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The practice of prosecuting child maltreatment: Results of an online survey of prosecutors☆

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ABSTRACT

Despite efforts by advocates, practitioners, and legislators to alleviate the burden on child maltreatment victims in the criminal justice system, many challenges remain for prosecutors as they seek to hold offenders accountable while minimizing the emotional impact on children. More than 200 state and local prosecutors in 37 states responded to an online survey to share their perspectives on current challenges, procedures to support children in the adjudication process, and the impact of the U.S. Supreme Court opinion in Crawford v. Washington (2004), sex offender registries, and "Safe Harbor" legislation to protect child sexual exploitation victims. Respondents' most pressing challenges were obtaining evidence to corroborate children's statements and the difficulties of working with child victims. Child testimony was ranked as more frequent than any other type of evidence, and least frequent were DNA, photos or videos of criminal acts, and other physical evidence. Prosecutors rely primarily on victim/witness assistants and courtroom tours to prepare children for testimony; technological alternatives are seldom used. Results suggest a real but limited impact of the Crawford opinion on the need for child testimony and on the decision to prosecute. Survey findings indicate a need for greater attention to thorough investigations with particular attention to corroboration. Doing so may strengthen the child's credibility, which is especially critical in cases lacking physical or medical evidence of maltreatment.

1. Introduction

Prosecuting child maltreatment is an enormous undertaking with considerable impact. It can have life-changing consequences for both defendants and child victims, who typically must recount their history of abuse in investigations and testify in court for cases to be prosecuted. It is built on a complex edifice of investigation and victim support, engaging police, victim advocates and child protection, medical and mental health professionals as well as prosecutors. Some research suggests a relationship between prosecution and child protection outcomes (Cross, Martell, McDonald & Ahl, 1999, but see also Martell, 2005 for contradictory evidence). Families, professionals and the community as a whole have a substantial investment and stake in the prosecution process.

Yet prosecution of child maltreatment is difficult, because evidence is often sparse (Walsh, Jones, Cross & Lippert, 2010; Whitcomb, 1992) and often so much of the effort to prove abuse in court rests on the child's testimony. Small proportions of cases are prosecuted (Cross, Walsh, Simone & Jones, 2003). Participating in prosecution and testifying in court is stressful for many children

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(Goodman et al., 1992; Quas et al., 2005), though the well-being of most children involved in these cases improves over time (Whitcomb, Goodman, Runyan & Hoak, 1994). Testifying has been associated with better mental health outcomes in one study in a juvenile court setting (Runyan, Everson, Edelsohn, Hunter, & Coulter, 1988), but repeatedly testifying has been associated with poorer mental health outcomes (Goodman et al., 1992; Quas et al., 2005; Whitcomb, Runyan et al., 1994). In a follow-up study, Quas et al. (2005) found that the negative effects of repeatedly testifying persisted even more than a decade after the case. In Quas' long-term follow-up, children were split on the degree to which their experience of the case was positive or negative and whether it had a positive or negative impact on their lives. When defendants received a lighter sentence, *not* testifying was associated with poorer mental health outcomes.

Research provides empirical evidence of some of the challenges prosecutors face in deciding whether or not to prosecute child abuse, in preparing and supporting child witnesses, and in eliciting testimony from children in court. For example, Cross, DeVos, and Whitcomb (1994) found that such factors as the non-offending parent's support for the child and the child's mental health were related to whether child sexual abuse cases were accepted for prosecution. Child victims often approach testifying in court with considerable fear (see, e.g., Back, Gustafsson, Larsson, & Bertero, 2011), though research suggests that court preparation programs can significantly reduce children's anxiety (Nathanson & Saywitz, 2015). Yet McAuliff, Lapin and Michel's (2015) study suggests that providing a support person for a child testifying in court may backfire, as research participants viewing a simulation of child testimony with a support person next to the child were less likely to believe the child than participants viewing child testimony without a support person. Ahern, Stolzenberg and Lyon's (2015) study of trial transcripts found that prosecutors questioning children in court often failed to provide adequate instructions to the child, to build rapport with the child, and to ask open-ended questions that best elicited accurate testimony.

By the early 1980s, concerned legislators began to introduce protective measures intended to support and protect child victims who testify in court (Whitcomb, 1992). Closed-circuit television and videotape technology were increasingly proposed as alternatives to in-court testimony. Under certain circumstances, courtroom audiences can be limited during children's testimony. Special hearsay exceptions were designed to allow children's out-of-court statements that did not fit within any of the established exceptions in federal or state rules of evidence.

In 1985, Whitcomb et al. interviewed prosecutors, law enforcement officers, judges, victim/witness assistants, and allied professionals in four jurisdictions, and concluded that most courtroom accommodations to help children testify would likely be considered measures of last resort (Whitcomb, Shapiro & Stellwagen, 1985). Respondents cited concerns with infringements on due process and defendants' constitutional rights, especially their Sixth Amendment right to confront their accusers (the child victims) in court (Whitcomb et al., 1985; see also, Goodman et al., 1992; Whitcomb, 1992). Since then, in fact, the United States Supreme Court has imposed specific restrictions on prosecutors' ability to introduce alternative procedures for child victim/witnesses. In Maryland v. Craig (1990), the Court ruled that before allowing a child's testimony via closed circuit television, there must be a finding that the child would be traumatized beyond "de minimus" if made to testify in the presence of a defendant. Results from Goodman and colleagues' 1999 survey (Goodman, Quas, Bulkley, & Shapiro, 1999) were consistent with Whitcomb et al.'s (1985) findings: prosecutors reported that they rarely utilized courtroom accommodations to assist child victims, relying instead on preparing children in advance and providing support during their testimony. Goodman et al.'s findings suggest that *Maryland v. Craig*'s allowance for testifying via closed circuit television for some child victims had little impact on prosecutorial practice (Goodman et al., 1999).

In 2004, the Supreme Court provided additional guidance regarding efforts to introduce out-of-court statements when children are unavailable to testify. In Crawford v. Washington (2004), the Court stated that unless the child victim/witness testifies, out-of-court statements that do not fit within traditional hearsay exceptions (e.g., excited utterances or statements made for purposes of medical diagnosis) cannot be introduced if they are determined to be "testimonial" in nature, that is, if they were made under circumstances that might objectively lead to use at trial, such as statements made to law enforcement officers.

The impact of Crawford on prosecution of child maltreatment is not entirely clear. Two judges reviewing cases one year after Crawford suggested that it had little impact on prosecutor actions in child abuse cases (Gersten & Karan, 2005). On the other hand, Richey-Allen (2009) suggests that Crawford has affected some cases seen at Children's Advocacy Centers (CACs), which facilitate and coordinate the investigative and service response of multiple agencies to severe child abuse in over 800 communities across the country (see, e.g., Cross, Jones, Walsh, Simone, & Kolko, 2007; National Children's Alliance, 2014). Trained forensic interviewers at CACs conduct many of the child forensic interviews in these cases; usually interviews are videotaped. Some courts have ruled that CAC interviews are not testimonial because of CACs' child service function, while other courts have ruled that these interviews *are* testimonial because police and prosecutuors are involved in CACs and make use of the interviews (Richey-Allen, 2009). A number of legal studies have analyzed the conditions in which child statements in abuse cases would be considered testimonial (e.g., Carr, 2007; Kyed, 2004; Lyon & Dente, 2012; McKimmie, 2005; Richey-Allen, 2009). Crawford has led to a number of convictions in child sexual abuse cases being reversed or returned to a lower court on appeal (Carr, 2007; Lyon & Dente, 2012). The research on the effect of Crawford in prosecuting child abuse has involved review of legal cases. It has not studied prosecutor practice generally nor has it used statistical methods.

Meanwhile, the federal government and many states have enacted legislation that could have important implications for prosecution of child maltreatment. In 2006, the U.S. Congress enacted the Sex Offender Registration and Notification Act as Title 1 of the Adam Walsh Child Protection and Safety Act (P.L. 109-248). This legislation created a comprehensive, national registration system to monitor and track sex offenders following their release into the community. All states, the District of Columbia, four territories, and many federally recognized Indian tribes have enacted their own laws creating registries and identifying offenses that are subject to mandatory lifetime registration (United States Department of Justice, 2017). Research casts doubt on the effectiveness