

1-1-2015

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### Recommended Citation

Alexandra E. Bochte, *The Double-Edged Sword of Justice: The Need for Prosecutors to Take Care of Child Victims*, 35 CHILD. LEGAL RTS. J. 200 (2015).

Available at: <http://lawcommons.luc.edu/clrj/vol35/iss3/2>

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## The Double-Edged Sword of Justice: The Need for Prosecutors to Take Care of Child Victims

By Alexandra Emily Bochte\*

### I. INTRODUCTION

Only in our criminal justice system do we expect five-year-old children to act in the same capacity as adults.<sup>1</sup> If a child is found legally competent, then he or she is qualified to testify on the witness stand.<sup>2</sup> Children are expected to testify in a variety of different cases. They can testify in child custody cases, child abuse and neglect cases, criminal cases, as well as others. Sometimes, a case will rest solely on a child's testimony.<sup>3</sup>

Inside our criminal justice system child witnesses, for the most part, are treated like any other witness. This is not true outside of the criminal system, where courts have safeguards so that children do not have to testify.<sup>4</sup> An example of one such safeguard is New Mexico's policy of having a court clinician interview children prior to a hearing in family court<sup>5</sup> or in restraining order cases and then testify in place of the child. In the criminal justice system, however, children are directly cross-examined, forced to testify on the witness stand, and compelled to swear to tell the truth. In trials that involve crimes against children, children are obligated to talk unflinchingly about personal, humiliating, and traumatizing events in front of juries, family, and strangers.

It is not uncommon for very young children to testify in open court about brutal rapes, beatings, and abductions that they have endured. The news is replete with such examples.<sup>6</sup> In Cobbs Creek, Pennsylvania, a seven-year-old girl testified against the female daycare worker who abducted her from school and raped her when she was five years old.<sup>7</sup>

In Memphis, Tennessee, a fourteen-year-old girl testified in open court against her relative, James Hawkins.<sup>8</sup> The girl testified about the five years Hawkins raped her, from age five to ten.<sup>9</sup> She also testified about how Hawkins would hold a gun to her head and threaten her not

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\* This Author is a graduate from the University of New Mexico School of Law. She would like to express her sincere gratitude for the invaluable feedback and support from her supervisor and mentor, Special Assistant District Attorney and Professor Martina Kitzmueller.

<sup>1</sup> FED. R. EVID. 601; *see* discussion *infra* Part I.A.

<sup>2</sup> *See, e.g.*, *Bullock v. Carver*, 297 F.3d 1036, 1051–52 (10th Cir. 2002) (citing a Utah statute stating that children under the age of ten “shall be allowed to testify without prior qualification in any judicial proceeding” and holding that even a subsequent state court decision giving the trial courts the right to consider the reliability of children's testimony when deciding whether such testimony should be admitted did not require the per se exclusion of unreliable testimony).

<sup>3</sup> This is not uncommon, especially in child sex abuse cases with no physical evidence. If there is no physical evidence and no witnesses, then the only person who can testify about the crime is the child victim.

<sup>4</sup> *Divorce*, STATE OF N.M., SECOND JUDICIAL DIST. COURT, [http://seconddistrictcourt.nmcourts.gov/family\\_proceedings\\_divorce.html](http://seconddistrictcourt.nmcourts.gov/family_proceedings_divorce.html) (last visited Apr. 15, 2015) (providing information and tools for pro se litigants in domestic relations matters).

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, Sarah Mervosh, *Dallas Boy, 6, Testifies Against Mom at Aggravated Kidnapping Trial*, DALL. MORNING NEWS (Jan. 28, 2015), <http://www.dallasnews.com/news/crime/headlines/20150128-6-year-old-testifies-against-mom-at-aggravated-kidnapping-trial.ece> (reporting that a six-year-old boy testified against his mother during her aggravated kidnapping trial); Paris Achen, *Girl, 6, Testifies Former Police Officer Raped Her*, COLUMBIAN COURTS REPORTER (Oct. 28, 2014), <http://www.columbian.com/news/2014/oct/28/girl-6-testifies-former-police-officer-raped-her/> (reporting that a six-year-old girl testified in court that a former police officer raped her).

<sup>7</sup> Vince Lattanzio, *7-Year-Old Girl to Testify in Cobbs Creek Abduction, Rape Case*, NBC 10 (Aug. 21, 2014), <http://www.nbcphiladelphia.com/news/local/Cobbs-Creek-Abduction-Victim-Will-Testify-in-Court-272177121.html>.

<sup>8</sup> Beth Warren, *Observers Weep as Girl Testifies in Child Rape Case of James Hawkins Sr.*, COMMERCIAL APPEAL MEMPHIS (Apr. 10, 2014), <http://www.commercialappeal.com/news/local-news/da-scared-and-nervous-victim-14-will-testify-by>.

<sup>9</sup> *Id.*

to tell anyone about the abuse.<sup>10</sup> During her testimony, the judge had to ask the girl to speak up because she was talking so quietly.<sup>11</sup> Relatives in the courtroom could be heard weeping, and one even had to leave the courtroom.<sup>12</sup> Hawkins was sentenced to fifty years in prison.<sup>13</sup>

These are just two examples, which give a glimpse into the world in which children are expected to testify. They sit in the witness stand, alone. They have to talk in front of a judge, whom they do not know. They must answer questions from both the prosecution and the defense. The children who suffered the most are expected to remain stronger than those in the audience, who, though not having been victimized themselves, break down crying and flee the courtroom when overwhelmed.<sup>14</sup> Perhaps most terrifying is that the child must do all of these things in front of the perpetrator. The burden is on the child in the name of justice and in the name of the Sixth Amendment.<sup>15</sup>

Both child sexual and physical abuse are criminally sanctioned in the criminal justice system. But in order to punish child abusers, child victims must go through the judicial process. This process forces a victim to endure the long, arduous, and often traumatic road to and through a trial. Sexual and physical abuse are also both adverse childhood experiences, which have been shown to negatively impact a child's physical and mental health.<sup>16</sup> Prosecutors need to take an active role to reduce the negative impact on child victims. While this prospect may seem daunting, there are numerous interventions and techniques prosecutors can and should use to help these child victims through the judicial process.

#### A. Intersection of the Sixth Amendment and Child Witness Testimony

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . .”<sup>17</sup> It is found among other rights, such as the right to a speedy trial, the right to a trial by jury, the right to counsel, and the right to notice of a charge, and it is the right that places children on the stand.<sup>18</sup> The Confrontation Clause provides a defendant with a constitutional right to question witnesses who are accusing him or her of a crime.<sup>19</sup> This includes five-year-old children who have been raped and abused by their fathers. When children disclose abuse, they do not realize that their disclosure will often lead to a courtroom with powerful judges, meddlesome media reporters, relentless defense attorneys, and a face-to-face confrontation with their alleged abuser. Nor do they know that they will be required to repeatedly relive the nightmare they initially disclosed.

In the 1980s, courts held the Confrontation Clause to mean that defendants had the right to confront witnesses face-to-face. In *Coy v. Iowa*, the defendant was charged with sexually

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Les Smith, *Hawkins Sentenced to 50 Years for Child Rape*, MY FOX MEMPHIS (June 19, 2014), <http://www.myfoxmemphis.com/story/25824419/hawkins-sentenced-to-50-years-for-child-rape>.

<sup>14</sup> Warren, *supra* note 8.

<sup>15</sup> See U.S. CONST. amend. VI (providing a criminal defendant the right to confront the witnesses against him); see also *Coy v. Iowa*, 487 U.S. 1012, 1020–22 (1988) (holding that the defendant's right to face-to-face confrontation was violated because the child-witness testified behind a screen rather than in the physical presence of the defendant in the courtroom).

<sup>16</sup> Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults, The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREV. MED. 245, 252 (1998), available at <http://www.sciencedirect.com/science/article/pii/S0749379798000178>.

<sup>17</sup> U.S. CONST. amend. VI.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* But see *Maryland v. Craig*, 497 U.S. 836, 859–60 (1990) (holding that a defendant's right to confrontation is not violated when the victim testified via one-way closed circuit television); see also *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (holding that out-of-court statements are barred under the confrontation clause unless the witness is unavailable and the defendant had a right to cross-examine the witness).

assaulting two thirteen-year-old girls who were camping in the backyard next to him.<sup>20</sup> Both the trial court and the Iowa Supreme Court held that placing a screen between the children and the defendant was permissible to “mak[e] the complaining witnesses feel less uneasy in giving their testimony.”<sup>21</sup> The U.S. Supreme Court reversed that decision, stating that use of the screen was a clear violation of the defendant’s Sixth Amendment right to confront witnesses.<sup>22</sup> Thus, Justice Scalia held that the right to confrontation meant a “constitutional right to face-to-face confrontation.”<sup>23</sup>

The U.S. Supreme Court in *Maryland v. Craig* clarified the issue left open in *Coy* about whether there was an absolute right to face-to-face confrontation.<sup>24</sup> In *Craig*, the trial court allowed four children to testify via one-way closed circuit television.<sup>25</sup> This procedure allowed the prosecutor and the defense counsel to question the child witness in a separate room, while the judge, the jury, and the defendant remained in the courtroom viewing the testimony on a video monitor.<sup>26</sup> The Supreme Court stated that the Confrontation Clause involves “physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.”<sup>27</sup> The Court went through various examples, which demonstrated that the preference for face-to-face confrontation is eased when issues of public policy about the right.<sup>28</sup> In fact, the Confrontation Clause must be “interpreted in the context of the necessities of trial and the adversary process.”<sup>29</sup> The Court held that the state had a substantial interest in protecting the children from trauma associated with testifying.<sup>30</sup> “[A] State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”<sup>31</sup>

Herein lies the Sixth Amendment dilemma. Yes, it is a defendant’s constitutional right to confront his or her accusers, but what happens when the accuser is a five-year-old child? The Federal Rules of Evidence state that “[e]very person is competent to be a witness . . . .”<sup>32</sup> This includes young children. Thus, even though a child is very young, he or she can be compelled to testify in court because of the Confrontation Clause.

#### *B. How Prosecutors Can Reduce Traumatization in Their Child Witnesses*

In view of the Sixth Amendment right to confront witnesses, what can prosecutors do to help children who are expected to participate in trials as if they were adults? In criminal cases involving allegations of child abuse, the child is expected to be interviewed numerous times prior to trial, and is usually expected to testify during trial about the abuse.<sup>33</sup> The prosecutors, who call these children as witnesses, should know the signs of trauma and be cognizant about how their actions could further traumatize or re-traumatize these children. Prosecutors should also know

<sup>20</sup> *Coy*, 487 U.S. at 1014.

<sup>21</sup> *Id.* at 1014–15.

<sup>22</sup> *Id.* at 1020–22.

<sup>23</sup> *Id.* at 1022.

<sup>24</sup> *Craig*, 497 U.S. at 844.

<sup>25</sup> *Id.* at 843.

<sup>26</sup> *Id.* at 841.

<sup>27</sup> *Id.* at 846.

<sup>28</sup> *Id.* at 849.

<sup>29</sup> *Id.* at 850.

<sup>30</sup> *Id.* at 852–53.

<sup>31</sup> *Id.* at 853.

<sup>32</sup> FED. R. EVID. 601.

<sup>33</sup> At minimum, a child will have to tell his or her story three times: (1) the initial disclosure to a family member, friend, or teacher; (2) to the forensic interviewer or police officer; and (3) at trial. Realistically, a child will have to retell his or her story again in a pre-trial interview.

how to adequately prepare these children for trial, as well as to assist them during trial, to minimize re-traumatization in the courtroom.

### 1. Know the Signs of Trauma

There are countless definitions of trauma. The American Psychological Association defines trauma in part as “an emotional response to a terrible event . . . .”<sup>34</sup> A terrible event can include rape,<sup>35</sup> accidents,<sup>36</sup> natural disasters,<sup>37</sup> physical abuse,<sup>38</sup> neglect,<sup>39</sup> exposure to violence,<sup>40</sup> as well as several other situations. Trauma can cause both short-term and long-term reactions and consequences.<sup>41</sup>

Children who experience trauma may experience numerous symptoms such as memory problems, poor skill development, uncontrolled temper, attention-seeking behaviors, excessive screaming or crying, startling, inability to trust, social withdrawal, eating problems, tortuous nightmares or other sleep problems, and compulsive self-blame, among others.<sup>42</sup>

In 1998, researchers from the Centers for Disease Control and Prevention and San Diego's Kaiser Permanente began a long series of studies that examined the effects of adverse childhood experiences (“ACEs”).<sup>43</sup> Eight different ACEs were examined: physical abuse, sexual abuse, emotional abuse, witnessing maternal violence, living with a household member with substance abuse problems, living with a household member with a mental illness, parental separation or divorce, and having a household member incarcerated.<sup>44</sup> These studies have found that people who experience ACEs are at a higher risk for various negative health outcomes compared with those who have not experienced ACEs.<sup>45</sup> Some of the negative health outcomes include depression, smoking,<sup>46</sup> obesity, suicide, hallucinations,<sup>47</sup> drug usage, sleep disturbance,<sup>48</sup> and anxiety.<sup>49</sup>

Physical abuse, sexual abuse, and neglect are all crimes, and our justice system punishes them with criminal sanctions. These crimes can unsurprisingly be traumatic events for the

<sup>34</sup> *Trauma*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/topics/trauma/> (last visited Apr. 15, 2015).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Early Childhood Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK 2, 4 (Aug. 2010), <http://www.nctsn.org/trauma-types/early-childhood-trauma>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Trauma*, *supra* note 34.

<sup>42</sup> *Early Childhood Trauma*, *supra* note 38, at 5–6.

<sup>43</sup> Felitti et al., *supra* note 16, at 246.

<sup>44</sup> Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 174, 176 (2006), available at [https://childtrauma.org/wp-content/uploads/2013/11/Anda\\_Perry\\_etal.pdf](https://childtrauma.org/wp-content/uploads/2013/11/Anda_Perry_etal.pdf).

<sup>45</sup> *Id.* at 178.

<sup>46</sup> See Valerie J. Edwards et al., *Adverse Childhood Experiences and Smoking Persistence in Adults with Smoking-Related Symptoms and Illness*, 11 PERMANENTE J. 5, 7 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3057738/> (concluding that adults who have experienced more adverse childhood experiences are more likely to smoke than adults who have not experienced adverse childhood experiences).

<sup>47</sup> See Charles Whitfield et al., *Adverse Childhood Experiences and Hallucinations*, 29 CHILD ABUSE & NEGLECT 797, 802 (2005), available at <http://www.theannainstitute.org/ACE%20folder%20for%20website/26ACEH.pdf> (concluding that adults who have experienced more adverse childhood experiences are more likely to suffer from hallucinations than adults who have not experienced adverse childhood experiences).

<sup>48</sup> See generally Daniel P. Chapman et al., *Adverse Childhood Experiences and Sleep Disturbance in Adults*, 12 SLEEP MED. 773 (2011), available at <http://www.ncbi.nlm.nih.gov/pubmed/21704556> (concluding that adults who have experienced more adverse childhood experiences are more likely to suffer from sleep disturbance than adults who have not experienced adverse childhood experiences).

<sup>49</sup> Anda et al., *supra* note 44, at 178–79; Felitti et al., *supra* note 16, at 252–54.

victims. Physical signs of trauma include trouble sleeping, headaches, under- or over-eating, and anxiety.<sup>50</sup> Depression can also be a sign of trauma.<sup>51</sup> Testifying requires children to recall these traumatic events. When a victim recalls a traumatic event, he or she may experience physical and emotional reactions just as when the event originally occurred.<sup>52</sup> These types of reactions may cause fight, flight, or freeze reactions.<sup>53</sup> The child may experience anxiety or fear.<sup>54</sup>

In the legal system, abuse is defined as a crime and may be punished as a felony.<sup>55</sup> In reality, abuse is more than a crime; it is a traumatic event with repercussions surpassing the sparse accommodations the legal system provides for victims.<sup>56</sup> This is why prosecutors need to have knowledge of ACEs and their effects. Ignorance only leads to continued and further suffering of child victims.

Prosecutors should be aware of behaviors indicative of abuse. This information is valuable and may greatly aid prosecutors in handling the case. For example, it can corroborate or bolster the child's statement of abuse.<sup>57</sup> When a child is having behavioral problems and the prosecutor determines that this information would be useful for a jury to hear, the prosecutor needs to consider using an expert witness.<sup>58</sup> Prosecutors must keep in mind that responses to abuse cannot be used to conclude that abuse has occurred.<sup>59</sup> Responses are indicative, not conclusive.<sup>60</sup>

The range of reactions that children have to abuse is vast, so this is neither an exhaustive nor exclusive list. Moreover, behaviors that can result from abuse are variable and unique; they may even be counterintuitive.<sup>61</sup> Children can have reactions that are behaviorally, cognitively, and emotionally based.<sup>62</sup> For example, children may act lovingly toward their abuser, they may act older than their age (as if they were a parent), or they may become anxious when separated

<sup>50</sup> *How Crime Victims React to Trauma*, NAT'L CTR. FOR VICTIMS OF CRIME (2008), <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/how-crime-victims-react-to-trauma>.

<sup>51</sup> Christine Heim et al., *The Link Between Childhood Trauma and Depression: Insights from HPA Axis Studies in Humans*, 33 PSYCHONEUROENDOCRINOLOGY 693 (2008), available at <http://www.aipro.info/drive/File/The%20link%20between%20childhood%20trauma%20and%20depression.%20Insights%20drom%20HPA%20axis%20studies%20on%20humans.%20C.%20Heim%20et%20al.,%202001%20202014.pdf>.

<sup>52</sup> Alison Cunningham & Lynda Stevens, *Helping a Child Be a Witness in Court*, CTR. FOR CHILD. & FAM. IN THE JUSTICE SYS. 17–19 (2011), available at [http://www.lfcc.on.ca/Helping\\_a\\_Child\\_Witness.pdf](http://www.lfcc.on.ca/Helping_a_Child_Witness.pdf).

<sup>53</sup> *Id.* at 17–18.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> To this Author's knowledge, child abuse is a crime in all fifty states. *See, e.g.*, ALA. CODE § 26-15-3 (2015) (making it a felony to torture, willfully abuse, cruelly beat, or otherwise willfully maltreat any child); *see also* 42 U.S.C. § 5119 (2012) (requiring the reporting of child abuse crime information in each state).

<sup>56</sup> *See generally* Felitti et al., *supra* note 16 (finding numerous negative health outcomes in adults who experienced abuse and neglect); *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization> (last visited Apr. 15, 2015) (listing and discussing negative outcomes of trauma); Astrid Heger et al., *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children*, 26 CHILD ABUSE & NEGLECT 645, 651–54 (2002), available at [http://ac.els-cdn.com/S0145213402003393/1-s2.0-S0145213402003393-main.pdf?\\_tid=9832137a-df8c-11e4-abe8-00000aab0f6b&acdnat=1428675747\\_d6db7efe695cd6a04b0ea5463b4d1897](http://ac.els-cdn.com/S0145213402003393/1-s2.0-S0145213402003393-main.pdf?_tid=9832137a-df8c-11e4-abe8-00000aab0f6b&acdnat=1428675747_d6db7efe695cd6a04b0ea5463b4d1897) (discussing possible negative health outcomes for child sex abuse victims).

<sup>57</sup> NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 16–17 (Arthur T. Pomponio et al. eds., 3d ed. 2004).

<sup>58</sup> *See discussion infra* Part III (discussing expert witnesses).

<sup>59</sup> NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 57, at 16.

<sup>60</sup> *Id.*

<sup>61</sup> JERRY J. BOWLES ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE DEPT., A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 6 (2008), available at [http://www.ncjfcj.org/sites/default/files/judicial%20guide\\_0\\_0.pdf](http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf).

<sup>62</sup> NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 57, at 16.

from their abuser.<sup>63</sup> They may experience nightmares, be hyper-vigilant, be hyperactive, act hyper-aggressively, or socially isolate themselves.<sup>64</sup>

Sexual abuse has many insidious effects upon its victims. For children, one of the many ways the effects of sexual abuse can manifest themselves is through sexual behaviors, or “[s]exual[ly] acting out.”<sup>65</sup> Behaviors such as a child exposing himself to others, masturbating suddenly, looking at pornographic material, or dressing promiscuously are all behaviors that may result from sexual abuse.<sup>66</sup> In a child who has been sexually abused, these types of behaviors may result from Post-traumatic Stress Disorder (“PTSD”) and a phenomenon called “re-experiencing.”<sup>67</sup> A child may be depressed or have other mental health issues.<sup>68</sup> He or she may self-medicate with drugs or alcohol.<sup>69</sup>

## 2. Build Trust

Along with victim advocates, prosecutors are in the best position to help a child victim with the demands and stressors of a trial. After all, the prosecutor will know the most about the case, they will be calling the child as a witness, they will meet with the child multiple times, and they will be the primary defender of the child in the courtroom. The latter is especially true when the child and his or her support network are both testifying, because in these cases, the support network may be excluded from the courtroom while the child testifies.<sup>70</sup>

Moreover, when a child is forced into the legal system, he or she is forced into a world full of strangers.<sup>71</sup> When children, abused or not, have to interact with strangers in a strange place, they frequently experience anxiety.<sup>72</sup> Throughout the legal process, previously traumatized children must extensively interact with strangers, such as attorneys, interviewers, judges, jurors,<sup>73</sup> victim advocates, and other legal staff. All of these interactions can add stress to an already stressful situation.<sup>74</sup>

For these reasons, prosecutors must establish trust with the child if the prosecutor intends to have honest and productive interactions with the child.<sup>75</sup> “Rapport . . . must be achieved before an adolescent will truly allow an adult into his or her world.”<sup>76</sup> There are many ways to build trust. This Article explores building trust through meeting with children and being able to educate them about the legal system.

### *i. Meeting with the child*

<sup>63</sup> BOWLES ET AL., *supra* note 61, at 7.

<sup>64</sup> See WILLIAM E. KRILL, JR., GENTLING: A PRACTICAL GUIDE TO TREATING PTSD IN ABUSED CHILDREN 9–34 (2d ed. 2011) (detailing the possible signs and symptoms of PTSD).

<sup>65</sup> *Child Sexual Abuse Trauma Treatment*, THE REFUGE – A HEALING PLACE, <http://www.therefuge-ahealingplace.com/ptsd-treatment/child-sexual-abuse> (last visited Apr. 10, 2015).

<sup>66</sup> Paris-Goodyear Brown et al., *Child Sexual Abuse: The Scope of the Problem*, in HANDBOOK OF CHILD SEXUAL ABUSE: IDENTIFICATION, ASSESSMENT, AND TREATMENT 3, 5 (Paris Goodyear-Brown ed., 2011).

<sup>67</sup> *Id.* at 14.

<sup>68</sup> BOWLES ET AL., *supra* note 61, at 7.

<sup>69</sup> *Id.*

<sup>70</sup> This is procedurally known as the “exclusionary rule.” See FED. R. EVID. 615; see also Karen J. Saywitz, *Developmental Underpinnings of Children’s Testimony*, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 3, 12 (Helen L. Westcott et al. eds., 2002) (“When both parents and children are witnesses in a case, parents are often precluded from being in the courtroom when their children testify.”).

<sup>71</sup> Saywitz, *supra* note 70, at 12.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 13.

<sup>76</sup> Sharon A. McGee & C. Curtis Holmes, *Treatment Considerations with Sexually Traumatized Adolescents*, in HANDBOOK OF CHILD SEXUAL ABUSE: IDENTIFICATION, ASSESSMENT, AND TREATMENT 447, 449 (Paris Goodyear-Brown ed., 2012).

A child victim should not be repeatedly asked to retell his or her story of abuse. Some repetition may inevitably occur, but the prosecutor should strive to have only the minimum number of interviews necessary. When possible, prosecutors should be involved at the forensic interview<sup>77</sup> so that they can suggest questions, which will ultimately help reduce the number of subsequent interviews.<sup>78</sup> If there is no forensic interview, or if the prosecutor is unable to attend, the prosecutor should attempt to collaborate with those present at the initial interview.

It is problematic for numerous reasons to have a child repeatedly retell his or her story.<sup>79</sup> Multiple interviews can cause children to experience further traumatization, children may recant because of the stress and may make inconsistent statements.<sup>80</sup> Multiple interviews also increase the chances that the defendant will argue a child's testimony has been the product of suggestion as opposed to independent recollection.<sup>81</sup>

A prosecutor should meet with a victim outside of formal interviews. Formal interviews can be scary and taxing on a child, and it is unlikely that there will be opportunities during these types of interviews for the prosecutor and the child to get to know each other.<sup>82</sup> To reduce a child's anxiety in a formal interview, prosecutors could meet with the child before and after the interview. They can meet before the interview to inform the child of what will happen and to make sure that the child has a support person. The meeting after the interview should debrief the child, as the interview may have brought up traumatizing events and stressful emotions.<sup>83</sup> Simply talking about trauma can itself be traumatizing. Anytime a child has to talk about trauma, the prosecutor needs to be aware of aftereffects. If the child appears highly stressed afterward, the prosecutor should suggest that the child be taken to a counselor.

One way for a prosecutor to establish trust and rapport with a child is for the prosecutor and the child to have informal meetings. In the early stages of pre-trial preparation, the prosecutor should not try to elicit details about the child's abuse.<sup>84</sup> Instead, the prosecutor needs to take these opportunities to get to know the child's world. For example, the prosecutor can talk with the child

<sup>77</sup> Sometimes the forensic interviews are conducted at Child Advocacy Centers. The goal of these interviews is to have a collaborative team of interdisciplinary professionals at the interview, in order to minimize the number of interviews in an abuse investigation. Theodore P. Cross et al., *Child Forensic Interviewing in Children's Advocacy Centers: Empirical Data on a Practice Model*, 31 CHILD ABUSE & NEGLECT 1031, 1034 (2007), available at <http://www.unh.edu/ccrc/pdf/cv108.pdf>; see also Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, 65 LAW & CONTEMP. PROBS. 179, 181 (2002), available at [http://www.jstor.org/stable/1192370?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/1192370?seq=1#page_scan_tab_contents) (discussing the importance of preserving forensic interviews for purposes of trial).

<sup>78</sup> Major Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, 2013 FEB. ARMY LAW. 4-5 (2013).

<sup>79</sup> Cross et al., *supra* note 77, at 1033.

<sup>80</sup> *Id.* at 1034; Simona Ghetti et al., *Legal Involvement in Child Sexual Abuse Cases Consequences and Interventions*, 25 INT'L. J. L. & PSYCHIATRY 235, 238 (2002), available at [http://ac.els-cdn.com/S0160252702001048/1-s2.0-S0160252702001048-main.pdf?\\_tid=c01f47f0-ad68-11e4-b589-00000aab0f02&acdnat=1423162794\\_b549035061caf72372b9a74c8b61aedef](http://ac.els-cdn.com/S0160252702001048/1-s2.0-S0160252702001048-main.pdf?_tid=c01f47f0-ad68-11e4-b589-00000aab0f02&acdnat=1423162794_b549035061caf72372b9a74c8b61aedef).

<sup>81</sup> Colin H. Murray, *Child Witness Examination*, 31 NO. 3 LITIG. 16, 17 (2005).

<sup>82</sup> See generally Ghetti et al., *supra* note 80 (discussing negative emotional effects on children as a result of legal involvement). Based on my experiences as a student prosecutor and based on my conversations with other prosecutors, there is no opportunity for prosecutors to spend time with the children outside of the interview. During a pre-trial interview, a defense attorney will question the child. The interview is usually scheduled for a block of time. The child may arrive just a few minutes before the interview. The prosecutor may have time to talk to the child beforehand, or he or she may not. It also may be that there is no time after the interview for the prosecutor to speak with the child. It also may be that the child is stressed out after the interview, so talking afterward would not be beneficial to either the child or the prosecutor.

<sup>83</sup> Although the model of Critical Incident Stress Debriefing is beyond the scope of this Article, the idea is something that a prosecutor should consider. A child should not just be sent home after a pre-trial interview. The prosecutor may be able to help ground the child, or at the very least make sure the child has support when he or she gets home. See Jeffery T. Mitchell, *Critical Incident Stress Debriefing*, TRAUMA, <http://www.info-trauma.org/flash/media-e/mitchellCriticalIncidentStressDebriefing.pdf> (last visited Apr. 10, 2015) (explaining debriefing in general).

<sup>84</sup> Cowan, *supra* note 78, at 6.

about school,<sup>85</sup> friends,<sup>86</sup> sports, movies, or activities the child enjoys. For example, if the child likes “Hello Kitty,” then the prosecutor may direct the conversation around that interest. If the prosecutor and the child find they have a commonality, such as a favorite sports team, then this can become the topic of conversation. If all the prosecutor does is talk about trial and legal issues, the child will become disinterested quickly and trust will not be established. “Once you have children talking at their level, you are halfway home to a successful working relationship.”<sup>87</sup>

*ii. Legal education*

It is challenging enough for adult victims and witnesses to walk into a courtroom filled with strangers, a judge in powerful black robes, a box full of waiting jurors, an isolated witness stand, and an alleged abuser. Most adult witnesses do not understand the underlying intricacies of a trial, nor do they have knowledge of the rules of evidence, nor the impact these rules have on a trial. If adults struggle to understand the nuances of a trial, how much more does a child struggle?

A child who is prepared for trial will be more accurate and complete in his or her testimony during trial.<sup>88</sup> Witnesses must tell their story two times during a trial. Once on direct examination and a second time through cross-examination. On direct, the victim can tell his or her story in a more or less fluid, chronological manner, with direction by the prosecutor. Cross-examination follows, which can be the most challenging part of testifying for victims.<sup>89</sup> Leading questions can trap witnesses into black and white answers. Defense attorneys may intentionally ask confusing or misleading questions.<sup>90</sup> They may even use an angry or a frustrated tone with the child.<sup>91</sup>

The attorneys may take turns standing up and objecting and arguing. They may approach the judge and talk under the static noise, which blocks out the conversation going on at the bench. This experience can be a very stressful experience for children. Prosecutors can reduce this stress by educating their child witnesses.<sup>92</sup>

Children, especially young children, do not have the capacity to fully comprehend what goes on in the courtroom.<sup>93</sup> Prosecutors should never assume that a child understands something.<sup>94</sup> Children lack the cognitive faculties to comprehend legal jargon and legal procedures.<sup>95</sup> They need to be taught about the courtroom and prepared for what will happen before, during, and after a trial.<sup>96</sup> Children must be taught in a manner that they can comprehend. Lawyers should not assume that children can extrapolate information, nor that they have the capacity to understand the legal rules and ethical guidelines governing the legal system.<sup>97</sup> These intricacies and legal underpinnings must be explained to children in a language that the child understands<sup>98</sup> (which will differ from child to child). This might have to be done multiple times to ensure that the child has the opportunity to process and comprehend the information.<sup>99</sup>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Murray, *supra* note 81, at 17.

<sup>88</sup> Cunningham & Stevens, *supra* note 52, at 5.

<sup>89</sup> *Id.* at 14.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Cowan, *supra* note 78, at 7.

<sup>93</sup> Karen J. Saywitz et al., *Interviewing Children In and Out of Court*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 349, 356 (Helen L. Westcott et al. eds., 2002).

<sup>94</sup> Cunningham & Stevens, *supra* note 52, at 12.

<sup>95</sup> Saywitz, *supra* note 70, at 7.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

Education should involve more than just having conversations with the child. Prosecutors should take children to the actual courtroom where the trial will be held. Prosecutors should show the child where the judge, jury, prosecution, and defense will sit.<sup>100</sup> When appropriate, it may also be advantageous to let a child physically touch and use courtroom objects,<sup>101</sup> like the witness stand, microphones, and the projector. Depending on the situation and the child, it may be a good idea to let a child watch a live trial to actually see what one looks like.<sup>102</sup>

There is not one single way to educate a child. Prosecutors must remember that every child is unique in his or her needs and personality. Taking time to prepare children for trial will help reduce their anxiety and stress, which is essential for victims to testify most accurately and articulately.<sup>103</sup> Prosecutors must be attuned to the needs of their witnesses, and this cannot happen if the child does not trust the prosecutor.

### 3. Defend a Child in the Courtroom

Once a witness enters the courtroom, the formalities for the judicial system take over. Witnesses sit apart from their friends and family. From a witness's perspective, they are alone, seated next to the judge. Attorneys, the audience, tables, chairs, and the defendant are between the witness stand and the exit. When the child witness testifies, all eyes are fixed on the child.

Objections and asking for breaks are two common ways attorneys can bring reprieve to their witnesses. Forcing traumatized children to testify can be damaging to the children and against their best interests.<sup>104</sup> Prosecutors should act in ways that reduce re-traumatization or traumatization in their child witnesses. While completely eliminating traumatic reactions is unrealistic, there are several options prosecutors should consider to reduce the negative effects of trial. Prosecutors can utilize support persons, support objects, and support dogs to provide direct support. Prosecutors can also use expert testimony to help explain a victim's behavioral reactions to trauma.

Courts are finally implementing procedures and regulations to help reduce the harmful effects of testifying on children. The Federal Child Abuse Prevention and Treatment and Adoption Reform Act specifically provides funds to states for implementing procedures to reduce a child's trauma.<sup>105</sup> States, too, have started implementing statutes that are protective of child witnesses.<sup>106</sup>

#### *i. Use of support persons*

Support persons are commonly allowed in the courtroom to aid child witnesses.<sup>107</sup> According to a 2010 survey by the National District Attorneys' Association, forty-seven out of fifty states specifically make provisions for support persons during trial.<sup>108</sup> New Jersey and New

<sup>100</sup> Cowan, *supra* note 78, at 7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 8.

<sup>103</sup> Cunningham & Stevens, *supra* note 52, at 13.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> 42 U.S.C. § 5106c (2012).

<sup>106</sup> See ARK. CODE ANN. § 16-43-1001(a)(1) (West 2015) (permitting testimony of a child by closed-circuit television); see COLO. REV. STAT. ANN. § 16-10-402(1)(a) (West 2015) (permitting the use of closed-circuit television for a child witness); see IOWA CODE ANN. § 915.38(1)(a), (b) (West 2015) (allowing child testimony to be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom); see MISS. CODE ANN. § 13-1-407(1) (West 2015) (permitting a trial court to order the videotaping of a child's testimony in some circumstances).

<sup>107</sup> Bradley D. McAuliff et al., *Supporting Children in U.S. Legal Proceedings: Descriptive and Attitudinal Data from a National Survey of Victim/Witness Assistants*, 19 PSYCHOL. PUB. POL'Y & L. 98, 99 (2013) (citing 18 U.S.C. § 3509 (2012)).

<sup>108</sup> See NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, NAT'L DISTRICT ATTORNEYS ASS'N, NDAA PRESENCE OF SUPPORT PERSONS FOR CHILD WITNESSES COMPILATION (2010), available at <http://www.ndaa.org/pdf/Presence%20of%20Support%20Persons%20for%20Child%20Witnesses%202010.pdf>.

Mexico are the only states that do not have specific provisions for support persons.<sup>109</sup> There is a broad range of specifications for support persons, depending on the state.<sup>110</sup>

Victim advocates work inside and outside the courtroom to support victims. Victim advocates may work at the district attorney's office, but in some states, outside programs provide advocate services. For example, the district attorney's office in Albuquerque, New Mexico<sup>111</sup> has victim advocates who attend pre-trial interviews, hearings, and trial with victims. They also help victims apply for funding through the New Mexico Crime Victims Reparation Commission.<sup>112</sup> The victim advocates are essential resources for both child victims and their families. In Colorado Springs, the police department contains a victim advocacy unit.<sup>113</sup> These advocates work with victims to help them understand their rights, to receive compensation through the Crime Victim Compensation Act,<sup>114</sup> to see that they receive necessary services, and to provide them with emotional support.<sup>115</sup>

Friends, family, therapists, staff members, or guardians ad litem ("GAL") are allowed to serve as support persons, depending on the state.<sup>116</sup> In March 2002, sixteen states required appointment of a GAL for child victims in criminal cases.<sup>117</sup> A study published in 2013 found that victim advocates and assistance were the most common support persons for child victims.<sup>118</sup> GALs were the least common support person.<sup>119</sup>

Prosecutors cannot be direct support persons to a child in court, thus they should make sure the child has someone with them throughout the trial. A support person is especially important if the child has no parents or family who can support them. The child should be comfortable with whoever is supporting them, whether the support person is a parent, family member, friend, or victim advocate. Prosecutors should be working closely with the support person to make sure that the child is being cared for.

#### *ii. Use of support objects*

Support objects, such as favorite toys, blankets, or stuffed animals have also been used during a child's testimony to help reduce the stress and anxiety of testifying,<sup>120</sup> and these objects can be a comforting aid to a child witness.<sup>121</sup> In *Sperling v. State*, a Texas court allowed a child witness to hold a teddy bear while testifying.<sup>122</sup> Similarly, in Connecticut, a court allowed a child victim to hold a large stuffed gorilla while testifying in *State v. McPhee*.<sup>123</sup> As is the case with many actions of the prosecutor, he or she must be careful to act within the bounds of ethical

<sup>109</sup> *Id.* at 58.

<sup>110</sup> See McAuliff et al., *supra* note 107, at 99.

<sup>111</sup> This Author worked very closely with victim advocates as a clinical law student at the Bernalillo County District Attorney's Office in Albuquerque, New Mexico.

<sup>112</sup> CRIME VICTIMS REPARATION COMM'N, <http://www.cvrc.state.nm.us> (last visited Apr. 10, 2015).

<sup>113</sup> Colorado Springs Police Department, *Victim Advocacy Unit*, CITY COLO. SPRINGS, <https://www.springsgov.com/Page.aspx?NavID=4391> (last visited Apr. 10, 2015).

<sup>114</sup> See generally COLO. REV. STAT. ANN. § 24-4.1-101–24-4.1-124 (West 2015) (detailing the Colorado Crime Victim Compensation Act).

<sup>115</sup> See Colorado Springs Police Department, *supra* note 113 (explaining the role of victim advocates).

<sup>116</sup> McAuliff et al., *supra* note 107, at 99.

<sup>117</sup> NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 57, at 462–63.

<sup>118</sup> McAuliff et al., *supra* note 107, at 101.

<sup>119</sup> *Id.*

<sup>120</sup> CHILDREN'S ADVOCACY CTR. TEX., CHILD-FRIENDLY COURTROOMS: ITEMS FOR JUDICIAL CONSIDERATION 9 (2011), available at <http://www.cactx.org/public/upload/files/general/CACBenchBook-FINAL.pdf>.

<sup>121</sup> John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interview and Courtroom Testimony*, 28 PAC. L.J. 3, 71 (1996).

<sup>122</sup> *Sperling v. State*, 924 S.W.2d 722, 725 (Tex. Ct. App. 1996).

<sup>123</sup> *State v. McPhee*, 755 A.2d 893, 896 (Conn. App. Ct. 2000).

conduct. In *State v. Aponte*, the Connecticut Supreme Court held that it was prosecutorial misconduct for the prosecutor to give the child witness a doll before she testified.<sup>124</sup>

There is no golden rule about when a child should have a support object. The decision to use a support object should be based on the child's needs. Offering a support object will not hurt the child. As with all conduct during a trial, prosecutors must act ethically, but finding this balance does not have to be difficult.

### *iii. Use of support dogs*

One of the rising tools witnesses can utilize in the courtroom is a support dog. Support dogs have been around since the 1990s, but they are gaining more popularity as research continues to show the negative impact of testifying, especially for sexual abuse victims.<sup>125</sup>

There are numerous examples of how support dogs help child witnesses in court. In San Francisco, Faber, a Golden Retriever, helps comfort victims during interviews and will soon be used during trials.<sup>126</sup> Rosie, a Golden Retriever, sat with a fifteen-year-old girl who testified about how her father raped and impregnated her.<sup>127</sup>

The Assistance Dogs International is an organization dedicated to accrediting dog training organizations.<sup>128</sup> Support dogs are not appropriate for every witness and should be reserved for children who are having an especially hard time.<sup>129</sup> Some examples in which support dogs are appropriate are for children who have been brutally physically abused, rape victims, children who cannot stop crying, and children who refuse to get on the witness stand.<sup>130</sup>

Several considerations must be taken into account before a support dog is allowed into the courtroom. The most important factor that courts must take into consideration is prejudice to the defendant. Defendants have argued that support dogs deprive them of a fair trial by interfering with their Confrontation Clause rights, the dogs incite juries to be sympathetic to witnesses, the dogs encourage juries to put more weight on the victim's testimony, and that the dogs give witnesses the incentive to testify in favor of the prosecution.<sup>131</sup> The prejudice to the defendant must be counterbalanced with the emotional harm or trauma that would occur to the victim who is testifying.<sup>132</sup>

Regardless of the severity of the abuse, a child victim should always have some kind of support before, during, and after trial. Not every option must be utilized. The amount of support will depend on the child and the severity of the abuse, but the bottom line is that a child must have some sort of support. Prosecutors should be mindful about the type and amount of support available to a child. If the child has no support system in place, the prosecutor should assist with

<sup>124</sup> *State v. Aponte*, 738 A.2d 117, 124 (Conn. 1999). It is noteworthy that it was not the prosecutor's conduct alone that caused the court to find the conduct improper. The Connecticut Supreme Court found that the trial court's handling of the doll was also influential in the finding that the doll prejudiced the defendant. *Id.*

<sup>125</sup> Natalie R. Troxel et al., *Child Witnesses in Criminal Court*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 150 (Bette L. Bottoms et al., eds., 2009); see Nicole Hensley, *San Francisco Brings in Aid Dog to Help Victims at Courthouse*, N.Y. DAILY NEWS (Sept. 17, 2014, 3:18 PM), <http://www.nydailynews.com/news/national/san-francisco-brings-aid-dog-victims-courthouse-article-1.1943123>.

<sup>126</sup> Hensley, *supra* note 125.

<sup>127</sup> William Glaberson, *By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate*, N.Y. TIMES (Aug. 8, 2011), [http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?pagewanted=all&_r=0).

<sup>128</sup> *Using a Facility Dog in the Courtroom*, COURTHOUSE DOGS, [http://courthousedogs.com/settings\\_courtroom.html](http://courthousedogs.com/settings_courtroom.html) (last visited Apr. 15, 2015).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *State v. Dye*, 283 P.3d 1130, 1132 (Wash. Ct. App. 2012); *People v. Spence*, 212 Cal. Rptr. 3d 478, 511 (Cal. Ct. App. 2012).

<sup>132</sup> *People v. Patten*, 9 Cal. Rptr. 2d 1718, 1726 (Cal. Ct. App. 1992).

establishing a support system for the child. Aside from weakening the child's ability to give adequate testimony to the case, the absence of support will have powerful and negative effects on the well-being of the child. Prosecutors can only be a support person for the child before and after trial. There are more limitations during trial, but even during trial, prosecutors can take measures to make sure the child is not overwhelmed.

#### A. Using Expert Witnesses During Child Abuse Cases

Jurors judge the credibility of witnesses and ultimately determine if the witness's statement was believable. For prosecutors trying child abuse cases, proof beyond a reasonable doubt may be a difficult standard to meet. Jurors bring their own biases into the courtroom about how victims should conduct themselves following abuse.<sup>133</sup> Reactions to abuse and trauma are not predictable, nor are they consistent from person to person. Prosecutors must be prepared to deal with victims as individuals, with the understanding that victims have their own individual responses to abuse.<sup>134</sup>

While each victim will have his or her own individual reactions, there are some behaviors that are quite common. Prosecutors must be prepared to handle delayed disclosures and recanting victims.<sup>135</sup> These issues are common to adult witnesses as well, but for children, these issues may be even more pronounced because of their young age, their suggestibility, and their vulnerable and underdeveloped coping skills.<sup>136</sup> Prosecutors must know how to handle these issues, because defense attorneys will attempt to use them to discredit a victim's credibility.<sup>137</sup>

#### 1. Know the Victim

A prosecutor cannot be effective in the courtroom if he or she does not know the victim. If there are issues involving delayed disclosure, recantation, or inconsistent statements (or a combination of the three), the prosecutor needs to find out why. Depending on the victim, he or she may be able to explain the reasons for his or her behavior and may be able to articulate these reasons to a jury.<sup>138</sup>

For example, there are numerous reasons why a child may not disclose abuse immediately. Delayed disclosure is, in fact, the norm, not the exception.<sup>139</sup> The perpetrator may have threatened the child or the child might be embarrassed or ashamed about the abuse.<sup>140</sup> A child may not disclose the abuse because the perpetrator is someone he or she lives with or someone whom he or she knows.<sup>141</sup> The U.S. Department of Justice published a report in 2003, finding that seventy-four percent of adolescents who experienced sexual abuse were familiar with

<sup>133</sup> JENNIFER G. LONG, NAT'L DIST. ATTORNEYS' ASS'N, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 8 (2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

<sup>134</sup> *Id.* at 1.

<sup>135</sup> Paula Schaeffer et al., *Children's Disclosures of Sexual Abuse: Learning from Direct Inquiry*, 35 CHILD ABUSE NEGLECT 343, 345 (2001), available at <http://www.sciencedirect.com/science/article/pii/S0145213411000780>; Lindsay C. Malloy et al., *Filial Dependency and Recantation of Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD. ADOLESC. PSYCHIATRY 162 (2007), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=thomaslyon>.

<sup>136</sup> Cunningham & Stevens, *supra* note 52, at 18.

<sup>137</sup> Long, *supra* note 133, at 1.

<sup>138</sup> *Id.* at 18.

<sup>139</sup> Kamala London et al., *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Ways that Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 198 (2005); Mike McGrath & Carolyn Clemens, *The Child Victim as a Witness in Sexual Abuse Cases*, 46 MONT. L. REV. 229, 230 (1985), available at <http://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=1653&context=mlr>.

<sup>140</sup> McGrath & Clemens, *supra* note 139, at 231.

<sup>141</sup> R.L. Sjoberg & F. Lindblad, *Delayed Disclosures and Disrupted Communication During Forensic Investigation of Child Sexual Abuse: A Study of 47 Corroborated Cases*, 91 ACTA PAEDIATR 1391, 1394 (2002), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1651-2227.2002.tb02839.x/epdf>.

their abuser.<sup>142</sup> A 2000 report found that 92.9 percent of abused children knew their abuser, with approximately thirty-four percent of the perpetrators being family members.<sup>143</sup> Thus, especially for victims assaulted by a family member, delayed disclosure should not come as a surprise.

## 2. Using an Expert in the Courtroom

Another tool that prosecutors can use to indirectly help child victims is to have an expert testify to help explain a child's behavioral reaction to abuse. Not all states allow an expert to testify about a victim's behavior.<sup>144</sup> The scope of expert testimony also varies from state to state.<sup>145</sup> In New Mexico, expert testimony has been allowed to explain victim behavior. In *State v. Alberico*, the Supreme Court of New Mexico allowed expert testimony to show that the teenage victims suffered from PTSD, which was consistent with someone who was a victim of sexual abuse or rape.<sup>146</sup> Two different cases were addressed in *Alberico: Alberico* and *Marquez*.<sup>147</sup> The court allowed expert testimony in the case of *Alberico*, to show a crime had been committed and that the victim did not consent to sexual intercourse.<sup>148</sup> In the case of *Marquez*, the court allowed expert testimony to show the victim's behavior was indicative that sexual abuse had taken place.<sup>149</sup> The court did note that PTSD testimony was inadmissible to show credibility or to identify the defendant.<sup>150</sup>

In Wisconsin, in *State v. Jensen, L.J.*, an eleven-year-old child, accused her stepfather of sexually assaulting her.<sup>151</sup> The state qualified the school guidance counselor as an expert witness to testify about L.J.'s behavior in school.<sup>152</sup> L.J. was sent to the counselor's office after teachers noticed marked changes in her behavior:

“acting out in class, some noncompliance as far as doing homework, standards [sic] up to the teachers, being a little bit disrespectful and quite a bit of writing notes to boys, and boys writing notes to her.” [The counselor] testified that L.J. had been [wearing] tight jeans and v-necked sweaters without an undershirt; had written “I love \_\_\_” (her “boyfriend's” name) on the back pocket of her pants; and had on one occasion pinched a boy's buttocks.

The instructor of the school's sex education class had reported to [the counselor] that L.J. asked precocious questions, such as whether it was possible to get pregnant by having sexual intercourse in a bathtub. [The counselor] himself had also observed that L.J. was noticeably nervous and anxious during the sex education class that dealt with sexual abuse.<sup>153</sup>

<sup>142</sup> *Youth Victimization: Prevalence and Implications*, U.S. DEP'T OF JUSTICE 5 (2003), available at <https://www.ncjrs.gov/pdffiles1/nij/194972.pdf>.

<sup>143</sup> Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, U.S. DEP'T OF JUSTICE, BUREAU JUSTICE STAT. 10 (2000), available at <http://www.bjs.gov/content/pub/pdf/saycrle.pdf>.

<sup>144</sup> Long, *supra* note 133, at 19.

<sup>145</sup> *Id.*

<sup>146</sup> *State v. Alberico*, 861 P.2d 192, 195 (N.M. 1993).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 195, 208.

<sup>149</sup> *Id.* at 208.

<sup>150</sup> *Id.* at 210–11.

<sup>151</sup> *State v. Jensen*, 432 N.W.2d 913, 914 (Wis. 1988).

<sup>152</sup> *Id.* at 915.

<sup>153</sup> *Id.*

The court allowed the counselor to testify about L.J.'s behavior at school and that these behaviors were "red flags" for someone who had been sexually abused.<sup>154</sup> He was also permitted to testify that L.J.'s behavior was "consistent with the behavior of children who were victims of sexual abuse."<sup>155</sup> The counselor further testified that L.J.'s delay in reporting was not uncommon for child abuse victims.<sup>156</sup> The court held that the counselor's testimony was relevant to explain behavioral reactions to child abuse, which may be outside the jury's common experience.<sup>157</sup> His testimony was also relevant to "counter the defense's explanation of the complainant's behavior and to provide the jury with an alternative explanation."<sup>158</sup> The court further held that "[e]xpert testimony on the post-assault behavior of a sexual assault victim is admissible in certain cases to help explain the meaning of that behavior."<sup>159</sup>

In Delaware, in *Wheat v. State*, Willie Wheat was convicted of raping his ten-year-old stepdaughter.<sup>160</sup> The two main issues in this case involved a delay in reporting and recantation.<sup>161</sup> The victim testified that she recanted because her stepmother had scared her by making threatening statements to her.<sup>162</sup> The State introduced expert testimony from a clinical worker from Intrafamily Sexual Abuse Treatment Program for the Children's Bureau of Delaware.<sup>163</sup> The court permitted the worker to testify as an expert in the field of intrafamily sexual abuse.<sup>164</sup> The worker testified that:

[B]etween thirty percent and forty percent of children recant, alter, or otherwise minimize their original allegations of sexual abuse, but that fewer than five percent recant and maintain the altered statement. She stated that of the seventy-five to eighty children whom she had treated or counseled, "about thirty" had recanted at some point, but only three had recanted and maintained their recantations.<sup>165</sup>

The Supreme Court of Delaware allowed this testimony because the child's "behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its emotional antecedents."<sup>166</sup> The court held that in cases with delayed reporting or recantation, expert testimony can help explain why these may occur and the significance of the occurrences.<sup>167</sup> This holding was limited to cases with recantation or a delay in reporting "which, to average laypeople, are superficially inconsistent with the occurrence of sexual abuse and which are established as especially attributable to intrafamily child sexual abuse rather than simply stress or trauma in general."<sup>168</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 916.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 918.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Wheat v. State*, 527 A.2d 269, 270 (Del. 1987).

<sup>161</sup> *Id.* at 270, 273.

<sup>162</sup> *Id.* at 270–71.

<sup>163</sup> *Id.* at 271.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 273.

<sup>167</sup> *Id.* at 274.

<sup>168</sup> *Id.*

These cases using expert witness testimony to exemplify the importance that prosecutors take time to get to know their victims. In *Wheat*, the child's testimony about her stepmother scaring her into recanting is critical information, without which, the recantation reflects poorly on the victim. Behavioral acting out and issues with statements are not unlikely to occur. Prosecutors need not immediately assume that the presence of these issues significantly weakens the case. They should talk to the victim and his or her family to get enough information and then decide if an expert witness is appropriate.

## II. CONCLUSION

The ramifications of child abuse can vary from case to case. Research has established that children who are victims of abuse face real challenges with poor physical and mental health outcomes as a result of the abuse. Child victims are thrust into the criminal justice system, often without knowledge or choice. Prosecutors are at the forefront of the judicial process, and therefore need to take action to reduce the negative effects of a trial on child victims. There are numerous instances where prosecutors can implement measures that will reduce the negative impact on victims. It is an unavoidable fact that child victims will have to repeatedly tell their story, and some re-traumatization will likely occur. However, prosecutors can take the time to get to know the victim and establish trust, and they can ensure that a child has support. When appropriate, they can have an expert testify about "unusual" behaviors. Prosecutors have the opportunity, and arguably a responsibility, to reduce the negative effects of trial. The goal cannot be to eliminate all the possible traumatic effects of a trial; instead, the goal should be to reduce the instances of re-traumatization and provide support for the inevitable times of stress.