet, *Child Witnesses, Pro Se Defendants, and the Confrontation Clause in California*, 29 S. CAL. REV. L. SOC. JUST. 365, 375–80 (2020) (referencing *Crawford v. Washington*, 541 U.S. 34 (2004)).

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