

## COMMENT

### **Empowering Voices: Working Toward a Children’s Right to Participatory Agency in Their Courtroom Experience**

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#### INTRODUCTION

*Mia,<sup>1</sup> a 16-year-old precocious, smart, and self-assured young woman, was in foster care due to her father’s arrest (and later conviction) of rape and child molestation of her older sister, Zoe. The father had obtained custody of the two girls years before and their mother was not in regular contact with them. After the father was arrested and incarcerated without bond, the girls were placed in foster care. There were suspicions that the father had also raped Mia. She was bonded and attached to him and didn’t believe he should be in jail. The suspicion was that the father was having sex with both girls and that, although Zoe ended up telling a teacher what was going on, Mia was protective of him and didn’t think that he had done anything wrong.*

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1. Names in this anecdote have been changed to protect confidentiality.

*Through her attorney, Mia requested visitation with her father in prison. Although Mia had spoken informally during court hearings previously, and was actually very articulate in doing so, she had never been on the stand and subject to cross-examination. In essence, she had never provided sworn testimony. As Mia's custodian, the State was resistant to Mia visiting her father and opposed her motion. The State subsequently called Mia as a witness and asked direct, pointed questions about whether she had been raped by her father. Assumptions were made about her ability to handle the intense questions because of the confidence and intellect she had demonstrated in previous hearings.*

*As it turned out, those assumptions were false. Yes, Mia was confident and intelligent, but she was not emotionally equipped to deal with the issues and questions she was forced to address in a quasi-public forum. She made it through the hearing and completely fell apart afterward. Mia had recently made it out of the Group Home she so desperately wanted out of and into a foster family home. She had seemed happy and bonded to her foster mother. They were even discussing permanency. However, Mia moved in a downward spiral after that hearing, refusing to let anyone close to her. She pushed the foster mother away, she pushed everyone away. She engaged in behavior that required police involvement and was eventually placed back into a Group Home. Mia now says that she wants to stay in a Group Home until she can go away to college; she doesn't want a family anymore.<sup>2</sup>*

Mia's story is just one of a vast number of child witness cases, but in her story particularly, one can see how her lack of agency deeply impacted her life in a negative way. She wanted to visit her father, but her request was opposed. She was called as a witness, even though she may not have wanted to testify. She lacked preparation or advisement as to what she could expect in the hearing. Further, Mia received no additional assistance after she experienced trauma, from mental health professionals or any others in what should be a network of support. Most devastating is that the negative consequences could have been avoided if Mia had a right to participatory agency. Mia's personal interest in the case and the fact that she might not be ready to handle the situation were overshadowed by her attorney's insistence that she testify. Although Mia initially seemed prepared, the attorney focused narrowly on her past behavior in hearings. In

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2. Email from Brooke N. Silverthorn, CWLS, Staff Attorney, Nat'l Assoc. of Counsel for Children, to author (Jan. 7, 2015, 04:59 EST) (on file with author) (anecdote slightly adjusted for style).

circumstances like Mia's, what is essential is a legal framework that focuses on the rights of children and adolescents who testify. If Mia had voiced her needs and desires and been treated as an active participant in this proceeding, then the outcome could have been a positive one.

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The number of child witness cases have dramatically increased in the legal system over the past two decades.<sup>3</sup> Factors such as “mandatory reporting laws . . . , more education in the schools on crimes against children . . . , the creation of specialized child abuse and child protection teams, and better overall public awareness of crimes against children” have led to that increase.<sup>4</sup>

While it is certainly encouraging to see this enhanced awareness of child abuse and other crimes perpetrated against children, the resulting upsurge of child witnesses in a system they are not adequately prepared to face is disheartening. The American legal system is an adversarial system by design, and not crafted for children's needs.<sup>5</sup> Children are at a disadvantage because they lack understanding of the practices and procedures of the legal system—even as teenagers their understanding is limited.<sup>6</sup> Some examples of the potential disadvantages for children are an accused's right to confront the accuser, and the structure of cross-examination, which may include hypothetical questions, compound questions, and double negative questions.<sup>7</sup> All of these practices can affect children's accuracy in presentation of their testimony.<sup>8</sup>

When children participate in any type of proceeding in the American legal system (not just in criminal trials) they are inherently at this disadvantage. A system that is designed to elicit truth may actually subvert that truth.

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3. SHERRIE BOURG CARTER, *Child Witnesses in the Courtroom*, in CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 121, 121 (2d ed. 2009).

4. *Id.*

5. *Id.* at 123.

6. *Id.*

7. *Id.*

8. *Id.*

Children may experience anxiety and trauma, which could impede their voices and quell their adequate expression while testifying. Although a number of practitioners, theorists, and decision-makers may advocate for children through the method of “shielding” children from the courtroom, I propose instead a shift from third party protection to first party agency for children and a children’s right to own their experience in the courtroom.

In Parts I and II, this Comment examines U.S. case law and the dominant U.S. approaches to the difficulties child witnesses face. I examine Confrontation Clause issues and the developing case law implicating major changes to child testimonial practices. In conjunction with these developments is the response in state and federal legislatures to child witness testimony and a number of suggestions for how to alleviate trauma and stress for child witnesses. I will therefore consider one- and two-way closed circuit television, federal and state shielding statutes (and prosecutors’ use of these statutes), and courtroom procedures, which are all efforts to protect children from the trauma of testifying in court. Prosecutors’ discretion in particular shows how the system is not currently working to ensure children’s rights. These Parts assess the current legal framework in the United States for protecting children in the courts. This contemporary approach has unfortunately pinned children as objects of the law, rather than empowered subjects, making it so that the rights of children are not taken seriously.

In Part III, I suggest a shift from shielding children to empowering children. This shift is absolutely necessary for the improvement of child witnesses’ experience in our legal system. In this Part I examine the changing conceptions of childhood and the development of the children’s rights movement, and how both altered perceptions of children and the laws impacting them. I explore in depth the United Nations Convention on the Rights of the Child (“CRC”), the formation process of this international treaty, and the relevant provisions that affect child witness testimony. The United States has not ratified this treaty, and that certainly stems from exceptionalism: the United States is eager to criticize other states’ approaches to children’s rights, yet hesitates to reflect on the deficiencies in its own practices. The enforcement mechanisms in the CRC help to set

indicators and benchmarks so that public officials are responsible for looking at and implementing the principles of the CRC and the rights of children into public policy. If the United States ratifies this treaty or takes its principles into consideration, it will be held accountable for how child witnesses are treated and will be forced to think critically about its own practices and develop ones that better conform to CRC principles.

From there, in Part IV, I introduce insights from international human rights law, providing examples of how this shift from third party protection to first party agency might occur by putting the CRC into practice. I propose that in order to enact a change from third party protection to first party agency for child witnesses, we need both a focal point at the national level and a coordination mechanism to integrate those rights into public policy. An effective focal point could be a national Children's Rights Ombudsman, and the coordination mechanisms could include a variety of innovative preparatory and integrative approaches to child witness testimony.

In Part IV.A, I introduce how the CRC has been implemented around the world through children's rights ombudsmen and how an ombudsman for children could serve as a designated focal point, a last stop at accountability, for child witnesses in the United States. Although the United States has not itself ratified the CRC—and need not do so to implement the shift proposed here—the CRC offers an important set of comparative best practices that the U.S. justice system can and should learn from. In Part IV.B, I focus on the innovative practices that seek to implement that shift to participatory agency, including court schools, specialized courts, child witness attorneys, and specialized child advocates. Further, domestic courts can use the CRC indirectly in their decisions, and grassroots organizations have made use of the CRC through a bottom-up incorporation strategy. I suggest that several of these approaches can and should be ultimately merged into the court system itself to streamline a children's right to participatory agency in their relation to the legal system. While none of these methods are posited as more effective than the others, or a perfect solution, a combination of these tactics could work as a

necessary companion piece to the Children's Rights Ombudsman.

I conclude by advocating for a judicial system that focuses more on the rights of children, through development of preventative practices and concurrent approaches to improve their testimony and foster their sense of empowerment. This standpoint is where I think legal advocates and other participants should seek to reposition both the law and themselves. Rather than working against children, the U.S. legal system should enhance children's experience and provide them with the tools necessary to aid in the overall administration and pursuit of justice.

#### I. THE CONFRONTATION CLAUSE AND THE INCREASED PREVALENCE OF CHILD TESTIMONY

The Sixth Amendment's Confrontation Clause has many implications for child witness and child victim testimony in the United States. The Clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>9</sup> Additionally, children are presumed competent to testify under the Federal Rules of Evidence.<sup>10</sup> Child witness testimony is particularly important in criminal child abuse cases—when child witnesses are purportedly victims of abuse, they are often the only witnesses of the crimes, so their testimony is crucial.<sup>11</sup> The risk of testifying is that children can be exposed to additional harm, and there is the danger that the children's testimony could be used against innocent defendants if the children were "coached or influenced by repeated and suggestive questioning."<sup>12</sup> The challenge in child abuse cases is to balance the competing interests of the "state's obligation to protect the child" and the state's "obligation to preserve the defendant's right to a fair trial."<sup>13</sup> As federal case law has

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9. U.S. CONST. amend. VI.

10. See FED. R. EVID. 601.

11. Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 393 (2000).

12. *Id.* at 393-94.

13. *Id.* at 394.

developed, the implications for child testimony have been manifold, and many early efforts at reform tended to focus on the use of shielding in court. Shielding involves limiting the juvenile witness's view of the defendant while the witness is testifying (and, at times, the defendant's view of the juvenile).<sup>14</sup>

In a seminal Supreme Court case, *Coy v. Iowa*, Iowa Code Section 910A.14 was examined, as it established that complaining witnesses were allowed to testify behind a screen or via closed-circuit television ("CCTV").<sup>15</sup> In this case, a large screen was placed between two 13-year-old girls and the appellant they were testifying against in a jury trial, which resulted in the appellant's conviction of two counts of lascivious acts with a child.<sup>16</sup> The appellant argued that the employment of the screen violated due process as the screen "would make him appear guilty and thus erode the presumption of innocence," and also interfered with his right to face-to-face confrontation of his accusers under the Confrontation Clause.<sup>17</sup> The narrow issue here was whether the appellant's right to confrontation was violated.<sup>18</sup> The Court found that it was and reversed judgment, remanding the case.<sup>19</sup> The Court reasoned that "confrontation is essential to fairness."<sup>20</sup> The State conversely argued that the interest of confrontation was outweighed by "the necessity of protecting victims of sexual abuse."<sup>21</sup> The Court declined to consider whether exceptions to a face-to-face encounter existed, but left that question open: "We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."<sup>22</sup>

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14. *See id.* at 394-95.

15. *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988).

16. *Id.*

17. *Id.* at 1015.

18. *Id.* at 1020.

19. *Id.* at 1022.

20. *Id.* at 1019.

21. *Id.* at 1020.

22. *Id.* at 1021.

Regardless, the Court found that the Iowa statute was faulty because it did not require an individualized finding that a particular witness needed special protection from her alleged abuser.<sup>23</sup> But this case notably opened up the possibility of exceptions to a witness's face-to-face encounter with a defendant.

*Maryland v. Craig* was another pivotal case implicating child witness testimony, particularly because it answered the question that the Court in *Coy* reserved.<sup>24</sup> A statutory procedure in Maryland permitted a child witness who was allegedly a child abuse victim to testify via one-way CCTV.<sup>25</sup> Here, a six-year-old girl who attended the respondent's pre-kindergarten and kindergarten center was allegedly abused by the respondent.<sup>26</sup> The trial court permitted three children and the named victim to testify against the respondent from one-way CCTV following the State's presentation of expert testimony that these children would suffer "serious emotional distress . . . such that [they could not] reasonably communicate," if required to testify in the courtroom.<sup>27</sup> The issue before the Supreme Court was whether the Confrontation Clause "categorically prohibits" child witnesses in child abuse cases from testifying at trial via one-way CCTV, outside the physical presence of the defendant.<sup>28</sup> The Court therefore considered the question that the Court reserved in *Coy v. Iowa*, whether exceptions to face-to-face confrontation are legal under the Confrontation Clause, because the trial court found that each of the children individually needed special protection.<sup>29</sup> The Court followed similar reasoning to the dissent in *Coy v. Iowa*<sup>30</sup>: the elements of confrontation include "physical presence, oath, cross-examination, and observation of demeanor by the trier of

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23. *Id.*

24. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

25. *Id.* at 840.

26. *Id.*

27. *Id.* at 842-43 (internal quotations omitted).

28. *Id.* at 840.

29. *Id.* at 844-45.

30. *See Coy v. Iowa*, 487 U.S. 1012, 1025-30 (1988) (Blackmun, J., dissenting).



fact,” and therefore face-to-face encounters are not always required at trial.<sup>31</sup> Also, hearsay cases support that “confronted” does not mean face-to-face confrontation, and therefore it is not an indispensable element.<sup>32</sup> The Court held that the other elements of the confrontation right were preserved in Maryland’s statutory procedure and did not subvert the Clause’s purposes.<sup>33</sup>

The *Craig* Court declined to affirm the Court of Appeals’ interpretation of the *Coy* decision as requiring that (1) the child witness is initially questioned in the defendant’s presence, and (2) a trial judge must determine that if a child testified by two-way CCTV he or she would suffer “severe emotional distress.”<sup>34</sup> Instead, the majority held that the State’s interest in protecting child victims of sex crimes was a compelling one.<sup>35</sup> Therefore,

if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.<sup>36</sup>

Further, the finding of necessity must be case-specific, necessary to protect the particular child witness’s welfare, and the emotional distress the child would suffer in the defendant’s presence must be “more than *de minimus* . . . , more than ‘mere nervousness or excitement or some reluctance to testify.’”<sup>37</sup> The Maryland statutory procedure that required that emotional distress must at least “impair the child’s ability to communicate . . .” met constitutional

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31. *Craig*, 497 U.S. at 846-47.

32. *Id.* at 849.

33. *Id.* at 851-52.

34. *Id.* at 858-60 (internal quotation marks omitted).

35. *Id.* at 852.

36. *Id.* at 855.

37. *Id.* at 855-56 (quoting *Wildermuth v. Maryland*, 530 A.2d 275, 289 (Md. 1987)).

standards.<sup>38</sup> The Court further supported this holding by stating 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.”<sup>39</sup> The generalizability of *Craig*’s holding, as interpreted by both state legislatures and other actors, is addressed below.

## II. PROBLEMS WITH, AND RESPONSES TO, SHIELDING STATUTES

The Child Victims’ and Child Witnesses’ Rights Act<sup>40</sup> was passed by Congress in 1990 in direct response to *Craig* and as part of the Crime Control Act of 1990, taking into account the balancing of interests and requirements that *Craig* set forth.<sup>41</sup> This statute established conditions under which children could testify via CCTV, while laying out other alternative methods of testifying and accommodations for child witnesses.<sup>42</sup>

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38. *Id.* at 857.

39. *Id.* Some questions raised in *Craig* remain unsolved. Andrea L. Dennis, *Prosecutorial Discretion and the Neglect of Juvenile Shielding Statutes*, 90 NEB. L. REV. 341, 363 (2011). Some of the Court’s reasoning seems grounded in social science research and data that was not “robust” at the time—thus, if newer data undermines those conclusions or if that data is discredited, does shielding still hold? *Id.* It is also unclear how much *de minimis* trauma is required for shielding; if shielding is available to traumatized children who are still capable of testifying; if expert testimony is required to establish that trauma; what standard of proof applies; and whether the *Craig* decision is generalizable to all kinds of juvenile witnesses in any case, or if it is limited to young child victims entrenched in sex abuse cases, like the children in *Craig*. *Id.* Child victims and witnesses have arguably similar testimonial experiences in both sex and non-sex cases, and Dennis argues that would “seem to call for equal access to shielding.” *Id.* at 368. Trial courts tend to broadly construe the class of witnesses who are eligible by relying on statutory interpretation and inherent authority. *Id.* at 369.

40. 18 U.S.C. § 3509 (2012).

41. *United States v. Moses*, 137 F.3d 894, 897-98 (6th Cir. 1998); *see also* Richards, *supra* note 11, at 399.

42. 18 U.S.C. § 3509; *Moses*, 137 F.3d at 897-98. This statute, like the holding in *Craig*, is also ambiguous in its language, although federal courts tend to embrace a broader interpretation of who may be shielded. Dennis, *supra* note 39, at 370. Notably, the statute applies to child abuse victims *and* child witnesses of crimes. *Id.* However, the scope of *Craig*’s holding remains uncertain, and it is difficult to predict who the Court will approve for shielding. *See id.* at 371.

One way that the federal and state legislatures have sought to ameliorate problems inherent in child witness testimony is through the enactment of statutes such as 18 U.S.C. §3509 to codify the case law. In the 1980s and 90s most shielding laws were enacted when there was an abundance of media coverage of child sex abuse scandals, an increase in child sex abuse cases that were reported, and emerging research showing that children could be traumatized in the presence of defendants.<sup>43</sup>

Shielding is one of a variety of tools that prosecutors have available to assist child witnesses who are experiencing emotional trauma while testifying, and “[t]he ability to request shielding of at least some child witnesses is available to prosecutors in virtually every jurisdiction.”<sup>44</sup> Prosecutors’ decisions not to use shielding statutes have possibly frustrated the legislative aims behind shielding.<sup>45</sup> Four factors for why prosecutors may choose not to utilize statutes are: “namely, that shielding is (1) infeasible, (2) needless, (3) ineffective, and (4) impermissible.”<sup>46</sup> In 1999, Gail Goodman and several other researchers conducted a study of prosecutors in these cases.<sup>47</sup> The prosecutors are the ones who make use of the statutes because of their responsibility to make strategic litigation decisions, like whether to seek

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43. Dennis, *supra* note 39, at 345. For their part, state statutes vary in whether one- or two-way CCTVs are allowed; the degree of trauma that states must show to allow child witnesses to testify out of the defendants’ presence; the type of offenses the statutes apply to (i.e. sexual abuse cases, a range of offenses, broadly defined child abuse, or no limitation of the charged offense); the age of the children protected (i.e. all minors; limited to under thirteen, twelve, or ten); the use of testimony through contemporaneous or prerecorded video testimony; closing the courtroom to the public; allowing leading questions on direct; the mode of interrogation; providing for a representative or support person; providing for multi-disciplinary teams (“MDTs”); authorizing or requiring courts to make special accommodations, broadly or specifically stated; expediting proceedings; or educating or training prosecuting attorneys. Richards, *supra* note 11, at 401-08.

44. Dennis, *supra* note 39, at 344-45.

45. *Id.* at 345.

46. *Id.* at 346.

47. Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL. PUB. POL’Y & L. 255 (1999).

approval for using shielding.<sup>48</sup> In Goodman's study, prosecutors "indicated that they rarely or never used shielding measures."<sup>49</sup> The most common reasons prosecutors gave for not utilizing these statutes was "lack of permission, fear of defense challenges, and lack of resources."<sup>50</sup>

The fact that prosecutors are not utilizing shielding statutes, at times to their child clients' detriment and for reasons contrary to their clients' welfare, demonstrates that something in the system is broken and that this method seeking to improve child witness experience is not adequate. Children should have the right to meaningful participation in these proceedings, and shielding statutes, regardless of their goal, are not providing that agency to them. There are

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48. Dennis, *supra* note 39, at 355.

49. *Id.*; Goodman et al., *supra* note 47, at 267-68.

50. Dennis, *supra* note 39, at 356; Goodman et al., *supra* note 47, at 274. Although Dennis relies heavily on Goodman's study, the lack of resources argument may be fading since Goodman's study was conducted in 1999, and modern technology is becoming more accessible to a wider variety of people and jurisdictions. But shielding may still be seen as needless. *See* Dennis, *supra* note 39, at 356-57. Because of prosecutors' caseloads, child victim-witness cases may not be prioritized or the prosecutor may not receive many of these cases. *Id.* at 357-58. For that reason, these offices may not devote much energy or resources to those prosecutions. *Id.* at 358. Additionally, if a jurisdiction has a high rate of guilty pleas, shielding would only be used in cases that make it to trial, so the need to use the measure would be eliminated. *Id.* The tactic of shielding may also be perceived as ineffective, as prosecutors may be concerned with the possibility of successful defense appeals if shielding is used. *Id.* at 359. Lastly, the primary reason that prosecutors have indicated for not using shielding is that courts reject their requests. *Id.* Interestingly, "[i]n the case of child witness testimony, Goodman's survey revealed that prosecutors would strategically decline to use innovations that had the potential to hurt their cases, even if the measures might benefit children." *Id.*; Goodman et al., *supra* note 47, at 272. Prosecutorial success, from a prosecutor's perspective, may amount to case outcomes. Dennis, *supra* note 39, at 359. Thence prosecutors "will seldom seek shielding in the absence of clear witness eligibility lest they expose a successful prosecution to reversal on appeal." *Id.* at 371-72. This tactic can be viewed as a "risk-avoidance" measure. *Id.* at 373. Even more complicated is the case of a child witness who was previously a victim. *E.g.*, Marx v. Texas, 987 S.W.2d 577, 578-79 (Tex. Crim. App. 1999); *see also* Dennis, *supra* note 39, at 373. Furthermore, *Craig* has not been clarified or refined, so state constitutional laws may interfere with the workability of shielding, and the rationale of the *Craig* standard and a number of unsolved issues as to its meaning could discourage prosecutors from using these mechanisms. Dennis, *supra* note 39, at 360.

better options for improving child witnesses' courtroom experience beyond shielding. Additionally, federal and state shielding statutes are subject to interpretation by the courts, and interpretation may be varied and ill-conducive to bettering the system for child witnesses.

After the Child Victims' and Child Witnesses' Rights Act ("CVCWRA") was enacted, a number of cases sought to interpret its provisions. In the Sixth Circuit Court of Appeals case *United States v. Moses*, the defendant was babysitting his two nieces, two-and-a-half-year-old Amber, and four-year-old Elizabeth, when, according to Elizabeth's testimony, she walked past the room and saw him abusing Amber.<sup>51</sup> The defendant was convicted of sexual abuse.<sup>52</sup> The district court found that Elizabeth would be traumatized by testifying because she was fearful, and ordered that she testify by CCTV, finding that Section 3509(b)(1)(B) of the CVCWRA was satisfied.<sup>53</sup> Section 3509(b)(1)(B) states that a child witness can testify by CCTV if she is fearful or mentally impaired, would be traumatized by testifying in the defendant's presence, or would not be able to testify due to defense counsel's or defendant's conduct.<sup>54</sup> The defendant in *Moses* argued that the grandfather or Amber's mother's boyfriend was the perpetrator, and that the district court was erroneous in finding the requirements of the statute satisfied.<sup>55</sup>

The majority opinion in *Moses* discussed how after Section 3509(b)(1)(B)(i) was passed, the Court of Appeals had held in a number of cases that "a general fear of the courtroom is insufficient."<sup>56</sup> There must be "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."<sup>57</sup> Here,

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51. *United States v. Moses*, 137 F.3d 894, 896 (6th Cir. 1998).

52. *Id.*

53. *Id.*

54. 18 U.S.C. § 3509(b)(1)(B) (2012).

55. *Moses*, 137 F.3d at 896-97.

56. *Id.* at 898.

57. *Id.*

Elizabeth's own testimony confirmed that she did not fear the defendant; she did not *want* to see him, but she was not afraid of him.<sup>58</sup> The Court of Appeals for the Sixth Circuit also held that there was not a proper expert to establish that Elizabeth would be traumatized from testifying in the defendant's presence, as the expert did not have any knowledge or special skill related to trauma.<sup>59</sup> The Sixth Circuit discussed how the expert's testimony only marginally supported Elizabeth's fear of the defendant, with no finding of particularized fear that the CVCWRA requires.<sup>60</sup> The court held that the error was not harmless beyond a reasonable doubt.<sup>61</sup> Elizabeth's testimony was ambiguous as to who the perpetrator was; therefore, face-to-face confrontation was critical, and the reliability of the defendant's confession, which the case then relied upon, was questionable.<sup>62</sup> The court found that the district court mistakenly allowed Elizabeth to testify by CCTV without meeting the criteria of Section 3509, and that error was not harmless.<sup>63</sup> The defendant's conviction was reversed, and the case was remanded for a new trial.<sup>64</sup>

The Court of Appeals for the Eighth Circuit held that the child's fear of the defendant must be the "dominant reason" that the child cannot testify in open court for the child to be allowed to testify via alternative method (two-way CCTV) under the CVCWRA.<sup>65</sup> The court was also concerned about whether the two-way system could actually "capture the essence of the face-to-face confrontation in some situations," and posed some logistical questions: how large the monitor should be, where it should be placed, and where the camera that is focusing on the defendant should be placed.<sup>66</sup> Thus, courts have wrestled with more refined meanings of the

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58. *Id.*

59. *Id.* at 899-900.

60. *Id.* at 900.

61. *Id.* at 901.

62. *Id.* at 901-02.

63. *Id.* at 902.

64. *Id.*

65. *United States v. Bordeaux*, 400 F.3d 548, 553, 555 (8th Cir. 2005).

66. *Id.* at 555.

ambiguities inherent in both *Craig* and the CVCWRA, Section 3509.

The *Crawford v. Washington* decision in 2004, moreover, spurred even more child testimony because of its reduction of admissible hearsay statements. The Court in *Crawford* held that “testimonial” statements by witnesses at trial,<sup>67</sup> regardless of admissibility, are barred unless the witness is unavailable at trial and the defendant had an opportunity to cross-examine the witness before trial.<sup>68</sup> Therefore, the reliability of evidence is not ensured under the Confrontation Clause by determining that evidence is reliable and trustworthy (as the Court in *Craig* reasoned), but solely through a requirement that testimonial evidence is tested by cross-examination.<sup>69</sup> After *Crawford*, more children had to testify in court facing the defendant, as their statements to therapists, forensic interviewers, or police could no longer be introduced as evidence.<sup>70</sup>

The most recent development in Confrontation Clause jurisprudence is *Ohio v. Clark*; the Supreme Court heard oral arguments on March 2, 2015.<sup>71</sup> The case involved a three-year-old boy, L.P., who when asked at school about bruises on his face and who had hurt him, responded “Dee,” meaning his mother’s boyfriend, Darius Clark.<sup>72</sup> The schoolteachers informed the police about L.P.’s statement, Clark was

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67. A number of cases have sought to define what “testimonial” means, and what statements fit into the categories of testimonial/non-testimonial, but generally they are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (quoting Brief for Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

68. *Id.* at 68; *see also* Dennis, *supra* note 39, at 376.

69. *See Crawford*, 541 U.S. at 68-69.

70. Casey Holder, Comment, *All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant’s Right to a Fair Trial*, 50 HOUS. L. REV. 1155, 1163 (2013).

71. *Ohio v. Clark*, 135 S. Ct. 2173, 2173 (2015).

72. Richard D. Friedman & Stephen J. Ceci, *How Courts Should Hear From Children*, WASH. POST, Mar. 13, 2015, at A19.

charged with child abuse, and the case went to trial.<sup>73</sup> L.P. was deemed incompetent to serve as a witness, but the teachers were allowed to testify about what L.P. had told them.<sup>74</sup> Clark was convicted.<sup>75</sup> He then appealed, arguing that his rights under the Confrontation Clause had been violated, and the Ohio Supreme Court agreed.<sup>76</sup> The court held that L.P.'s statement would not be admitted unless he actually testified at the trial.<sup>77</sup>

In oral arguments to the U.S. Supreme Court, the main issue was whether L.P.'s statement was testimonial within the meaning of the Confrontation Clause and therefore whether it should have been let in at trial.<sup>78</sup> The petitioner, the State of Ohio, argued for the reversal of the Ohio Supreme Court's ruling: the teachers were not acting as police agents, but performing their duties as educators in reporting child abuse and seeking to protect their students.<sup>79</sup> The argument from the petitioner was that this was not a testimonial statement, as L.P. was a young child, the question was posed to him in a classroom of students, and therefore "his statements were not made to create evidence."<sup>80</sup>

*Ohio v. Clark* was decided by the Supreme Court on June 18, 2015, and the Court reversed the Supreme Court of Ohio's ruling, holding that prosecutors were not barred from introducing this statement when L.P. was unavailable for cross-examination.<sup>81</sup> The Court held that L.P.'s statement to his teachers was not testimonial because, in light of all of the

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Ohio v. Clark*, 999 N.E.2d 592, 600-01 (Ohio 2013); Friedman & Ceci, *supra* note 72.

77. *Clark*, 999 N.E.2d at 600-01; Friedman & Ceci, *supra* note 72.

78. Cassandre Plantin, *Ohio v. Clark*, CRIMINAL LAW PRACTITIONER BLOG (Feb. 13, 2015, 6:00 AM), <http://crimlawpractitionerblog.blogspot.com/2015/02/ohio-v-clark.html>.

79. *Id.*

80. *Id.*

81. *Ohio v. Clark*, 135 S. Ct. 2173, 2173, 2177, 2183 (2015).



circumstances, it was not made for the primary purpose of assisting the prosecution of Clark: it was sought by his teachers to respond to an ongoing emergency and was made in a situation that was “informal and spontaneous.”<sup>82</sup> Because the Court ruled that the statement was not testimonial, there is the possibility for a new hearsay exception (already allowed in some states) that could ultimately apply at the federal level, and this decision could have sweeping implications for practitioners.<sup>83</sup>

Beyond courts’ attempts to make sense of these reform efforts, Andrea Dennis has proposed the following three reforms for juvenile shielding laws: “(1) expanding the group of persons with standing to seek shielding at trial, (2) narrowing the class of witnesses for whom shielding is available through the creation of sharply defined eligibility criteria, and (3) avoiding reliance on technology to effectuate shielding.”<sup>84</sup> The first proposed reform specifically calls for moving away from complete deference to prosecutors—shielding laws should “authorize children to request shielding,” as well as “permit courts to raise the issues *sua sponte*.”<sup>85</sup> The second reform proposes that these laws should expand to allow all juvenile witnesses in any kind of criminal case to be eligible for shielding (a bright-line rule), but counter-balance that with specific factors and strict

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82. *Id.* at 2181.

83. See Plantin, *supra* note 78. One suggestion that the amicus curiae authors provided for solving the problem inherent in *Ohio v. Clark*, when the case was at the state level, was what they deemed a “creative, constitutionally appropriate middle path.” Friedman & Ceci, *supra* note 72. They suggested treating L.P., not in the same way an adult witness would be treated, but in the vein of “non-human sources of evidence.” *Id.* Using the term “non-human” in this context is troublesome, but essentially Friedman and Ceci argued that, under a prescribed protocol, the court should allow Clark to choose a “qualified forensic examiner” who would then interview L.P. to determine if there were grounds for questioning his statement. *Id.* That way, the State could decide on the procedures to be used, the critical evidence would not be lost, the accused could better explore weaknesses in the child’s account, and this process would avoid applying a blanket approach to very young children’s statements (tailoring it more to their specific needs). Brief of Richard D. Friedman & Stephen J. Ceci as Amici Curiae Supporting Respondent, *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352).

84. Dennis, *supra* note 39, at 378-79.

85. *Id.* at 380-81.

standards that courts apply when they consider these shielding requests.<sup>86</sup> “Low-cost” and “low-technology” shielding, such as counseling, testimony prep, courtroom visits, adult attendants, companion animals, alteration of the courtroom’s physical layout, use of a physical screen, or relocation of people in the room, are all methods that exist alongside modern technological shielding.<sup>87</sup> In the third proposed reform, statutes should allow for advanced and low-technology shielding.<sup>88</sup> If legislatures do mandate high-technology shielding, then they should allocate funds for courthouse renovation, hire the necessary people to operate the technology, and purchase it as well.<sup>89</sup>

The disparity of the state and federal statutes becomes pronounced when prosecutors, along with judges and attorneys, have to not only face the already challenging task of weighing children’s interests against the interests of justice but “[t]he myriad of statutes that pertain to children as witnesses, as victims, or as perpetrators.”<sup>90</sup> Many reformers propose the enactment of a uniform statute, the ultimate goal of which is a uniform code of protections for child witnesses that would be adopted by each of the states and by Congress.<sup>91</sup> One of these proposed statutes is the Uniform Child Witness Testimony by Alternative Methods

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86. *Id.* at 382.

87. *Id.* at 385.

88. *Id.* at 386.

89. *Id.*

90. Hon. Barbara Gilleran-Johnson & Timothy R. Evans, *The Criminal Courtroom: Is it Child Proof?*, 26 LOY. U. CHI. L.J. 681, 682, 700-01 (1995) (calling for a unified code in Illinois for child victims and witnesses, of both juvenile and child welfare laws, and for additional legislation). Further, “while courts often deal with the same parties and child witnesses in both civil and criminal proceedings, courts must apply different statutes which result in contrasting decisions.” *Id.* at 682-83. The Honorable Gilleran-Johnson and Evans also point out the role of the judge to “promote the welfare of children in the courtroom,” and how judges could carry out this responsibility more effectively if child welfare laws were unified and consistent. *Id.* at 700.

91. *See, e.g.*, Richards, *supra* note 11, at 417. Federal incentives could strongly influence reform. *Id.* at 419. Richards’ overall recommendation is more uniform safeguards. *Id.* at 420.

Act.<sup>92</sup> This Act is an example of model legislation approved by the ABA in 2002. Only four states have adopted it.<sup>93</sup> The Act provides that “[c]hild witness” means “an individual under the age of [13] who has been or will be called to testify in a proceeding.”<sup>94</sup> This age limit means that the recommended maximum age is thirteen, but states can decide on the maximum age in their jurisdiction.<sup>95</sup> “Child witness” also applies to both victims of crimes and witnesses of crimes, even if children are not the victims.<sup>96</sup> The Act allows for alternative methods in both criminal and civil cases.<sup>97</sup> The Act therefore acknowledges that children testifying in cases of either physical or sexual abuse could very well experience the same impact and risks of testifying in court. Further, “other similar methods either currently employed or through technology yet to be developed or recognized in the future” are open to adoption.<sup>98</sup>

The Act also lays out the procedures for a determinative hearing for deciding whether to authorize an alternative method of testifying for children.<sup>99</sup> It provides that the hearing can be initiated “upon the motion of a party, the child

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92. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT (UNIF. LAW COMM’N 2002).

93. The states that have enacted the Act are New Mexico, Oklahoma, Nevada, and Idaho, while Hawaii, Pennsylvania, Minnesota, the District of Columbia, and Connecticut have all introduced the Act. *Legislation*, UNIF. LAW COMM’N, <http://uniformlaws.org/Legislation.aspx> (Under the “Narrow Results By” search bar, search for “Child Witness Testimony by Alternative Methods Act” under “Act Title or Keywords,” and search “All” under “State,” “Bill Date,” and “Status.”) (last visited Feb. 10, 2016).

94. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2(2).

95. *Id.* § 2 cmt.

96. *See id.*

97. *Id.* §§ 2(1), 3.

98. *Id.* § 2 cmt. The Act therefore allows for future innovative alternative methods.

99. *Id.* § 4. The standards for determining if child witnesses may testify by alternative methods are by clear and convincing evidence if involving criminal proceedings, and by a preponderance of the evidence if involving non-criminal proceedings. *Id.* § 5. Section 5(a)(2) of the Act “comports with the essence of the holding of the Supreme Court of the United States in *Maryland v. Craig* . . . .” *Id.* § 5 cmt.

witness, an interested individual with sufficient connection to the child to be a proper person to seek to protect the child's best interests, or the presiding officer *sua sponte*, all as set forth in Section 4(a).<sup>100</sup> The Act additionally "does not attempt to define the method or methods by which face-to-face confrontation may be avoided."<sup>101</sup>

In addition to the alternative methods provided for by statute, the courts themselves have considerable discretion regarding how the trial is managed, and can use "unauthorized procedures to protect a child witness."<sup>102</sup> There are a number of ways that courts can assist children through the actions of lawyers and judges who are willing and take initiative.<sup>103</sup> Steps can be taken by the judge to make the courtroom itself less intimidating, such as a judge taking off her robe; stepping down from the bench; limiting the number of people in the courtroom; and allowing basic courtroom modifications, such as "allowing the child to testify while sitting at a child-sized table and chair."<sup>104</sup> Another specific authority that the court has in certain cases is to bar the public and the press from entering the courtroom.<sup>105</sup> Lawyers

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100. *Id.* § 4 cmt. The Act therefore recognizes the agency of child witnesses in permitting them to request a hearing for alternative testimony.

101. *Id.* § 5 cmt. Section 6 lays out six factors that the presiding officer must consider when determining whether to allow children to testify by alternative methods, as well as "any other relevant factor[s]." *Id.* § 6. The Act also expressly provides for an issuance of an order that either allows or does not allow for alternative method testimony. *Id.* § 7. The Act has a severability clause, so that if a provision of the Act is held invalid, the rest of the provisions are not held invalid and the Act can still be given effect. *Id.* § 10.

102. Richards, *supra* note 11, at 409. But judges' conduct will be "court error" if it is perceived as partial to, or endorsing, child witnesses. *Id.* at 411. Also, if courts explain why there is a need for special accommodations that could be deemed as comments on witness credibility, that is in error as well. *Id.*

103. CARTER, *supra* note 3, at 123-24.

104. *Id.* at 125.

105. Richards, *supra* note 11, at 412. Courts should consider additional trauma that children may be subjected to if the media is allowed in court, or if testimony is televised. *Id.* at 413. See generally Karla G. Sanchez, *Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?*, 46 BUFF. L. REV. 217 (1998) (suggesting that under certain circumstances the media should be barred from the courtroom, especially when children are testifying in criminal cases or

can also reduce anxiety in child witnesses by preparing children through a number of techniques.<sup>106</sup> Overall, legal procedures can accommodate children's special needs by having vertical prosecution or specialized units ("the same prosecutor handles the case from the initial investigation to disposition"); avoiding delays; scheduling testimony at better times for children; providing frequent breaks; allowing testimonial aids, comfort items, and parents in the courtroom; closing the courtroom to the public and the press; and providing for alternatives, both in court and out of court, to face-to-face confrontation (through shielding).<sup>107</sup>

Beyond alternative testifying methods that include comfort items and support persons, companion animals like dogs have been used in court for children who are testifying as child abuse witnesses.<sup>108</sup> Some may argue that regardless of potential prejudices toward the defendant, use of court facility dogs is a "logical step forward" because prejudices can be mitigated, and dogs reduce children's re-experiencing of trauma at trial.<sup>109</sup> Dogs may arguably even have less prejudicial potential than support persons because they are a more "neutral source of comfort" for children.<sup>110</sup> Dogs allow

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child custody proceedings, and that children's testimony should never be broadcast on television).

106. CARTER, *supra* note 3, at 126-27. The prosecuting attorney has the authority to (1) prepare the witness, (2) conduct a practice interview on an unrelated matter, (3) prepare age-appropriate questions, (4) request special accommodations that are appropriate for the particular child, and (5) make special arrangements for counseling. Richards, *supra* note 11, at 413-17.

107. CARTER, *supra* note 3, at 127-31.

108. Holder, *supra* note 70, at 1157-58. As of September 2012, seventeen states allowed dogs into court. *Id.* at 1168-69. But no legislation *expressly* allowed dogs as an alternative means of testifying (also as of 2012). *Id.* at 1175.

109. *Id.* at 1176-79. Defendants oppose the use of court facility dogs for a number of reasons. *See id.* at 1169-74 (enumerating those reasons).

110. *Id.* at 1178. For a counterargument, see generally Abigayle L. Grimm, Note, *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims When Testifying During Criminal Trials Should Not Be Permitted*, 16 J. GENDER RACE & JUST. 263 (2013) (arguing that dogs should not be permitted into the courtroom, and that they are unconstitutional under the Confrontation Clause as other alternative methods are less prejudicial).

for a face-to-face encounter with the defendant, which the defendant may prefer.<sup>111</sup>

The problems associated with shielding statutes and attempts to ameliorate those problems have an underlying theme: inherent in the word “shield” is a focus on children’s vulnerability<sup>112</sup> and need for protection. What is vexing is not the idea that protection from adults may benefit vulnerable children, but that the law surrounding child witness and child victim testimony is based on theories of protection, rather than on inspiring and educating children, which further perpetuates their vulnerability and ignorance in their involvement with the legal system. Rather than vigorously promoting the agency of children and their right to have a voice in proceedings that affect them, United States law chooses to subvert children’s voices and shield their eyes. While shielding statutes and other forms of “shielding” may certainly benefit particular children who are testifying, there should be an even greater emphasis and push toward empowering children and enabling them to have some choice in how they will positively interact with the American legal system: “Although testifying is difficult for most children, the difficulty should not be exaggerated. Children are strong and resilient, and most of them cope with testifying and move on with their lives. Indeed, with proper preparation and support, some children are empowered by testifying.”<sup>113</sup> The problem inherent in a model of protection and vulnerability is that children do not have rights that are recognized and

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111. Holder, *supra* note 70, at 1179.

112. It should be emphasized that there are two dominant meanings of “vulnerability” in legal scholarship. The first comes from the literature on “vulnerability theory,” which focuses on state responsibility. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1342, 1342-43 n.9 (2015). That theory purports that state actions must be responsive to citizens and allow them all to actively participate in society on an equal basis with others, taking into account vulnerabilities that we all have (but not necessarily providing a mechanism for people’s voices to be heard). *See id.* at 1342-44. The second is the use of the term in the context of international human rights, where “vulnerability” means objectification: a lack of agency, where the target population is marginalized. *See, e.g.,* Jayne Huckerby, *Feminism and International Law in the Post – 9/11 Era*, 39 FORDHAM INT’L L.J. 533, 584 (2016). My meaning of “vulnerability” is the latter.

113. John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, 4 FUTURE CHILD. 84, 90 (1994).

can provide a balance between the constitutional rights of the accused and the vague governmental interest in protecting children that case law has provided. From here, I turn to theory and frameworks in international law to demonstrate the possibility of a shift from protecting children to empowering them.

### III. A PARADIGM SHIFT FROM THIRD PARTY PROTECTION TO FIRST PARTY AGENCY: CHILDREN'S RIGHTS AND THE CONVENTION ON THE RIGHTS OF THE CHILD

Historically, there has been a transformation from regarding children as “mere objects of the law” to recognizing them as human beings, with whom we can have a relationship based on respect for their personhood: “In legal terms this means that children are to be regarded as individuals with fundamental human rights.”<sup>114</sup> This shift can be explained partially through the ways in which attitudes toward children have changed over time: in the West, until the end of the Middle Ages, there was a dominant attitude of “indifference” toward children.<sup>115</sup> Because of high infant mortality, children of about six or seven years old were disregarded, and once children survived that period, they were perceived as adults in some important ways.<sup>116</sup> In the sixteenth century, however, “gradually children became a

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114. EUGENE VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES 7 (1st ed. 1994). Verhellen defines childhood as a social construction. *Id.* at 9. I do recognize that there are a multitude of ways childhood may be defined, and that Verhellen's argument is limited to a “Western” legal and social analysis.

115. *Id.*

116. *Id.* at 10. At the age of seven, children were a part of the production process and worked alongside their parents, or as apprentices, and became a part of the larger community of adults (although children of nobility would not work, as their parents did not work themselves). *Id.* at 11. Further, “[c]hildren participated fully in all aspects of life: work – sexuality – life and death. There was no difference in treatment between adults and children. In fact the apprentice system remained in existence in the West until well into the 19th century.” *Id.* Some of Verhellen's sweeping generalizations, such as stating that there was “no difference in [the] treatment between adults and children” I read with caution, but his general proposition of the social emergence of the category of childhood I find informative and useful.

*separate* group with *separate* characteristics, of whom *specific* behaviour was expected.”<sup>117</sup> In the nineteenth century, the conception of children as property items under the law shifted, but not until the latter half of the twentieth century did children receive legal personhood status.<sup>118</sup> Also in the twentieth century, the human rights movement expanded to include children’s rights.<sup>119</sup>

The children’s rights movement is in itself somewhat of a paradox in its efforts to reject essentialist models of childhood: that is, the children’s rights movement must embrace some notion of a universalized child and a universalized concept of childhood to advance its cause.<sup>120</sup> Regardless of this paradox, we can still reject conceptions of childhood that place children in a subservient, passive position of powerlessness, and embrace others that focus on enabling children to act.<sup>121</sup> The children’s rights movement realizes that children’s right to self-determination and recognition of children’s autonomy are both vital, as well as “the acknowledgment of their legal capacity.”<sup>122</sup> Empowering children may run counter to what our society, and the law, currently practice: “At the moment it is common practice in our society to remove children from situations which are dangerous for them or in which their needs cannot be satisfied, rather than to change the situations themselves or

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117. *Id.* at 11. After childhood became its separate category, that category was demarcated even more and differentiation between age groups further categorized children: for example, adolescence is now perceived as a separate age group. *Id.* at 12.

118. A. GLENN MOWER, JR., *THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN* 11 (1997); *see also* VERHELLEN, *supra* note 114, at 13.

119. MOWER, *supra* note 118, at 11.

120. *See* Eric Heinze, *The Universal Child?*, in *OF INNOCENCE AND AUTONOMY: CHILDREN, SEX AND HUMAN RIGHTS* 3, 7 (Eric Heinze ed., 2000).

121. Verhellen views children as being placed in a “position of not yet being,” as they are “in limbo”—“not yet able to express themselves, not yet responsible . . .” VERHELLEN, *supra* note 114, at 14 (emphasis omitted). This position places them in a relationship of dependence with adults. *Id.* at 15. But we must not regard them as “unfinished products,” as that is the human condition, not just a condition of childhood. *Id.* at 18.

122. *Id.* at 23.



provide the necessary means to satisfy their needs.”<sup>123</sup> Although it may be imperative to an individual child’s health or safety to remove her from a situation, legal advocates and policymakers should concentrate more on resolving those situations and building children’s capacities to cope with and overcome them.

A fundamental reason that adults may be averse to switching their focus to a children’s right to autonomy is that children are purportedly incompetent to make “well-founded decisions.”<sup>124</sup> They are arguably “not sufficiently mature physically, intellectually and emotionally and they lack the necessary experience” to act rationally in their own interests.<sup>125</sup> However, adults may also lack emotional, intellectual, and physical maturity, but are not denied this basic right to self-determination.<sup>126</sup> There is a delicate balance between respecting children’s right to make their own decisions, and “a need to override” (by mature, responsible adults entrusted with their care) choices that “would otherwise damage their lives.”<sup>127</sup> While one may acknowledge that children have a right to autonomous decision-making, the extent of that right is what is at issue, and “[i]t is argued that the law should be concerned with nurturing . . . child[ren]’s *capacity* for autonomous decision making.”<sup>128</sup> In cases when permitting children to make a final decision could be inappropriate or damaging, one could “ensure some *consultation* with . . . child[ren] to improve the overall decision making process. After all, the airing of . . . child[ren]’s views is good practice for more central

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123. *Id.*

124. *Id.* at 25.

125. *Id.*

126. Regardless, there exists preoccupation with what children lack, rather than what they can do. But “[c]hildhood is not incomplete adulthood. It is a set of experiences neither more nor less internally coherent than those of adults.” Heinze, *supra* note 120, at 17.

127. TREVOR BUCK, INTERNATIONAL CHILD LAW 15 (2005).

128. *Id.* at 14.

participation in decision making to be undertaken later in adulthood.”<sup>129</sup>

Therefore, a solution to the search for a balance between children’s autonomous rights and their possible need for protection is to steadily increase their involvement in decision-making, while making certain that even very young children have some degree of voice in decisions that will impact them.<sup>130</sup> It is essential to recognize children’s right to self-determination “in order to make them more competent and not the other way around: that their right to self-determination be (gradually) recognised because (step by step) they have gained more competence.”<sup>131</sup>

The United Nations Convention on the Rights of the Child<sup>132</sup> is an international treaty that aspires to transform children from “passive ‘object[s]’ of measures of protection to . . . active subject[s] of rights.”<sup>133</sup> This treaty is remarkable for many reasons: First, because of its “near global ratification,” and how quickly states signed and ratified it.<sup>134</sup>

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129. *Id.*

130. One could view social policy that relates to children as on a spectrum between “welfarist” and “rights-based” policy. *Id.* at 9. The welfarist view is “an underlying policy aimed at protecting children who are seen as vulnerable members of society in need of guidance and control.” *Id.* The state, parents, social services, and schools must “protect, nurture and provide fulfilling opportunities for children’s development.” *Id.* In contrast, the “[r]ights-based policy is designed to support children’s own participation in decision making and is based on a conception of children having distinct rights that can be asserted, morally and legally.” *Id.*

131. VERHELLEN, *supra* note 114, at 26 (emphasis omitted).

132. Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, 1577 U.N.T.S. 3 [hereinafter CRC] (entered into force Sept. 2, 1990).

133. MOWER, *supra* note 118, at 4; *see also* BUCK, *supra* note 127, at 47; Christine M. Szaj, *The Right of the Child to be Heard*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 127, 140 (Jonathan Todres, Mark E. Wojcik & Cris R. Revaz eds., 2006) (arguing specifically that Article 12 of the CRC has an “overall effect” of moving “the child’s status from a passive object of concern to an active participant”). Article 12 will be discussed in length momentarily. *See infra* pp. 637-39.

134. BUCK, *supra* note 127, at 47. In contrast to the expeditious signing and ratification process, the drafting process was quite lengthy, largely because of the vast variety of backgrounds of state participants included in that process. MOWER,

It was unanimously adopted by the United Nations General Assembly on November 20, 1989; states could sign the treaty starting on January 26, 1990; and on September 2, 1990, the CRC “entered into force.”<sup>135</sup> Only four years after the CRC became effective, in November of 1994, 167 states had ratified the CRC.<sup>136</sup> The CRC is therefore “the first global human rights treaty to be ratified by this many states in such a short period.”<sup>137</sup> A further remarkable aspect of the CRC is that children are considered independent people: they have a right to international law protection regardless of their relationship to any other group or persons.<sup>138</sup> There are currently 196 countries that are parties to the CRC, including all members of the United Nations besides the United States.<sup>139</sup>

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*supra* note 118, at 15. NGOs had a substantial contribution: they produced relevant comments and documents, as they had much “experience in dealing with child-related issues and . . . first-hand knowledge of the status of the world’s children through their field work.” *Id.* at 17. The drafting process’s lengthy nature was also beneficial because the “prolonged debate” over the CRC had the effect of raising consciousness “as governments and citizens throughout the world were made more aware of children’s needs and interests.” *Id.* at 18. These drawn-out discussions “allowed more time to build support both for the convention itself” and its “specific goals,” perhaps another reason for the overwhelming support for the CRC once time came for signatures. *Id.*

135. BUCK, *supra* note 127, at 49. Therefore, after only eight months of the CRC opening for signature, it became effective. MOWER, *supra* note 118, at 14.

136. MOWER, *supra* note 118, at 15.

137. *Id.* at 14. There are two interpretations as to why the CRC was ratified so quickly and by so many states. *See id.* at 14-15. First, states may have noted the various loopholes in the treaty and recognized that their obligations under the CRC could be “circumvented easily” if they wanted to do so and on the international stage did not want to appear as indifferent to children. *Id.* at 14. A more positive interpretation is that states sincerely wanted to see children’s needs and welfare “more adequately served,” their basic rights protected, and children “able to enjoy a higher quality of life.” *Id.* at 15. One would hope the latter explanation is correct, although in reality it is probably some mixture of the two.

138. *Id.* at 4. Also significant about the treaty is its consolidation of eighty texts that directly or indirectly address the rights of the child, bringing them all together in a single instrument. *Id.* at 6. The CRC is therefore an example of globalization—“the worldwide convergence of normative legal standards.” BUCK, *supra* note 127, at 47.

139. *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtds>

The provisions of the CRC relevant to advocating for a children's right to agency of their courtroom experience include Articles 1, 12, and 42.<sup>140</sup> The definition of children is provided in Article 1: "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."<sup>141</sup> This definition of the child is the "most widely accepted legal definition of the child," which demonstrates the lack of consensus on childhood, as eighteen is the stated age of adulthood, but subject to states' legal definitions of adulthood that may differ.<sup>142</sup> Based on chronology, the definition could be problematic, as it only makes one question why people under age eighteen are significantly different.<sup>143</sup> One could argue that the existence of this treaty operates on the assumption that people of this age are "sufficiently distinctive to warrant a separate regime."<sup>144</sup> Therefore, the paradox of the children's rights movement as discussed above<sup>145</sup> is demonstrated in this particular human rights treaty. However, there is a more likely explanation for why a separate regime is necessary: it is really the *social context* that creates the need for social and legal protection for children. These separate, specialized treaties are necessary because of the social stereotypes that place particular individuals into categories: for example, people with disabilities and the Convention on the Rights of Persons with Disabilities.<sup>146</sup> Without these treaties that focus on rights for

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g\_no=IV-11&chapter=4&lang=en (last updated Mar. 7, 2016, 5:00:46 EDT). Somalia was the last U.N. member state that became a party to the treaty, on October 1, 2015. *Id.* The implications of the United States' failure to ratify will be discussed in greater length further on in this Part. *See infra* notes 181-95 and accompanying text.

140. CRC, *supra* note 132, at 46, 48, 58.

141. *Id.* at 46.

142. CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD 18 (2002).

143. Heinze, *supra* note 120, at 5.

144. *Id.*

145. *See supra* notes 120-21 and accompanying text.

146. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

disadvantaged people, those people would not have access to such rights. Hence why these special measures of protection are imperative.

Article 12 of the CRC “reflects the general view of children as rights-bearing individuals.”<sup>147</sup> The first part reads: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”<sup>148</sup> The term “freely” can be interpreted as requiring States parties to ensure that the child who is deemed “capable” has the right to “say as he or she pleases without interference and to choose whether to express his or her views or not”—thence, the freedom is a right to express or not express, to voice or not voice.<sup>149</sup> There was originally a list of rights in this provision during the drafting process, but the majority of delegations objected to limiting children’s expression of their views in a list: hence, the inclusion of the phrase “all matters.”<sup>150</sup> The phrasing is “in all matters affecting the child,” not “all matters affecting the rights of the child.”<sup>151</sup> The implication here is that the right in Article 12 goes beyond matters that affect children “arising under a specific rights provision of the CRC”—it has a more far-reaching function, as it is not limited to rights stemming from this treaty.<sup>152</sup> But there is still an ambiguity in this provision: How much of an impact is needed before Article 12(1) is triggered, and considered a matter “affecting” children?<sup>153</sup> Are those matters only those directly affecting children, or are matters that indirectly impact children also

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147. Szaj, *supra* note 133, at 127.

148. CRC, *supra* note 132, at 48.

149. SHARON DETRICK, *Article 12: Respect for the views of the child*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 213, 221 (1999) (detailing the drafting history of Article 12 and the changes made to its language).

150. *Id.*

151. *Id.* at 222.

152. *Id.*

153. *Id.*

implicated?<sup>154</sup> The last phrase of Article 12(1) means that children who demonstrate their capabilities under this provision not only have a right to express their views, but also for their views to be “taken into consideration.”<sup>155</sup> But it is not clear whether the state is obliged to provide children with opportunities to express those views directly, or if the requirement would be satisfied “as long as there is *some* mechanism through which . . . child[ren]’s views are elicited” in place.<sup>156</sup> Age and maturity factors included in Article 12(1) allow for individual judges and administrators to make subjective considerations, therefore impacting how efficacious this provision is in practice.<sup>157</sup>

The second part of Article 12 reads: “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”<sup>158</sup> “Administrative proceedings” could encompass a wide variety of legal proceedings, including those involving care, and divorce and custody.<sup>159</sup> This provision could be deemed as fundamental, as “it reflects a move away from merely identifying what decisions children are *not* competent to take, to the consideration of how children *can* participate.”<sup>160</sup> But how children’s views should impact proceedings’ outcomes (e.g. to what extent) is a question that remains.<sup>161</sup> Further, the phrase “either directly, or through a representative or an appropriate body” provides some

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154. Szaj, *supra* note 133, at 130.

155. DETRICK, *supra* note 149, at 222. The Committee on the Rights of the Child, the enforcement body of the CRC, requires that States parties detail how they have complied with this provision through incorporation into their national legislation. *Id.* at 222-23.

156. Szaj, *supra* note 133, at 130.

157. *Id.*

158. CRC, *supra* note 132, at 48.

159. DETRICK, *supra* note 149, at 224.

160. BUCK, *supra* note 127, at 60.

161. Szaj, *supra* note 133, at 131.

examples through which children's views can be heard.<sup>162</sup> The way this phrase is worded may indicate that children do not necessarily have to have their own separate representation.<sup>163</sup> If representation is required, it is unclear whether representatives would act as attorneys *ad litem*, representing what children express their views and interests to be, or as *guardians ad litem*, representing children's best interests as determined by their representatives.<sup>164</sup>

Adoption of the CRC, in particular Article 12, would not necessarily give children a right to the ultimate decision of issues that involve their interests, but the right created by this provision "clearly opens the doors to participate in a decision-making process."<sup>165</sup> The method of soliciting children's views and what weight their views are given in making decisions will establish the "true impact" of Article 12.<sup>166</sup> The language of the CRC "makes clear that the authors of this Convention envisioned a world where children have a voice and where other people must listen," which can transfer into a children's right to autonomy in the courtroom.<sup>167</sup>

Article 42, together with Article 12, "describe the child as a person to be made aware of his or her rights under international law and enabled to assert these rights in judicial and administrative proceedings affecting his or her welfare and interests."<sup>168</sup> Children can also be prepared for these proceedings, and they will then, as adults, have the understanding and attitude to more effectively ensure children's well-being.<sup>169</sup> Article 42 reads: "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means,

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162. DETRICK, *supra* note 149, at 224.

163. *Id.*

164. Szaj, *supra* note 133, at 130.

165. *Id.* at 128.

166. *Id.*

167. *Id.* at 130.

168. MOWER, *supra* note 118, at 4.

169. *Id.* at 8.

to adults and children alike.”<sup>170</sup> As many societies have not viewed children as rights holders, the duties to publicize and disseminate the CRC are imperative, as they can translate into requiring “language translations for minority or indigenous groups, and programmes of rights awareness through mass media, professional training, school and other educational curricula.”<sup>171</sup> NGOs and children themselves have become involved in these advocacy campaigns.<sup>172</sup>

Perhaps the most meaningful aspect of the CRC is its capacity to significantly impact its parties’ domestic laws and practices (*pacta sunt servanda*).<sup>173</sup> Parties to the CRC assume obligations under international law to implement the rights of the Convention.<sup>174</sup> Some countries have national constitutions that incorporate international treaties into their law of the land, and under this incorporation process, courts of these states can cite to the rights in the CRC and enforce them through domestic procedures.<sup>175</sup> Also, while some may view the reporting procedures of the CRC as its only “remedy,”<sup>176</sup> that is certainly not true. The reporting procedures ensure that indicators and benchmarks are set up so that states comply with the CRC’s provisions, and make a real effort to improve their laws and practices to more closely align themselves with the purposes of the CRC.<sup>177</sup> The Committee on the Rights of the Child examines states’ progress of realizing their obligations under the CRC.<sup>178</sup> The reporting process is “deliberately aimed to encourage states

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170. CRC, *supra* note 132, at 58.

171. BUCK, *supra* note 127, at 57.

172. *Id.*

173. MOWER, *supra* note 118, at 8.

174. *Id.* at 3.

175. *Id.* at 3, 8.

176. BUCK, *supra* note 127, at 49.

177. *See* CRC, *supra* note 132, at 59 (setting forth reporting provisions in Article 44).

178. BUCK, *supra* note 127, at 49. States’ governments are expected to self-monitor and evaluate, but independent monitoring, particularly by establishing independent human rights institutions, is encouraged and rendered essential by the Committee. *Id.* at 55.



to comprehensively review all their child-related legislation and policy. That process can engender new policy thinking and initiatives.”<sup>179</sup> Therefore, both the potential of incorporation and the push for innovation in policymaking move states that have ratified the CRC toward domestic policies and decisions that advance the rights set forth in the CRC.<sup>180</sup> In implementing the rights of the CRC, public officials assume the responsibility to look closely at these rights and put them into practice in their own states.

The United States signed the CRC in 1995 but has not transmitted it for ratification to the U.S. Senate.<sup>181</sup> The fact that the United States has still not ratified the CRC is a “significant weakness” because of its power and influence throughout the world and because of its “active interest and participation in the original drafting process.”<sup>182</sup> The United States needs to influence its *own* laws as well, and ratification of the CRC would have a great impact on that. The foreign policy of the United States has encouraged other states to observe human rights, and this policy is most likely more difficult to advance because of its “own delays in

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179. *Id.* at 56.

180. Following the adoption of the CRC, the Economic and Social Council of the U.N. set out a resolution focused on child victims’ and child witnesses’ rights. The rights that it establishes, as related to child victims and child witnesses, are as follows: the right to be treated with dignity and compassion, the right to be protected from discrimination, the right to be informed, the right to be heard and to express views and concerns, the right to effective assistance, the right to privacy, the right to be protected from hardship during the justice process, the right to safety, the right to reparation, and the right to special preventative measures. Economic and Social Council Res. 2005/20 (July 22, 2005).

181. *Status of Treaties: Convention on the Rights of the Child*, *supra* note 139. The act of signing a treaty is not without any legal effect, as “[s]uch a state is bound not to do anything that would defeat the object and purpose of the relevant treaty until the state has made its intention not to ratify clear.” *Id.* at 49 n.1 (citing Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)). But other scholars indicate that a country’s signature alone does not have any legally binding effect. HOWARD A. DAVIDSON ET AL., ESTABLISHING OMBUDSMAN PROGRAMS FOR CHILDREN AND YOUTH 29 n.2 (1993). Regardless of its signature’s effect, the United States’s failure to ratify the CRC is still an obstacle to the advancement of children’s rights.

182. BUCK, *supra* note 127, at 77-78.

ratifying such instruments and in particular its complete failure to ratify the CRC.”<sup>183</sup> The reasons why the United States has not ratified the CRC lie within structural and constitutional complexities; for example, family law issues are typically handled by state legislatures, not the federal government, so people fear that ratifying the CRC would federalize a legal area that has traditionally been under state control.<sup>184</sup> Therefore, objections may also stem from the issue of how “children’s rights” might infringe on “parental rights,”<sup>185</sup> and, more likely than not, a feeling of exceptionalism. Furthermore, ratification of human rights treaties by the Senate has recently included a declaration that the treaties’ provisions are not “self-executing” and so will not be automatically incorporated into domestic law.<sup>186</sup>

It could be argued that the United States has already “laid the foundation” for children’s participation in matters that affect them when they are witnesses or parties in court, and their right to be heard, in particular situations, “has been a part of our legal landscape for nearly [five] decades.”<sup>187</sup> But if the United States did ratify the CRC, Article 12 could have a broad impact on U.S. law.<sup>188</sup> It is highly probable that many existing laws would have to be modified to comply with Article 12’s mandates partly because of variance in federal laws but mostly due to disparities between state laws.<sup>189</sup> The main difference between Article 12 and law in the United States is that the United States requires a “preliminary finding of a source of a claimed interest or right,” while Article 12 refers more broadly to “all matters affecting the child.”<sup>190</sup> Therefore, a right to be heard in a proceeding would

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183. *Id.* at 78.

184. *Id.* at 77.

185. *Id.* at 78.

186. *Id.* at 77. Ratification of a treaty by the United States under the Supremacy Clause of Article VI of the U.S. Constitution, in principle (although not in practice), should allow courts to cite to its provisions. *Id.*

187. Szaj, *supra* note 133, at 128, 132.

188. *Id.* at 140.

189. *Id.* at 129.

190. *Id.* at 133-34.

not have to be conditioned on “the recognition of a particular right originating in a constitution, statute, or the common law.”<sup>191</sup> This difference could provide a real balance between the rights of the accused in criminal proceedings and the rights of children; the latter rights are currently not taken seriously as they are merely a vague government interest in protecting children. There is another reason why “Article 12 would provide for a more expansive opportunity for children to be heard than currently is allowed by U.S. law.”<sup>192</sup> The right to be heard under Article 12 would apply to every person under the age of eighteen who has the capabilities to form her own views—so Article 12 “would serve as a catalyst to reformulating current perceptions of children based on a subjective assessment of their capacity, maturity, vulnerability, or autonomy.”<sup>193</sup> Furthermore, the right to be heard under Article 12 and the appointment of a representative would require that children have competent representatives with them at proceedings to assist in advocating based upon children’s particular views.<sup>194</sup> *Guardians ad litem* who express what they think are in children’s best interests are unlikely to satisfy this mandate under Article 12, so the United States would need to adopt a uniform code to outline the duties and responsibilities of these representatives.<sup>195</sup>

Children have criticized the lack of information available to them in the judicial process; they should know before and through the process “the manner in which their voices will be heard.”<sup>196</sup> Further, adults who are involved need to be receptive to children’s needs, “whether they wish to be heard,

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191. *Id.* at 140.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 140-41.

196. Judy Cashmore & Patrick Parkinson, *What Responsibility Do Courts Have to Hear Children’s Voices?*, 15 INT’L J. CHILD. RTS. 43, 50-51, 55 (2007) (recounting interviews with children involved in family law proceedings and their thoughts on the option of speaking with a judge in chambers).

and if so, how.”<sup>197</sup> Children’s involvement entitles them to knowledge about the judicial process and what their expectations can be, as well as “some choice” regarding their level and means of involvement.<sup>198</sup> Both domestically and internationally, there have been a variety of creative responses to the call for children’s greater role in judicial proceedings that involve them, and their right to a say in how their voices will factor into those decisions. Countries that have ratified the CRC use that international treaty to support their advancement of children’s rights. Although the ratification of the CRC by the United States would be a significant step in the arena of children’s rights, it need not do so to improve upon and reflect on its methods. By looking at how the CRC has been implemented in other countries, and utilizing the principles inherent in the CRC, the United States can have at hand a number of comparative best practices, including state and local practices that embrace the CRC’s values, to improve the lives of child witnesses in the United States.

#### IV. IMPLEMENTING THE PARADIGM SHIFT THROUGH A FOCAL POINT AND COORDINATION MECHANISM

For a paradigm shift from third-party protection to first-party agency for child witnesses to actually occur, it would behoove the United States to look to international and domestic efforts that enforce the CRC or follow its principles. It would be most effective to utilize that information through an approach that includes both a focal point and a coordination mechanism, the latter integrating the focal point into public policy. A focal point that many states have utilized and found successful is the children’s rights ombudsman, a set-up that holds children’s interests at its forefront, does not balance those interests against budgetary constraints or other extraneous matters, and provides children with a means to voice their concerns. The United States should consider such a focal point to improve the experiences of child witnesses. Additionally, there are a number of coordination mechanisms that the United States

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197. *Id.* at 55.

198. *Id.*

could use to integrate the ombudsman's work more directly into public policy. These approaches are discussed below, and include both preparatory and integrative approaches: kids' courts, independent legal counsel, specialized child advocates, specialized courts, a bottom-up incorporation strategy, and domestic courts that apply the CRC indirectly.

A. *Focal Point: Children's Rights Ombudsman*

One response that provides children with more of a voice is the children's rights ombudsman. Today, an ombudsman is someone who is a "public watchdog" or "citizen defender."<sup>199</sup> An ombudsman is typically a government official who attempts to improve systemic efficiency by reviewing complaints of citizens.<sup>200</sup> Ideally an ombudsman is viewed as highly credible by the general public, a reputation procured by maintaining a high level of "independence and autonomy" and operating as an "independent voice for citizens within the government."<sup>201</sup> Ombudsman offices can exist at municipal, county, provincial, and national levels—every governmental level.<sup>202</sup> An ombudsman can be created through a number of methods—by the executive branch, a legislative mandate, or through the citizens themselves.<sup>203</sup> The principles of an ombudsman include "unbiased treatment [of citizens], fair decisions, and a confidential process."<sup>204</sup>

All national ombudsman offices were established after 1987, except in Norway, which houses the most well-known

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199. DAVIDSON ET AL., *supra* note 181, at 8. This text provides an extensive overview of the ABA's Child Welfare Ombudsman Project, which reviewed thirteen programs established in ten other nations, *see id.* at 37-59, as well as U.S. domestic programs, *see id.* at 61-87.

200. *Id.* at 8.

201. *Id.* at 8-9.

202. *Id.* at 9.

203. *Id.* at 16. For a comparison of the strengths and weaknesses of each type of ombudsman office formation, *see id.*

204. *Id.* at 12.

children's ombudsman.<sup>205</sup> There are several major distinctions between ombudsman programs in the United States and those established outside of the United States; these distinctions may be accounted for partially through the fact that the CRC has been a large factor in setting parameters for international children's ombudsman programs.<sup>206</sup> The United States has no national ombudsman program that concentrates on children.<sup>207</sup> Most of the U.S. programs are created through an administrative directive, executive order, or an act of state legislature, while most programs outside of the United States are established by national legislatures.<sup>208</sup> Programs of other nations focus largely on "children's rights" concerns and use the CRC to support their work, while only about half of the U.S. programs described their role as educating the public about children's rights.<sup>209</sup> The fact that "all ombudsman offices outside the [United States] base their activities on the *rights* of the child" stems from the "heightened national awareness" of children's rights in countries that have ratified the CRC; those countries use its standards to formulate government-sponsored children's programs.<sup>210</sup> Programs instituted outside of the United States also make efforts to enable children's participation in the democratic process by paying attention to children's opinions.<sup>211</sup> Further, the United States typically uses direct intervention tactics, such as direct advocacy for individual clients through litigation, while ombudsman programs usually pressure authorities to take

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205. *Id.* at 9. Norway's Commissioner for Children was founded in 1981. *Id.* Offices similar to that of Norway's are located in Austria, Costa Rica, Guatemala, New Zealand, and Sweden. *Id.*

206. *See id.* at 30. Due to the expansive language of CRC Article 45, the Committee on the Rights of the Child can use information from ombudsman programs' experiences to bolster its work. *Id.* at 36; *see also* CRC, *supra* note 132, at 59-60.

207. DAVIDSON ET AL., *supra* note 181, at 91.

208. *Id.*

209. *Id.* (internal quotation marks omitted).

210. *Id.* at 100.

211. *Id.*

action by “providing information [to citizens] and indirectly influencing public policy.”<sup>212</sup>

A variety of international children’s ombudsman techniques exist for influencing public policy.<sup>213</sup> Materials are published to inform public opinion, the media raise awareness on children’s issues, research studies are conducted on matters of concern to children, “hot lines” provide avenues for children to ask questions and express their views, and children are given major roles at public hearings.<sup>214</sup> All of these techniques take more of a proactive approach to ombudswork, as legislative reform stems from other recognized sources on children’s legal rights, in particular the CRC.<sup>215</sup> Ombudswork in the United States takes a primarily reactive approach, as legislative recommendations come from individual case work experiences.<sup>216</sup>

An example of a children’s ombudsman program is the Norwegian Ombudsman for Children, which was created by the Norwegian Parliament through the Commissioner for Children’s Act, and was the first national statutory initiative for a children’s ombudsman.<sup>217</sup> It was meant to serve a watchdog role for children’s rights by monitoring the Norwegian domestic situation and comparing that to the international criteria of the CRC.<sup>218</sup> The Ombudsman for Children has “free access to public and private institutions for children” and has the right to information and records

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212. *Id.* at 100-01.

213. *Id.* at 106.

214. *Id.*

215. *Id.* at 120.

216. *Id.* Davidson et al. discuss how legislative recommendations often come from these experienced case workers, which can be seen as pro-active. In my view, however, the fact that these recommendations come *after* these case workers have seen so many cases demonstrates the need for the United States to take action earlier on when issues arise.

217. MÅLFRID GRUDE FLEKKØY, WORKING FOR THE RIGHTS OF CHILDREN: THE EXPERIENCE OF THE NORWEGIAN OMBUDSMAN FOR CHILDREN 1-4 (1990).

218. *Id.* at 1.

even if that information is typically confidential.<sup>219</sup> The Ombudsman does not have decision-making power and cannot revoke other authorities' decisions; therefore, the principal means of advocacy for the Ombudsman is through disseminating information and documenting case presentations.<sup>220</sup> When the Commissioner makes a statement on a case, she decides toward whom it is directed, such as the press or a broadcasting corporation; she may criticize the legal or factual situation of a case but may not present an opinion about the law when the case has been decided by or is brought before the courts.<sup>221</sup> An annual Commissioner's report is made available to the public. The position is a four-year appointment, no longer than eight years total, and the Commissioner works with an Advisory Panel that is solely an advisory body with no decision-making power.<sup>222</sup>

The cases that the Commissioner takes up are by her "own initiative" or through the "request of other people."<sup>223</sup> Many of the cases can be solved through providing straightforward information, and some cases are declined or referred elsewhere for handling.<sup>224</sup> If a case involves an issue of general concern, the Ombudsman may more comprehensively handle it through statements made to national or local administration or proposals for modifying existing regulations or legislation.<sup>225</sup> The complaints and requests that come from children provide "inside"

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219. *Id.* at 5.

220. *Id.*

221. *Id.* at 7.

222. *Id.*

223. *Id.* at 6. The Commissioner cannot take a case without the permission of the child who is the subject of the application—either the relevant child must have been the one who submitted an application to the Commissioner on her own behalf or the relevant child must have indicated approval for the Commissioner to take the case. *Id.* After the child gives this approval the guardian's permission should also be sought if the child is of a younger age. *See id.* Even if the child is young, the Commissioner may deal with the case without the child's guardian's permission, as long as she obtains the child's consent and general considerations show that the guardian's permission is not necessary. *See id.*

224. *Id.* at 11.

225. *Id.*



information into the life of children in Norway.<sup>226</sup> These complaints are more “wide-ranging” and differ from adults’ complaints, and they show that children are aware of, and capable of effectively expressing, their concerns.<sup>227</sup> Further, “[c]hildren are also effective in following up: given a place to go with their complaint and some minimal support and information, even young children can and will do a lot on their own behalf. Children also call back to report on their results, which adults rarely bother to do.”<sup>228</sup> When the cases come through the Commissioner, the action that is taken is either providing information, making a public statement, or proposing change; if one of the latter two actions is chosen, the Ombudsman office may support other initiatives rather than initiating support itself.<sup>229</sup>

One of the most important aspects of the office is the fact that its establishment signifies “official recognition” by Parliament of the “need for child advocacy.”<sup>230</sup> Parliament cannot make decisions for the Ombudsman, however, and only the Ombudsman decides how she carries out her responsibilities.<sup>231</sup> The legislative obligation to criticize means that “the Ombudsman can raise issues that others . . . are not in a position to raise” because of political loyalties or parental status.<sup>232</sup> Also, because the Ombudsman can “handle any case or problem in any way,” she can issue opinions or statements regardless of any political consent.<sup>233</sup> The release from confidentiality provided by the position gives the Ombudsman the right to relieve others of their confidentiality oaths and the right to protect sources of

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226. *Id.* at 12.

227. *Id.*

228. *Id.* Although most of the children who rendered complaints were from the age bracket of 7–15, there were a few 3–4 year-olds who contacted the Ombudsman. *Id.*

229. *Id.* at 12-13.

230. *Id.* at 21. Parliament also provides the office’s annual budget. *Id.*

231. *Id.* The Act outlines how the Ombudsman can carry out her responsibilities. *Id.* at 4, 21.

232. *Id.* at 21.

233. *Id.* at 22.

information.<sup>234</sup> Perhaps the most important aspect of the Norwegian Ombudsman for Children is the “[s]upremacy of children’s interests.”<sup>235</sup> As the Ombudsman is both financially and legally independent, she cannot be suspected of serving a purpose other than to advance the rights of children.<sup>236</sup> She does not have to balance children’s interests against potentially conflicting interests, or defend her budgetary expenditures spent on varying social interests.<sup>237</sup>

Howard Davidson has set out several strategies to promote ombudswork in the United States. The United States could use existing federal laws that relate to the delivery and supervision of services to youth and children at local and state levels as a vehicle for creating and supporting ombudsman programs for children and youth; Congress could add an ombudswork section to any of these existing or proposed federal laws.<sup>238</sup> Alternatively, the legislature could create an act focusing specifically on children’s ombudswork to fuel children’s ombudsman programs and “stimulate state development of relevant programs.”<sup>239</sup> The United States could create a children’s rights ombudsman or even an ombudsman that tackles child witness and child victim issues specifically. The United States could also aim for a more proactive approach to ombudswork by initiating techniques that internationally have impacted children’s rights—through media, hot lines, public hearings, and research. These initiatives would all help shift the focus from third-party protection to first-party agency so that child witnesses and victims could have a much stronger voice in if or how they testify in court. These initiatives could also raise concerns for stronger preparation programs.

The United States could benefit from looking at children’s ombudsman programs internationally, like that of Norway or those of other countries, to gather information

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. DAVIDSON ET AL., *supra* note 181, at 121.

239. *Id.* at 122.

about what aspects of the programs work and do not work and to learn how to improve ombudsman programs domestically.<sup>240</sup> The ultimate goal would be to create a national Children's Ombudsman, a focal point for efforts to improve child witnesses' experiences in the courtroom and other hearings that deeply affect them.

### B. *Coordination Mechanisms: Preparatory and Integrative Approaches*

Other mechanisms that shift focus to first-party agency for children who are testifying could be used to coordinate domestic ombudswork. These other tactics include court schools, specialized courts, and attorneys for children, some of which can be found domestically. These are all mechanisms that integrate child witness rights in public policy and would work alongside the Children's Rights Ombudsman.

#### 1. Preparatory approaches

One approach to empower children who are testifying is to focus more on the preparation of children for court; such an approach includes an "empowerment (versus protectionist) model" of advocating for child witnesses that simultaneously does not compromise interests of the defense.<sup>241</sup> Children may fear testifying if they "are not adequately prepared" because they have a "very limited understanding of the court system, its participants and conventions."<sup>242</sup> Reforming the pre-trial process rather than

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240. In 1993, the ABA reviewed ten nations' children's ombudswork programs: Austria, Belgium, Canada, Finland, Guatemala, Israel, New Zealand, Norway, Sweden, and the United Kingdom. *Id.* at 37. The CRC has "played an important role in . . . acceptance" of the idea of a children's ombudsman and children's ombudswork in these foreign countries, and therefore the activities in these countries have a "decidedly child rights focus." *Id.* at 39. For an overview of these programs, see *id.* at 40-59.

241. Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 972 (1993) (examining the importance of reforming the pre-trial process).

242. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 307,

“focusing on trial reform” would certainly help our nation tackle the problems associated with children involved in the court system; it would also allow these children to more effectively voice their concerns and views.<sup>243</sup>

Innovative programs have been developed by several jurisdictions to assist children in the court process.<sup>244</sup> “Court schools” are programs for children who will be testifying and exist in a “number of communities.”<sup>245</sup> “Classes” are held in which children learn about court, and role-playing may be used so that children can practice testifying about events that are unrelated to their abuse or their specific case.<sup>246</sup> The benefit of these programs is that they increase children’s confidence and eradicate their fear of court, or “the unknown.”<sup>247</sup> One specific example of a court school is the Kids’ Court School (“KCS”) at the William S. Boyd School of Law of the University of Nevada, Las Vegas.<sup>248</sup> KCS “court educators”—law students and dual-degree students—use “an evidence-based curriculum” to teach children aged four to seventeen “who [are] scheduled to appear in court in any capacity,” and “there is no charge for participati[ng].”<sup>249</sup> The students could be youth charged with a crime, witnesses, or

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323-34 (1999) (advocating for preparation of children for testifying through model programs and an attorney-client model rather than a *guardian ad litem* model).

243. Montoya, *supra* note 241, at 987.

244. For a review of some model programs that aim to reduce child trauma in court, see Debra Jenkins, *Reducing Trauma for Children Involved in Dependency and Criminal Court*, 27 CHILD L. PRAC. 1 (2008) (detailing forms of court-related trauma children may experience, practitioners’ roles in alleviating and preventing that trauma, and other collaborative strategies to support and prepare children for testifying).

245. Myers, *supra* note 113, at 90.

246. *Id.*

247. *Id.*

248. Anne R. Traum, *Empowering Kids in the Courtroom at UNLV’s Kids’ Court School*, 22 NEV. LAW. 40, 40 (2014); see also Dawn Hathaway Thoman, *Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses*, 14 NEV. L.J. 236, 247-48 (2013) (detailing how anxiety breeds harm in child witnesses and providing strategies for reducing that anxiety).

249. Traum, *supra* note 248, at 41; *Kids’ Court School*, UNLV, <http://www.law.unlv.edu/kids-court> (last visited Mar. 8, 2016).

victims.<sup>250</sup> The curriculum consists of two one-hour long sessions. Session one centers on processes before and during trial by taking the children through “the roles and functions of courtroom participants”; students also learn about communication techniques, such as the ability to pose clarifying questions and “the importance of telling the truth.”<sup>251</sup> Session two includes “stress inoculation training,” using “coping skills to reduce anxiety,” such as “breathing techniques and positive self-talk.”<sup>252</sup> The second session concludes with a summary of the ideas and concepts the children have learned and closes with a mock trial in the courtroom at the law school; individual cases are not discussed.<sup>253</sup> Over 865 children and youth who are involved in judicial proceedings have participated in KCS, and these participants have been significantly less anxious about court appearances and testifying due to reduction of their “court-related stress” through this program.<sup>254</sup> The KCS program has received national recognition by Harvard University as a model program for courtroom education of children.<sup>255</sup> Children do not have to be subpoenaed by a court in order to participate,<sup>256</sup> but some Nevada judges require child witnesses to attend KCS before testifying.<sup>257</sup> Court education programs like KCS continue to burgeon throughout the country, and several county governments have found these programs valuable enough to fund.<sup>258</sup>

Another way to ensure that children have a voice is through “representation and counseling,” which will help to “develop[ ] a legal system that [views and] treats children as persons.”<sup>259</sup> A child needs independent representation

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250. *Kids' Court School*, *supra* note 249.

251. Traum, *supra* note 248, at 41; *Kids' Court School*, *supra* note 249.

252. Traum, *supra* note 248, at 41.

253. *Id.*

254. *Id.*

255. Thoman, *supra* note 248, at 247-48; *Kids' Court School*, *supra* note 249.

256. *Kids' Court School*, *supra* note 249.

257. Thoman, *supra* note 248, at 247.

258. *Id.*

259. Goodmark, *supra* note 242, at 317.

because “[a]ppointing a representative for the child increases the likelihood that the child’s needs, wants and rights are the central focus of the litigation” and ensures that the child has a voice in the proceedings.<sup>260</sup> There are two models for legal representation—there is a debate surrounding which one is better suited for children: the traditional attorney/client relationship model, where attorneys advocate for children’s expressed positions, regardless of what they think about children’s choices, and the *guardian ad litem* (“GAL”) model, where attorneys advocate for children’s best interests rather than children’s expressed desires.<sup>261</sup> The GAL model could potentially disempower children, as children are heard only if their views are consistent with their GAL’s views; children may be further disillusioned if they believe their attorneys were appointed to express their views, but find that the GALs “failed to zealously advocate” for their positions.<sup>262</sup> But the traditional attorney/client model may give children “a real voice in the proceedings”—their attorneys would advise the children about the consequences of their choices, but children would hold “ultimate decision-making authority,” and the children’s “power in relation to other parties” in the proceeding would be “equalized.”<sup>263</sup> Regardless of the model, child witnesses need independent legal representation to “enhance their testimonial experience” and “courts should appoint independent counsel” rather than “automatically defer[ring] to prosecutors’ discretion.”<sup>264</sup>

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260. *Id.* at 320-21.

261. *Id.* at 323.

262. *Id.* at 328-29.

263. *Id.* at 324-25. Goodmark also considers the numerous problems associated with a traditional attorney/client model for children. *See id.* at 325-26. Furthermore, Goodmark discusses a number of model programs for providing representation for children, such as law school clinics and *pro bono* projects. *See id.* at 330-34.

264. Tanya Asim Cooper, *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*, 9 CARDOZO PUB. L. POLY & ETHICS J. 239, 286 (2011) (moving toward a child-centered approach by advocating the need for independent legal counsel for child witnesses to ensure their rights); *see also* Myrna S. Raeder, *Enhancing the Legal Profession’s Response to Victims of Child Abuse*, 24 CRIM. JUST. 12, 12 (2009) [hereinafter Raeder,

An additional approach could be to appoint “specialized child advocates” to help child victims and witnesses “cope with the trial process” and prepare them to testify.<sup>265</sup> These specialized child advocates would have the training and credentials to provide adequate support to children and follow them through to the outcome of their cases. Specialized courts could also be provided for child victims and witnesses.<sup>266</sup>

## 2. Integrative approaches

Taking the creative approaches of kids’ courts, independent legal counsel, and specialized child advocates a step further, why not integrate some of these approaches in the court system directly? There could exist a focal point in the court system for child witnesses and child victims that would show children that the court system is not separate from these efforts to educate and empower them. For example, in lieu of sending child witnesses and victims to kids’ courts in law schools, why not institute a program in which the law clinics come to the courts and educate children there? A courtroom could be designated for children’s education and preparation for testifying in court. That way, children would actually be immersed in the court building from the beginning stages of their cases in a manner that is

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*Enhancing Response to Victims*] (noting that the ABA adopted policies from the Criminal Justice Section, including resolutions that urged support of legislation so that “child victims of criminal conduct have independent attorneys who can assist them in obtaining applicable victims’ rights”).

265. See Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don’t Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 276 (2010) [hereinafter Raeder, *Distrusting Young Children*] (suggesting this approach for assisting children and their families in child abuse cases, as victim advocates are now common in domestic violence cases); see also Raeder, *Enhancing Response to Victims*, *supra* note 264, at 13. I am utilizing this idea not just for child abuse cases but more generally for child witnesses and victims who will testify.

266. See Raeder, *Distrusting Young Children*, *supra* note 265, at 277-78 (positing that “specialized child abuse courts” could be created “in urban locations, similar to domestic violence courts that have helped to increase successful prosecutions and assist victims”). I am again expanding this idea from child abuse courts to courts for children who are testifying generally.

positive, inviting, and informative. Specialized child advocates, along with other support staff, such as mental health workers, could be appointed and work with the children throughout all stages of the pre-trial, trial, and post-trial process—or whatever proceeding in which they are involved. This integrative approach, in placing children's rights work directly inside the court system, would certainly follow the values of the CRC and push for a children's right to agency in the courtroom.

Alongside these more individualized approaches to working the CRC into the court system are efforts to incorporate the CRC through a strategic, systematic process. Working around the United States's lack of ratification of the CRC at the federal level, locally there are some legislative strategies taking place, including a bottom-up incorporation strategy.<sup>267</sup> This strategy begins at the grassroots level and incorporates upwards; for example, “domestically popular human rights treaties” have been ratified by local and state governments through lobbying efforts that have focused on “direct localized incorporation,” as opposed to federal incorporation.<sup>268</sup> With the CRC as a paradigmatic example, “governmental bodies in scores of U.S. states, territories, cities, and localities have adopted resolutions or instruments endorsing the conventions or adopting them on behalf of their jurisdictions.”<sup>269</sup> Sometimes these initiatives are complemented by “innovative community-based supervision and other follow-up procedures to monitor local level progress in achieving treaty-related commitments and to ensure implementation of locally relevant solutions to the problems identified.”<sup>270</sup> A second tactic is for domestic courts to apply human rights treaty law like the CRC indirectly and use it

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267. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 392, 427-28 (2009) (focusing on the potential for a shift from “partial subsidiarity (paradox) to genuine subsidiarity of U.S. human rights policy”—a U.S. policy that is directed not just outward toward international audiences, but also inward, critical of U.S. domestic constituencies).

268. *Id.* at 427-28.

269. *Id.* at 428.

270. *Id.*



as a “nonbinding interpretive aid or source of persuasive authority in discerning meaning under independent private causes of action.”<sup>271</sup>

Therefore, although the CRC has not been ratified by the United States, its principles can be implemented at the domestic, grassroots level by state and local governments and by legal advocates as an indirect, secondary source for arguments; the latter may be achieved through utilization of the human rights/children’s rights framework to fill in gaps and bolster legal arguments in the courtroom. These creative responses, along with the others mentioned above, such as kids’ courts, independent legal counsel, specialized child advocates, and specialized courts, could all be used in a sincere effort to empower child victims and witnesses in the courtroom.

CONCLUSION:  
USING INNOVATIVE MODELS TO  
EMPOWER CHILDREN IN THE COURTROOM

Mia, the sixteen-year-old who was traumatized from testifying in a quasi-public forum, could have had quite a different ending to her story. If international children’s rights frameworks were better employed in the United States to embolden children who testify in court, she could have been empowered rather than suppressed. Perhaps she could have been prepared at a kids’ court, could have voiced her concerns to a Children’s Rights Ombudsman, or even been appointed a specialized child advocate who would have assisted her in coping with her trauma. The myriad of creative tactics to empower children in the courtroom should be utilized more widely. Rather than responding to children’s time in the courtroom retroactively, a more proactive approach would enhance their experiences in the American justice system and provide them with the tools to give them a full sense of agency. A dissemination of knowledge is also key, as children are not currently well-equipped to face the adversarial system that works in many ways against them. In following the relevant provisions of the CRC, the federal

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271. *Id.* at 429.

or domestic arena could have enabled Mia to have a voice in those proceedings that deeply affected her.

Particularly with the shift in Confrontation Clause cases that implicate an increase in child witness testimony, as well as growing awareness and actions around child abuse, it is more imperative than ever to ensure that child witnesses' rights are enforced. While the current tendency in the United States to "shield" children and protect them from defendants may affect some child witnesses positively, the concern with that methodology is that some children may not have a chance to voice their opinions on cases in which they are entrenched. Those children will have to live with the outcomes of those cases, and their level of involvement in them, for the rest of their lives. How then do they not have a valid right, some allotment, to their agency in those proceedings? While some opponents may shy away from or argue against this right for reasons like conflicting parental rights and children's lack of cognizance and responsibility, I have demonstrated that, through international law, children have a claim upon this right, and their increased participation will actually enhance their testimony, improve their legal experiences, and provide them with the means to grow as persons.

With the CRC at hand, both international and domestic NGOs and other grassroots efforts have proliferated in developing the rights of children. By utilizing its provisions, particularly Articles 12 and 42, a children's right to agency in the courtroom can be better supported and advanced. Most importantly, entities can critically examine their practices surrounding child witnesses and work toward genuine improvement of those practices.

With the increased prevalence of child witnesses and victims entrenched in the legal arena, a more comprehensive, innovative approach is required to meet their needs. If the United States pays greater attention to inventive domestic tactics, looks outward to international methods, and then actually implements those approaches, the United States will garner a much better international reputation than it has currently. Through the creation of a Children's Rights Ombudsman, a focal point for the country, and then the incorporation of an array of coordination mechanisms to

ensure integration of child witness rights into public policy, those rights can actually balance against the rights of the accused. People in the United States could then take the rights of children seriously. Children would gain a better understanding of legal proceedings and project their voices so their right to participatory agency in the courtroom is realized.