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**Sacrificing the Child to Convict the Defendant:
Secondary Traumatization of Child Witnesses by
Prosecutors, Their Inherent Conflict of Interest,
and the Need for Child Witness Counsel**

Tanya Asim Cooper

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SACRIFICING THE CHILD TO
 CONVICT THE DEFENDANT:
 SECONDARY TRAUMATIZATION OF CHILD
 WITNESSES BY PROSECUTORS, THEIR
 INHERENT CONFLICT OF INTEREST, AND THE
 NEED FOR CHILD WITNESS COUNSEL

*Tanya Asim Cooper**

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INTRODUCTION

Before Princess could testify, she was murdered.¹ She was fourteen years old.² Less than one mile from the Capitol, the crime made national headlines. She was slated to be the government's star witness in a high-profile gang-related murder,³ and her impending testimony was no secret.⁴ Gunned down by two masked men in her friend's house one night,⁵ Princess died instantly.⁶ Keisha (age six) was there that night; so was her sister, Tara (age twelve), and her brother, Antoine (age nine).⁷ Tara was shot in the leg before she scooted out of range of the gunfire.⁸ Afterwards, Keisha, Tara, and Antoine were afraid to talk about it, and

¹ The murder of "Princess" Hansen in January 2004 shook Washington, D.C. See David A. Fahrenthold, *D.C. Girl, 14, Was Killed as Witness, Police Say*, WASH. POST, Jan. 25, 2004, at A01; Marc Fisher, *Vilified on All Sides, Slain Girl's Family Clings to Its Pride*, WASH. POST, Feb. 2, 2004, at B01; Henri E. Cauvin, *Witness Describes Gunman's Attack; Person Hid, Then Found Teen Dead*, WASH. POST, Jan. 27, 2004, at B02 [hereinafter Cauvin, Jan. 27, 2004]; Serge F. Kovalski & David A. Fahrenthold, *NW Housing Complex A Tangle of Drugs, Despair*, WASH. POST, Feb. 1, 2004, at A01 [hereinafter Kovalski & Fahrenthold, Feb. 1, 2004]; Carol D. Leonnig, *Yet Another Witness Intimidated, D.C. Authorities Fear*, WASH. POST, Feb. 17, 2004, at B01 [hereinafter Leonnig, Feb. 17, 2004]; Henri Cauvin, *Trial Opens for Two Men Charged in Girl's Death*, WASH. POST, Sept. 28, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092702267_pf.html [hereinafter Cauvin, Sept. 28, 2006]; Henri Cauvin, *2 Men Found Guilty of Murder in Slaying of 14-Year-Old Witness*, WASH. POST, Nov. 1, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103100667_pf.html [hereinafter Cauvin, Nov. 1, 2006] ("The slaying of Jahkema 'Princess' Hansen was as brazen a witness attack as the city had experienced, and the trial, which began in late September, cast an unsettling light on the netherworld that Hansen—and her killers—inhabited.").

² See Cauvin, Nov. 1, 2006, *supra* note 1 ("Just a seventh-grader, Hansen hung out with people a lot older, and she was out buying drugs with some of them at 3 a.m. when she saw a killing that later would cost her her life.").

³ *Id.* (the defendants were known in the neighborhood as "Corleone, for the Mafia family portrayed in the 'Godfather' films, and . . . Frank Nitti, for the feared accomplice to Al Capone.").

⁴ *Id.* (noting that one defendant became worried that Princess would talk and "secretly follow[ed] her to a police station, where she had been summoned by detectives"); see also Cauvin, Sept. 28, 2006, *supra* note 1 (reporting that even though Princess was summoned by detectives to share her eyewitness account, she "would reveal nothing to detectives").

⁵ Cauvin, Nov. 1, 2006, *supra* note 1 ("Hansen and other children were gathered around a dining table at a friend's residence, laughing the evening away.").

⁶ Before she was shot twice in the head, she ran from the hitman, who first chased her through the house. See *id.*

⁷ To respect their privacy, the children's names in this article have been changed, with the exception of "Princess."

⁸ See Cauvin, Jan. 27, 2004, *supra* note 1.

they were not alone.⁹ Police and prosecutors urged the children to cooperate with their investigation, but the family was unwilling.¹⁰ Because they were afraid to talk for fear the defendants would retaliate against them, and because they were wary of prosecutors who promised to protect them,¹¹ they declined to participate. But that frustrated prosecutors, who referred the family to child protective services alleging that the parents would not participate in a safety plan to protect their children. As a result, the children landed in foster care, which is where I met them, as their court-appointed lawyer.¹²

Almost three years later, prosecutors subpoenaed the children to testify before a grand jury and then at the criminal trial, but the children were still afraid. The prosecutors had never met the children before the trial started, and the children did not know what to expect. The children wanted to testify outside the presence of the men accused of killing Princess, but the prosecutors refused, arguing that the children would be fine, so the children's requests were denied.¹³ Once the trial began, it

⁹ See Kovaleski & Fahrenthold, Feb. 1, 2004, *supra* note 1. ("Another 10-year-old wouldn't discuss Princess: 'I don't want anybody to shoot me in the head.'"); Cauvin, Sept. 28, 2006, *supra* note 1 ("Talking to police was a capital offense in their world."); Cauvin, Nov. 1, 2006, *supra* note 1 ("In the small community in and around Sursum Corda, everyone seemed to know everyone else's business, and that made talking to the police a perilous practice.").

¹⁰ See Leonnig, Feb. 17, 2004, *supra* note 1 (reporting that for some witnesses, putting themselves in danger by talking to police is not worth the \$10 or \$20 in witness fees).

¹¹ Another key government witness "absconded from the witness protection program, and for a time prosecutors feared that she would be killed." Cauvin, Nov. 1, 2006, *supra* note 1.

¹² Studies show that foster care harms children in many ways, often exposing them to situations in which foster parents physically, emotionally, and sexually abuse them. See, e.g., Kathleen A. Copps, Comment, *The Good, The Bad, and the Future of Nicholson v. Scoppetta: Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 497-99 (2009) (recounting haunting tales of severe neglect and abuse endured by children in foster care in one class action lawsuit after they were removed from their mother's care because of domestic violence). But see LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 606 (2009) (pointing out the legitimate purpose of the dependency court system "to protect the child from future losses and abuse, ensure his safety and well-being, and reunite him with family or find him another permanent place to call home").

¹³ On behalf of the children, I made those requests as their court-appointed guardian *ad litem*, but I had to fight with prosecutors to even appear as the children's lawyer. As discussed *infra* Part IV, some prosecutors will likely be hostile towards child witness lawyers, whom they perceive as interference. See Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, CRIM. JUST., Spring 2009, at 12, 18. My experience as child witness counsel in this case was no exception; the prosecutors' hostility towards me was evident when I approached the counsel table one day before the trial had started and prosecutors told me to "step back from counsel table."

“was full of horrible images and grim testimony about sex, drugs and violence.”¹⁴

When the youngest, Keisha, took the stand, I recall that she could not answer any of the prosecutor’s questions. The first question, “[W]here were you born and where do you reside?” confused Keisha, and she answered when she was born instead. Her answers to the prosecutor’s subsequent questions were similarly nonresponsive, reflecting her lack of understanding, and shortly after Keisha started testifying, she visibly shut down on the witness stand. She appeared startled, and when she understood that she was not answering as expected, her shoulders began to hunch, her head dipped, and she started to answer, “I don’t know,” in response to every question. The judge and many female members of the jury looked at the prosecutor askance. The judge called a short recess and Keisha jumped off the witness stand and ran out of the courtroom. When the trial resumed, Keisha’s barely-audible testimony was still confusing and contradictory, so the prosecutor impeached the now nine-year-old girl using her own prior grand jury testimony given months earlier. Notwithstanding all of the issues with Keisha’s testimony, the prosecutors were ultimately, by focusing on other stronger evidence, still able to win their case.¹⁵

So why compel Keisha to testify?¹⁶ She was never properly prepared for trial. No aids were employed to help elicit her testimony, and her testimony utterly lacked probative value. But the harm to her in testifying was great. Keisha had already endured her young friend’s murder in her own home; pressure to testify from unsympathetic and skeptical authorities; the trauma of removal from her home into foster care; media scrutiny implicating her involvement; stress from lack of information and preparation to testify; humiliation of impeachment with her own grand jury testimony; and the terror of facing the accused.

¹⁴ Cauvin, Nov. 1, 2006, *supra* note 1 (testimony revealed Princess “styled herself as a sex object” and slept with older men).

¹⁵ *See id.* (noting that the man accused of ordering the hit on Princess and the gunman he hired to kill her for \$8000 were convicted of first-degree murder, conspiracy to commit murder, and obstruction of justice, among other offenses related to Princess’s death).

¹⁶ As discussed *infra* Part III, prosecutors must weigh many factors in their decisions of whether and how to prosecute child abuse cases, but as I argue throughout this Article, the specific legal and psychological issues confronting child witnesses in criminal prosecutions are often given short shrift.

Magnifying Keisha's anxiety may have been the prosecutors' very reason for calling her: to convict the defendant by sacrificing the child.¹⁷

In criminal cases, prosecutors often compound the trauma child witnesses endure.¹⁸ Keisha's plight and that of other child witnesses in this Article will hopefully shine some light on this problem. As a child witness lawyer for five years in Washington, D.C., I have had ample opportunity to watch prosecutors handle child witnesses, sometimes recklessly.¹⁹ That secondary traumatization—the intimidation and disregard of child witnesses by authorities—threatens the integrity of the entire criminal justice system.²⁰ While unfortunate, perhaps secondary traumatization of child witnesses by prosecutors is inevitable because prosecutors have multiple duties to juggle besides attending to the child. Prosecutors must protect society and even respect the rights of the accused.²¹ Fulfilling these other prosecutorial duties might conflict with the needs and wishes of the child witnesses. Because prosecutors have

¹⁷ See *infra* Part III (discussing a prosecutor's tactic to foster the notion that the defendant is guilty by using children's fears to engender juror sympathy).

¹⁸ In this Article, child witnesses are defined to include victims of and witnesses to crime. Laws protect child victims and witnesses of crime, without distinction. See, e.g., Child Victims' and Child Witnesses' Rights Act, 18 U.S.C.A. § 3509 (a)(2)(A)-(B) (West 2009) (defining "child" for purposes of the statute as a victim of a crime or witness to one against another).

Women and elderly witnesses face similar predicaments from overzealous or indifferent prosecutors in domestic violence and elder abuse cases. For a discussion of those witnesses' predicaments in the current legal framework, see, e.g., Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 381 (2005) [hereinafter Raeder, *Remember the Ladies*]; ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (Oxford Univ. Press, Inc. 2007).

¹⁹ I am not the first lawyer to comment on the awesome power and discretion that prosecutors in the District of Columbia wield, sometimes abusively. In her book, *Arbitrary Justice: The Power of the American Prosecutor*, criminal law professor and former public defender Angela J. Davis wrote,

It was [as a public defender] that I learned of the formidable power and vast discretion of prosecutors. Although some saw themselves as ministers of justice and measured their decisions carefully, very few were humbled by the power they held. Most wanted to win every case, and winning meant getting a conviction Yet most prosecutors with whom I had experience seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim.

DAVIS, *supra* note 18, at 4. As the injustices described in this Article reveal, this is, unfortunately, a nationwide problem.

²⁰ See Raeder, *supra* note 13, at 14 ("It is no wonder that many children freeze when testifying or are easily led into inconsistencies.").

²¹ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecutors to turn over exculpatory information to the criminal defendant).

multiple roles and responsibilities, which they interpret differently,²² and because the Supreme Court has recently made prosecuting crimes against children more difficult,²³ the potential for prosecutors to mistreat their complaining child witnesses, even unwittingly, has increased.

To combat this problem, child witnesses need lawyers. The need for independent counsel with clearly defined roles for representing child witnesses in criminal cases is timely,²⁴ and for children's rights advocates, it is the "next frontier."²⁵ In Part I, I explore the statistics on crimes against children and the social science research on how children cope as victims and then witnesses. In Part II, I examine how laws have evolved to help child witnesses through the process of testifying. With Part III, I compare and contrast prosecutors' multiple and difficult roles in child abuse cases and their sometimes conflicting duties to their complaining child witnesses. Finally, in Part IV, I propose that child witnesses need no less than legal representation and courts need guidance from child witness counsel to ensure the most judicious outcome.

I. THE PROBLEMS CHILD WITNESSES FACE: PRIMARY
VICTIMIZATION OF CRIME AND SECONDARY
TRAUMATIZATION BY THE CRIMINAL JUSTICE
SYSTEM AND ITS PROSECUTORS

A. *Primary Victimization of Children*

The problem of violence against children affects millions of children each year in their homes, schools, and communities, as both victims and witnesses.²⁶ Empirical studies have captured children's past-

²² See *infra* text accompanying notes 138-41.

²³ See *infra* Part III for a discussion on how *Crawford v. Washington*, 541 U.S. 36 (2004) has impacted child abuse prosecutions.

²⁴ The American Bar Association Criminal Justice Section Child Victims Committee recently focused on and presented two discussions and trainings on *Whether Child Victims Should Have Court Appointed Counsel Representing Them* in February 2009, see ABA MIDYEAR MEETING HIGHLIGHTS 9 (Feb. 2009), http://www.abanow.org/wordpress/wp-content/files_flutter/1248452529_20_1_1_7_Upload_File.pdf, and *How to effectively represent child victims in criminal cases* in July 2009, see JUV. JUST. COMM. NEWSLETTER 2 (June 2009), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjust_newsletterjune09_june09_pdfs_Kate_e_Newsletter_Message_609.authcheckdam.pdf.

²⁵ See Raeder, *supra* note 13, at 17.

²⁶ See David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, in U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN (Oct. 2009), available at <http://www.ncjrs.gov/pdffiles1/ojdp/227744.pdf> [hereinafter *Children's Exposure to Violence*] (defining exposure to violence across several major research categories for children who were both directly

year incidence and lifetime exposure to violence, including conventional crime,²⁷ child maltreatment,²⁸ victimization by peers and siblings,²⁹ sexual victimization,³⁰ exposure to family and community violence,³¹

victimized and children who were indirectly victimized (including exposure to community and family violence)).

²⁷ *Id.* at 2 (screening for nine types of conventional crime, including robbery, theft, destruction of property, assault with and without an object or weapon, attempted and threatened assault, attempted and completed kidnapping, and hate crimes or bias assault).

²⁸ *Id.* (including physical abuse, psychological or emotional abuse, neglect, and abduction by parent or caregiver). According to the U.S. Department of Health and Human Services (HHS), in 2007, 794,000 children were maltreated (defined as death, serious physical or emotional harm, sexual abuse or exploitation, or imminent risk of serious harm). See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2007, at 23 (2009), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf> [hereinafter CHILD MALTREATMENT 2007]. This estimate is down from recent years: in 2003, there were 904,000 estimated child victims; 891,000 in 2004; 900,000 in 2005; and 904,000 in 2006. *Id.* at 38. Researchers note, however, that studies designed to capture the prevalence and incidence of child victimization underestimate the scope and variety as well as the interrelationships among different kinds of child victimization. See David Finkelhor et al., *The Victimization of Children and Youth: A Comprehensive National Survey*, 10 CHILD MALTREATMENT 5, 6 (2005), available at <http://www.unh.edu/ccrc/pdf/jvq/CV73.pdf> [hereinafter Finkelhor et al.]. For example, children who are physically abused by a violent parent are also likely to be exposed to domestic violence. *Id.*

²⁹ *Children's Exposure to Violence*, *supra* note 26, at 2 (including victims of dating violence).

³⁰ *Id.* (including sexual contact or fondling by another child or teenager, an adult the child knows, or an adult stranger; attempted or completed sexual intercourse; exposure or flashing; sexual harassment; and consensual sexual contact with an adult).

Estimates on the number of children sexually abused each year vary greatly. See EMILY M. DOUGLAS & DAVID FINKELHOR, CHILDHOOD SEXUAL ABUSE FACT SHEET 1 (May 2005), available at <http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf> [hereinafter DOUGLAS & FINKELHOR]. For example, in 1993, HHS reported that 217,700 children were sexually abused. *Id.* at 2. In 1999, The National Studies of Missing, Abducted, Runaway and Thrownaway Children (NISMAART-2), "with a specific Congressional mandate to make a count of sexual offenses against children, estimated that 320,400 children experienced sexual assault or other sexual offense." *Id.* In 2001, 225,000 sex crimes against children were reported to police nationwide. *Id.* In 2002, a national telephone survey estimated over two million children had been sexually assaulted. *Id.* at 3. In 2003, the U.S. Administration for Children and Families estimated that only 78,188 children were sexually abused. *Id.* at 1. Researchers attribute these differences primarily to three factors: how sexual abuse is defined (by acquaintance or stranger, and not all estimates count both); whether sexual abuse was reported to and investigated by professionals; and whether estimates are based on children abused during a single year or over a person's lifetime. *Id.* at 1-2.

Thus, these numbers are likely an underestimate. See *id.* at 8 (noting that children are most often sexually abused by acquaintances or family members); Raeder, *supra* note 13, at 14 (arguing that estimates are probably low because most children are abused by someone they know and love, not strangers; and "[e]ven when the abuser is not a family member, children are often sworn to secrecy by their abusers with threats of personal or family harm . . ."); DEBRA WHITCOMB, NAT'L INST. OF JUST., WHEN THE VICTIM IS A CHILD 2 (2d ed. 1992) ("[Y]oung victims (age 12 to 19) are far less likely than older victims to report crimes to police, particularly

school violence and threats,³² and Internet victimization.³³ The data demonstrate that “violence, crime, maltreatment and other forms of victimization have become a “routine part of ordinary childhood in the United States.”³⁴ Boys and girls are victimized at equal rates.³⁵ Among

when the offender is not a stranger.”); Finkelhor et al., *supra* note 28, at 18 (lower estimates are based on cases known only to authorities); DOUGLAS & FINKELHOR, *supra* note 30, at 1 (many cases of child sexual abuse are never reported to officials); Ill. Coalition Against Sexual Assault, *Child Sexual Abuse, in* BY THE NUMBERS: SEXUAL VIOLENCE STATISTICS (2006), available at http://www.icasa.org/docs/child_sexual_abuse_-_DRAFT-7.doc (noting that children often tell no one about the sexual abuse).

³¹ See *Children’s Exposure to Violence*, *supra* note 26, at 2 (witnessing assault, victimization of property theft from household, witnessing murder, witnessing domestic violence, among others).

³² *Id.* (studying children subjected to credible bomb threats at school).

³³ *Id.* (studying Internet threats or harassment and unwanted online sexual solicitation).

³⁴ Finkelhor et al., *supra* note 28, at 18; see also *Children’s Exposure to Violence*, *supra* note 26, at 1 (noting that most U.S. children are exposed to violence in their daily lives, and more than sixty percent were exposed, either directly or indirectly, to violence within the past year).

In 2003, Finkelhor and his colleagues conducted telephone surveys to obtain one-year incidence estimates of childhood victimization across gender, race, and developmental stage. See *Children’s Exposure to Violence*, *supra* note 26, at 7. The final nationally representative sample consisted of 2030 children age two to nine years living in the contiguous United States. *Id.* at 8.

More than one half of this nationally representative sample had experienced a physical assault in [2003], more than 1 in 4 a property victimization, more than 1 in 8 a form of child maltreatment, 1 in 12 a sexual victimization, and more than 1 in 3 had been a witness to violence or another form of indirect victimization.

Id. at 18. Researchers explained that while the aggregate data may seem inflated, the population survey that they conducted captured many cases otherwise undisclosed to authorities to whom reports of victimization are usually made. *Id.* (highlighting the unusual and remarkable nature of his study, which examined the “variety of forms victimization takes and the enormous cumulative and collective burden it imposes”).

In 2008, Finkelhor and his colleagues replicated and expanded the telephone-population survey sponsored by the Office of Juvenile Justice and Delinquency Prevention and Center for Disease Control and Prevention. See *Children’s Exposure to Violence*, *supra* note 26 (conducting a population survey by telephone of 4549 children ages ten to seventeen and adult caregivers of children age nine and younger between January and May 2008). This time, researchers found:

[N]early one-half of the children and adolescents surveyed (46.3 percent) were assaulted at least once in the past year, and more than 1 in 10 (10.2 percent) were injured in an assault; 1 in 4 (24.6 percent) were victims of robbery, vandalism, or theft; 1 in 10 (10.2 percent) suffered from child maltreatment (including physical and emotional abuse, neglect, or a family abduction); and 1 in 16 (6.1 percent) were victimized sexually. More than 1 in 4 (25.3 percent) witnessed a violent act and nearly 1 in 10 (9.8 percent) saw one family member assault another.

Id. at 1-2.

³⁵ However, gender differences emerge in the empirical data depending on the type of victimization. For example, boys are more likely to be victims of assault (past-year incidence and lifetime incidence) than girls, and boys are more likely to be physically bullied or threatened; but girls are more likely than boys to be victims of Internet and sexual harassment and sexual assault. *Children’s Exposure to Violence*, *supra* note 26, at 5-6.

age groups, children four years old and younger have the highest rate of victimization.³⁶ Minority children have the highest rates of victimization among races.³⁷

Once victimized, children often feel guilt, shame, or embarrassment. These children comprise a “high-risk population” with significant mental health needs and symptoms such as depression and suicidal ideation, as well as behaviors like victimizing other children.³⁸ Primary victimization, in that being the victim of a crime often requires children to testify in court about the crime, also affects children’s attitudinal and emotional development in significant ways.³⁹

³⁶ CHILD MALTREATMENT 2007, *supra* note 28, at 25; *see also* AM. BAR ASS’N, CRIM. JUST. SEC., VICTIMS COMM., THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM 2 (June 2006) (*cited in* Michael M. O’Hear, *Punishment, Democracy, and Victims*, FED. SENT’G REP., Oct. 2006, at 1, 1 n.2, *available at* <http://ssrn.com/abstract=951550>). Twelve- to fifteen-year-olds, however, comprise the largest percentage of sexually abused children. CHILD MALTREATMENT 2007, *supra* note 28, at 28; *Children’s Exposure to Violence*, *supra* note 26, at 19 (noting that teenagers are more frequent victims of rape, sexual harassment, serious assaults resulting in injury, as well as more likely to witness assault and violence than younger children).

³⁷ *See* CHILD MALTREATMENT 2007, *supra* note 28, at 25 (reporting that African-American, American Indian or Alaska Native children, and children of multiple races had the highest rates of victimization, while Asian children had the lowest).

³⁸ Thomas D. Lyon & Karen J. Saywitz, *From Post-Mortem to Preventive Medicine: Next Steps for Research on Child Witnesses*, 62 J. SOC. ISSUES 833, 835 (2006), *available at* <http://works.bepress.com/cgi/viewcontent.cgi?article=1020&context=thomaslyon>. Fortunately, based on child treatment outcome studies, efficacious mental health treatments exist, and researchers suggest studying interventions designed to serve children in legal and mental health systems for forensic and therapeutic goals. *Id.*

³⁹ Natalie R. Troxel et al., *Child Witnesses in Criminal Court*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 150-62 (Bette L. Bottoms et al. eds., 2009) (discussing attitudinal and emotional outcomes for victimized children who testify in court about the crimes committed against them).

Many crimes against children are prosecuted,⁴⁰ and significant numbers of children testify.⁴¹ The most common child witnesses are grade school children.⁴² Historically, children testified mostly as victims of sexual abuse,⁴³ but increasingly more cases now require children to testify about a wider spectrum of violence that they have endured or witnessed.⁴⁴

B. *Secondary Traumatization of Child Witnesses*

In the 1980s, as awareness of the problem of violence against children grew, child abuse prosecutions surged.⁴⁵ As human victims first

⁴⁰ However, compared to the number of children actually victimized, few cases of child abuse are prosecuted and even fewer of those prosecuted go to trial. Because most child abuse victims underreport, on balance, most child abuse prosecutions that actually reach trial have merit. See James K. Stewart, *Foreword* to DEBRA WHITCOMB ET AL., NAT'L INST. OF JUST., *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS*, at i (Aug. 1985), available at <http://www.eric.ed.gov/PDFS/ED271684.pdf> ("More than 90 percent of all child abuse cases do not go forward to prosecution."). But see Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 AM. J. TRIAL ADVOC. 585, 585 n.1 (2001) (citing several cases in which children falsely accused defendants, whose convictions were overturned on appeal). Professor Raeder reconciles these points by arguing that while "incidents of false accusations by children and their manipulation by adults" is possible, the underreporting of sex crimes, in particular, against children counters the phenomenon of children who falsely accuse, making the converse more likely, "that most claims are based in fact." Raeder, *supra* note 13, at 13.

⁴¹ See, e.g., Lyon & Saywitz, *supra* note 38, at 838 (reviewing research findings of over 250 child sexual abuse cases that went to trial in the late 1990s in one large urban county, in which 400 child witnesses testified).

⁴² See *id.* at 841 (citing Michael E. Lamb et al., *Effects of Age and Delay on the Amount of Information Provided by Alleged Sex Abuse Victims in Investigative Interviews*, 71 CHILD DEV. 1586, 1596 (2000)). In the 1990s, "only 20% of sexual abuse cases reaching the charging stage of criminal prosecution involved preschool children" because, in part, younger children cannot communicate as well, thereby making it harder to prove what happened to them. *Id.* at 837. However, if most abused children are four years old or younger, see *supra* note 34 and accompanying text, and cases involving those younger children are harder to prove and prosecuted less often, it follows that preschool children are the most vulnerable to ongoing abuse.

⁴³ See Troxel et al., *supra* note 39, at 150, 152-56 (reviewing the scientific literature to date on child witnesses in criminal court); Raeder, *supra* note 13, at 13.

⁴⁴ Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 169 (1985); Raeder, *supra* note 13, at 14 (noting that while child sexual abuse has decreased since the 1990s, "the number of children who may be required to testify still remains significant.").

⁴⁵ See *Nelson v. Farrey*, 874 F.2d 1222, 1224 (7th Cir. 1989) (noting the "growing sensitivity to the prevalence of child abuse in our society"); see also Lyon & Saywitz, *supra* note 38, at 833-36; John E. B. Myers, *Children in Court*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 323, 333 (Marvin Ventrell & Donald N. Duquette eds., 2005); Raeder, *supra* note 13, at 13 (noting that "[t]he routine presence of child victims as witnesses in criminal cases is largely

and testifying witnesses second, few have doubted these children's vulnerability.⁴⁶ Because child abuse cases are difficult for prosecutors and children alike, these prosecutions have often been scrutinized.⁴⁷ To study them, Congress commissioned task forces that consistently found that child witnesses in the criminal justice system need better treatment to protect their rights and prevent the legal process from re-victimizing them.⁴⁸ In 1990, Congress found that "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced."⁴⁹ Prosecutors, as explained *infra* Part III, are part of this problem of secondary traumatization.⁵⁰ Their intimidation and disregard of child wit-

attributable to the 1974 enactment of the Child Abuse Prevention and Treatment Act (CAPTA)" because "CAPTA required states to mandate the reporting of child . . . abuse.").

⁴⁶ See Gershman, *supra* note 40, at 585 ("Children as victim witnesses generate unique concerns within the legal system because of their vulnerability, immaturity, and impressionability.").

In respective ways, all branches of U.S. government and policymakers have taken some measures to address child witnesses' vulnerability in criminal cases. See, e.g., 18 U.S.C. § 3509 (2006) (allowing appointment of guardians *ad litem* for child witnesses in federal courts); Maryland v. Craig, 497 U.S. 836 (1990) (permitting child witnesses to testify without directly confronting the defendant); Raeder, *supra* note 13, at 15 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 1 (2005), http://www.justice.gov/olp/pdf/ag_guidelines.pdf) (noting the recently-promulgated Attorney General's Crime Victim's Guidelines reminds prosecutors to be mindful of what the victims endured and how they are forced to relive that while testifying); A.B.A. RESOLUTION 101D, REPORT ON CHILD VICTIMS OF CRIME RESOLUTION, Feb. 2009, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my09101d.authcheckdam.pdf.

⁴⁷ For example, in 1985, the National Institute of Justice of the U.S. Department of Justice commissioned a report on this issue. See generally WHITCOMB ET AL., *supra* note 40.

Since the 1920s, states have formed crime commissions to study the criminal justice system, and their findings were alarming. See DAVIS, *supra* note 18, at 11. "In every way the Prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney." *Id.* (quoting a 1931 report by the National Commission on Law Observance and Enforcement).

⁴⁸ John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 267, 267 (1987) (noting that as society's awareness of the problems of secondary traumatization to children, society has called for new laws). See also Angela Downes, *Practice Tips for the Child's Attorney*, AM. BAR ASS'N CRIM. JUST. SEC. NEWSLETTER, Winter 2009, at 10, 10, <http://www.abanet.org/crimjust/committees/childattorneytip.pdf> ("The adversarial nature of criminal court often neglects the victim.").

⁴⁹ Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, 104 Stat. 4792 (codified as amended at 42 U.S.C. § 13001(4) (2006)).

⁵⁰ See Raeder, *supra* note 13, at 14; Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294 (1999) (describing that for vic-

nesses often causes children unnecessary and palpable harm.⁵¹ Poor and minority children suffer most.⁵² Regardless of race or age, secondary traumatization for many children means victimization twice.

This need not be so. Studies show that, as victims, children want to participate, and need procedural justice.⁵³ Children want correct information about the process and the possible outcomes, and they need at least a basic understanding of the legal system, roles of the professionals with whom they are forced to interact, and sources of information upon which the judge or jury will rely.⁵⁴ Professor Weisz and her colleagues found that “children with more general legal knowledge were less distressed about their hearings.”⁵⁵ “Parents often fear that testifying about a traumatic event will re-traumatize their children, but literature shows that child victims who tell their stories in court, regardless of the outcome, feel empowered and have a better rate of healing.”⁵⁶ In fact, when children were denied or discouraged from participating, those children were more likely to have negative perceptions of justice within the system and less likely to have faith and confidence in it.⁵⁷ Indeed, empirical data demonstrates that “if children did not testify and cases were dismissed or resulted in reduced sentences, some children suffered

tims, the primary harm comes from the crime itself, and secondary harm results from the criminal justice process and governmental actors within that process).

For a history on how secondary harm to victims fueled the crime victims’ rights movement, see David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims’ Rights Act of 2004*, 28 PACE L. REV. 623, 625 (2008).

⁵¹ See Raeder, *supra* note 13, at 14.

⁵² Race and class differences are factors that, for criminal defendants alike, compound the power imbalance between prosecutors and victims. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (“Through the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime.”).

⁵³ Victoria Weisz et al., *Children and Procedural Justice*, 44 COURT REV. 36, 36 (2008) (“children desire and deserve a voice in legal proceedings that affect them”). In their article, Professor Weisz and colleagues cite social science research that “suggests a link between children’s judgments about the procedural fairness of legal activities they experience, their developing conceptions of the legitimacy of our legal system, and their delinquent behaviors.” *Id.* at 38 (citing Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217 (2005)).

⁵⁴ *Id.* at 41.

⁵⁵ *Id.*

⁵⁶ Carri Geer Thevenot, *Kids have their day in court*, LAS VEGAS REV.-J., Dec. 21, 2008, at 1B, available at <http://www.lvrj.com/news/36525339.html>. Professor Nathason’s research and Kids’ Court school is discussed *infra* Part III.

⁵⁷ Weisz et al., *supra* note 53, at 42.

long-term consequences just as some children reacted badly to the experience of testifying.”⁵⁸

While many children, as crime victims, want and need to participate as testifying witnesses, participating in the process causes many of them significant fear and anxiety.⁵⁹ Researchers attribute the cause of child witnesses’ anxieties to a number of factors, “including their fear of not being believed and their fear of answering questions in front of the person who hurt them.”⁶⁰ Facing the accused is consistently children’s top concern.⁶¹ If the abuser is the parent, even the Supreme Court has surmised that the child’s feelings of vulnerability, guilt, and unwillingness to come forward would be particularly acute.⁶² The prospect of direct examination, and especially cross-examination, scares children.⁶³ Children dread repeated interviews about the abuse,⁶⁴ and the adversarial nature of criminal court—and their unfamiliarity with the legal system and its processes—intimidates them.⁶⁵

That anxiety that child witnesses experience, researchers speculate, “interferes with [their] ability to retrieve information from their memories.”⁶⁶ Social and motivational factors can likewise affect a child’s ability to recount the abuse.⁶⁷ “Oftentimes, they change their answer because they think they’re giving the wrong answer.”⁶⁸ Children also may answer differently depending on the question, how it is posed, and what language is used.⁶⁹ Prosecutors who use big words or legal jargon may confuse children, especially if they have not practiced the testimony together.

Because many child witnesses are afraid to testify, researchers have been particularly concerned with outcomes for those child witnesses who testified in court and interested in whether procedures could allevi-

⁵⁸ Raeder, *supra* note 13, at 14.

⁵⁹ Troxel et al., *supra* note 39, at 152-54.

⁶⁰ Thevenot, *supra* note 56.

⁶¹ *Id.*

⁶² See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

⁶³ *Id.*; L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused’s Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 442-43 (1994).

⁶⁴ Brannon, *supra* note 63, at 441-42.

⁶⁵ See Troxel et al., *supra* note 39, at 153.

⁶⁶ Thevenot, *supra* note 56.

⁶⁷ Brannon, *supra* note 63, at 444.

⁶⁸ Thevenot, *supra* note 56.

⁶⁹ See generally Anne Graffam Walker, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (2d ed. 1999), available at <http://ssrn.com/abstract=191391>.

ate the secondary trauma that many of them experienced by virtue of their participation.⁷⁰ Researchers, however, disagree on whether the effect of testifying on children is positive or negative.⁷¹ The reluctance of social scientists to definitively predict the good or ill effects of testifying on children is understandable given the methodological challenges of conducting psychological studies on this phenomenon,⁷² and given the number of factors that can influence a child's experience.⁷³ There is, however, little question that many child witnesses suffer at least short-term harm. In one research study conducted by Gail Goodman and her colleagues, a majority of children found testifying to be both a frightening and upsetting experience;⁷⁴ in another study, Goodman and her colleagues found that the short-term effects on the children's behavior as a result of testifying were more harmful than helpful.⁷⁵ "In contrast, by the time the cases were resolved, the behavioral adjustment of most, but not all, children who testified was similar to that of children who did not take the stand. The general course for these children, as for the control children, was gradual improvement."⁷⁶ Other research has similarly shown that regardless of their experiences in court, virtually all children improve emotionally. "At worst, testifying may impede the

⁷⁰ See Troxel et al., *supra* note 39, at 154-62 (describing possible outcomes and explaining procedures that might be used to alleviate the fear of testifying).

⁷¹ Myers, *supra* note 45, at 333 (citing Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *The Child in Court: A Subject Review*, 104 PEDIATRICS 1145, 1146 (1999)); see also Tedesco & Schnell, *supra* note 48, at 268 ("[W]e do not know whether a court experience is harmful for some but beneficial for others, or which circumstances lead to trauma and which to catharsis."). See also *State v. Michaels*, 625 A.2d 489, 511 (N.J. Super. Ct. App. Div. 1993) (commenting that "the research is so overwhelming that even researchers cannot keep up with it . . . [moreover], the views and conclusions of the researchers and writers vary greatly").

⁷² Troxel et al., *supra* note 39, at 151-52 (discussing difficulties in conducting valid scientific studies of children's reactions to legal involvement because the "lack of random assignment to witness groups (e.g., [those who testified in] open court vs. closed-circuit television []) typically precludes causal inference about the effects of criminal court on children.").

⁷³ See Brannon, *supra* note 63, at 440-41 (identifying factors that make testifying easier on children, such as testifying in dependency versus criminal court, having family support, enduring fewer interviews, etc.).

⁷⁴ Troxel et al., *supra* note 39, at 153.

⁷⁵ Myers, *supra* note 45, at 333 (noting increased negative behaviors in children after testifying as reported by their caregivers).

⁷⁶ *Id.* (citing Gail S. Goodman et al., *Testifying in Criminal Court*, 57 MONOGRAPHS SOC'Y FOR RES. CHILD DEV. 1 (1992)).

improvement process for some children; at best, it may enhance their recovery.”⁷⁷

Children should have more control over the process and how it affects them, so that their chances for a speedy recovery from the primary harm are maximized, such that they are not exposed to any further needless trauma, and so that their needs as victims and witnesses are met.⁷⁸ Many laws already provide them with these rights. More are needed.⁷⁹

II. HOW THE LAW HAS ADAPTED TO ACCOMMODATE CHILD WITNESSES

Today, children have broad and specific rights recognized by law to address their needs as victims and witnesses, including rights of protection, privacy, and participation in the criminal justice system; and the provision for and recognition of these rights by the legislature and judiciary signifies a discernible shift in the law.⁸⁰ Congress, federal courts, the Supreme Court, and at least thirty-three states now deem child witness interests important in the administration of criminal justice.⁸¹

In the 1980s, as awareness of child abuse grew, the Supreme Court recognized the vulnerable and unique role child witnesses play in criminal prosecutions, as well as their need for privacy and protection. For example, in the landmark case *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Supreme Court held that while the accused is entitled to ask the trial court to review child protective services’ files for information material to the preparation of the defense (and for use in cross-examina-

⁷⁷ *Id.* (citing U.S. DEP’T OF JUSTICE, DEBRA WHITCOMB ET AL., THE EMOTIONAL EFFECTS OF TESTIFYING ON SEXUALLY ABUSED CHILDREN 5 (1994)).

⁷⁸ See Raeder, *supra* note 13, at 15 (“[T]he criminal justice system can be more child-friendly to promote more child testimony, as well as better mental health outcomes for children who testify.”).

⁷⁹ See *infra* Part IV (arguing for legislative reform to ensure child witnesses are appointed independent counsel in criminal cases when their needs are not otherwise protected).

⁸⁰ See Douglas E. Beloof, *Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1136 (2007); DAVIS, *supra* note 18, at 64; Mary L. Boland & Russell Butler, *Crime Victims’ Rights: From Illusion to Reality*, CRIM. JUST., Spring 2009, at 4, 11 (outlining how the Federal Rules of Criminal Procedure were revised to implement the Crime Victims’ Rights Act (CVRA)).

⁸¹ Beloof, *supra* note 80, at 1137; Gershman, *supra* note 40, at 585; Raeder, *supra* note 13, at 15 (discussing how many of the rights accorded to child witnesses in state constitutions and federal and state statutes do not specifically target children, but apply to them as well as adults). See generally Boland & Butler, *supra* note 80.

tion), the State has a compelling interest in maintaining the confidentiality of its child protection records.⁸²

Throughout the 1980s, the Supreme Court struggled to balance the rights of the accused with the government's interest in protecting the child witness from direct confrontation. In *Kentucky v. Stincer*, 482 U.S. 730 (1987), the Supreme Court found that the criminal defendant had no Sixth Amendment right to confront witnesses against him at a pretrial competency hearing.⁸³ The Court held that the defendant's exclusion from the pretrial competency hearing of the seven- and eight-year-old girls whom he allegedly sexually abused did not violate his Sixth Amendment right to be confronted by the witnesses against him, especially where his counsel was present at the pretrial hearing, and where at trial, the girls were cross-examined in his presence.⁸⁴

However, just the next year, in *Coy v. Iowa*,⁸⁵ the Supreme Court held that the use of screens to separate the testifying child witnesses from the accused at trial violated the Sixth Amendment right to confrontation.⁸⁶ In *Coy*, the child witnesses were two thirteen-year-old girls who had been sexually assaulted by a man they could not identify while camping in their backyard.⁸⁷ An Iowa statute allowed the trial judge to place a specially-designed screen between the criminal defendant and the children during their testimony. The screen allowed the defendant to dimly see the witnesses but it obstructed their view of him entirely.⁸⁸ The defendant objected that the procedure violated his Sixth Amend-

⁸² *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987).

⁸³ *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987).

⁸⁴ *Id.* at 737-39 (holding that the accused's Sixth Amendment right is a functional trial right that ensures a defendant the opportunity for effective cross-examination, but it is not absolute). The issue was whether the defendant had an opportunity for effective cross-examination, not all the cross-examination he desired, and the Court found he did. *Id.* at 740.

⁸⁵ *Coy v. Iowa*, 487 U.S. 1012 (1988).

⁸⁶ *Id.* at 1014. In *Coy*, Justice Scalia, writing for the majority, discussed the history of the right of confrontation and its origins in Roman law.

The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."

Id. at 1015-16 (quoting *Acts* 25:16). "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Id.* at 1020.

⁸⁷ The assailant had allegedly shone a light in the girls' face and they could not see him. *Id.*

⁸⁸ *Id.* at 1014-15.

ment and due process rights and made him appear guilty.⁸⁹ The Supreme Court agreed. Iowa's enabling statute presumed trauma to the testifying children, but without requiring any individualized findings that the children actually needed special protection, that presumption of trauma was not enough to overcome the defendant's right of confrontation.⁹⁰

Two significant cases that changed the legal landscape for child witnesses were argued and decided on the same day by the Supreme Court in 1990. In *Idaho v. Wright*,⁹¹ the Supreme Court held that admitting the hearsay statements of a child sexual abuse victim to an examining physician under Idaho's residual hearsay exception violated the defendant's Sixth Amendment right to confrontation.⁹² In *Wright*, after two sisters, ages 5 1/2 and 2 1/2, disclosed that they were sexually molested by the older girl's father, they were subsequently interviewed by a pediatrician about the abuse.⁹³ During the younger sister's examination, when questioned about her own abuse, she volunteered information about her sister's abuse to the pediatrician.⁹⁴ At trial, the younger girl, who had since turned three years old, was deemed "incapable of communicating with the jury."⁹⁵ Instead, the pediatrician testified to what she told him, which the trial court admitted under the residual hearsay exception.⁹⁶ The Court found that Idaho had not met its burden of proving that the younger girl's statement "bore sufficient indicia of reliability to withstand scrutiny under the [Confrontation] Clause"⁹⁷ because Idaho's residual hearsay exception was not firmly rooted,⁹⁸ and because the doctor used leading and suggestive questions and the interview was not recorded, the three-year-old's statement lacked particularized guarantees of trustworthiness.⁹⁹

The next significant decision to impact the law on child witnesses was *Maryland v. Craig*,¹⁰⁰ in which the Court upheld Maryland's statute

⁸⁹ *Id.* at 1021.

⁹⁰ *Id.*

⁹¹ *Idaho v. Wright*, 497 U.S. 805 (1990).

⁹² *Id.* at 813.

⁹³ *Id.* at 809.

⁹⁴ *Id.* at 811.

⁹⁵ *Id.* at 811, 816.

⁹⁶ *Id.* at 811-12.

⁹⁷ *Id.* at 816.

⁹⁸ *Id.* at 817.

⁹⁹ *Id.* at 822.

¹⁰⁰ *Maryland v. Craig*, 497 U.S. 836 (1990).

allowing child witnesses to testify via one-way closed circuit television, without seeing the defendant, because Maryland's statute required that the trial court make an individualized finding and "determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."¹⁰¹ The child witnesses in *Craig* included a six-year-old girl and other young children who were sexually abused while attending Craig's kindergarten class.¹⁰² In support of its motion for the testimonial accommodation, Maryland offered expert testimony that the children would have difficulty testifying in Craig's presence.¹⁰³

Although the defendant objected that the procedure violated her constitutional right to confrontation, the Court held that the right to confrontation is not an absolute, but a trial right, noting that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial 'that must occasionally give way to considerations of public policy and the necessities of the case.'"¹⁰⁴ The *Craig* Court approved the use of closed-circuit television because the Maryland statute preserved the other elements of the Confrontation Clause: the child witnesses were found competent to testify, testified under oath, the defendant had the contemporaneous opportunity to cross-examine them, and all could view the child witnesses' demeanor.¹⁰⁵

Maryland's interest, moreover, "in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify" procedures that depart from face-to-face confrontation with the defendant.¹⁰⁶ "We have of course recognized that a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one."¹⁰⁷ The *Craig* court articulated three findings a trial court must make to justify such a special procedure: 1) "[t]he trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect

¹⁰¹ *Id.* at 841 (quoting the Maryland statute, which allowed the child to testify in a separate room, in which the prosecutor and defense attorney were present, while the judge, jury, and defendant remained in the courtroom).

¹⁰² *Id.* at 840. Other children Craig allegedly abused also testified in the case. *Id.* at 842.

¹⁰³ *Id.* at 842.

¹⁰⁴ *Id.* at 848 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)) (emphasis in original).

¹⁰⁵ *Id.* at 851.

¹⁰⁶ *Id.* at 855.

¹⁰⁷ *Id.* at 852 (internal citations omitted).

the welfare of the particular child witness who seeks to testify”; 2) “[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant”; and 3) “the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus*, *i.e.*, more than ‘mere nervousness or excitement or some reluctance to testify[.]’”¹⁰⁸ In *Craig*, the Supreme Court concluded that “where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause’s truth-seeking goal.”¹⁰⁹

“In direct response to *Craig*,”¹¹⁰ as part of the Crime Control Act of 1990, Congress enacted the Victims of Child Abuse Act of 1990 (VCAA).¹¹¹ In this statute, Congress enabled child victims and witnesses with rights in federal court to request protection from directly confronting the defendant with an order “that the child’s testimony be taken in a room outside the courtroom and be televised by two-way closed circuit television.”¹¹² However, a court may order the child witness’s testimony to be taken by closed-circuit television only after making “a case-specific finding that a child witness would suffer substantial fear or trauma and be unable to testify or communicate reasonably because of the physical presence of the defendant.”¹¹³ The VCAA also protects the privacy of the child witnesses’ names and information from

¹⁰⁸ *Id.* at 855-56 (internal citations omitted) (italics in original). “[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness’s testimony.” *Id.* at 858 (quoting from the Maryland Court of Appeals opinion, *Maryland v. Craig*, 560 A.2d 1120, 1127 (Md. 1989)).

¹⁰⁹ *Id.* at 857 (internal citations omitted) (emphasis in original).

¹¹⁰ *United States v. Moses*, 137 F.3d 894, 897 (6th Cir. 1998).

¹¹¹ Pub. L. No. 101-647, tit. II, § 225(a), 104 Stat. 4792, 4798 (1990) (codified as amended at 18 U.S.C. § 3509(h) (2006)); Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 399 (2000).

¹¹² 18 U.S.C. § 3509(b)(1)(A). Child witnesses can also move for a recorded deposition of their testimony that is preserved for a definite time. *See* 18 U.S.C. § 3509(b)(2)(A)-(F).

The special protections afforded child witnesses in the statute apply only to minors. *See, e.g., United States v. Carrier*, 9 F.3d 867, 869 n.1 (10th Cir. 1993) (noting that the oldest child, who was victimized at sixteen years old, had reached the age of eighteen when the case reached the pretrial stage; thus she did not qualify under the statute’s protections).

¹¹³ *See Moses*, 137 F.3d at 898 (citing courts of appeals cases that analyzed VCAA “in light of the principles articulated in *Craig*, 497 U.S. 836 (1990)); *Carrier*, 9 F.3d at 870 (noting the statute’s requirement that “[t]he court must support its ruling on the child’s inability to testify with findings on the record.”).

unfettered disclosure,¹¹⁴ and ensures children's views are heard without delay.¹¹⁵ Federal courts have upheld the constitutionality of the statute's provisions for children's protection,¹¹⁶ privacy,¹¹⁷ and participation.¹¹⁸

¹¹⁴ 18 U.S.C. § 3509(d)-(e) (closing the courtroom if court makes findings that testifying in open court would cause substantial harm to the child or affect her ability to communicate). *See also* United States v. Broussard, 767 F. Supp. 1536, 1545 (D. Or. 1991) (nondisclosure provisions of 18 U.S.C. § 3509 not unconstitutional because the statute is narrowly tailored to serve the compelling interests of keeping the child's identity private, which does not interfere with defendant's Sixth Amendment right to a public trial nor the press' First Amendment right to access public documents).

¹¹⁵ *Id.* § 3509(f) (requiring, for victim impact statement, that every effort be made to "obtain and report information that accurately expresses the child's and family's views concerning the child's victimization"), (j) ("The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.").

¹¹⁶ *See* United States v. Etimani, 328 F.3d 493, 495-500 (9th Cir. 2003) (upholding the defendant's conviction where the child witness testified via two-way closed-circuit television, even though the monitor was not in her direct field of vision); *Carrier*, 9 F.3d at 871 (holding that the district court's findings to order closed circuit television testimony of the child witnesses satisfied the VCAA statute and *Craig*).

Together, the statute and *Craig* require case-specific findings that closed circuit testimony is necessary for a child because the child would suffer more than *de minimus* fear or trauma, and in fact would be unable to testify because of such fear or trauma, brought on by the physical presence of the defendant.

Id. *But see* *Moses*, 137 F.3d at 899-901 (reversing defendant's conviction based on the child witness' closed-circuit television testimony because the child witness unequivocally stated that she was not afraid of the defendant, and the social worker was not qualified "to render an expert opinion on trauma or that [the child witness] would be unable to testify or reasonably communicate in Defendant's presence because of emotional trauma.").

In *Etimani*, the child witness testified in the witness room seated at a conference table with her guardian *ad litem* across from the prosecutor and one defense attorney. The defendant, judge, jury and other defense attorney watched the testimony through monitors in the courtroom. *See Etimani*, 328 F.3d at 497-98. The child witness could see the defendant, her father, and during questioning she was directed to and identified him. However, "the monitor in the witness room was not in [the child witness'] line of sight as she faced forward, but was readily visible if she turned to her left. . . ." *Id.* at 498-500 (quoting legislative history that placement of the television "within the child's field of vision" should not be read to force the child to watch the monitor). The Ninth Circuit Court of Appeals rejected the defendant's argument that *Craig*'s provision for one-way closed-circuit television was unconstitutional, noting that, if *one-way* television testimony can be appropriate, "then *two-way* television testimony, a procedure that even more closely simulates in-court testimony, also passes constitutional muster." *Id.* at 499 (emphasis in original).

¹¹⁷ *Broussard*, 767 F. Supp. at 1545 (confidentiality provisions of 18 U.S.C. § 3509 not unconstitutional); United States v. Anderson, 139 F.3d 291, 302 (1st Cir. 1998) (approving the trial judge's decision to use § 3509 to preclude disclosure of the identities of the child witnesses).

¹¹⁸ *Broussard*, 767 F. Supp. at 1545 (speedy trial provisions of 18 U.S.C. § 3509 constitutional).

Two years after *Craig*, in *White v. Illinois*,¹¹⁹ the Supreme Court held that the four-year-old, sexually-abused girl's out-of-court statements were admissible as exceptions to the hearsay rule, without requiring the trial court to find the child witness unavailable to testify.¹²⁰ The prosecution attempted to have the child witness testify twice: "she apparently experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying."¹²¹ But the trial court made no finding that the child witness was unavailable to testify.¹²² The Court declined to impose an "unavailability rule"¹²³ and found "it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the [child witness] later testifying in court."¹²⁴ The Court specifically declined to find a "necessity" requirement applied here, as it had required in *Coy* and *Craig*, because those cases involved in-court procedures that are constitutionally required once a child witness testifies, rather than requirements the Confrontation Clause imposes for the admission of out-of-court declarations.¹²⁵

In 2005, fifteen years after Congress enacted the VCAA,¹²⁶ the Crime Victims' Rights Act (CVRA)¹²⁷ was passed, affording crime victims many participation rights, including: the right to timely and accurate notice of public court proceedings; the right not to be excluded from public court proceedings; the right to be heard at public court proceedings involving release, plea, sentencing, and parole proceedings; the right to full and timely restitution; the right to proceedings free from unreasonable delay; the right to confer with the prosecutor; and the right to be treated with fairness and respect.¹²⁸ In enacting the

¹¹⁹ *White v. Illinois*, 502 U.S. 346 (1992).

¹²⁰ *Id.* at 348-49.

¹²¹ *Id.* at 350.

¹²² *Id.*

¹²³ *Id.* at 354-55.

¹²⁴ *Id.* at 356. *But see infra* Part III (discussing the Supreme Court's dubious mention of *White* in its later opinion in *Crawford v. Washington*, 541 U.S. 36 (2004)). "One case arguably in tension with the [*Crawford*] rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations." *Crawford*, 541 U.S. at 58 n.8 (internal citation omitted).

¹²⁵ *White*, 502 U.S. at 358.

¹²⁶ See *supra* notes 111-16 and accompanying text.

¹²⁷ 18 U.S.C. § 3771 (2006); Downes, *supra* note 48, at 12.

¹²⁸ 18 U.S.C. § 3771(a).

CVRA,¹²⁹ Congress granted victims, and therefore child victim witnesses, the right to be protected from the accused.¹³⁰

In 2009, the American Bar Association adopted several policies “to address the concerns and needs of young children who have to appear in court Justice requires that, to the extent possible, judges and prosecutors advise victims of their rights and confirm that the victims have understood the rights.”¹³¹ The ABA developed a list of ten rights for child witnesses and their guardians:

1. You have the right to know what is happening in the court case that came about from the report you made.
2. You have the right to be in court whenever the judge and the prosecutor are there to discuss the case, before a trial starts.
3. You have the right to request to speak to the judge anytime the judge makes a major decision in the case.
4. If you lost money or something valuable was stolen from you or damaged as a result of the crime, you have the right to ask the court to make the defendant pay you back for what you have lost.
5. If your property was stolen and has been recovered you have a right to get your property back as soon as possible.
6. If you are scared or feel threatened, you have the right to ask the judge to provide reasonable protection before, during, and after the trial.
7. There are services and people you can talk to outside of the courtroom about what you are feeling.
8. If you would like to talk to someone privately without your parents or legal guardian knowing, you may ask the judge to appoint a guardian or attorney to represent you.
9. You have the right to ask the judge to allow your parents, your guardian, or another adult whom you trust to be present with you during your testimony.

¹²⁹ *Id.* § 3771.

¹³⁰ *Id.* § 3771(a)(1).

¹³¹ *Child Victim Rights*, AM. BAR ASS'N CRIM. JUST. SEC. NEWSLETTER, Winter 2009, at 13, 13, available at <http://new.abanet.org/sections/criminaljustice/PublicDocuments/childvictimrights.pdf>. See also Raeder, *supra* note 13, at 12 (“The policies urge jurisdiction to ensure child victims of criminal conduct have access to specialized services and protections . . . as well as prompt access to legal advice and counsel.”).

10. Whether or not there is a trial, you have the right to know if the defendant is sent to jail or prison and, if so, when the defendant is expected to be released.¹³²

As a result of the actions of the Supreme Court, Congress, the states, and policymakers, child witnesses' rights have evolved considerably. Probably the most recognized right that children in criminal litigation possess today is the right to protection as testifying witnesses from directly confronting the accused, notwithstanding the express dictates of the Sixth Amendment.¹³³ Recognizing that child witnesses need protection from direct confrontation, and that this need is clear and compelling, the Supreme Court has legitimized the testimonial experiences of victimized children. With VCAA and CVRA, Congress has codified children's rights to protection, privacy, and participation, which lower courts have upheld.

Despite this growth of the child witness's rights movement, there is a tension in how the Supreme Court has characterized child witnesses' interests in criminal cases. In all of the child abuse cases of the 1980s and early 1990s, it was the prosecutors who championed child witness interests. The prosecutorial interest in protecting these children's rights was compelling and clear,¹³⁴ and the Court has consistently recognized the importance of child's protection, privacy, and participation in court proceedings. Strikingly, however, it has consistently characterized these child victim-witness interests as issues of compelling State importance, but not necessarily as interests belonging to the children themselves. For example, in *Pennsylvania v. Ritchie*, Justice Powell framed why the Court granted certiorari: it was "[i]n light of the substantial and conflicting interests" of the State and the accused over "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendants' Sixth and Fourteenth Amendment rights to discover favorable evidence."¹³⁵ There was no mention of these interests belonging to the subject children.

¹³² *Child Victim Rights*, *supra* note 131, at 13.

¹³³ The Sixth Amendment, applicable to the States through the Fourteenth Amendment, provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI.

¹³⁴ See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (recognizing "a State's interest in the physical and psychological well-being of child abuse victims").

¹³⁵ *Pennsylvania v. Ritchie*, 480 U.S. 39, 42-46 (1987).

Characterizing children's rights as witnesses as matters of government interest, however, ignores the instances when the prosecutors' interests conflict with child witnesses' interests, and more importantly, their rights.¹³⁶ The Supreme Court has not revisited a balancing of interests between the prosecution and defense in a criminal child abuse case recently,¹³⁷ and the Supreme Court has never expounded on child witnesses' rights post-VCAA or CVRA within that classic balancing of interests, or in the context of a conflict between the prosecution and the child witness.

III. SECONDARY TRAUMATIZATION BY PROSECUTORS AND CONFLICT OF INTEREST

When Anne, one of my former clients, was eleven years old, she was sexually abused by her godfather, who invited her to sit on his lap and then tickled her vagina above her underwear. That happened several times one summer while the rest of her family was asleep or watching TV. She felt instinctively what happened to her was wrong, and she was ashamed. When she told her family, they doubted and even ridiculed her at first, but nevertheless they acted quickly to expel the godfather from their home and report the incidents. Prosecutors charged the godfather with sexual abuse of a minor, and the case was set for trial. During their preliminary exercise of discretion, prosecutors found the case worthy to prosecute.

Over a year later, when the prospect of trial loomed closer, Anne was terrified that she might have to face her godfather in court. "Don't make me talk about it," she begged. She feared her godfather would rise from his seat in the courtroom, pull out a gun, and shoot her. She was adamant that she could not face him in court, so a special evidentiary hearing was convened on the issue of whether she should testify by closed-circuit television because her fear of her godfather would harm and silence her. The prosecutor took no position on where Anne should testify for the special evidentiary hearing. The hearing was set up in a jury room right outside the courtroom, and her live testimony was transmitted to the courtroom, where her godfather sat. The judge questioned her, and she consistently and tearfully told him her fears of facing

¹³⁶ See *infra* Part III.

¹³⁷ See Brian Fox, Note, *Crawford At Its Limits: Hearsay and Forfeiture in Child Abuse Cases*, 46 AM. CRIM. L. REV. 1245, 1246 (2009) (noting how, since 2004, the Court's opinions have not impacted child witnesses).

her godfather in court. After the judge heard that, he ruled Anne could testify outside of her godfather's presence at trial.

But on the day of trial, the prosecutor met Anne for the first time to practice Anne's testimony as per the prosecutor's usual practice. Anne said that maybe the incident was an accident, and her that godfather didn't mean to tickle her "down there." This statement gave the prosecutor pause, and she moved to dismiss the case. Anne wanted to know why, but the prosecutor wouldn't tell her, citing her office policy. Anne cried that her family would ridicule her further. Her family, meanwhile, lamented the time and stress the court proceedings had caused them.

In another case of mine, thirteen-year-old Paul told investigators that his mother beat him with a baseball bat and a belt, leading one prosecutor to charge his mother with a crime. Paul was removed from his home and placed in foster care for years while the criminal case was pending. Paul's foster care treatment team expressed serious concerns about Paul testifying, believing that if he was compelled to testify, he would act out in self-destructive ways. At one point, Paul was moved to a residential treatment facility in Florida. A second prosecutor subpoenaed Paul to come from Florida to Washington, D.C. to testify against his mother, but the trial was continued at her attorney's request. Many months later, a third prosecutor subpoenaed Paul, and he flew again from Florida to Washington, D.C. to testify against his mother. During Paul's first meeting with the third prosecutor, Paul's story of the incident gave the prosecutor some doubt about whether to proceed to trial. The prosecutor dismissed the case, and Paul, like Anne, expressed some disappointment.

But why compel Paul to testify? Why compel Anne to testify? If the cases were weak based on the child witnesses' testimonies, the shortcoming should have been clear far before the day of trial. If the prosecutors had met and interviewed Anne and Paul before trial, the weaknesses in both cases would have come to light sooner. Anne might have been spared from testifying at the evidentiary hearing, dreading the trial for a year more after that, and waiting at the courthouse for hours on end. Paul might have avoided flying from Florida to Washington, D.C. and back again twice without satisfaction. If the prosecutors had more effectively handled Anne and Paul as both crime victims and witnesses, both children would have known the process, what to expect, and might not have suffered unnecessarily when their respective cases were dismissed.

Had Anne's family been treated with respect and empowered with information about the case and process, they, too, might not have regrets about the toll Anne's case had on them. But indifferent prosecutors treated these victims as afterthoughts, even though, ironically, these criminal prosecutions were supposed to be about the victims, their vindication, and ensuring their well-being.

Prosecutors, as these examples illustrate, can be one source of the secondary trauma that child witnesses experience. This is surprising in light of the storied prosecutorial interest in protecting them.¹³⁸ Prosecutors' practices in handling child witnesses vary, and many are genuinely helpful,¹³⁹ but others are decidedly harmful. Some infamous cases—albeit outliers—illustrate prosecutors coercing children into making false accusations.¹⁴⁰ More often, though, prosecutors silence child witnesses with incoherent questions or skeptical and indifferent attitudes.¹⁴¹

Busy prosecutors with challenging child abuse caseloads may find handling child witnesses and their special needs difficult and time consuming. According to the American Prosecutors' Research Institute, to

¹³⁸ See, e.g., Craig, 497 U.S. at 852 (finding the State's interest in protecting child crime victims at trial compelling); *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987) (holding the State's interest in the confidentiality of its investigative files concerning child abuse compelling).

¹³⁹ For an empirical study of the practices of prosecutor's offices in handling child witnesses, see generally WHITCOMB, *supra* note 30.

At each ABA panel in 2009, see *supra* note 24, conscientious prosecutors from different jurisdictions, including Kathleen Muldoon and Mary Boland from Cook County, Illinois, described "child-centric" practices in their child abuse prosecutions. When deciding whether and how to prosecute child abuse cases, these prosecutors consider legal, social, and psychological factors specific to the child witness, and protect the child first, even if it means forgoing a conviction. *Id.*

¹⁴⁰ See, e.g., Doug Linder, *The McMartin Preschool Abuse Trial: A Commentary (2003)*, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/mcmartinaccount.html> (last visited Apr. 29, 2011) (discussing the notorious trial in which prosecutors were considered by some to be complicit in the coercion to which preschoolers were subjected); Douglas Linder, *The Kelly Michaels Case*, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html> (last visited Apr. 29, 2011) (describing how prosecutors, rather than investigate the cases, referred children to therapists who collected their "disclosures"); Jean Montoya, *Lessons from Akiki and Michaels on Shielding Child Witnesses*, 1 PSYCHOL. PUB. POL'Y & L. 340, 346 (1995) (revealing how prosecutors and investigators pressured children with threats and suggestive questioning to disclose sexual abuse by their nursery school teacher).

¹⁴¹ See Raeder, *supra* note 13, at 14 ("Not only do children face the skepticism and disbelief that women often confront when reporting rape, but they also encounter insensitivity to their age and developmental stage throughout the criminal process.").

competently handle child abuse cases, prosecutors must possess knowledge and skill in many areas, including:

dynamics of, and victim responses to, child sexual abuse; child development and age-appropriate questioning; the disclosure process and potential blocks to disclosure; effective use of, and withstanding legal challenges to, anatomical dolls, diagrams and drawings; the search for corroborative evidence; hearsay; memory and suggestibility; preparing the child and forensic interviewer for testifying; and diversity issues.¹⁴²

Becoming a competent lawyer when it comes to child witness issues requires, according to prosecutors themselves, a great deal.

Not all prosecutors, however, will undertake the effort necessary to become competent. Searching for corroborating evidence in these cases, moreover, may be futile, particularly in sexual abuse cases.¹⁴³ Prosecutors might dismiss the case in favor of finding and admitting other evidence to prove the case, or they might forge ahead to prosecute with no evidence beyond the child's testimony. Some prosecutors save critical decisions like whether the child should testify until the last moment. While many prosecutors are chastised by courts

for overzealous exercise of prosecutorial discretion . . . the opposite is similarly troubling—prosecutors who through inexperience, lack of training, personal interest, bias (known or subconscious), apathy, poor judgment, or mistake tend to ignore, reject, or overlook information that could have and would have solved crimes and resulted in convictions of guilty persons with just a telephone call or some minimal follow-up investigation.¹⁴⁴

To truly understand how this phenomenon of secondary traumatization by prosecutors can occur, we must consider, first, the difficulties prosecutors encounter when prosecuting crimes against children, and second, how prosecutors are supposed to handle child witnesses in light of their sometimes conflicting roles to protect society, the victim, and

¹⁴² AM. PROSECUTORS' RESEARCH INST., FINDING WORDS: HALF A NATION BY 2010: INTERVIEWING CHILDREN AND PREPARING FOR COURT 3 (June 2003), available at http://ndaa.org/pdf/finding_words_2003.pdf [hereinafter FINDING WORDS] (discussing prosecutorial obligations to learn and improve techniques to interview children).

¹⁴³ See *supra* note 30 and accompanying text.

¹⁴⁴ See Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 81-82 (2008).

even the defendant. Given this inherent tension within prosecutors' own duties, secondary traumatization by prosecutors might be inevitable for some unfortunate child witnesses.

A. *Prosecuting Child Witness Cases is Inherently Difficult*

First, prosecuting crimes against children is hard "because often the only witness is a child who may be unable to understand the nature of the crime, the effect of their testimony, or be too traumatized to testify."¹⁴⁵ Plus, the evidence in these cases comes from the children themselves, a population vulnerable to undue influence.¹⁴⁶ Even the Supreme Court has acknowledged that child sexual abuse cases in particular are the most difficult to prove because the child victim is often the only witness,¹⁴⁷ and often there is no physical evidence,¹⁴⁸ so a conviction depends largely on the child's trial testimony. But when it comes to testifying, children are often afraid to confront their abuser in court, and their fear can debilitate them, making them unable, and therefore unavailable, to testify.¹⁴⁹ Because child witnesses are often unavailable to testify, prosecutors must instead use their out-of-court statements to prove abuse.¹⁵⁰ Indeed, to overcome the difficulties inherent in these

¹⁴⁵ Fox, *supra* note 137, at 1245.

¹⁴⁶ See Jennifer A. Lindt, Comment, *Protecting the Most Vulnerable Victims: Prosecution of Child Sex Offenses in Illinois Post Crawford v. Washington*, 27 N. ILL. U. L. REV. 95, 119 (2006); Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1009 (2007) [hereinafter Raeder, *Comments on Child Abuse Litigation*]; Gershman, *supra* note 40, at 585.

¹⁴⁷ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

¹⁴⁸ Raeder, *Comments on Child Abuse Litigation*, *supra* note 146, at 1009.

¹⁴⁹ See FED. R. EVID. 804 (defining unavailable witness to include situations in which the declarant 1) invokes exemption from testifying because of privilege; 2) refuses to testify despite court order; 3) testifies to a lack of memory; 4) dies or becomes infirm; and 5) is absent despite reasonable efforts to secure that testimony); see also Fox, *supra* note 137, at 1245 (noting that if the child is determined "unavailable" "then the child, who will likely be the only individual with personal knowledge of the event, will be precluded from testifying about the abuse or any statements she may have made to others.").

Though Federal Rule of Evidence 804 does not include trauma as one of the five illustrative alternatives to meet the unavailability requirement, a child who is too frightened of the defendant to testify will have the same status as a witness who had died or invoked a privilege. Whether or not the unavailability is a formal prerequisite for admission of out of court statements into evidence, prosecutors will only be able to use the statements if they meet a hearsay exception.

Fox, *supra* note 137, at 1245-46.

¹⁵⁰ Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 412 (2005) [hereinafter Mosteller, *Craw-*

cases generally, prosecutors have relied on children's hearsay.¹⁵¹ For awhile, the law not only allowed this practice, but facilitated it.

In 1980, for example, the Supreme Court decided *Ohio v. Roberts*,¹⁵² allowing an unavailable witness's out-of-court statement to be admitted in evidence as long as it bore adequate indicia of reliability, a test met when the evidence either fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.¹⁵³ Many prosecutors subsequently used the legal principles articulated in *Roberts* to admit child witness hearsay.¹⁵⁴ "Child abuse cases usually involve, often by law, multiple actors working in concert, including law enforcement, social workers, counselors, and medical professionals. Interviews with children will often be conducted for multiple purposes with law enforcement present."¹⁵⁵ When fearful or incompetent child witnesses became unavailable to testify, prosecutors would use their statements from forensic interviews, which were often deemed by trial courts to be sufficiently reliable to admit into evidence. A number of states even enacted special hearsay statutes to ease the introduction of this evidence.¹⁵⁶

ford's *Impact*] (noting prosecutors reliance on children's hearsay in child sex abuse cases, in particular).

¹⁵¹ Children's statements made for purposes of medical diagnosis or treatment and children's excited utterances are among those firmly-rooted exceptions to the rule against hearsay that are routinely offered against the accused. *See id.*; *see also* FED. R. EVID. 803(2), (4). For a discussion of whether these classes of children's statements survive a confrontation clause analysis post-*Crawford v. Washington*, discussed *infra*, see generally Mosteller, *Crawford's Impact*, *supra* note 150; Fox, *supra* note 137.

¹⁵² *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹⁵³ *Id.* at 66.

¹⁵⁴ *See* Fox, *supra* note 137, at 1248-49 (citing Mosteller, *Crawford's Impact*, *supra* note 150, at 412); Raeder, *supra* note 13, at 20 ("Pre-*Crawford*, prosecutors focused on protecting children from the trial process because their statements would routinely be admitted as reliable hearsay that survived any confrontational clause challenge.").

¹⁵⁵ *See* Fox, *supra* note 137, at 1246 (citing Raeder, *Remember the Ladies*, *supra* note 18, at 381 (2005)).

¹⁵⁶ *See* Raeder, *supra* note 13, at 19 ("Virtually every state has a child hearsay exception, or uses a catchall to permit child hearsay that would otherwise be barred."); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 591 (2005) [hereinafter Mosteller, *Crawford v. Washington*] (describing Oregon's law, which "is like many other states' exceptions in providing for admission of hearsay based upon an ad hoc determination of reliability and trustworthiness where the child is unavailable.").

In 2004, however, in *Crawford v. Washington*,¹⁵⁷ the Supreme Court overruled *Roberts* and made child abuse prosecutions suddenly much more difficult. In *Crawford*, the Supreme Court banned “testimonial” hearsay of an unavailable witness unless the defendant has had a prior opportunity to cross-examine the declarant.¹⁵⁸ The Supreme Court declined to precisely define what constitutes “testimonial.”¹⁵⁹ “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”¹⁶⁰ Children’s statements in forensic interviews within abuse litigation are now considered largely testimonial.¹⁶¹ Forensic interviews, however, have proven useful in detecting child abuse,¹⁶² and *Crawford* has now threatened years of interdisciplinary research and practice that was meant to ease eliciting reliable statements from child witnesses.¹⁶³ The consequence of *Crawford* on child abuse

¹⁵⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁵⁸ *Id.* at 62-68.

¹⁵⁹ *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

¹⁶⁰ *Id.* at 68.

¹⁶¹ See Mosteller, *Crawford v. Washington*, *supra* note 153, at 591 (citing a few cases in which the “initial ‘disclosure interviews’” of child abuse victims to “a professionally trained interviewer at the local child advocacy center” were “clearly testimonial”).

¹⁶² See Raeder, *supra* note 13, at 13 (“[T]he use of child advocacy centers and best interviewing practices assist prosecutors in identifying false claims and determining which cases to bring.”).

¹⁶³ Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1559 (2009); Tom Lininger, *Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children*, 82 IND. L.J. 999, 999 (2007); Raeder, *Remember the Ladies*, *supra* note 18, at 312 (arguing *Crawford* has wreaked havoc on domestic violence and child abuse cases in which “extensive use of hearsay is now the norm, not the exception”); Fox, *supra* note 137, at 1264 (calling on the Supreme Court to clarify post-*Crawford* “how interviews with multiple purposes should be treated so that multidisciplinary teams can more effectively treat the child and collect evidence.”); Mosteller, *Crawford’s Impact*, *supra* note 150, at 426 (“Cases involving child sexual abuse and domestic violence are particularly susceptible to negative consequences because they often critically depend on hearsay to prove the case.”).

cases was immediate,¹⁶⁴ and the fates of these prosecutions and the child witnesses involved are now uncertain.¹⁶⁵

Harder prosecutions, post-*Crawford*, bode ill for children.¹⁶⁶ To convict the accused post-*Crawford*, more children will have to testify.¹⁶⁷ Prosecutors more often will compel the children to testify instead of admitting their hearsay statements, or prosecutors will admit the hearsay statements after the children have testified and been subject to cross-examination.¹⁶⁸ Some prosecutors will diligently prepare the child witness to testify and produce “a willing and able child for testimony at trial. If the child takes the stand, testifies against the defendant, and is subject to cross-examination, then there is no Confrontation Clause objection to the admission of prior hearsay statements by the child[.]”¹⁶⁹

This mechanism gives the prosecution the incentive to succeed in preparing the child to testify. This is a practical, safe, and ethical solution because the prosecution is the party that generally has access to the child and is best situated to help prepare the child for testimony. Moreover, the prosecution is likely in the best position to actually produce the child. This method of satisfying *Crawford* motivates the prosecution to make the child available rather than trying to admit hearsay after persuading the court that the child is unavailable or incapable of testifying.¹⁷⁰

¹⁶⁴ See Fox, *supra* note 137, at 1246 (citing *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006), in which the defendant’s conviction was reversed because of the admission into evidence of the hearsay statements of a child witness to a forensic interviewer) (“*Crawford* had an instant and profound effect on prosecutions. Many statements that had been admissible under hearsay exceptions prior to *Crawford* are now excluded.”).

¹⁶⁵ See Mosteller, *Crawford v. Washington*, *supra* note 153, at 513 (“Investigative and prosecutorial practices are certain to change.”). “*Crawford*’s impact on the types of hearsay often admitted in child abuse prosecutions is particularly uncertain.” *Id.* at 518.

¹⁶⁶ See Scallen, *supra* note 163, at 1565.

¹⁶⁷ See generally Mosteller, *Crawford’s Impact*, *supra* note 150; Downes, *supra* note 48, at 11.

¹⁶⁸ See Raeder, *supra* note 13, at 20.

¹⁶⁹ Mosteller, *Crawford’s Impact*, *supra* note 150, at 414 (noting that where prosecutors have incentives to have the child testify, statutes that allow children’s hearsay into evidence once the child testifies and is subject to cross examination, they are successful in preparing the child).

¹⁷⁰ *Id.* According to Professor Mosteller, “prosecutors in many jurisdictions have learned that children can in fact be enabled to testify and be available for cross-examination, which broadly permits introduction of their out-of-court statements under the Confrontation Clause.” Mosteller, *Crawford v. Washington*, *supra* note 156, at 520. See also Raeder, *supra* note 13, at 22-23 (predicting that “prosecutors are more likely to argue for use of protective devices such as screens, or remote TV links, pursuant to *Maryland v. Craig*” but “prosecutors may be skeptical of remote or shielded testimony because some studies indicate that despite an increase in accu-

Unfortunately, in my experience, some prosecutors will not prepare the children or will produce children who are not competent or incapable of testifying just to allow the defendant an opportunity to cross-examine the children's "warm breathing bodies."¹⁷¹ If children lose their composure, prosecutors can admit their out-of-court statements because the child has become "unavailable" to testify and the defendant has had a prior opportunity to cross-examine the child.¹⁷² At the other extreme, post-*Crawford*, prosecutors may rush to dismiss the case and return the child to an abusive situation before exploring other admissible evidence.¹⁷³

B. *How Prosecutors Interpret Their Roles Motivates and Affects Their Treatment of Child Witnesses*

Second, to appreciate the phenomenon of secondary traumatization of child witnesses by prosecutors, we must remember whom the prosecutors represent and what motivates them.

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.¹⁷⁴

racy of shielded child testimony, jurors find such children less credible than those who testify openly in their presence.”).

¹⁷¹ Scallen, *supra* note 163, at 1575; Mosteller, *Crawford's Impact*, *supra* note 150, at 413 (arguing that the confrontation right requires the prosecutor to call the child and first attempt to elicit the accusation publicly before the defendant has the right to cross-examine); Mosteller, *Crawford v. Washington*, *supra* note 156, at 585.

¹⁷² See Scallen, *supra* note 163, at 1575.

¹⁷³ See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749 (2005) (noting that within hours of *Crawford's* ban on testimonial hearsay, “prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented limited difficulty in the past.”).

¹⁷⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court (condemning the actions of the prosecutor, who “overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense[.]” *Id.* at 84. In *Berger*,

[the prosecutor] was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying

Thus, the prosecutor has no client.¹⁷⁵ The prosecutor represents the sovereign government or state,¹⁷⁶ which in turn is beholden to society.¹⁷⁷ To do what is best for society, the prosecutor must “heed society’s interest in fairness to the defendant as well as to the victim.”¹⁷⁸

To fulfill their mission to seek justice, moreover, prosecutors must decide which crimes to pursue and which to forgo.¹⁷⁹ Prosecutors weigh a “broad range of legitimate factors when making important decisions in criminal cases, including the safety of the community, fairness to the defendant, the allocation of resources in the criminal justice system, and the interests of the victim.”¹⁸⁰ In short, prosecutors exercise discretion. Indeed, discretion is the *sine qua non* of prosecution, in which prosecutors “take into account the individual facts, circumstances, and characteristics of each case.”¹⁸¹ “Without discretion, prosecutors might be required to bring criminal charges in cases that most people would view as frivolous and in cases where the evidence is weak or lacking in credibility.”¹⁸² Without discretion, moreover, manifest injustice is a more likely outcome.¹⁸³

What does it mean to treat the victim fairly, especially when it is a child, and how should prosecutors exercise their discretion vis-à-vis child witnesses? Some children need procedural justice and want to testify, while others cannot handle the stress of court proceedings, however horrific their victimization.¹⁸⁴ The victims and witnesses in these cases, the

and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner.

Id.

¹⁷⁵ DAVIS, *supra* note 18, at 61.

¹⁷⁶ See Kenneth Bresler, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 540 (1996) (“The prosecutor is simply an agent of the sovereignty.”).

¹⁷⁷ R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2-3 (Thomson West 2005).

¹⁷⁸ *Id.* at 3; DAVIS, *supra* note 18, at 61.

For a history of the rise of the modern system of public prosecution, see DAVIS, *supra* note 18, at 9-12.

¹⁷⁹ See DAVIS, *supra* note 18, at 13 (describing examples of cases not likely to warrant prosecutorial attention, like gambling at a Saturday night poker game in a private home in a jurisdiction where gambling is illegal).

¹⁸⁰ *Id.* at 76.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.* at 13.

¹⁸³ *Id.* at 6-13 (noting that the entire criminal justice system and the officials (police, prosecutors, judges) who operate within that system exercise discretion). “A system without discretion . . . would undoubtedly produce unjust results.” *Id.* at 6.

¹⁸⁴ See *supra* Part I.

children, have special needs. Besides weighing the typical factors inherent in any criminal case (society, defendant, resources), prosecutors in child abuse cases, it seems, must pay careful attention to the special needs and abilities of the children upon whom their cases depend, in order to wield their discretion wisely and justly.¹⁸⁵

But does that special interest in child witnesses give rise to a heightened duty that prosecutors owe them?¹⁸⁶ Some say yes. In fact, it was prosecutors themselves who urged the Supreme Court to find that the government has a compelling interest in the protection of child victims of abuse from further trauma and embarrassment.¹⁸⁷ “Indeed, pre-*Crawford*, it was often prosecutors, not only parents, who felt that the best way to protect children from being retraumatized was to keep them from testifying.”¹⁸⁸ Prosecutors have interpreted this interest as a duty to protect the child first and convict the accused second, or the “child first doctrine.”¹⁸⁹ Where the doctrine ends, however, for these prosecutors, the dilemma begins: “Should [prosecutors] risk putting an unpredictable, emotionally fragile child through the adjudication process, and possibly on the witness stand . . . [o]r should they spare the child that trauma, knowing that the case may not be tried and the child may re-

¹⁸⁵ See *supra* note 142 and accompanying text.

¹⁸⁶ DAVIS, *supra* note 18, at 62. “The critical question is whether [victim witnesses] should play a greater role in the prosecution of a case than that of an ordinary witness whose sole function is to provide evidence in support of the prosecutor’s case.”

¹⁸⁷ See, e.g., *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (crediting Maryland for contending that it has a substantial interest in protecting “children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator” and citing its own recognition of the State’s compelling interest in “the protection of minor victims of sex crimes” in *Globe Newspaper Co. v. Super. Ct. of Norfolk County*, 457 U.S. 596, 607 (1982)).

¹⁸⁸ Raeder, *supra* note 13, at 14.

¹⁸⁹ FINDING WORDS, *supra* note 142. “[N]o other aspect of the case should come before [protecting] the child[.]” *id.* at 5, and no ego should interfere either, *id.* at 3; see also Raeder, *supra* note 13, at 15 (noting that the Attorney General’s Crime Victim’s Guidelines “make reduction of the trauma to child victims and witnesses caused by their contact with the criminal justice system a primary goal”).

“Child first” policies are not binding on prosecutors, and if these guidelines are not followed, prosecutors face no consequences. Besides policies, ethical rules offer prosecutors little guidance. See Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 (2005) [hereinafter Gershman, *Prosecutorial Ethics*]. Neither the ABA’s Model Rules of Professional Conduct nor the Model Code of Professional Responsibility addresses the prosecutors’ ethical responsibilities to crime victims. *Id.* The model rules and code of professional responsibility as well as national standards of prosecution provide a general ethical framework to prosecutors to simply “seek justice.” *Id.* But even “these standards are aspirational.” DAVIS, *supra* note 18, at 15. “No prosecutor is required to follow them or even consider them.” *Id.*

turn to an abusive environment?”¹⁹⁰ With little to no physical evidence, putting the theory of children first into practice presents practical challenges.

Others say no. Prosecutors owe no special duty and must remain neutral towards the child, weighing the child witness as simply one factor among several in the prosecutor’s exercise of discretion to prosecute a given case.¹⁹¹ Interpreting the prosecutorial duty to consider the child witness as merely one factor among others will cause some prosecutors to minimize or disregard the child witness’s needs and wishes. Angela J. Davis, criminal law professor and authority on unfair prosecutorial practices, writes:

As with most other prosecutorial issues, the role of the victim in the prosecution of criminal cases varies widely from office to office and even within individual offices. Some prosecutors consult with victims before making plea offers, and some don’t. Some prosecutors consult with some victims and not others. Some prosecutors will not make a plea offer unless the victim “signs off” on the deal. Other prosecutors treat victims purely as witnesses and barely keep them informed of the status of the case. . . . Although some prosecutors take great interest in the victim of the crime and treat them with dignity and respect, others do not.¹⁹²

This disparate treatment of victim witnesses by prosecutors that Professor Davis describes is especially troubling for children because the potential for secondary traumatization is maximized.¹⁹³

¹⁹⁰ *Preface to WHITCOMB ET AL.*, *supra* note 40, at iii.

¹⁹¹ See A.B.A. RESOLUTION 101D, *supra* note 46, at 12 (“Prosecutors ensure that justice is done for the community; they do not and cannot always represent the individual needs of the child victim or witness, particularly when those needs conflict with the safety needs of the community.”).

¹⁹² DAVIS, *supra* note 18, at 63.

¹⁹³ “A prosecutor’s relationship with a victim in a particular case often depends on who the victim is.” *Id.* Not surprisingly, prosecutors treat victim witnesses differently depending on factors such as class, race, “worthiness,” media coverage, etc. See *id.* at 63, 71-76.

There is no doubt that the media’s decision to focus on certain cases moves them to the top of the prosecutor’s priority list. What is unclear is what comes first – the media attention or the prosecutor’s interest in the case. Does the media begin to focus on a case that law enforcement and prosecutors bring to their attention, or do prosecutors focus on a case when they know the media is informing the public? Recall Keisha’s experience described at the beginning of this article. Why compel her to testify? If Princess’s murder had not garnered such media coverage, perhaps the prosecutor would have decided, on balance, that the harm to Keisha in testifying outweighed the probative value of her testimony, which, in the end, was nil.

This tension inherent in prosecutors' multiple duties allows them to interpret their roles and responsibilities in different ways, and reconciling these positions on what duties prosecutors owe child witnesses is challenging. On the one hand, at a minimum, we expect prosecutors to develop their competence to handle child abuse prosecutions in a way that is mindful of the child and his or her vulnerable status. Learning a particular child witness's strengths and limitations and then crafting a child-friendly case theory makes sense, and includes: 1) meeting with the child witness early and often and learning relevant details about her life, her family, her desires and fears, her thoughts about testifying, her cognitive strengths and abilities, her oral competence; 2) learning whether her fears of the defendant will affect her testimony and to what extent; 3) determining whether her testimony can improve with pretrial preparation; 4) contemplating whether social factors are relevant to the child's testimony; 5) investigating whether other admissible evidence exists; and 6) reflecting whether the prosecutor's other interests in the case conflict with the child's. We expect at least this much from prosecutors, because society cannot tolerate prosecutors who coerce children to falsely accuse someone or to testify falsely. Likewise we cannot sanction indifferent prosecutors who ignore or confuse a child witness. Overzealous and indifferent prosecutions have cost many people a great deal, financially and emotionally, and for children, even developmentally. Sacrificing the child to convict the accused must not be tolerated.

But on the other hand, can we really expect all of this from prosecutors? Child abuse prosecutions are already difficult, and child-minded practices are not only time consuming but also may require a change in prosecution culture so all prosecutors who handle child witnesses are properly trained. Even with additional training and a "child-first" philosophy, however, sometimes prosecutors' interests in the case and their multiple duties to society, defendants, and the child witnesses will conflict, often to the children's detriment.¹⁹⁴ The motivation to win, for some prosecutors, prevails.¹⁹⁵ Child witnesses become pawns, and their debilitating displays of fear can persuade juries of the defendants' guilt,

¹⁹⁴ See Raeder, *supra* note 13, at 15 (noting that victims' rights and prosecutors' strategies might conflict at times). "For example, when the judge rules that evidence is not protected by the rape shield, should the prosecutor counsel the witness to testify or respect the victim's desire not to?" *Id.*

¹⁹⁵ See Bresler, *supra* note 176, at 543 ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case – to win at all costs.").

“a benefit which . . . outweighs the actual content which can be elicited in the courtroom.”¹⁹⁶ That seems unjust, but prosecutors owe an allegiance to protect the public from harm as well as to protect the rights of the accused, and balancing these interests requires considerable skill.¹⁹⁷ Prosecutors cannot align themselves too closely with child witnesses lest they compromise their ability to remain neutral and impartial and to, thereby, exercise their discretion fairly.¹⁹⁸ Because prosecutors’ interests will sometimes conflict with the child witnesses’ interests, prosecutors cannot truly help child witnesses in these cases, and child witnesses cannot solely rely on prosecutors to represent their rights and interests.

IV. CHILD WITNESSES NEED LAWYERS AND COURTS TO PROTECT THEM

A. *Children Need Independent Counsel*

One way to respond to the unique needs of child victims is to routinely appoint counsel for a child victim. . . . Not only should appointing counsel for child victims in criminal courts be more widespread but it can be most effective when it includes clearly defined roles for all so that the child’s counsel can best protect the child.¹⁹⁹

To equip children to handle conflicts with prosecutors and participate meaningfully as witnesses in the criminal justice system, children need independent counsel as much as they need information, process, and compassion.²⁰⁰ Through laws, children have a right to information,

¹⁹⁶ Berliner, *supra* note 44, at 174 (citing some prosecutors’ preference for “the presence of a live child witness, albeit a nervous or hesitant one . . .”). *But see* Berger v. United States, 295 U.S. 78, 88 (1935).

But, while [the prosecutor] may strike hard blows, [the prosecutor] is not at liberty to strike foul ones. It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id.

¹⁹⁷ See Gershman, *Prosecutorial Ethics*, *supra* note 189, at 562.

¹⁹⁸ *Id.* at 561-62 (acknowledging the conflicting allegiances prosecutors owe and advocating that prosecutors’ duty to justice is paramount, requiring the prosecutor to be neutral to each constituency).

¹⁹⁹ See Downes, *supra* note 48, at 10 (“[C]hild victims need added assistance to protect their rights”).

²⁰⁰ See *supra* Part I.

to be heard, protected, and respected.²⁰¹ However, children cannot invoke these rights without help,²⁰² and only child witness lawyers can truly protect children from pernicious practices within the system.

Legal counsel for children is the most meaningful solution. Even when prosecutors treat child witnesses fairly and empower them with information about the process, children generally lack the capacity to understand the particulars of their cases, something that an independent representative is best equipped to provide.²⁰³

Do child witnesses really need lawyers, or will lay advocates suffice? If child witnesses need lawyers, what is their proper role? These questions spark an interesting debate.²⁰⁴ On the one hand, any child advocate (lay or lawyer) can perform some functions: provide general and neutral information about the criminal justice system and process; “make a recommendation to the court regarding the child’s best interest . . . at each stage in the criminal proceeding[.]”²⁰⁵ coordinate resources and services through crime victim assistance funds;²⁰⁶ “protect the child from intimidation from the defendant or family members, and work to alleviate the general trauma of the courtroom.”²⁰⁷

For example, at Kids’ Court School at Boyd School of Law at the University of Nevada Las Vegas, law students partner with graduate students in education to inform child witnesses about “the investigative

²⁰¹ See *supra* Part II.

²⁰² See Raeder, *supra* note 13, at 18 (“Children are not only more vulnerable than adults, but also are unlikely to know their rights or be able to exercise them.”); Gershman, *Prosecutorial Ethics*, *supra* note 189, at 559-60 (noting that the protections afforded children are not self-executing and require, at a minimum, the involvement and cooperation of the prosecutor).

²⁰³ Weisz et al., *supra* note 53, at 42 (“The child’s attorney or guardian ad litem should take some responsibility to prepare children ahead of time and provide explanations after hearings.”).

²⁰⁴ The provocative discussions at the 2009 ABA conferences on this topic enlivened prosecutors, defense counsel, and child witness counsel. See *supra* note 22 and accompanying text. At the January 2010 gathering of the Mid-Atlantic Clinical Theory and Practice Workshop, I presented this article to local clinicians and law professors. Some clinicians, like Ann Shalleck, felt that while it may be true that child witnesses need information and representation to ensure their voices are heard and respected, that role can sometimes be filled by a non-lawyer – a social worker (independent of the prosecution), or better still, a parent. A parent advocate for the child witness might not be appropriate, however, in cases of intrafamilial abuse. See Downes, *supra* note 48, at 11 (describing conflicts parents might encounter if torn between two family members, one alleged perpetrator and one victim, and asserting that “[t]he court should always appoint a child counsel in the case of intrafamilial abuse.”).

²⁰⁵ Downes, *supra* note 48, at 10.

²⁰⁶ *Id.* at 11 (“Most states and the federal government have codified a victim’s right to restitution, but child victims may have difficulty understanding and exercising a right to restitution.”).

²⁰⁷ See *id.* at 10.

and judicial processes, as well as the roles and functions of courtroom participants[,]”²⁰⁸ but the law and education students do not represent the child witnesses in court. Child witnesses who participate are either victims of crimes or are themselves accused of crimes.²⁰⁹ Kids’ Court School uses “a model courtroom, complete with wooden figurines of a judge, bailiff, attorneys, jurors and spectators . . . students are taught techniques to reduce their anxiety while testifying.”²¹⁰ Although many of their child witness clients were initially referred from prosecutors’ offices, the program is independent.²¹¹ The clinic prepares the children based on a fictional bicycle theft case, and they “never talk about the facts of the actual cases.”²¹² Kids’ Court alleviates a lot of children’s fears about testifying by teaching children to recognize suggestive questions, assuring them that “I don’t know” and “I don’t remember” are acceptable responses, and exposing them to the court process before actually going to court.²¹³ “[I]f you educate a child and decrease their anxiety, and if the questions are posed in a developmentally appropriate, non-leading manner, then children definitely have the potential to be credible witnesses.”²¹⁴ This is one example indicating that laypersons may be effective advocates.

On the other hand, child witnesses need lawyers. Independent legal counsel for child witnesses are better equipped than lay advocates to: counsel children about their rights under VCAA and CVRA;²¹⁵ “protect the child from improper questioning during discovery or testimony[;]”²¹⁶ file a motion to allow the child witness to testify by closed-

²⁰⁸ University of Nevada, Las Vegas, *Going to Court with Confidence*, <http://impacts.unlv.edu/2009/janLawKids.html> (last visited Jan. 13, 2010). Rebecca Nathanson, “a professor of education and law, started the program . . . to educate child witnesses” after “[y]ears of research told her that giving young witnesses more knowledge about the justice system could reduce their anxiety and enhance their testimony.” Thevenot, *supra* note 56. Professor Nathanson’s research focused on enhancing the memory of child witnesses and reducing their suggestibility as well as an appreciation that “children had little to no knowledge about the judicial process.” *Id.*

²⁰⁹ See Thevenot, *supra* note 56.

²¹⁰ *Id.* The children also participate in a mock trial.

²¹¹ *Id.* (“We’re not on anybody’s side, if you will[.]”). Through word of mouth, they were also able to attract young defendants. *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See Downes, *supra* note 48, at 10.

²¹⁶ *Id.*

circuit television under VCAA or similar state laws;²¹⁷ practice a child witness's testimony and prepare the child for objections and cross-examination;²¹⁸ prepare a child witness for closed-circuit testimony or video deposition;²¹⁹ explain the importance of the oath and testifying truthfully;²²⁰ "aggressively advocate for child's rights at each stage[;]"²²¹ collaborate with attorneys in related proceedings;²²² assist the child witness when appropriate to write a victim impact statement for use at sentencing;²²³ and argue competency issues and evidentiary issues. Post-*Crawford*, more children will testify, making "child [witness] need[s] for counsel even more palpable,"²²⁴ and providing for those needs can require some legal prowess.

Prosecutors and defense attorneys are likely to be wary of child witness counsel, and not surprisingly, will sometimes oppose their presence.²²⁵ For defense attorneys, Professor Myrna Raeder notes:

²¹⁷ See 18 U.S.C. § 3509(b)(1)(A) (2006); see also Downes, *supra* note 48, at 11 ("The child's counsel, with the assistance of therapists and experts, should evaluate and then inform the court of the child's ability to testify in front of the accused and when necessary file a motion to provide the child's testimony by closed-circuit television, recorded deposition, or alternate means.").

As its name suggests, the Uniform Child Witness Testimony by Alternative Methods Act (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/ucwtbama/2002act.pdf>, allows for alternative methods for taking testimony from child witnesses in criminal proceedings.

In a criminal proceeding . . . a child witness' testimony may be taken otherwise than in an open forum . . . if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate . . . if required to testify in the open forum [or . . .] to be confronted face-to-face by the defendant.

Id. § 5(a)(1)-(2). Under the Act, the child or "an individual determined by the presiding officer to have sufficient standing to act on behalf of the child" may apply for a hearing on this issue. *Id.* § 4(a). Child advocates who are not attorneys will likely find invoking these provisions difficult.

²¹⁸ See Downes, *supra* note 48, at 11.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *id.* at 10.

²²² See *id.* at 11 ("Because many criminal cases involving minors may also include child welfare proceedings, the child's counsel may be needed simply to connect the activities and decisions of the two courts.").

²²³ 18 U.S.C. § 3509 (2006); see Downes, *supra* note 48, at 11.

²²⁴ Downes, *supra* note 48, at 11.

²²⁵ In my experience, prosecutors were more opposed than defense counsel to my presence as a child witness lawyer. "To the extent that the next frontier for child victims' rights advocates is an attempt to obtain representation at counsel table, it will likely be met with hostility by judges, as well as by prosecutors and defense counsel." Raeder, *supra* note 13, at 17.

In individual cases, the presence of attorneys for children may either prove a help or a hindrance to the defense, but the specter of a GAL appointed by the judge sitting at counsel table and acting as a second prosecutor was viewed as “dangerously erod[ing] the defendant’s presumption of innocence.”²²⁶

However vigorous the defense objections, “[i]t is important to understand that the legal experience of child abuse victims can be enhanced without impacting the constitutional or evidentiary rights of criminal defendants.”²²⁷

Many prosecutors may oppose child witness counsel because they are “concerned that a lawyer will erect a barrier between them and children who are complainants and witnesses, because this interferes with the prosecutor’s ability to obtain the trust of the children and also to make informed decisions about their credibility.”²²⁸ As stated earlier, many prosecutors already do a fine job protecting child witnesses; and if their handling of child witnesses is child-centric, child witnesses might need no other help.²²⁹ In her article, Professor Lucy Berliner argues that child witnesses ultimately need “nothing more than a trained and knowledgeable prosecutor who is willing to develop a prosecutorial approach which takes into account children’s limitations and special needs and creatively uses what little available corroboration there may be.”²³⁰

²²⁶ *Id.* at 18 (brackets in original) (quoting *State v. Harrison*, 24 P.3d 936, 945 (Utah 2001)).

²²⁷ *Id.* at 13.

²²⁸ *Id.* at 18. “Indeed, some prosecutors are concerned that in criminal cases, child attorneys or GALs would come from the defense bar, and be predisposed not to cooperate with the prosecutor.” *Id.* As a child witness lawyer, I quickly learned that erecting a barrier between the child witness and the prosecutor hampered the child witnesses more because it would be impossible to meaningfully prepare the child witnesses to testify without communicating with the prosecutor who would ultimately elicit their testimony. *But see* Mary L. Boland, *ABA Endorses Attorneys for Child-Victims in Criminal Cases*, NCVLI NEWS, 11th ed. 2009, at 5, 6, available at http://maricopa.gov/courttower/downloads/news/NCVLI_Newsletter.pdf (“But, given the caseloads, the need for specialized knowledge, the time intensity, and the limited resources of the public prosecutor’s offices, many prosecutors welcome the assistance of child attorneys who can assert the varied independent rights and interests of child-victims and child-witnesses.”). *Cf.* A.B.A. RESOLUTION 101D, *supra* note 46, at 12 (“[M]any of the prosecutors who are most concerned about the safety and protection of child victims are those who also advocate for independent attorneys to be appointed for them.”).

²²⁹ In my experience, I encountered several prosecutors who practiced their child abuse prosecutions with a child-first philosophy. Those prosecutors, though, were not opposed to my presence or advocacy.

²³⁰ Berliner, *supra* note 44, at 172.

But some prosecutors who are intent on convicting the defendant, i.e., protecting society from the crimes of the accused, may focus on the child witness only as the prosecution's complaining witness, ignoring, as a necessary consequence, the child witness's rights to protection, privacy, and participation.

Unless children receive . . . assistance . . . , they are dependent on the prosecutor's decision about their manner of testifying. The ability of a lawyer to request and argue for alternative methods of testifying may be key to the child's mental health if the prosecutor believes that winning the case is more likely if the child testifies in person.²³¹

If the child witness without legal counsel wants testimonial protections, but the prosecutor disagrees, the child witness's voice can be lost because the child has less power.²³²

Some prosecutors will resist child witness lawyers, citing existing reforms as sufficient to help child witnesses, like child advocacy centers (CACs).²³³ Existing reforms, however, do not help child witnesses from prosecutors when their respective interests conflict. CACs are one example. Designed to minimize the times the child witness recounts the abuse to the fewest people possible in a multidisciplinary team,²³⁴ Congress codified the regional CACs in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003.²³⁵ In

²³¹ Raeder, *supra* note 13, at 19.

²³² See DAVIS, *supra* note 18, at 17-18.

²³³ See Raeder, *supra* note 13, at 18 ("Some prosecutors argue that child advocacy centers (CACs), rather than lawyers, better protect the privacy, therapeutic, and legal interests of children while also helping prosecutors to weed out cases in which the claim of . . . abuse is false.")

²³⁴ See Berliner, *supra* note 44, at 170.

²³⁵ Pub L. No. 108-21, tit. III, § 381(a), 117 Stat. 650, 667 (2003) (codified as amended at 42 U.S.C. § 13001b (2006)). Congress intended, through the establishment of child advocacy centers, to:

- (1) focus attention on child victims by assisting communities in developing child-focused, community-oriented, facility-based programs designed to improve the resources available to children and families;
- (2) provide support for non-offending family members;
- (3) enhance coordination among community agencies and professionals involved in the intervention, prevention, prosecution, and investigation systems that respond to child abuse cases; and
- (4) train physicians and other health care and mental health care professionals in the multidisciplinary approach to child abuse so that trained medical personnel will be available to provide medical support to community agencies and professionals involved in the intervention, prevention, prosecution, and investigation systems that respond to child abuse cases.

42 U.S.C. § 13001b(a)(1)-(4) (2006).

reality, though, CACs operate as agents of the prosecution because many CACs conduct the initial child abuse interview, refer cases for prosecution, and are subject to defendants' requests for exculpatory information under *Brady v. Maryland*.²³⁶ Post-*Crawford*, children's statements made to CACs not independent of the prosecution will likely be considered "testimonial" as a matter of law.²³⁷

Despite prosecutors' best intentions, this Article illustrates occasions when prosecutors and child witnesses find themselves at odds. "[I]t is reasonable to expect such conflicts will arise" because prosecutors recognize that child witnesses are not their clients.²³⁸ "The interests of child victims in criminal cases may be ignored unless those persons who have contact with the child victim take appropriate legal actions to protect the child's interests."²³⁹ Congress contemplated that scenario, too, because it obligated prosecutors under CVRA to inform child witnesses and their parents of the child witness's rights and the specific right to counsel,²⁴⁰ and it allows victims or their representatives to assert rights under the statute.²⁴¹ "[I]f there is no parent or legal guardian acting in the child's interest, the only way for a prosecutor to comply with the

²³⁶ Fox, *supra* note 137, at 1254.

Two of the most common types of professions that work closely with law enforcement are state-employed counselors, such as social workers, and forensic investigators, who may or may not be employed by the state. . . . Even if the forensic investigators are private, their role is not therapeutic but to help law enforcement establish facts relevant to a prosecution.

Id. Raeder, *supra* note 13, at 18 (citing *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963)).

²³⁷ See Mosteller, *Crawford v. Washington*, *supra* note 156, at 591; see also *supra* text accompanying note 156. Indeed, lower courts have consistently held that children's statements made to those either employed by the government or working closely with the government are testimonial. See Fox, *supra* note 137, at 1254 (surveying the lower court decisions). "In most cases, the court's inquiry will focus on the purpose of the interview and the extent to which the individual is acting as a proxy for, or in conjunction with, law enforcement." *Id.* See Raeder, *supra* note 13, at 21 ("Because *Crawford* has turned these best practices into a blueprint for creating testimonial statements, most children who are interviewed at CACs will have to testify for those statements to be admitted.").

For a discussion of how children's statements to multidisciplinary teams in structured forensic interviews should not be deemed testimonial post-*Crawford*, see Jonathan Scher, Note, *Out of Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 167 (2009).

²³⁸ Raeder, *supra* note 13, at 16 (citing the Attorney General's Guidelines).

²³⁹ Downes, *supra* note 48, at 12.

²⁴⁰ *Id.* at 10; see 18 U.S.C. § 3771(b)(2)(B) (2006).

²⁴¹ See Raeder, *supra* note 13, at 18 ("Children need their own attorneys to protect their interests without being subject to *Brady* obligations.").

rights of the child victim may be to have counsel appointed on the child's behalf."²⁴²

Although many prosecutors and defense counsel alike believe that a child witness's counsel has no place at the counsel table in a criminal courtroom, others herald the next frontier for child advocates at counsel table in the criminal courtroom.²⁴³ In their respective roles, the prosecutor, defense counsel, and child witness counsel can not only attain equipoise, but the combination will also ensure the most just outcome.²⁴⁴ "In other words, appointment of GALs or lawyers for children is not dependent on any reconceptualization of legal practice."²⁴⁵ When child witnesses are adequately prepared, something which a child witness counsel is best trained to ensure, then children are more likely to avoid unnecessary trauma, before, during, and after their testimony.²⁴⁶ Securing a lawyer for every child witness is complicated, however.

There are some practical problems with appointing counsel for every child witness. First, child witnesses are not entitled to have lawyers appointed for them under current federal and most state statutory schemes. Legislative reform would be necessary. For example, in 1974, Congress enacted The Child Abuse Prevention and Treatment Act (CAPTA), which provides federal funding to states to create programs for the prevention, identification, and treatment of child abuse and neglect.²⁴⁷ CAPTA requires that states appoint children a guardian *ad litem* (GAL) to represent them in every case which results in a judicial proceeding.²⁴⁸ The guardian *ad litem*, "who has received training appropriate to the role," does not have to be an attorney.²⁴⁹ The guardian *ad litem* may be an attorney or a court appointed special advocate with

²⁴² Downes, *supra* note 48, at 10.

²⁴³ See Raeder, *supra* note 13, at 18 ("[A]ppointment of [guardians *ad litem* in criminal courtrooms] is not dependent on any reconceptualization of legal practice.").

²⁴⁴ *Id.*

One does not have to resolve the debate about what level of trial participation by attorneys for child victims is appropriate to recognize that children cannot exercise their existing rights without assistance, and that an independent attorney should be appointed when the court makes a finding that the child's interests are not otherwise adequately protected.

²⁴⁵ *Id.*

²⁴⁶ Downes, *supra* note 48, at 11.

²⁴⁷ Pub. L. No. 93-247, 88 Stat. 5 (1974) (codified as amended at 42 U.S.C. § 5101 *et. seq.* (2006)).

²⁴⁸ 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006).

²⁴⁹ *Id.* See Downes, *supra* note 48, at 10-11 (describing the options child witnesses have in retaining either a child's attorney or a guardian *ad litem* as a representative of the child's best

specialized training, or both.²⁵⁰ Similarly, the Child Victims' and Child Witness' Rights Statute allows federal courts to appoint—and provide reasonable compensation to—guardians *ad litem* for children who are victims of or witnesses to crimes involving abuse or exploitation;²⁵¹ and the CVRA allows federal crime victims the right to independent advice from an attorney, but few jurisdictions actually appoint lawyers for a child witness.²⁵²

Ultimately, these practical challenges to appointing counsel for child witnesses can be overcome. “[F]ederal victims’ rights legislation concerning children already authorizes counsel and provides funding[.]”²⁵³ and a number of state statutes have codified a right to legal representation for child witnesses.²⁵⁴ Discussions have already occurred across the country about funding child witness counsel, as the ABA meetings and trainings on this issue have revealed.²⁵⁵ The 2009 ABA resolutions urged jurisdictions to: 1) pass legislation providing child witnesses with “independent attorneys who can assist them in obtaining applicable victims’ rights such as those provided by [CVRA], and age-appropriate accommodations such as those provided by [VCAA],” and 2) establish pilot programs to compensate child witness lawyers “on a pro bono or compensated basis.”²⁵⁶ In her article, Professor Raeder calls on many entities (“bar associations, law schools, victim rights organizations, child rights organizations, and courts”) to develop a process and standards for appointing and training child witness attorneys, whose

interests who is not mandated to represent the child’s wishes). *But see* Raeder, *supra* note 13, at 19 (“Given the indicated statutory duties of GALs, lawyers are typically appointed.”).

²⁵⁰ 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006).

²⁵¹ Victims of Child Abuse Act of 1990, 42 U.S.C. § 13031 (1994); 18 U.S.C. § 3509(h) (2006) (“The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian *ad litem* for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.”).

²⁵² Raeder, *supra* note 13, at 16; *see* Seiden, *supra* note 191; *but see* Downes, *supra* note 48, at 11 (citing N.C. GEN. STAT. § 7B-601) (describing some states’ practices, including North Carolina’s, which allow “the GAL representing the minor in juvenile court to accompany the minor to criminal court if the minor may be called to testify.”).

²⁵³ Raeder, *supra* note 13, at 18 (noting that VCAA was recently amended to specifically “authorize reasonable compensation of GALs”).

²⁵⁴ *Id.* at 19 (noting Maryland’s and Wisconsin’s laws allow criminal courts to appoint representatives for child witnesses).

²⁵⁵ *See supra* note 24 and accompanying text.

²⁵⁶ *See* Raeder, *supra* note 13, at 12 (citing ABA Policy 101D). Indeed, as a child witness lawyer, I was appointed and appeared as a guardian *ad litem* on a pro bono basis as a salaried staff attorney at a legal services organization.

role has been clearly defined.²⁵⁷ Many courts, in the meantime, have already recognized the need for child witness counsel in criminal cases, and have appointed counsel for these children, joining the effort to treat child witnesses in the criminal justice system better.

B. *Courts Must Take a More Proactive Role in Protecting Child Witnesses*

Cases involving crimes against children and child witnesses are difficult for judges, too.²⁵⁸ “Judges are often in a position where they must balance a defendant’s right to confront her accusers in court, the practical difficulties of forcing a young child to testify, and . . . protecting victims from additional psychological harm.”²⁵⁹ Some judges will “not want the orderly trial process interrupted by lawyers who are not focused on resolution of the criminal case but on protecting the child. . . . Ultimately, [however], it is the responsibility of the judge to ensure that children are treated appropriately in court.”²⁶⁰ Judges have the power to control questioning of the child, stay a civil case during pendency of an attendant criminal one, ensure children are comfortable testifying, and allow children to use testimonial aids.²⁶¹ In her article, Professor Raeder speculates that “enhancing child testimony may require the creation of specialized child abuse courts in urban locations, similar to domestic violence courts that have helped to increase successful prosecutions and assist victims.”²⁶²

Historically, courts have taken control of procedures affecting child witnesses in their courtrooms. In *Kentucky v. Stincer*,²⁶³ for example, the Supreme Court noted and cited laws from a number of states that require the trial judge to assess whether the child is competent to testify, including whether “the child is capable of expression, is capable of understanding the duty to tell the truth, and is capable of receiving just impressions of the facts about which he or she is called to testify.”²⁶⁴ “In

²⁵⁷ *Id.*

²⁵⁸ Fox, *supra* note 137, at 1245.

²⁵⁹ *Id.*

²⁶⁰ Raeder, *supra* note 13, at 18, 23. “Federal and state rules give judges the ability to control the nature of questions posed to children to avoid harassment.” *Id.* at 23. *See also* Boland & Butler, *supra* note 80, at 9 (“In cases where the law does not specifically identify judicial duties, ethical rules should nonetheless guide judges to consider victims’ interests.”).

²⁶¹ Raeder, *supra* note 13, at 24.

²⁶² *Id.*

²⁶³ *Kentucky v. Stincer*, 482 U.S. 730 (1987).

²⁶⁴ *Id.* at 742 n.12.

those States where the judge has the responsibility for determining competency, that responsibility usually continues throughout the trial.”²⁶⁵

In *Pennsylvania v. Ritchie*, the Supreme Court likewise sanctioned the wisdom of trial courts investigating and balancing interests of children who testify in criminal cases.²⁶⁶ In *Stincer*, the Supreme Court balanced the child witness’s interests against the defendant’s interests and found in favor of the child by affirming the trial court’s *sua sponte* removal of defendant—over his objection—from the pretrial competency hearing of the child witness.²⁶⁷

To continue to accommodate child witnesses in criminal courtrooms, courts “should take appropriate action to facilitate the appointment of GALs or counsel for child [witnesses] in criminal proceeding[s].”²⁶⁸ If courts do not safeguard the children’s interests, the prosecutors’ interests might completely overshadow and jeopardize them. “The system can become more just as well as more effective if children’s rights as crime victims are respected by appointing [GALs] or lawyers to advise them and participate on their behalf to the extent permitted by law when the court finds their interests are not otherwise adequately protected.”²⁶⁹

To determine whether a child witness’s interests are not otherwise adequately protected, courts might conduct a preliminary investigative inquiry to determine the interests of the child.²⁷⁰ By conducting a preliminary investigative inquiry in child witness cases, trial courts could more easily balance whether the sometimes competing interests of the prosecutor, defendant, and the child witness interfere with the child’s rights in ways that require appointing independent counsel for the child.²⁷¹ On occasion, the prosecutor and child will disagree, and while

²⁶⁵ *Id.* at 743.

²⁶⁶ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987).

²⁶⁷ *Stincer*, 482 U.S. at 747.

²⁶⁸ Downes, *supra* note 48, at 12.

²⁶⁹ Raeder, *supra* note 13, at 13.

²⁷⁰ See John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169 (1996) (advocating for judicial inquiry in the civil-law (or investigative) style).

²⁷¹ See, e.g., *id.* at 172 (quoting John R. Spencer & Rhona Flin, *THE EVIDENCE OF CHILDREN* 75 (2d ed. 1993)).

“In an inquisitorial system . . . the court is viewed as a public agency appointed to get to the bottom of the disputed matter. The court takes the initiative in gathering information as soon as it has notice of the dispute, builds up a file on the matter by questioning all those it thinks may have useful information to offer—including, in a

laws like CVRA allow victims to confer with prosecutors, and consequently obligate prosecutors to consider them, that right is qualified, and so it does not interfere with the prosecutor's superior discretion to direct the prosecution.²⁷² Rather than automatically defer to prosecutors' discretion in decisions of when and how to prosecute,²⁷³ courts should appoint independent counsel for children to consider ways to accommodate child witnesses and enhance their testimonial experience.²⁷⁴

CONCLUSION

A few years later, I still think about Keisha.²⁷⁵ I wonder if she thinks about the time when she was forced to testify in her friend Princess's murder trial, and whether she shudders at the memory of testifying.²⁷⁶ I hope not.

The law today—particularly concerning the admission into evidence of children's hearsay statements—means more children will have to testify, putting prosecutors in the untenable position of deciding whether to sacrifice the child to convict the accused. Courts can help children, but they will not always be poised to help child witnesses when prosecutors and child witnesses are at odds, and children cannot therefore defend themselves without independent legal counsel.

criminal case, the defendant—and then applies its reasoning powers to the material it has collected in order to determine where the truth lies.”

²⁷² 18 U.S.C. § 3771(a) (2006).

²⁷³ See DAVIS, *supra* note 18, at 12 (discussing some courts' tendencies not to become involved in prosecutorial decisions lest it have a chilling effect on law enforcement).

²⁷⁴ See generally Raeder, *supra* note 13.

²⁷⁵ We have since lost touch, unfortunately.

²⁷⁶ See Raeder, *supra* note 13, at 20 (“One of a child's most lasting impressions of the criminal justice process will revolve around testifying, which can be a stressful experience . . . [.]”).