

# TRUTH WITHOUT TRAUMA: REDUCING RE-TRAUMATIZATION THROUGHOUT THE JUSTICE SYSTEM

*Dorislee Gilbert & Emily Bonistall Postel, Ph.D.\**

## INTRODUCTION

Attendance in court is often directly linked to a traumatic experience. Except for those who work there, most people enter courtrooms because something awful has happened to them—the death of a loved one, an injury, an unjust firing, or the loss of their livelihood. For many people, the cause of their journey to a courtroom is even more dire—witnessing or experiencing a murdered loved one; a violating sexual assault; or the intrusion of a home invasion burglary. Unfortunately, there is nothing the justice system or any actor within it can do to take away, remedy, or cure the trauma experienced by victims and witnesses.

In fact, the system can and often does intensify the trauma that led to the courthouse in the first place, and this can have lasting consequences in the victim's life.<sup>1</sup> Various studies show that negative experiences with the criminal justice system can negatively impact healing for victims.<sup>2</sup> Victims who describe their contact with the legal system as hurtful have higher levels of psychological distress than those who have more positive contacts with the system.<sup>3</sup> One study of family members of homicide victims revealed a

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\* Dorislee Gilbert is a Kentucky attorney who has spent most of her career serving victims of crime. She is the former Executive Director of the Mary Byron Project, a nonprofit organization dedicated to enhancing justice to end intimate partner violence. Before that, she was a felony prosecutor for fifteen years. Dorislee has taught judges, lawyers, and law enforcement officers. In 2019, she received a prosecutor of the year award and in 2022, she received an award from National Justice and Hope for Crime Victims for her career of service to victims of crime.

Dr. Emily Bonistall Postel, State Director of Marsy's Law for Kentucky, is an educator and activist who has demonstrated a deep commitment to crime victims over the course of her career. She brings nearly two decades of experience teaching, researching, and advocating on behalf of crime victims, and she led the 2020 effort to secure constitutionally protected rights for crime victims in Kentucky. Dr. Bonistall Postel is a subject matter expert who presents workshops and trainings across the country, and works with organizations to develop and implement victim-centered and trauma-informed approaches. Dr. Bonistall Postel has given more than fifty conference and invited presentations, and has taught five university courses (including Victimology & Family Violence).

<sup>1</sup> See Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 89, 90–91 (2020).

<sup>2</sup> See Maarten Kunst et al., *Victim Satisfaction with the Criminal Justice System and Emotional Recovery*, 16 TRAUMA, VIOLENCE, & ABUSE 336, 337 (2015).

<sup>3</sup> *Id.* at 353 (citing Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239 (2001)).

negative association between satisfaction with the criminal justice system and anxiety, depression, and overall PTSD symptom severity.<sup>4</sup> Research involving rape survivors found that perceptions of secondary victimization by the legal system were associated with PTSD symptoms.<sup>5</sup> A study of victims of violent and property crimes found that satisfaction with the criminal justice system was negatively associated with current distress and recollections of distress following victimization.<sup>6</sup>

These outcomes often occur because the structure of our criminal justice system emphasizes the fairness of proceedings, yet regularly ignores the pain, inconvenience, and burden it causes participants. Sometimes it happens due to the adversarial nature of the system—i.e., through the cross-examination of a victim or witness by an attorney with an ethical obligation to zealously represent the accused.<sup>7</sup> Other times may be due to the negligence of prosecutors, other attorneys, court staff, paralegals, and victim advocates who do a poor job keeping the victim or witness apprised regarding the proceedings.<sup>8</sup> Sometimes it happens due to the chronic overcrowding of the justice system and resultant inevitable delay of cases.<sup>9</sup>

Well-intentioned attorneys, advocates, police officers, judges, and other court staff without sufficient understanding of trauma and victimization can inadvertently re-traumatize victims and witnesses. If system actors do not understand behavioral manifestations of trauma, they may become frustrated with “difficult” victims or witnesses whose behavior is perceived to be an overreaction to something as seemingly mundane as not getting a phone call or being advised of an uneventful court date after it occurred.<sup>10</sup> System actors must realize that participating in the justice system can be burdensome for victims—requiring time off work, childcare, transportation, and emotional energy.<sup>11</sup> As explained by one victim in conversation with the authors:

“Every court proceeding, I took unpaid time off work, paid my own parking and showed up at 7:30 a.m. to sit on floor eight to be ready whenever our case was to be heard. Many times I did not find out until the day or so before

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<sup>4</sup> *Id.* at 342 (citing Angelyne Amick-McMullan et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. TRAUMATIC STRESS 21 (1989)).

<sup>5</sup> *Id.* at 344 (citing Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?*, 67 J. CONSULTING & CLINICAL PSYCH. 847 (1999)).

<sup>6</sup> *Id.* at 350 (citing Martie Thompson et al., *System Influences on Posthomicide Beliefs and Distress*, 24 AM. J. OF COMMUNITY PSYCHOLOGY 785 (1996)).

<sup>7</sup> Katirai, *supra* note 1, at 102.

<sup>8</sup> *See id.* at 106 (explaining that survivors often are unrepresented and rely on court staff).

<sup>9</sup> *See id.* at 100 (explaining that overcrowding led to a difficult, delayed trial for victim in case study).

<sup>10</sup> *See id.* at 106 (explaining the traumatizing impact of untrained court staff).

<sup>11</sup> *See id.* at 106 n.110.

and the proceeding often took hours to half the day. A few times the defendant did not show up due to a form not being signed or an evaluation not being completed.” (Michelle)

A phone call would have made a tremendous difference to that victim and is just one example of how trauma-informed practices and proactive litigation strategies can help reduce the re-traumatization of victims and witnesses throughout the justice system.<sup>12</sup>

In this Article, the authors present an overview of the neurobiology of trauma, including common manifestations of trauma. They then describe ways in which the justice system adds to victims’ trauma by sharing real quotes from victims that will provide examples of ways in which the system—and systemic failures—caused additional trauma and distress. These victims’ voices and experiences will illuminate why it is vital for those working within the system’s rules and procedures to understand trauma and to take basic, practical steps that can minimize the negative consequences of interaction with the system for victims of crime. Then an empathy building training activity is introduced that can be effective in helping system-participants understand how the system can re-traumatize victims, encouraging them to actively seek to avoid such negative outcomes while diligently pursuing positive case outcomes.

Finally, practical and litigation strategies are suggested that can improve the justice system experience for victims and witnesses while balancing the system’s goals of justice, truth, and fairness. While the specific techniques and practical guidelines offered will be situated within the criminal legal system, they will largely transfer to other types of cases, including civil and family law cases. The authors’ hope for this Article is to share their collective knowledge and to elevate the voices of victims to encourage readers to think more broadly about what it means to embrace a trauma-informed and victim-centered approach.

## I. UNDERSTANDING THE ROLE OF TRAUMA

“From the exact moment of the death notification, the person we were just moments before ceases to exist. Survivors will develop new patterns of thinking, feeling, and acting. Not only will we have to learn to grieve and navigate the criminal justice system, we have to learn to live again.”

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<sup>12</sup> See *id.* at 106 (explaining that court staff who are not trauma-informed may further traumatize victims).

(Melissa)

Just as Melissa described in conversation with the authors, millions of Americans are affected by crime every year and their lives are forever altered by a specific moment in time or traumatic experience.<sup>13</sup> At its most basic level, trauma is “an event that combines fear, horror, or terror with actual or perceived lack of control.”<sup>14</sup> Further, “[t]rauma is often a life-changing event with negative, sometimes lifelong consequences.”<sup>15</sup> The body has a biological response to trauma impacting how that person processes memory, and by binding to the nervous system, trauma can change someone’s physiology. Leading trauma expert Dr. Ruth Lanius explains, “[t]raumatic memory is not a memory that’s remembered, but a memory [that is] relived. People will actually feel like the past is reoccurring. And this will happen at the level of mind, brain, and body.”<sup>16</sup> Trauma has a distinct physiological effect on the brain where the primitive survival parts of the brain override the conscious part.<sup>17</sup> As such, “[t]he memory of a traumatic event causes the individual to experience the present moment *as if* it were the past.”<sup>18</sup>

These are not conscious choices, but instinctive brain processes that occur during traumatic situations.<sup>19</sup> Accordingly, “[i]n traumatic memory, the past is not recollected consciously, it is instead relived in the sense that the memory *carries* the past with it and alters the experience of the present moment.”<sup>20</sup> This may manifest in flashbacks, anxiety attacks, depression, or PTSD.<sup>21</sup> A domestic violence and stalking survivor who has fled multiple states in the past ten years to escape her ex-husband explained to the authors

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<sup>13</sup> OFF. JUST. PROGRAMS, U.S. DEP’T JUST., NCJ 303936, CRIME VICTIMIZATION, 2020 – SUPPLEMENTAL STATISTICAL TABLES 1 (2022), <https://bjs.ojp.gov/content/pub/pdf/cv20sst.pdf> [<https://perma.cc/GY8E-HTD7>] (reporting 2.6 million people twelve years old or older were victims of violent crime in 2020).

<sup>14</sup> Christopher Wilson et al., *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, END VIOLENCE AGAINST WOMEN INT’L 6 (2020), [https://evawintl.org/wp-content/uploads/2016-11\\_TB-Neurobiology.pdf](https://evawintl.org/wp-content/uploads/2016-11_TB-Neurobiology.pdf) [<https://perma.cc/Y2UP-L4BD>].

<sup>15</sup> *Id.*

<sup>16</sup> Ruth Buczynski et al., *How to Work with Traumatic Memory That Is Embedded in the Nervous System*, NAT’L INST. FOR CLINICAL APPLICATION BEHAV. MED. 3 (2022), <https://s3.amazonaws.com/nicabm-stealthseminar/Trauma2017/confirmed/NICABM-TreatingTraumaMasterSeries-Module3TalkBack-TraumaticMemory.pdf> [<https://perma.cc/GR7P-WG7X>].

<sup>17</sup> Nicole Priesmeyer, *How Trauma Changes the Brain*, FULSHEAR (Nov. 6, 2013), <https://www.fulsheartransition.com/blog/how-trauma-changes-the-brain/> [<https://perma.cc/9RAJ-BX5M>].

<sup>18</sup> Mary Catherine McDonald, *A Prismatic Account: Body, Thought, Action in Trauma*, 37 TEOREMA: REVISTA INTERNACIONAL DE FILOSOFÍA 83, 87 (2018).

<sup>19</sup> Wilson, *supra* note 14.

<sup>20</sup> McDonald, *supra* note 18, at 87.

<sup>21</sup> *Id.*

that she “lives in fear every day, the flashbacks and nightmares do not go away.” (Sandra). Often, survivors experience more than one of these outcomes. Another survivor of domestic violence shared with the authors: “I became a panic disorder patient. I have general anxiety disorder and agoraphobia. And PTSD from my abuse.” (Nancy).

Trauma can also manifest in broader emotional ways, such as feeling a loss of control, loss of trust in the world, and grief for life before the traumatic event.<sup>22</sup> After her car was stolen, one victim said, “I feel ripped to shreds, alone, hurt, and in pain over this criminal spree. I am ashamed to be a part of the world we live in.” (Brooklyn). After Vickie’s daughter was killed in a hit-and-run, she developed psychosis PTSD and shared with the authors that “her death has consumed me in every way of my life, 24/7 I have nightmares of her getting hit and her screaming “mom!”—I don’t know how to go on.” For those who have not had to endure this firsthand, it can be difficult to understand the realities and implications of victimization, the long-term impact it can have, and the way it can affect every aspect of one’s life.

To illustrate this, a parallel can be drawn with our collective pandemic experience to provide a glimpse of what it can feel like to be a crime victim, what it means to have your whole world changed in an instant, and what it means to have to learn to live again. When the COVID-19 pandemic brought everything to a screeching halt in March of 2020, it brought with it a sudden loss of stability and control, isolation, and helplessness. The world as we knew it was no longer the one we were living in, and we suddenly found that our daily routines had changed, and our usual coping mechanisms were no longer options.<sup>23</sup> Suddenly, we did not feel safe around other people or in public spaces.<sup>24</sup> People began talking about our new normal instead of getting back to normal, and over the past two years we have had to figure what it means to “live our lives now”—an all-too familiar refrain for victims of crime.<sup>25</sup> We did not ask for our world to be changed, yet still we had to learn to live again.

To better understand the concept of being victim-centered, consider the important parallel that, although the pandemic has been a collective experience, it is not a universal experience. Trauma is “a fundamentally

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<sup>22</sup> See Buczynski et al., *supra* note 16, at 7.

<sup>23</sup> See generally, *Feeling safe during the coronavirus pandemic*, BRITISH RED CROSS, <https://www.redcross.org.uk/get-help/coronavirus/feeling-safe-during-the-coronavirus> [<https://perma.cc/U3SK-P47N>].

<sup>24</sup> *Id.*

<sup>25</sup> Ezekiel Emanuel et al., *A National Strategy for the “New Normal” of Life With COVID*, JAMA (Jan. 6, 2022) <https://jamanetwork.com/journals/jama/fullarticle/2787944> [<https://perma.cc/ZP3R-PUN5>].

subjective event—what is traumatic for one person may not be for another, because what’s fearful or terrifying to me, may not be for you.<sup>26</sup> What I experience as a lack of control, you may not.”<sup>27</sup> Each of us experienced the pandemic differently, and one-sized-fits-all solutions do not take into account individual needs or put us at the center of decisions regarding the support we need. Similarly, though there are common reactions and feelings that crime victims experience in the aftermath of their victimization, there is no one universal or “true” reaction to crime. While one victim may seem withdrawn and stoic, another may be uncontrollably emotional; one person may reject their faith because of the experience, another may have their faith strengthened.<sup>28</sup>

Moreover, “[r]esponse to trauma is impacted by multiple environmental and genetic factors, as well as the life experience, so how it manifests differs to some degree for each individual.”<sup>29</sup> The myth that violence affects all victims equally encourages service providers to use a one-size-fits-all approach to interacting with victims, but recent data indicates 63% of crime survivors overall and eight in ten survivors of violent crimes describe their experience as traumatic.<sup>30</sup> To truly be trauma-informed and victim-centered, actors in the legal profession must think critically about their expectations and stereotypes of crime victims.<sup>31</sup> What expectations do we have for the way a crime victim “should” react? What are the assumptions we hold about the impact of victimization across different types of crime, across different demographics of victims?

When a victim’s reactions do not match our expectations for *that* victim or *that* type of crime, how does that impact the service provided, and what impact will that have on the victim? In the words of one crime survivor to the authors, “I was told over and over, ‘This isn’t the worst thing that has ever happened to the Commonwealth.’ But that did not take away my fear. And this was the worst thing that had ever happened to ME.” (Alana). A basic understanding of the science of trauma can help attorneys better carry out

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<sup>26</sup> Wilson, *supra* note 14.

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

<sup>28</sup> See generally *Common Reactions of Crime Victims*, JUSTICE 4 CRIME VICTIMS (Mar. 15, 2021) <https://www.justice4crimevictims.com/common-reactions-of-crime-victims/> [https://perma.cc/Z8AZ-BKMB].

<sup>29</sup> Julie Valentine, Linda Mabey & Leslie Miles, *Neurobiology of Trauma*, in *A PRACTICAL GUIDE TO FORENSIC NURSING* 37 (2015).

<sup>30</sup> ALL. FOR SAFETY AND JUST., *CRIME SURVIVORS SPEAK* 10 (April 2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [https://perma.cc/542X-K26D].

<sup>31</sup> See generally EZZAT A. FATTAH, *CRIMINOLOGY: PAST, PRESENT AND FUTURE* (1997).

their ethical duties to represent their clients competently and zealously while avoiding causing further re-traumatization.

## II. THE JUSTICE SYSTEM'S ROLE IN ADDING TO TRAUMA

"I suffered shock and severe PTSD, which created panic attacks in public places, a fear of falling asleep, and distrust in strangers from the actual event, but I found the trauma would continue as I entered the judicial system. ... I just wanted to put the pieces of my life back together. And in order to do so, I needed to be a part of the system and feel heard and respected." (Alana).

As evidenced by the authors' conversations with Alana, trauma can affect how victims see themselves ("I am helpless" or "I am worthless"); how they see the world ("the world is dangerous" or "no one can protect me"); and relationships ("I cannot trust anyone").<sup>32</sup> These beliefs affect how victims respond to services and the criminal justice system, and how they will interact with system actors from police to prosecutors.<sup>33</sup> Many of the ways victims are re-traumatized throughout the system can be captured in two categories: the system and system actors.<sup>34</sup>

First, the very structure of the system is often incompatible with their needs.<sup>35</sup> As leading expert Dr. Judith Herman explains, "[t]he wishes and needs of victims are often diametrically opposed to the requirements of the legal proceedings."<sup>36</sup> Indeed, it has been observed: "if one set out to intentionally design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."<sup>37</sup> The legal system has been described for victims as "a theater of shame."<sup>38</sup> It can be seen to reward

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<sup>32</sup> CTR. FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 67 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf> [<https://perma.cc/EA4Z-7DCJ>].

<sup>33</sup> See OFF. FOR VICTIMS OF CRIME, OFF. JUST. PROGRAMS, FROM PAIN TO POWER: CRIME VICTIMS TAKE ACTION 1, 222 (1998), [https://www.ncjrs.gov/ovc\\_archives/reports/fptp/fptp.pdf](https://www.ncjrs.gov/ovc_archives/reports/fptp/fptp.pdf) [<https://perma.cc/Q8T6-8H38>].

<sup>34</sup> See Katirai, *supra* note 1, at 117.

<sup>35</sup> See INT'L ASS'N CHIEFS OF POLICE, WHAT DO VICTIMS WANT? EFFECTIVE STRATEGIES TO ACHIEVE JUSTICE FOR VICTIMS OF CRIME 1, 12 (May 2000), <https://www.theiacp.org/sites/default/files/2018-08/WhatDoVictimsWantSummitReport.pdf> [<https://perma.cc/4ATK-V6FH>].

<sup>36</sup> Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574 (2005).

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

<sup>38</sup> *Id.* at 573.

bullying behavior.<sup>39</sup> Especially for victims of domestic and sexual violence, where “strategies of domination and control” are utilized by perpetrators, the system can seem designed for the success of their perpetrators.<sup>40</sup>

<b>Victims' Needs</b>	<b>Court Requirements<sup>41</sup></b>
Social acknowledgement & support	Public challenge to their credibility
Establish sense of power & control	Complex rules and procedures where they have no control
Opportunity to tell their stories in their own way	Respond to a set of yes or no questions
Limit exposure to reminders of the trauma	Relive the experience
Fear direct confrontation with their perpetrators	Face-to-face confrontation with their perpetrator

Angela, a domestic violence survivor who endured extensive abuse from her ex-husband, presented with many of the needs on the above chart: “He goes to jury trial in July and I have to testify . . . I do NOT want to see him. I have PTSD from all the trauma endured over seventeen years. The closer it gets to the court date, the more I suffer from flashbacks of the abuse.”

It is often re-traumatizing when victims realize how little control they have in the justice system.<sup>42</sup> Establishing a sense of control is critical in the aftermath of a crime, as one of the most common reactions to experiencing trauma from crime victimization is feeling a loss of control.<sup>43</sup> One way victims can re-establish control is through information and being informed, so it can be re-traumatizing to be left in the dark.<sup>44</sup> When Kate’s father was murdered, she described the court system to the authors, saying, “I had no

<sup>39</sup> See, e.g., *id.* at 583.

<sup>40</sup> *Id.* at 584.

<sup>41</sup> *Id.* at 581–84.

<sup>42</sup> *Id.* at 574.

<sup>43</sup> *Id.*

<sup>44</sup> See SONIA D. FERENCIK & RACHEL RAMIREZ-HAMMOND, OHIO DOMESTIC VIOLENCE NETWORK, TRAUMA-INFORMED CARE: BEST PRACTICES AND PROTOCOLS FOR OHIO’S DOMESTIC VIOLENCE PROGRAMS 1, 11, [http://www.ncdsv.org/images/odvn\\_trauma-informedcarebestpracticesandprotocols.pdf](http://www.ncdsv.org/images/odvn_trauma-informedcarebestpracticesandprotocols.pdf) [https://perma.cc/M64S-GDEJ].



support with the courtroom, was not told when things were going to happen, was just left out of it all.” The impact this can have on victims is profound, as one victim reported to the authors:

“I had to find the court date and time of when his proceeding was all on my own. Never got a phone call or text message from anybody in the courts or even from the victim advocate. I have never been so in the dark in my life. [It is] like hell.” (Beverly).

It can be shocking to victims when they learn that they have no decision-making power over the case about a crime that happened to *them*. Victims soon learn that they are not considered the injured party, they have no legal standing in court, and they have no control over the prosecution of their case.<sup>45</sup> As one survivor, Lisa, explained to the authors:

“I thought the worst was over. I did what I was supposed to do. I went to the police and reported the crime, participated in the police recorded confession, and helped them make their case. I then trusted that the judicial system would take over and prosecute him for his crimes. I was even willing to testify, if necessary. But it quickly became very clear that the worst was not over.

The prosecutor reminded me that I was just a witness in this case, that it was the Commonwealth vs. my husband. Her words and actions sent a clear message—I had no voice and the defendant, my husband, had more rights in the courtroom than I did. Sometime later, the prosecutor informed me that she and my husband’s defense attorney had agreed on a plea deal—without speaking with me or informing me beforehand. I began to ask questions and the commonwealth attorney very quickly said to me these words: “I am driving this bus.” I was shocked. It felt like I was being re-victimized all over again . . . but this time it was by the judicial system.”

For many victims, the length of time and delays are re-traumatizing, and this is exacerbated when people in the system say or do harmful things or fail to do what they are supposed to do.<sup>46</sup> For example, although victims have the statutory right to be notified,<sup>47</sup> when they are not kept abreast of changes while the defendant is, they feel forgotten and cast aside by the system.

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<sup>45</sup> See Herman, *supra* note 36, at 581.

<sup>46</sup> Kayla Lasswell Otano, *Victimizing the Victim Again, Weaponizing Continuances in Criminal Cases*, 18 AVE MARIA L. REV. 110, 125 (2020).

<sup>47</sup> Crime Victims’ Rights Act of 2004, 18 U.S.C. § 3771(a)(2).

Further, the authors gathered the following statements in conversations with victims:

“We showed up in court on the date of the review like we were instructed to and found out the case had been postponed. This happened twice. We weren’t told ahead of time of the postponement, but the perpetrator was informed.” (Virginia).

“Six years later I am still going to court to try to receive justice for the crimes committed against me. My trial has been delayed over and over again. More than a handful of times I have been told a date and time that a trial would occur and only a couple of days beforehand be informed that it was going to be pushed back for months and months. My voice, along with so many others voices, are never able to be heard.” (Jordan).

“Four long years of court dates, calling the commonwealth attorney’s office twice a month for four years for updates and making sure that court dates [have not] been changed. Because you will get to court on a scheduled date and they will tell you we changed the date come back. The commonwealth’s attorney’s office switched attorneys four times. Some of the times you just show up to court and [there is] a new attorney. We had five different trial dates, countless hearings that we did not understand.” (April).

“In over five years we have not seen the county attorney appear in the court house one time. I have received two notices of court in the mail. The last court appearance we were told on November 30th that all hearings were canceled. Yet, they had a hearing with one of those indicted on complicity to commit murder via internet. I feel like my son has no one fighting for him.” (Kim).

Without a better understanding of these experiences, it can be difficult for system actors to recognize reactions in victims that are clearly a manifestation of trauma and to respond appropriately. To that end, the authors have designed a training activity<sup>48</sup> to allow participants to see how the criminal justice system treats survivors of trauma and seeks to empower participants to recognize ways that the criminal justice system can add to the trauma already experienced by crime victims and equip participants to take positive strides in preventing re-traumatization. Before the activity is

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<sup>48</sup> The authors first presented this activity at the 2021 annual conference for the National Crime Victims Law Institute in Portland, Oregon.

introduced, the next section will provide examples that will be helpful in guiding the activity.

### III. PRACTICAL PRACTICES TO EASE TRAUMA

Sadly, it is many of the safeguards of the criminal justice system—for example, the presumption of innocence,<sup>49</sup> the constitutional right to counsel,<sup>50</sup> and the constitutional right to confront accusers<sup>51</sup>—that leave crime victims feeling as if they have been tossed aside and forgotten by the system. Many states now have granted constitutional rights to victims and are making progress towards according victims a more meaningful place in the criminal justice process.<sup>52</sup> Regardless of the system change being made, there are actions that attorneys and legal professionals working with trauma survivors can incorporate in their practice to improve the survivor's experience in the justice system.

Even for civil litigants, who often feel more control over the conduct of their legal cases, survivors of trauma frequently feel “powerless and marginalized in the face of the complex rules and procedures of the legal system, which they often perceive[ ] as a cynical game.”<sup>53</sup> Many of the practical practices and litigation strategies below apply equally in civil cases and can aid in minimizing any re-traumatization caused by participation in the justice system.

One of the best ways an attorney can help prevent a traumatized person from being re-traumatized by the system is by always treating them with dignity, respect, and empathy—treatment that is the polar opposite of how they were treated by the one who caused their trauma.<sup>54</sup> These words are easy to say, and it is easy to assume that as trained professionals we are treating people with dignity and respect, but, as depicted above through the many quotes from crime victims, justice system professionals, including attorneys, often fail to do this.<sup>55</sup> Many shortcomings are unintentional, and a bit of

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<sup>49</sup> See Herman, *supra* note 36, at 572 (“All citizens are presumed to enter the legal arena on an equal footing, regardless of the real advantages that one of the parties may enjoy. The Constitution, therefore, offers strong guarantees for the rights of the accused, but no corresponding protection for the rights of victims.”).

<sup>50</sup> See *id.*

<sup>51</sup> Katirai, *supra* note 1, at 102.

<sup>52</sup> Herman, *supra* note 36, at 572 (“Thirty-two states have passed constitutional amendments determining victims’ rights”).

<sup>53</sup> *Id.* at 582.

<sup>54</sup> See Katirai, *supra* note 1, at 118.

<sup>55</sup> See *supra* section II.

forethought and intentionality can improve justice system contacts for trauma survivors.

### A. *Setting and Managing Expectations*

Few survivors know the elements of crimes in their states; the statutorily allowable penalties; the rules of evidence; the caseload of the courts, police, or crime labs; the priorities of the corrections and parole departments; or the temperament, experience, or knowledge of the judge who will hear their case. Rather, like most other people, trauma survivors' expectations can be informed by popular culture, less-than-thorough news accounts, and gossip.<sup>56</sup> The delays; discovery exchanges; routine motions, case management conferences and pretrial hearings; trials with all their rules of procedure and evidence; and sentencing options, post-conviction motions, and appeals that become second-nature to those practicing law are either unknown or, even more problematic, wrongly-known by trauma survivors.<sup>57</sup> It is up to legal system participants to educate and properly prepare trauma survivors for the realities of the justice system. Doing so minimizes the disappointment and re-traumatization that might otherwise be felt, but only when done so respectfully and while according dignity to the trauma survivor.<sup>58</sup>

A forthcoming conversation with a trauma survivor at the beginning of a case can make a big difference.<sup>59</sup> It is a time to hear their concerns and answer their questions, as well as a time to give them realistic expectations of the process. It is a good time to find out what the trauma survivor hopes will come from their involvement in the justice system. More than half of crime victims want prosecutors to consider their opinions on what would help them recover from the crime.<sup>60</sup> In many states, a Crime Victim's Bill of Rights or the state constitution requires that prosecutors confer with crime victims regarding case outcomes.<sup>61</sup>

The needs and wants of trauma survivors are not uniform or universal, and jumping to conclusions can be a disservice to all involved.<sup>62</sup> Contrary to

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<sup>56</sup> See *A Brief Description of the Federal Criminal Justice Process*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/resources/victim-services/a-brief-description-of-the-federal-criminal-justice-process> [<https://perma.cc/Z5P5-2GV7>].

<sup>57</sup> See *id.* ("Some victims are unfamiliar with the operation of the federal criminal justice system.").

<sup>58</sup> See Katirai, *supra* note 1, at 115.

<sup>59</sup> See *id.* at 117.

<sup>60</sup> ALL. FOR SAFETY AND JUST., *supra* note 30, at 5.

<sup>61</sup> *About Victims' Rights*, OFF. JUST. PROGRAMS, <https://victimlaw.org/victimlaw/pages/victimsRight.jsp> [<https://perma.cc/H69L-2HLJ>].

<sup>62</sup> See ALL. FOR SAFETY AND JUST., *supra* note 30, at 13.

common expectations, trauma survivors are not uniformly interested in seeing the one who traumatized them suffer or be punished simply for the sake of punishment.<sup>63</sup> Survivors also may not be driven by hopes of reconciliation and forgiveness.<sup>64</sup> One study found that “[b]y a [two] to [one] margin, victims prefer that the criminal justice system focus more on rehabilitating people who commit crimes than punishing them.”<sup>65</sup> The same study found that “[b]y a margin of [three] to [one], victims prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.”<sup>66</sup> So what is it that survivors seek through the justice system? Many seek validation—through acknowledgement and vindication.<sup>67</sup> Some desire a genuine apology from the person who traumatized them.<sup>68</sup> Others want the perpetrator to be exposed for what he or she really is, particularly to family and community members.<sup>69</sup> For most, safety for themselves and others is the paramount concern.<sup>70</sup> Rather than guessing what matters most to the traumatized individual, an attorney should ask what is most important to them.<sup>71</sup> Armed with that information, an attorney can help build the client’s reasonable expectations about possible outcomes.

For example, if a prosecutor or victim’s attorney learns from a victim that a priority for the victim is that the perpetrator admit guilt, serious consideration should be considered whether an *Alford* plea pursuant to *North Carolina v. Alford*,<sup>72</sup> which allows a criminal defendant to avoid making a personal admission of guilt while recognizing that the weight of the prosecution’s evidence would likely lead to conviction, will be accepted. If it is the prosecutor’s standard practice to allow such pleas, and the prosecutor is committed that a defendant’s desire for an *Alford* plea will not prevent entry of a plea, the prosecutor should entertain early discussions with the victim about the types of plea agreements, why one in which guilt is not admitted might be accepted, etc.<sup>73</sup> These conversations early in a case may

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<sup>63</sup> Herman, *supra* note 36, at 589–90.

<sup>64</sup> *Id.* at 591–92.

<sup>65</sup> ALL. FOR SAFETY AND JUST., *supra* note 30, at 5.

<sup>66</sup> *Id.*

<sup>67</sup> Herman, *supra* note 36, at 585.

<sup>68</sup> *Id.* at 586.

<sup>69</sup> *Id.* at 593.

<sup>70</sup> *Id.* at 594.

<sup>71</sup> *Id.* at 597.

<sup>72</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>73</sup> See Claire L. Molesworth, *Knowledge Versus Acknowledgement: Rethinking the Alford Plea in Sexual Assault Cases*, 6 SEATTLE J. SOC. JUST. 1 (2007).

prevent the devastation that could occur when a victim later appears in court to hear the entry of the defendant's guilty plea, only to hear the defendant personally say that he is "not admitting he did anything wrong."

Similarly, if the trauma survivor says that what is most important to them is that the perpetrator spends a long time in prison, but the crimes at issue do not carry lengthy prison sentences (or carry seemingly lengthy prison sentences with very early parole dates), it is important to explain these facts early to avoid giving false hope and causing increased, delayed anguish and loss of trust when the facts come to light at the end of the case. If a trauma survivor says that what they need more than anything is restitution and something akin to punitive damages, it is important that the survivor be accurately advised regarding the availability of this kind of compensation—especially where such damages are limited or not available through the criminal action but may be available through a time-restricted civil action or an appeal to the crime victim's compensation board. This sort of timely conversation not only prevents despair later in the case but can be an opportunity to connect the survivor with other resources to allow the survivor to timely pursue civil remedies against the perpetrator.<sup>74</sup> It is important for prosecutors and victims' attorneys to understand and express the limits of criminal prosecution and timely point survivors in the right direction to pursue possible civil remedies.<sup>75</sup>

Of course, attitude makes a difference for trauma survivors.<sup>76</sup> Those who are met with sympathy can be profoundly grateful; though, many are treated with "casual indifference and disrespect" and instead are left having experienced "an official confirmation of the victim's dishonored status and an endorsement of the perpetrator's attitude of contempt."<sup>77</sup> Consider these two ways of delivering the same information:

"I know you said you want him to go to prison for fifty years, but that's just not realistic. The law says the most time someone can get for this crime is ten years. That may seem harsh to you, but when you have seen all the murders, rapes, assaults, child sexual abuse that I have seen, what you experienced in comparison—while awful for you—just does not deserve the same punishment under the law."

"I have read your statement to police, and what you describe sounds absolutely horrible. I can understand why you think the perpetrator needs to

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<sup>74</sup> Herman, *supra* note 36, at 582.

<sup>75</sup> *Id.* at 572.

<sup>76</sup> *Id.* at 582.

<sup>77</sup> *Id.*

go to prison for a long time. Unfortunately, I do not make the laws, and the one that applies here is [identify law; explain why it is one that applies, possibly contrasting with other degrees of the same crime; describe available penalties under the law]. So what that means is that the perpetrator cannot get more than ten years in prison for the crime.<sup>78</sup> I know it does not feel fair because the perpetrator hurt you more than that. Unfortunately, nothing I can do can take away the hurt the perpetrator caused you. But I can help you be an informed participant in this process.”

The first explanation may be accurate, but it is insensitive to the trauma endured by the survivor.<sup>79</sup> The second explanation shows empathy, preparedness, and the intention to involve the victim in the process.<sup>80</sup> The second explanation contrasts starkly with any controlling, manipulative behavior endured by the trauma survivor, treating the survivor instead as an important part of the process entitled to accurate and thorough information.<sup>81</sup> It helps minimize any additional trauma through the justice system.

Addressing these other points with survivors early in a case can also help with minimizing additional trauma:

- How long is the case likely to last? How frequently will there be court appearances? Which ones should the survivor attend?
- How often and by what method will the survivor hear from you? This discussion should include who might contact them on your behalf.
- Who should the survivor direct inquiries to and how long can the survivor expect before a response will be received?
- Will the survivor be expected to talk about what happened? To whom? Under what circumstances? How many times?

Providing written materials containing contact information, the names of all people working on the case, the next date something is expected to happen, and a general outline of what happens during the pendency of the case can also be useful.<sup>82</sup> Because of the way trauma memories are formed, the

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<sup>78</sup> If there are significant known factors that change the reality of a statutorily imposed sentence (i.e., sentencing credits, likely probation, etc.), this conversation will likely need to be more detailed to explain the actual amount of time it is possible the perpetrator will spend in prison.

<sup>79</sup> Katirai, *supra* note 1, at 90.

<sup>80</sup> *Id.*

<sup>81</sup> MARY A. FINN, EFFECTS OF VICTIMS' EXPERIENCES WITH PROSECUTORS ON VICTIM EMPOWERMENT AND RE-OCCURRENCE OF INTIMATE PARTNER VIOLENCE 103-04 (2003), <https://www.ojp.gov/pdffiles1/nij/grants/202983.pdf> [<https://perma.cc/3NKT-M4GU>].

<sup>82</sup> *Id.* at 47.

conversation with the survivor may trigger a flood of those memories, thus making it difficult for the survivor to remember the details of what was shared.<sup>83</sup> For this reason as well, it may be beneficial to begin a conversation with the survivor in this way:

“I have reviewed your case file, and I know what happened to you. It is awful, and I do not need you to tell me the details today. If there is something you want to tell me, I will listen. Either way, we will talk today about procedure and what you can expect through this process.”

Information and preparation go a long way in helping ease the burden of the justice system on survivors of trauma.<sup>84</sup> This is especially important if a case goes to trial. If at all possible before trial, a trauma survivor should be permitted to see the courtroom; be told where various people—including the defendant—will be seated and what their roles will be; and even given the opportunity to sit at the witness stand and look out at the courtroom.<sup>85</sup> A trauma survivor should be prepared for testifying in a thorough, yet sensitive way that allows them to know what questions they will be expected to answer, what they should do if objections are lodged, and how they can expect to be cross-examined.<sup>86</sup> They should be aware of any physical evidence or exhibits that will be shown to them before testifying.<sup>87</sup> They should be assured that if they get emotional during testimony that is okay and that if they do not get emotional during testimony that too is okay.<sup>88</sup> They should be given as accurate an estimate as possible as to how long the trial will last, when their testimony is expected, how long their testimony might last, whether they are permitted to watch the trial, and if they can be present during closing arguments and the return of the jury’s verdict.<sup>89</sup> Making the process as predictable as possible helps minimize the re-traumatization.

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<sup>83</sup> *Properties of Trauma Memories*, PSYCH. TOOLS, <https://www.psychologytools.com/resource/properties-of-trauma-memories/> [https://perma.cc/3BQP-M2RP].

<sup>84</sup> Finn, *supra* note 81, at 6.

<sup>85</sup> NAT’L CRIME VICTIM L. INST., PRACTICAL TIPS AND LEGAL STRATEGIES FOR EASING VICTIMS’ CONCERNS ABOUT TESTIFYING (Winter 2007–08), <https://law.lclark.edu/live/files/21751-practical-tips-and-legal-strategies-for-easing> [https://perma.cc/V553-G7N2].

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

<sup>87</sup> VIVIENNE O’CONNOR ET AL., MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE: VOLUME II MODEL CODE OF CRIMINAL PROCEDURE 135 (Vivienne O’Connor et al. eds., 2008).

<sup>88</sup> See *Victim Impact Statements*, VICTIM SUPPORT SERVS., <https://victimsupportservices.org/help-for-victims/victim-impact-statements/> [https://perma.cc/9RMC-DT7N].

<sup>89</sup> *The Victim as a Witness*, OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/54-landing-a-successful-prosecution/the-victim-as-a-witness/> [https://perma.cc/C7QH-KFVH].



Undoubtedly some prosecutors reading this Article are bemoaning the time commitment this type of interaction with a victim will require. Perhaps not because they do not want to spend this time with victims but because they are already overworked and resource hungry.<sup>90</sup> Many folks are also asking, is this not the role of the victim advocate?<sup>91</sup> Some of what is recommended certainly can be handled by a victim advocate.<sup>92</sup> Arguably, some of it should—such as referrals and calls to other agencies for services. But having a victim advocate—even an excellent one whose time is wholly devoted to victim advocacy<sup>93</sup>—does not alleviate the need for prosecutors to have some of these conversations with victims. Some of these discussions concern legal opinions and the law, and a victim advocate is unlikely to be able to answer all questions the victim may have.<sup>94</sup> Additionally, until the victim has met the prosecutor and built good rapport with them, they may not be willing to accept the victim advocate’s explanations, leading to more dissatisfaction and more time spent trying to communicate with the victim.

While the type of victim contact described does require an early time commitment with the victim, it often saves considerable time later.<sup>95</sup> For example, a victim who is advised of the average timeline is less likely to call every few days or every week to find out what is happening.<sup>96</sup> A victim who has a clear understanding from the beginning of the case about what the law allows and who develops good rapport with the prosecutor is less likely to call the prosecutor’s supervisor or the news when a plea agreement disappoints the victim.<sup>97</sup> Frequently, these types of interactions in the beginning of a case also improve the discovery process, lessen the risk that a

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<sup>90</sup> Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, in 33 CRIM. JUST. 31, at 31 (Washington U. Sch. L., Legal Studies Rsch. Paper Series, Paper No. 19-03-04, Mar. 2019), [https://papers.ssm.com/sol3/Delivery.cfm/SSRN\\_ID3359801\\_code329869.pdf?abstractid=3359801&mirid=1](https://papers.ssm.com/sol3/Delivery.cfm/SSRN_ID3359801_code329869.pdf?abstractid=3359801&mirid=1) [<https://perma.cc/WY47-6KYN>].

<sup>91</sup> *What Is A Victim Advocate?*, VICTIM SUPPORT SERVS., <https://victimsupportservices.org/help-for-victims/what-is-a-victim-advocate/#:~:text=Victim%20advocates%20are%20trained%20to,through%20the%20criminal%20justice%20proceedings> [<https://perma.cc/UKP6-6Z7C>].

<sup>92</sup> *Id.*

<sup>93</sup> It is worth noting that in some prosecutor’s offices, the primary practical role of the victim advocate is more akin to a trial assistant than what is traditionally thought of as a victim advocate. During early interactions with a victim, the victim advocate’s role in the particular case and the prosecutor’s office generally should be explained honestly, with referrals made to other agencies for true victim advocacy if that is not a primary role of the prosecutor’s office victim advocate.

<sup>94</sup> *See, e.g.*, KY. REV. STAT. § 421.575.

<sup>95</sup> *See SART Toolkit: Resources for Sexual Assault Response Teams*, OFF. FOR VICTIMS OF CRIMES, [https://www.ncjrs.gov/ovc\\_archives/sartkit/focus/heal-print.html](https://www.ncjrs.gov/ovc_archives/sartkit/focus/heal-print.html) [<https://perma.cc/H6G8-LPJZ>].

<sup>96</sup> *See id.*

<sup>97</sup> Wilson et al., *supra* note 14, at 14.

prosecutor will be unable to find a victim during the pendency of the case, and allow for quicker contacts throughout the remainder of the case.

### *B. Giving Back Control*

As described above, a loss of control is often associated with trauma.<sup>98</sup> Thus, empowering survivors, even in small ways throughout their case, may help in their healing process and minimize re-traumatization caused by the system. There are some simple ways to let a trauma survivor regain a sense of control through their case. Letting them choose a seat at an in-office meeting and decide whether the door remains open or is closed.<sup>99</sup> Permitting them to take notes or write down questions during meetings or court proceedings.<sup>100</sup> Suggesting several alternative dates or times for a meeting and letting them choose.<sup>101</sup> Conferring with them as to dates when they are unavailable prior to scheduling a trial date.<sup>102</sup> Conferring with them regarding possible plea offers prior to extending an offer to the defendant.<sup>103</sup> It also accords a victim a sense of control to advise them in advance any time a meeting or court appearance is expected to involve a recounting of the trauma they experienced. It is also helpful to share any limitations on your time or possible interruptions prior to or at the beginning of any meeting with a trauma survivor.<sup>104</sup>

Here is a more specific example of a way to give a trauma survivor some sense of control during a trial—a proceeding during which they will have little control. For many trial attorneys, there is strategy in position in the courtroom.<sup>105</sup> During cross-examination, an attorney often chooses to stand across the courtroom away from the jury so that the witness, when focused on answering the attorney's questions, will naturally look in the attorney's direction instead of making eye contact with the jury.<sup>106</sup> In a case where the strength of a witness's testimony might be weakened due to the witness's feelings of fear or shame in front of the defendant, an attorney questioning the witness might purposefully stand near or in the line of sight of the defendant so that when the witness naturally looks to the questioner, the

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<sup>98</sup> Herman, *supra* note 36, at 597.

<sup>99</sup> *Id.* at 574.

<sup>100</sup> *Id.*

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

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

<sup>103</sup> *Id.*

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

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

witness will see and be influenced by his or her feelings about the defendant.<sup>107</sup> A simple strategy to help a witness avoid or at least minimize the re-traumatization that can occur at trial is witness preparation that includes a description of this kind of technique and explicitly gives the witness permission to look elsewhere besides at the defendant or the questioning attorney when answering the attorney's questions.<sup>108</sup>

Trauma survivors should be informed of actions they can take to have some control or participation in the process and provide assistance, as needed, to take those steps.<sup>109</sup> For example, in a jurisdiction that utilizes the VINE system for notifications regarding changes in custody status, trauma survivors should be told about the service and how to register.<sup>110</sup> Assistance in registration should be provided if needed.

Legal and victim advocates should recognize the whole person and not just their place in the justice system.<sup>111</sup> This means asking questions about the survivor's well-being and needs.<sup>112</sup> It requires connecting the survivor with available community resources.<sup>113</sup> Is the survivor escaping domestic violence? Do they have a safety plan in place? They should be connected with local domestic violence resources to help with this. Is the survivor homeless or food insecure? Shelter and food pantry information should be available. Is the survivor in need of counseling? Referrals for appropriate counselors should be made. Importantly, none of these resources should be forced upon a trauma survivor.<sup>114</sup> They should be offered and explained. There should even be an effort to make the first call with the trauma survivor, especially for calls for emergency mental health services or domestic violence or rape crisis calls. If a survivor rejects a referral recommendation, written information about the referral should be offered, and the survivor's decision should be respected without judgment.

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<sup>107</sup> *Id.* at 577

<sup>108</sup> Valentine et al., *supra* note 29, at 48.

<sup>109</sup> Herman et al., *supra* note 36, at 575.

<sup>110</sup> See *VINE Info*, COMMONWEALTH KY. DEP'T CORR., <https://corrections.ky.gov/Victim-Services/Pages/VINE-Info.aspx> [https://perma.cc/NU4S-KZX8].

<sup>111</sup> Herman et al., *supra* note 36, at 579.

<sup>112</sup> *Id.* at 574.

<sup>113</sup> Valentine et al., *supra* note 29, at 48.

<sup>114</sup> *Id.* at 46.

*C. Litigation Strategies to Avoid Trauma*

Litigation strategies can also be employed to help minimize trauma caused by the justice system.<sup>115</sup> Most states have a statutory or constitutional Crime Victim's Bill of Rights.<sup>116</sup> These accord valuable rights, such as the right to be heard and have safety considered in bail proceedings; the right to be present during trial; the right to notice of court proceedings and changes in custody status; the right to restitution; and the right to be heard at sentencing.<sup>117</sup> In many states, a victim can personally invoke their rights, can retain an attorney to invoke them, or can have a prosecutor invoke them.<sup>118</sup> Invocation of rights can be as simple as, "Your Honor, Survivor A is here and would like to be heard by the court before it imposes a sentence on the defendant." It can be as complex as an original action in an appellate court for a writ of mandamus to require a trial court to allow a victim to be present during court proceedings.<sup>119</sup> Practitioners should be aware of the laws in their jurisdiction and should not be hesitant to call on national resources, like Marsy's Law<sup>120</sup> and the National Crime Victim Law Institute,<sup>121</sup> for litigation assistance to help enforce victims' rights.

Aside from invoking specific statutory or constitutional rights of victims, there are other litigation strategies that can minimize trauma.<sup>122</sup> For example, many states have laws permitting crime victims to testify outside the presence of defendants under certain circumstances.<sup>123</sup> In Kentucky, one such law is Kentucky Revised Statute (KRS) 421.350.<sup>124</sup> It allows that when a compelling need is shown, a child victim and witness of certain crimes or a child who is alleged to be dependent, neglected, or abused and under the age of twelve, may testify outside the presence of the defendant via closed-circuit television or recorded testimony.<sup>125</sup> A motion is required, and it must be shown that there is a "substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced

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<sup>115</sup> Herman, *supra* note 36, at 575.

<sup>116</sup> *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT'L INST. JUST. RSCH. IN BRIEF (National Institute of Justice, Washington, D.C.), Dec. 1998, at 1, <https://www.ojp.gov/pdffiles/173839.pdf> [<https://perma.cc/Z9X5-7P2L>].

<sup>117</sup> See KY. CONST. § 26A.

<sup>118</sup> *Id.*

<sup>119</sup> 18 U.S.C. § 3771(d)(3).

<sup>120</sup> MARSY'S LAW, <https://www.marsyslaw.us> [<https://perma.cc/RHK5-KABL>].

<sup>121</sup> NATIONAL CRIME VICTIM'S LAW INSTITUTE, <https://ncvli.org> [<https://perma.cc/K5F7-XVDU>].

<sup>122</sup> Herman, *supra* note 36, at 574.

<sup>123</sup> KY. REV. STAT. § 421.350

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

by the defendant's presence."<sup>126</sup> Meeting the burden for such a motion can be difficult and often requires expert testimony.<sup>127</sup> Even in cases where that burden cannot be met or where the child is older than twelve, it may be possible to use "procedures" "to shield children from visual contact with [the] alleged perpetrator" during their testimony if KRS 26A.140 is invoked.<sup>128</sup> Importantly, though these protections exist in the law, their effectiveness in assisting trauma survivors is often dependent on prosecutors, who are legal practitioners that do not actually represent the survivor, knowing of and understanding their application.<sup>129</sup> Invoking the protections of these laws also requires communication, cooperation, and good rapport between the trauma survivor and the legal professional.<sup>130</sup> If an attorney does not understand trauma, the attorney is unlikely to recognize the need for this kind of protection in sufficient time to file the necessary motions and gather the necessary proof to aid the survivor through application of these laws designed for their protection.

In our post-COVID world, litigation has met technology in a way it never had before. As such, it might be particularly useful in non-criminal cases, where the perpetrator does not have a constitutional right to confrontation, to consider alternatives to live, in-person testimony in cases where such testimony poses a severe risk of re-traumatizing the survivor.<sup>131</sup> Depositions are being successfully taken remotely, and most hosting software likely has options that would allow the survivor to testify without seeing the perpetrator on screen, even if the perpetrator is participating in the call.<sup>132</sup> Consider other accommodations as needed for the safety of the survivor. In one recent case handled by the authors, for example, a survivor of sexual assault had significantly and purposefully changed her appearance in the years following the assault, and she was fearful that the perpetrator would see her during her testimony and now be able to recognize her again. An order was secured that

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<sup>126</sup> § 421.350(5).

<sup>127</sup> See *Kurtz v. Commonwealth*, 172 S.W.3d 409, 411 (Ky. 2005).

<sup>128</sup> See *Walker v. Commonwealth*, 548 S.W.3d 250 (Ky. 2018).

<sup>129</sup> Herman, *supra* note 36, at 754.

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

<sup>131</sup> *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW RSCH. CTR. (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> [<https://perma.cc/RYJ7-2M3U>].

<sup>132</sup> Steven K. Davidson, Michael J. Baratz & Molly Bruder Fox, *Witnesses During COVID Times: Remote Depositions, Virtual Testimony, and Unavailability*, STEPTOE (Sept. 1, 2020), <https://www.steptoelaw.com/en/news-publications/witnesses-during-covid-times-remote-depositions-virtual-testimony-and-unavailability.html> [<https://perma.cc/BX6J-G6PB>].

required the perpetrator to participate by audio only in the remote deposition so that he would not be able to see the survivor.

Enforcement of rape shield laws is another effective litigation strategy to help minimize trauma to survivors of sexual assault.<sup>133</sup> These laws are designed “to protect alleged victims of sex crimes against unfair and unwarranted assaults on character.”<sup>134</sup> They have application in criminal and civil cases.<sup>135</sup> Typically, these rules require notice to the victim and a hearing prior to trial before admission of evidence of other sexual conduct of the victim can be admitted during the trial.<sup>136</sup> It is important for practitioners to know the procedural requirements as well as the substantive requirements of the relevant rules and be prepared to protect survivors from the humiliation and shame of having their other sexual encounters exploited to assault their character.<sup>137</sup>

Not all effective litigation strategies are based on specific rules of law designed to protect victims.<sup>138</sup> Rather, one of the most effective litigation strategies is to know and vigorously seek to enforce the rules of evidence. “Bad character” evidence that can humiliate a victim can often be excluded by proper application of the rules of evidence regarding character and probative value of evidence.<sup>139</sup> Similarly, details of prior criminal misconduct can usually be excluded by proper application of the rules of evidence.<sup>140</sup>

In criminal, civil, and family court cases, litigation might be pursued to restrict the perpetrator’s personal access to certain information such as psychological evaluations, forensic interviews, and photographs of the victim.<sup>141</sup> Applying for a protective order to prevent the perpetrator’s counsel from providing copies of these items to the perpetrator personally can be effective. Such orders are generally available to protect survivors “from annoyance, embarrassment, oppression, or undue burden or expense” through the discovery process.<sup>142</sup> Similarly, attorneys might seek to have

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<sup>133</sup> See *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009).

<sup>134</sup> *Id.* at 715 (quoting Robert G. Lawson, *Ky. Evidence Law Handbook* § 2.30[3] (4th ed. 2003)).

<sup>135</sup> See KY. R. EVID. 412.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *Katirai*, *supra* note 1, at 118.

<sup>139</sup> See KY. R. EVID. 403; KY. REV. STAT. § 404; KY. R. EVID. 608; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010) (noting court properly excluded evidence that victim was a “crack whore” who used crack cocaine and marijuana on a daily basis).

<sup>140</sup> See KY. R. EVID. 609.

<sup>141</sup> See Jessica Mindlin & Liani Jean Heh Reeves, *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, NAT’L CRIME VICTIM LAW INST. AT LEWIS & CLARK L. SCH. (2005), <https://law.lclark.edu/live/files/6471-confidentiality-and-sexual-violence-survivors-a> [<https://perma.cc/RU7S-XEWQ>].

<sup>142</sup> KY. R. CIV. P. 26.03.

certain items sealed in the record so as to prevent the public from having access to those items.<sup>143</sup> This could limit public disclosure of private details, helping secure both the safety and dignity of the victim.

Steps should also be taken to protect any disclosure of personal records, such as psychological records of the survivor.<sup>144</sup> Attorneys should be familiar with and prepared to enforce the higher standards required to obtain psychological records. In Kentucky, for example, a criminal defendant seeking access to a crime victim's psychological records must present "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence."<sup>145</sup>

These are just a few of the many litigation strategies that may help ease the toll the justice system takes on trauma survivors. Importantly, even when the strategies are unsuccessful, it is validating for a trauma survivor that someone was willing to take action to attempt to protect them.

#### IV. TRAINING ACTIVITIES

If the justice system is going to better serve trauma survivors, training for justice system participants is vital.<sup>146</sup> This means training for the lawyers handling cases involving trauma survivors. But it also means training for judges; court clerks and administrative staff; court security; victim advocates; and probation and parole officers.<sup>147</sup> Training should emphasize the neurobiology of trauma, the shared experiences of victims of trauma, empathy-building activities, and the laws that can be used to protect trauma survivors. Training should be offered on a regular, continuing basis.<sup>148</sup> It should be in concert with local agencies, providers, and non-profit organizations that provide services to survivors of trauma in the local area and should include learning how to make useful referrals to these agencies.<sup>149</sup>

There should be follow-up to ensure that training is being applied in various areas of the justice system.<sup>150</sup> For example, what is the response of administrative staff when a distraught trauma survivor calls to report that they

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<sup>143</sup> Mindlin & Reeves, *supra* note 141.

<sup>144</sup> *Id.*

<sup>145</sup> Commonwealth v. Shaw, 600 S.W.3d 233, 238 (Ky. 2020) (quoting Commonwealth v. Barroso, 122 S.W.3d 554, 564 (Ky. 2003)).

<sup>146</sup> *Trauma-Informed Care*, KY. CABINET FOR HEALTH AND FAM. SERV. (Apr. 1, 2015, 8:53 AM), <https://dbhdid.ky.gov/dbh/tic.aspx> [<https://perma.cc/3DJG-6YK8>].

<sup>147</sup> Katirai, *supra* note 1, at 111.

<sup>148</sup> *See supra* section II.

<sup>149</sup> *See supra* section III.A.

<sup>150</sup> *Id.*

were not notified of a bail hearing? Or what is the response of court security when a survivor of trauma asks for an escort to their vehicle because they fear retaliation? The answer sought to both of these questions is more than just fulfilling the request—i.e., giving the post-hearing status of the case or providing an escort to the vehicle.<sup>151</sup> It is about the attitude accompanying the response.<sup>152</sup> Was it a snide—well, it is the prosecutor’s job to notify you, but I guess I can tell you what happened? Or a, well, I am sorry that happened. Let me see what I can find out for you, followed by the giving of an update and useful information about how the individual can register for automatic notifications; the phone number and name of the prosecutor on the case; and a referral to a domestic violence service agency for safety planning since the defendant was released on bail.

#### A. *The Crime Survivor Star Activity*

This activity was designed by the authors, adapted from the “Coming Out Stars” activity by the University of Southern California LGBT Resource Center.<sup>153</sup> The activity aims to emphasize the contributions that everyone can all make toward building our community’s capacity to support the healing journeys of crime victims.

Participants choose a colored paper star at the beginning of the training (blue, orange, yellow, green, purple, or red). They are then led through scenarios concerning various stages of the criminal justice process—i.e., bail hearing, plea negotiations, and sentencing. There are several variations of each scenario, with some characters in the scenarios responding in a trauma-informed way and others not. Some of the scenarios involve appropriate communication, notification, and consultation with the survivor. Others do not. At the end of each scenario, a color is assigned to each variation, and the participants who have that color star are asked to leave their star untouched, bend back one of the points, or tear off one of the points—depending on the level of trauma that was inflicted upon the survivor by the justice process in that scenario.

At the end of the exercise, some stars are still whole, some have points bent back or are missing some or all of their points. The activity shows that different actors can be responsible for trauma throughout the justice process, and that some of the trauma inflicted by the justice system is permanent.

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<sup>151</sup> See *supra* section III.

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

<sup>153</sup> See Jeff Pierce, “Coming Out” Stars, UNIV. SO. CAL. (2015) <https://lgbtrc.usc.edu/files/2015/05/Coming-Out-Stars.pdf> [<https://perma.cc/N8XB-F27R>].



Following the activity, participants are guided through a discussion in which they explore where trauma was inflicted and how it could have been avoided, as well as where trauma was avoided and what actions helped. Participants leave with practical suggestions about how they, in their differing professional capacities, can minimize trauma experienced by survivors of trauma. The goal is for participants to recognize the power they have in how they interact with victims, building a foundation for trauma-informed advocacy.

*1. Script.* — Imagine you are a victim and that this star represents your world, with you in the center. Start by writing your name in the center of the star, making it your very own star. You are at the beginning of your journey toward justice and healing, and you have never interacted with the criminal justice system before now. Gently crumple your star into a ball and then open it up again. The crinkled state of your star represents the traumatized state in which you enter the system.

As a crime victim, your world has been turned completely upside down. You no longer feel safe in your own home or in your own skin. You often have panic attacks and cannot remember the last time you slept through the night without waking up drenched in a pool of sweat from a flashback nightmare. You just want to feel safe again, and you believe that will only happen once justice is served. *Pick any point of the star and write the word “safety.”*

Because of the victimization you endured, your sense of trust is shattered. Now, you find it very difficult to trust other people and to trust the world around you. And importantly, you find it difficult to even trust yourself—you feel a total loss of control over your own safety and your own life. *On another point of the star, write the word “control.”*

As a crime victim, you feel voiceless. Your voice was silenced by your perpetrator. But each time you speak the truth, each time you use your voice, you feel empowered. What victims need in the aftermath of the crime is to feel heard and to feel validated, and you look to the justice system for that validation, and as a way to regain your voice. *Choose another point on the star and write “be heard.”*

You know that being part of the system is an important component of your healing journey on this path to justice. You want to be at every hearing, and you want to know what is being said about the case and about you more generally. You already feel a loss of control in your life, and you do not want to feel in the dark about the case. *On this point of your star, write the word “informed.”*

Finally, on the last point of your star, *write down the word “location.”*

Turn to the point of your star where you have written “safety.” The defendant has been arrested and charged, and is brought before a judge for arraignment and consideration of bail.

- If you have a blue star, you received notification prior to arraignment and were given the opportunity to express your preferences regarding bail. Because of your presence, the judge takes your safety into consideration when setting bail, and though the defendant is released on low monetary bail, the judge imposes certain conditions, including a no contact order and home incarceration.
- If you have a yellow or green star, you were not contacted prior to arraignment, but immediately thereafter. Your safety was not taken into consideration when setting bail, but you were contacted in time to take safety precautions. Please fold back the point of this star.
- If you have a red, orange, or purple star, you were not contacted prior to arraignment *or* afterwards. You received no notice, your safety was not considered, and you only learned of their release when you ran into him at the store. Please tear off this point and drop it on the ground.

Next, turn to the point on your star with the word “control.”

- If you have a green or blue star, the prosecutor contacts you upon receiving the case. She explains the process thoroughly and invites you to share as much or as little as you want about your experience. She asks you what you would like to see happen, and gives you an honest assessment of what you want versus what the law provides for. Later, the prosecutor discusses a plea offer with you, explaining in detail the reasons the offer is being made and the benefits of a plea versus trial. You disagree with the plea offer, and the prosecutor advises the court of your disagreement at the plea. You are given the opportunity to express your disagreement in court. The judge accepts the plea over your objection, but expresses empathy with your position. Even though it was not the outcome you wanted, you never felt in the dark because you were consistently informed, involved, and heard.
- If you have an orange or yellow star, the prosecutor takes a lengthy, planned medical leave, and you are not notified before

the prosecutor leaves the office. The next court proceeding is when you are supposed to be scheduled for trial, and when you arrive, you are completely taken off guard to see a different prosecutor. When you try to ask the prosecutor questions about your case, they respond “I do not really know anything about your case. I am just standing in for the other prosecutor because she had a baby and will not be back for a couple of months. We will just get another court date after that, and you can talk to her then.” The prosecutor standing in does not get a trial date and the case is passed to another date three months out. Though your case will ultimately go to trial, this experience made you feel abandoned by the prosecutor, and you have lost trust and faith in their office. Please fold back this point of the star.

- If you have a red or purple star, the prosecutor leaves the office for a new job. You are not notified. For two weeks, you have been calling the office trying to get an update on your case. All you are told is that the case has not been assigned to a new prosecutor yet, and they will contact you when that happens. You ask when you can expect to get that call, and the receptionist does not know but says soon. You call back three days later. The receptionist remembers you and says “I told you they would call you. I do not know how long it is going to be before it gets assigned and the new prosecutor gets to review the case and call you.” You call back a week later. This time the receptionist says, “All you are doing is wasting my time and your time. I cannot magically assign the case to someone or get someone to call you back. They will call you when something happens.” You try to be patient, and you do not want to be treated like that again so you wait for their call. Three weeks later, you run into the defendant at the mall. You find out that two days after your last call, the new prosecutor offered a plea agreement that allowed the defendant to be released immediately. When you call to talk to the prosecutor, the prosecutor casually says, “We tried to notify you, but the phone number we have on file was not working.” When you explain that you had been calling the office and were treated rudely, the prosecutor says, “That is just how the receptionist is. But, honestly, it would not have made any difference if I would talked to you first. It would have been the same agreement. I am driving this bus.” If you have a red or purple star, please rip off this point . . . you feel completely

forgotten as a survivor because of the trauma caused by the system that is supposed to help you.

Turn to the point of your star with the word “heard.” You arrive for final sentencing. The offender is expected to get a ten-year sentence, but probation is an option. It will be up to the judge to decide whether to probate the sentence or send the defendant to prison.

- If you have a green or blue star, the prosecutor tells the judge that the prosecution objects to probation and that you are present and would like to speak to the court. You are permitted to give victim impact testimony. You stand up and say out loud for the first time ever over a period of years what this crime meant to your life. You are able to speak directly to the defendant and to the court about your experience. After hearing your testimony, the judge grants probation but speaks to you with empathy, noting your strength and resilience. Though this was not the outcome you wanted, this moment changed everything for you: being given the power back to own that story and situation, and to use your voice and to be heard.
- If you have a yellow or orange star, you have been practicing your victim impact statement, and though you are nervous, you know that using your voice and being heard are necessary to your healing. The prosecutor tells the judge that the prosecution objects to probation and that you, too, object and are present and would like to address the court. The judge does not allow you to give your victim impact statement orally. Without even glancing at it, the judge tucks your written testimony into a folder before sentencing the defendant to prison. Fold this point back, because even though this was the outcome you wanted, having your voice silenced again feels as devastating as the crime itself.
- If you have a red or purple star, the prosecutor tells the judge that the plea agreement involved the prosecution taking no position on probation and leaving it solely to the judge’s discretion. The prosecutor then tells the court that you are present and would like to be heard in opposition to probation before the judge makes a decision. The defense attorney objects and asks that you be subject to cross-examination, and the judge agrees. You are able to orally give your testimony, expressing your opposition to probation, explaining why you think the defendant is deserving of a prison sentence, and how the crime has affected you. You

feel empowered when you are finished. Then, the defense attorney cross-examines you for thirty-five minutes, asking about prior charges you had pending against you (that were dismissed), about your mental health history, intimate details about what you were doing in the forty-eight hours preceding the crime, etc. The prosecutor does not lodge a single objection, and the judge grants probation. You feel absolutely humiliated and revictimized by the experience, and you wish you had never gone through the process in the first place. Rip off this point on your star.

With only two points left on our stars, take a quick moment to have everyone hold up their stars and look around the room. Now, turn to the point on your star with the word “informed.”

- If you have a blue star, it has been three years since the defendant was convicted of a crime against you, and you receive notice that he is going to be considered for parole. The parole board informs you that you have the right to be heard and explains the process to you. You appear before the parole board and are given an opportunity to speak. A few weeks later, the parole board informs you that parole has been denied. Though your participation in the system takes an emotional toll on you, you feel empowered each time you use your voice, and you are relieved parole was denied.
- If you have an orange or green star, it has been three years since the defendant was convicted of a crime against you. The original prosecutor reaches out and tells you that the defendant has filed a motion to have the conviction vacated. The prosecutor asks to meet with you. At the meeting, the prosecutor explains that the law has changed significantly since the defendant was convicted, and the defendant’s conviction is very likely going to be vacated. The prosecutor explains that they will make legal arguments to try to keep the conviction, but they do not believe they will be successful. The prosecutor asks you if you have safety concerns if the defendant is released from custody immediately and offers to have you speak with a victim advocate to come up with a safety plan. The prosecutor makes the legal arguments. Two weeks later, you receive an automated notification call that the defendant will be released from custody later that day. Fold back this point on your star. You feel as though the system has failed

you by allowing for this to happen, but you still maintain trust in the system since the prosecutor kept you informed and took your safety considerations seriously.

- If you have a red, purple, or yellow star, three years after the defendant was convicted of a crime against you, you receive an automated notice that the defendant is going to be released from prison the following day. You panic. You call the prosecutor's office asking how this could be possible because the defendant received a ten-year sentence. You believe there has been a mistake. The original prosecutor on your case has left the office, and your case has not been reassigned to anyone else because the case is closed. The receptionist says they will transfer you to someone in records. The person in records says, "all I can tell you is that our paperwork shows that the defendant was sentenced to ten years in prison." You later learn that a ten-year sentence does not necessarily mean they will be in prison for ten years—because the case was pending for two years before it was resolved; because the defendant earned "good-time credit" and educational credit; and because there is a prison overcrowding problem, the defendant has been released without your input. Rip this point of your star off. You have lost all faith in the system.

Finally, turn to the last point on your star with the word "location." You want to be present for opening arguments so you can hear what is being said about the case—what is being said about the crime that happened to *you*. The prosecutor files a motion requesting that you can be present, but the defense objects citing rules of evidence.

- If you have a blue, yellow, or purple star, you live in a state that has constitutionally protected rights. You DO have the constitutional right to be present, to have an attorney, and to assert your rights. Therefore, your own attorney enters an appearance on your behalf. The attorney argues that your constitutional right to be present to the same extent as the defendant trumps any contrary rule of evidence. The prosecutor agrees. The judge agrees, and because your rights as a crime victim are constitutionally protected, you are able to be present during opening arguments. You live in one of thirty-six states where crime victims are provided constitutional rights that are meaningful and enforceable.

- If you have an orange, green, or red star, you live in a state that does not have constitutionally protected rights. You are a crime victim living in any of the following states: Montana, Wyoming, Arkansas, Minnesota, Iowa, West Virginia, Pennsylvania, New York, Delaware, Vermont, New Hampshire, Massachusetts, Maine, or Hawaii. You do NOT have constitutional rights and therefore, the judge finds that the rules of evidence prevail and you may not attend any part of the trial because you will be called as a witness by the prosecution. The judge says that because the rule is mandatory when invoked, the court has no discretion to vary from its application, even if the court thought there was reason. The defendant's constitutional rights outrank your statutory rights. Please rip off this point of your star.

[Have participants hold up their stars and look around the room.]

If you have a blue star, all of your points are still intact and your path to justice was lined with difficult, but healing, experiences that have helped you find your voice again. The court system was intimidating, and you had a lot of fear of the unknown, but you knew you wanted to be there every time so you could hear firsthand what was happening. You showed up for every court date, and even with a good prosecutor and victim advocate, you were still extremely nervous. You are thankful the prosecution provided you with the support and representation you needed throughout the overwhelming judicial process. The crinkled marks on your star remain, but they were not worsened by the system, and, overtime, they will become smoother.

If you have a green, yellow, or orange star, your path through the system has been very difficult. For some of you, you had moments where "justice was achieved" but you felt cast aside by the system, left in the dark without regard for your safety or dignity. For others, the outcomes of your journey were met with disappointments, ultimately not achieving the type of justice you expected or hoped for; but the people in the system treated you with respect and dignity, provided moments for you to use your voice, and listened with empathy. If you have a green, yellow, or orange star, you have one or two points that are gone, representing re-traumatization that may be permanent or considerably harder to heal from. The rest of your points are intact but folded down, and over time they will slowly come back to make you feel more whole.

If you have a red or purple star, the re-traumatization you have experienced extends the long-term implications of your victimization, and you have lost all faith in the justice system. Your voice was muted by an inaccessibility to participate in the criminal justice process, you were not

notified of hearings or release, and your safety was never considered. No one was brought to justice for the harm committed against you, and you have no hope of restitution. You feel helpless. The crime committed against you sent you into a spiraling state of depression, but you feel it is the justice system that is responsible for traumatizing you to the point where you are not even functional most days. The system that you thought was intended to help you has done nothing but caused you more harm and trauma.

2. *A Note on Processing the Activity.* — The authors strongly suggest that the activity should be led by someone qualified to guide participants through a trauma-informed post-activity processing. Consider opening the discussion with an open floor for initial reactions or thoughts. Ask participants to share how it felt to have their color star and to watch the experiences of the other colors. Guide participants through exploring what went wrong and how it could be improved. Encourage participants to notice what went right, what examples were trauma-informed, and how the activity illuminated the experience of a victim in the system. Reflecting on their own roles in the system, participants should be encouraged to discuss how the activity informs the responses and actions they can take in the future.

#### CONCLUSION

Truth, cooperation, and healing are more likely to follow when system actors understand trauma and adapt their practices and legal strategies to proactively preserve crime victims' rights. Reporting of crime is more likely to happen when victims are confident that they will be treated with dignity and respect, as well as consulted about what will likely happen to the person who victimized them. In other words, justice is better served through a trauma-informed lens.