

Titimbangin: Innocent Until Proven Guilty at the Expense of the Best Interests of the Child — Reflections on the Ramifications of People vs. Agao on Child Victim-Witnesses

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I. BACKGROUND	719
II. TEXTUAL SURFACING OF AAA’S JUSTICE JOURNEY IN THE CASE OF <i>PEOPLE VS. AGAO</i>	722
III. LIMITATIONS OF THE STUDY: WHEN ANATOMY AND PHYSIOLOGY MEETS LEGALESE — PSEUDO-MEDICAL ANALYSIS OR FAKE MEDICINE?	729
IV. CRITICAL RESPONSE FROM FEMINISTS, SURVIVORS, AND CIVIL SOCIETY TO THE SUPREME COURT’S LANDMARK DECISION: PRESS RELEASE AND MEDIA REACTIONS	738
V. RETRACING AGAO’S ABUSIVE BEHAVIORS, DYNAMICS OF CSA AND GROOMING	750
VI. SUFFERING IN SILENCE: STRUGGLES OF RAPE VICTIMS IN PRE-REPORTING AND TRIAL STAGES	754
A. <i>The Elephant in the Room: Underreported Rape Cases</i>	

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The views expressed by the Author are her own and do not necessarily reflect the opinions of her current employer or affiliated projects.

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B. <i>How the Legal Framework Can Inadvertently Perpetuate Harmful Stereotypes and Misconceptions About Sexual Violence</i>	
VII. INTERSECTIONALITY: A HELPFUL GUIDE IN UNPACKING CSA DYNAMICS.....	760
A. <i>Consent vis-à-vis Positional and Situational Inequality</i>	
VIII. EXPLORATION OF POTENTIAL EFFECTS ON SURVIVORS’ ACCESS TO JUSTICE AND REPORTING RATES.....	764
IX. BROADER IMPLICATIONS OF AGAO ON LEGAL STANDARDS FOR PROSECUTING CSA CASES.....	767
A. <i>Adversarial Nature of CSA Trials, i.e., “One Judicial Rape Then He Goes to Jail”</i>	
B. <i>Amendment of the Code of Professional Responsibility: Use of Gender- and Child-Sensitive Language</i>	
X. INNOCENT UNTIL PROVEN GUILTY VS. BEST INTERESTS OF THE CHILD.....	778
XI. A FINAL NOTE TO THE FINAL NOTE.....	785

TRIGGER WARNING: This Article contains reference to rape and other forms for sexual assault with graphic information relevant to the legal issue which may be triggering to some readers.¹

I. BACKGROUND

In the criminal justice system, sexually based offenses are considered especially heinous. In New York City, the dedicated detectives who investigate these vicious felonies are members of an elite squad known as the Special Victims Unit. These are their stories.

— Law & Order: Special Victims Unit, Title Sequence²

The dramatic opening of *Law & Order: Special Victims Unit* paints a compelling picture of relentless pursuit of justice.³ The procedural’s success for over 25 seasons can be attributed to its gripping storylines and complex characters that

1. For further assistance, contact the Ateneo de Manila University’s University Gender Hub. It provides case response services, gender sensitivity trainings, and safe spaces. Their contact details are as follows: +63284266001 loc 5043-44 and genderhub@ateneo.edu.

2. *Law & Order: Special Victims Unit* (Wolf Entertainment Universal Television Sept. 20, 1999) (The quote is the voice-over of the show’s title sequence).

3. See generally *id.*

resonate with viewers.⁴ Its ability to tackle sensitive and timely issues with a blend of drama and realism has kept audiences engaged and invested in the quest for justice.⁵ This relentless pursuit of justice is particularly resonant for survivors of gender-based violence and child victims, whose struggles and perseverance underscore the show's narratives.⁶ Their harrowing journeys through the legal system reveal the often painful and arduous process of seeking accountability and protection.⁷

The reality behind the scenes, however, is often far more complex and troubling. Beneath the surface lies a broken child protection and criminal justice system that fails to safeguard the most vulnerable.⁸ The discrepancy — once described in an article as “[s]acrificing the [c]hild to [c]onvict the [d]efendant: [s]econdary [t]raumatization of [c]hild [w]itnesses”⁹ — starkly highlights the contradictions within the criminal justice system. While the presumption of innocence until proven guilty¹⁰ is a foundational principle that upholds the value of due process,¹¹ the rights of victims — particularly child victims of statutory rape and sexual abuse — are frequently compromised.

The power imbalance between the rights claimants — victim survivors of gender-based violence — and the constitutionally protected rights of the aggressor, often male, exacerbates the issue within the criminal justice system. #MeToo survivors,¹² led by Rose McGowan and Ashley Judd, refer to an aspect of it as institutional betrayal.¹³ The Author hopes that the title of this

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See generally *People v. Agao*, G.R. No. 248049, Oct. 4, 2022, available at <https://sc.judiciary.gov.ph/248049-people-of-the-philippines-vs-efren-agao-y-anonuevo> (last accessed Jan. 31, 2024).

9. See generally 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. POL’Y & ETHICS J. 239 (2011).

10. PHIL. CONST. art. III, § 14 (2).

11. PHIL. CONST. art. III, § 1.

12. See generally *Me Too, Survivor Story Series*, available at <https://metoomvmt.org/explore-healing/survivor-story-series> (last accessed Jan. 31, 2024) [<https://perma.cc/X9JV-JUFY>].

13. *Id.*

Article somehow manages to capture the imbalance and embedded injustice — *innocent until proven guilty at the expense of the best interests of the child*.

While the presumption of innocence until proven guilty is a fundamental principle that upholds the value of due process,¹⁴ it often comes at the expense of the victims' rights.¹⁵ In cases of statutory rape and sexual abuse, child victims are subjected to rigorous scrutiny to establish their credibility,¹⁶ resulting in secondary traumatization and revictimization.¹⁷ Should the protection of due process really come at the expense of the victim-turned-testifying witness?

This discrepancy between the idealized depiction of justice and the grim reality underscores the urgent need for reform in how the justice system handles sensitive cases involving gender-based violence. It is not to suggest that the core construct of the rule of law should be discarded. As a social worker's study describes, the system is not broken — it was designed that way.¹⁸ Gender-based violence, including violence against children, is considered especially heinous — yet, it must still adhere to the principle of “not being believed until proven otherwise.”¹⁹

Can a legal framework be developed that protects the rights of the accused while ensuring justice and support for victims? Is it possible to maintain due process without sacrificing the well-being and dignity of victim survivors? These questions highlight the gendered tension within the adversarial criminal system. Amidst complexities and institutional limits, one might argue for the urgent need for thoughtful and comprehensive reform. But, is achieving this goal feasible?

While it is true that the landmark decision seemingly made accommodations for child witnesses and victims,²⁰ the discussion under the section entitled “Circumspection Required in Appreciating Testimonies of

14. PHIL. CONST. art. III, §§ 1 & 14 (2).

15. *See generally Agao*, G.R. No. 248049.

16. *See id.* n. 19.

17. *Id.* (showing that AAA was crying when she testified).

18. Channele A. Jones, *The System Isn't Broken, It Was Designed This Way: A Critical Analysis of Historical Racial Disadvantage in the Criminal Justice System* (Faculty Paper, Hampton Institute, July 2013), *available at* <https://www.hamptonthink.org/read/the-system-isnt-broken-it-was-designed-this-way-a-critical-analysis-of-historical-racial-disadvantage-in-the-criminal-justice-system> (last accessed Jan. 31, 2024) [<https://perma.cc/2767-6Y2M>].

19. *See* PHIL. CONST. art. III, § 14 (2).

20. *See Agao*, G.R. No. 248049, at 26–27.

Child Victims in Rape Cases,”²¹ unwittingly reified rape myths and misogynistic misconceptions that are detrimental to the best interests of the child.²²

Nevertheless, amid these formidable and gender insensitive challenges, there are promising developments in the form of new laws and initiatives aimed at tackling these entrenched issues. Efforts such as enhanced victim support services, reforms in evidentiary standards, and the phased implementation of Republic Act. No. 8369 or the Family Courts Act of 1997²³ signify significant strides towards achieving a more victim-sensitive court process and safeguarding the best interests of the child. This Article revisits the pivotal 2022 landmark case *People of the Philippines vs. Efrean Agao y Anonuevo*,²⁴ as it addresses the inherent tensions and contradictions within adversarial justice systems, while also spotlighting emerging efforts and potential pathways for reform that offer optimism for a more equitable and child-sensitive, and perhaps, even trauma-informed system.²⁵

II. TEXTUAL SURFACING OF AAA’S JUSTICE JOURNEY IN THE CASE OF *PEOPLE VS. AGAO*

Kapag sa tingin mo nahihirapan ka na o naiiyak ka na[,] tandan mo, nasa malapit lang ako[:] o kapag sa chamber naman ng judge, katabi mo lang ako.

— Social Worker (SW) Melanie Olaño during Witness Preparation²⁶

21. *Id.* at 27–29.

22. *See id.*

23. An Act Establishing Family Courts, Granting Them Exclusive Original Jurisdiction Over Child and Family Cases, Amending Batas Pambansa Bilang 129, as Amended, Otherwise Known as the Judiciary Reorganization Act of 1980, Appropriating Funds Therefor and for Other Purposes [Family Courts Act of 1997], Republic Act. No. 8369 (1997). *See also* Implementing Rules and Regulations of the Social Aspects of Republic Act No. 8369, Otherwise Known as the Family Courts Act of 1997, A.M. No. 22–04–06–SC (Apr. 19, 2022).

24. *People v. Agao*, G.R. No. 248049, Oct. 4, 2022, *available at* <https://sc.judiciary.gov.ph/248049-people-of-the-philippines-vs-efren-agao-y-anonuevo> (last accessed Jan. 31, 2024).

25. *See id.*

26. Interview *with* Mellanie Olaño, Senior Lead NAD Advocacy, International Justice Mission, *in* Metro Manila, Philippines (Jan. 31, 2024).

In the Philippine criminal justice system, rape is considered as a heinous crime.²⁷ In June 2014, two years after the last sexual assault on AAA, the child victim survivor finally disclosed the abuse by her mother's former common-law partner to her aunt.²⁸ The aunt, in turn, confided in a friend who happened to be a police officer.²⁹ When, finally, AAA bravely confided in her father, CCC, he accompanied her to the police station.³⁰ This is her story.

AAA was sixteen when she testified against Efren Agao, her mother's former common law partner.³¹ She was 10 years old, and was in fourth grade, when Agao,³² as alleged in the information —

by means of force and intimidation, [Agao] did then and there [willfully], unlawfully[,] and feloniously have sexual intercourse with said minor victim, against her will and without her consent, thereby subjecting the said victim to sexual abuse, which debased, degraded[,] and demeaned her intrinsic [worth] and dignity as a human being.³³

During cross examination, the prosecutor actively questioned the witness, delving into the details of the case as documented in the court records —

PROSECUTOR: Do you remember around July 2010 when you were Grade 4, as you were sleeping something happened between you and Efren?

AAA: Yes, sir.

Q: Where were you living at that time?

A: Canuway West.

Q: Before Canuway West, where were you living?

A: Northville I, Bignay.

Q: Will you tell us what happened at that time?

A: When I was sleeping, sir.

Q: Around what time was this?

27. *People v. Tulagan*, 849 Phil. 197, 337 (2019).

28. *Agao*, G.R. No. 248049, at 6.

29. *Id.*

30. *Id.*

31. *See id.* at 3 & n. 19. Based on the Information, she was born on Dec. 6, 1999, whereas she gave her testimony on Mar. 1, 2016 based on the date on the Transcript of Stenographic Notes. *Id.*

32. *Id.* at 3.

33. *Id.*

A: 7 [AM].

Q: As you were sleeping what happened?

A: He touched me on my vagina, sir.

Q: You said you were sleeping, when he was *hinihipuan ka*, what happened?

A: I felt that there is a *malikot na gumagapang sa hita ko*.

Q: So, when you say you felt, you woke up?

A: Yes, sir.

Q: And when you [woke] up, who did you see?

A: Efren Agao, sir.

Q: When you saw him what happened?

A: He immediately put his hand on my vagina and suddenly he removed his clothes and also removed my clothes.

Q: At that time, where was your mother?

A: She [was] in her place of work.

Q: Other than your mother, you and Efren, who else was living in that house at that time?

A: None, sir.

Q: When that happened[,] did you not shout to get the attention probably of your neighbor?

A: Not anymore, sir, because he told me not to tell anyone about it.

Q: After he undressed himself and you, by the way, who did he undressed first?

A: Him, sir.

Q: As he was undressing himself, did you not [try] to go out of the house?

COURT: Put on record that the witness is crying.

A: No, sir.³⁴

Following the trial court judge's instruction, it was put on record that the witness is crying.³⁵ The trial prosecutor did not ask for a recess.³⁶ There are

34. *Agao*, G.R. No. 248049, n. 19.

35. *Id.*

36. *See id.*

also no indications on record that AAA, had a support person next to her during her cross examination —

Q: As he was undressing himself, did you not [try] to go out of the house?

COURT: Put on record that the witness is crying.

A: No, sir.

Q: After he undressed you, what did he do?

A: He mounted on me, sir.

Q: After he mounted on top of you, what did he do?

A: He wanted to insert his penis in my vagina, sir.

Q: How did you know that he wanted to do that?

A: He told me, sir.

Q: Did you see his penis?

A: Yes, sir and I also felt it.

Q: Was it hard?

A: Yes, sir.

Q: But was he able to fully penetrate your vagina?

A: No, sir.

Q: Using the female doll, at what part of your vagina where his penis was at that time?

A: *Dito po sa may gitna.*

Q: Witness pointed to the pelvic area. When you say ‘*sa may gitna,*’ you mean *sa may hiwa?*

A: Yes, sir.

Q: Why he wasn’t [sic] fully inserted his penis?

A: I was fighting, sir.³⁷

After highlighting the emotionally charged testimony of AAA, the Supreme Court found a suitable case to cue in the most graphic judicial guidepost on rape to date.³⁸ The *ponencia* explained that “[d]emonstrably, AAA’s account in open court vividly described how appellant’s penis was hard and erect as he kept trying to penetrate her vagina as antecedent for full

37. *Id.* (emphasis omitted).

38. *See id.* at 22–26.

penetration, eventually succeeding to introduce his erect penis on the vulval cleft of her vagina.”³⁹ To reiterate, the discussion appreciated AAA’s testimony further pointing out how —

the crucial facts of the appellant’s erect penis and its touching of her vulval cleft (i.e., ‘*sa may gitna*,’ ‘*sa may hiwa*’) were established categorically and beyond doubt, and sufficiently established that the minimum penile-vaginal contact between the penis and the vulval cleft to enable a finding of consummated rape was, in fact, obtained.⁴⁰

There is so much more to AAA’s justice journey and survivor story. While it is true that the *ponencia* found the key magic words for purposes of illustrating a point, criminal law narratives within the confines of legalese, indeed, at best, can only distill so much. To demonstrate the textual distinctions vis-à-vis the limits of criminal justice, we use this table below:

AAA’s Survivor Story Per Court Record During Cross and Cross-Examination	AAA’s Abuse Per Information as filed in Valenzuela RTC	Agao’s Conviction G.R. No. 248049 En Banc
AAA vividly recalls being raped at least three times a week from June 2010 to January 2012. ⁴¹	Ruling of the Regional Trial Court two counts of Statutory Rape. ⁴²	SC Uses Clear, Straightforward Language in Discussion of Rape to Ensure Accuracy in Court Judgments. ⁴³
<i>Tanong: Ano naman ang mga sumusunod pang pangyayari noong unang beses ka niyang. gahasain noong July 2010?</i>	Crim. Case no. 1453-V-14 That sometime in July 2010, in Valenzuela City,	One count of Statutory Rape in Criminal Case No. 1453-V-14.

39. *Id.* at 36.

40. *Agao*, G.R. No. 248049, at 37.

41. *Id.* n. 19.

42. *Id.* at 7.

43. Supreme Court Public Information Office, SC Uses Clear, Straightforward Language in Discussion of Rape to Ensure Accuracy in Court Judgments, *available at* <https://sc.judiciary.gov.ph/sc-uses-clear-straightforward-language-in-discussion-of-rape-to-ensure-accuracy-in-court-judgments> (last accessed Jan. 31, 2024) [<https://perma.cc/YMK5-KU2G>].

<p>[Sagot]: <i>Nung natutulog po ako sa may Northville I, Bignay po [.] hinihipuan niya po ako sa ari [ko po] tapos inaalís [ko po] yung kamay niya tapos po nilalagay niya ulit. Tapos sinarado niya po yung pinto tapos inumpisahan niya [na po] akong gahasain. Hinuhubaran po niya ko pati rin po siya naghuhubad din tapos pumatong na po [sic] siya sa akin tapos pinipilit po niyang ipasok yung ari niya sa ari ko pero lumalaban po ako kaya hindi niya po naipapasok tapos po sinabi [ko po] na ayoko po tapos magagalit po siya [.] Sasabihin niya sa akin na wag na raw po akong lalapit at ako na rin daw po ang bahala sa pag-aaral ko. Natatakot po ako nung mga oras na yun.</i></p> <p>T: <i>Maaari mo bang sabihin kung ilang beses pa ulit nangyari yung sinasabi mong panggagahasa sa iyo ni Efren?</i></p> <p>S: <i>Simula nung unang beses niya kong gahasain, mga</i></p>	<p>Metro Manila, and within the jurisdiction of this Honorable Court, the above-named accused, being the step-father of herein minor victim AAA, who was then 10 years old, DOB: (December 6, 1999), by means of force and intimidation, did and there willfully, unlawfully[,] and feloniously have sexual intercourse with said minor victim, against her will and without her consent, thereby subjecting the said victim to sexual abuse, which debased, degraded and demeaned her intrinsic worth and dignity as a human being.</p> <p>CONTRARY TO LAW.⁴⁶</p> <p>Crim Case No. 1454-V-14</p> <p>That sometime in January 2012, in Valenzuela City, Metro manila, and within the jurisdiction of this Honorable Court, the above-mentioned</p>	<p>One count of Simple Rape in Criminal Case No. 1454-V-14 through sexual intercourse sentenced to suffer the penalty of <i>reclusion perpetua</i> for each count.⁴⁸</p>
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46. *Agao*, G.R. No. 248049, at 3.

48. *Id.* at 38.

<p><i>tatlong beses po sa isang linggo niya ako gahasain magpapalipas lang siya ng dalawang araw tapos uulitin na naman po niya yun. Nung lumipat po kami sa Canumay West noong January 2012, ganun pa rin po ginagawa niya sa akin [.] Palagi niyang dinidikit yung ari niya sa ari ko [.] hindi lang niya naipapasok kasi po lumalaban ako.⁴⁴</i></p> <p>Q: Did you see his penis? A: Yes, sir and I also felt it.</p> <p>Q: Was it hard? A: Yes, sir.</p> <p>Q: But was he able to fully penetrate your vagina? A: No, sir.</p> <p>Q: Using the female doll, at what part of your vagina where his penis was at that time? A: <i>Dito po sa may gitna.</i></p> <p>Q: Witness pointed to the pelvic area. When you say 'sa may gitna,' you mean <i>sa may hiwa</i>?</p>	<p>accused, being the step-father of herein minor victim AAA, who was then 13 years old DOB (December 16, 1999), by means of force and intimidation, did then and there [willfully], unlawfully[,] and feloniously have sexual intercourse with the said minor victim, against her will and without her consent, thereby subjecting the said minor to sexual abuse which debased, degraded and demeaned her intrinsic worth and dignity as a human being.</p> <p>CONTRARY TO LAW.⁴⁷</p>	
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44. *Id.* n. 17 (emphasis omitted and supplied).

47. *Id.* at 3.

A: Yes, sir.		
Q: Why [wasn't he able to] fully inserted his penis?		
A: I was fighting, sir. ⁴⁵		

The table above is not simply a matter of translation issues. Despite the fact that the Supreme Court's press release framed the landmark decision as using "clear, straightforward language in the discussion of rape to ensure accuracy in court judgments,"⁴⁹ the complexities go beyond mere language clarity. The Author sees it as a simplified snapshot of the interplay of "connections between the law as written by legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors."⁵⁰ Judging by the way the press release was picked up, discussed, and reacted to by Philippine news sites, it opened a can of worms on violence against women and children. It also highlighted the numerous ways the criminal justice system fails to understand these issues.

III. LIMITATIONS OF THE STUDY: WHEN ANATOMY AND PHYSIOLOGY MEETS LEGALESE — PSEUDO-MEDICAL ANALYSIS OR FAKE MEDICINE?

A huge part of the controversy about *Agao* is the Court's clarification on the minimum threshold of rape.⁵¹ As the banner headline of the Court-sanctioned

45. *Id.* at 36-37.

49. Supreme Court of the Philippines, *supra* note 43.

50. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1090 (1986). These elements connections were used by Susan Estrich to examine rape within the criminal law tradition in order to expose and understand that tradition's attitude toward women. This Yale Law Journal Article predates her book REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987). As described in her Wikipedia bio, "[i]n several of Estrich's books, including Sex & Power and The Case for Hillary Clinton, she discusses her experience as a survivor of rape. Her book Real Rape talks about the history of rape law in the United States." *Id.* See also 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110, §§ 6 & 9 (read § 6, in relation to § 9). It is an established Rule on Criminal Procedure that the Information must be sufficient. § 6, in relation to § 9, Rule 110 of the Rules of Criminal Procedure states that "[i]n the event that a qualifying or aggravating circumstance attended the commission of the crime, [§] 9 ordains that the same should be stated in ordinary and concise language, sufficient to inform the accused not only of the crime, but also the qualifying circumstances which attended its commission." *Id.*

51. See *Agao*, G.R. No. 248049, at 25-26.

press release on the landmark decision, the Supreme Court uses “clear, straightforward language in discussion of rape to ensure accuracy in court judgments.”⁵² The case in fact dedicated a full section of almost four pages entitled — “[c]larifying the parameters for appreciation of ‘slightest penetration’ in cases of rape by sexual intercourse through penile penetration.”⁵³ As discussed in the dissenting and concurring opinion of Justice Marvic Leonen —

While it is admirable that the [ponencia] has introduced a novel way to distinguish between the attempted and consummated stages of the crime (i.e.[,] rape is consummated only when the penis touches the vulval cleft of the *labia majora*), it is respectfully submitted that this kind of discussion may not be as progressive as the [ponencia] perceives it to be.

I fear that continuing with this type of erudition disregards the strides the law has made into not only reclassifying the crime of rape, but also into shaping our very notions of what rape is and how it could be committed.⁵⁴

Further on, this portion of his dissent resonates well with the well-placed rejection and reaction of Feminist Lawyer Claire and Gabriela Secretary General Clarisa Palce, as reported and picked up by news sites —

The [ponencia] is correct in stating that this Court has, in past cases, diverged from the ruling in *Orita*, resulting in different interpretations of what may constitute genital contact. However, instead of simply upholding the doctrine in *Orita* and stating that a partial touching of the genitals is as traumatic to the victim as full penetration, the [ponencia] went so much as to provide a pseudo-medical analysis, with the sole purpose of lessening a rapist’s liability. By providing an exhaustive and extensive description of the parts of the vagina to determine when rape is considered consummated, the *ponencia* has unwittingly limited the scope of rape.⁵⁵

Before proceeding further with this Article, it is crucial to address a key limitation of the study. This issue warrants the attention and further investigation of the Court, academia, organizations focused on violence against women and children, and those involved in legislative reform agendas. These are some of the grounded questions from child protection frontliners:

- (1) How come the High Court did not call doctors as *amici curiae* to clarify complex medical issues related to rape and sexual assault?

52. See generally Supreme Court of the Philippines, *supra* note 43.

53. *Agao*, G.R. No. 248049, at 22-26.

54. *Id.* at 5 (J. Leonen, dissenting and concurring opinion).

55. *Id.* at 11.

Gender based violence on women and children by law are referred to multi-disciplinary teams.

- (2) How can a landmark decision where physiological details crucial to the court's understanding were all sourced from a single sourcebook? This approach raises questions about the thoroughness and accuracy of the medical information considered.
- (3) Could relying on medical experts have provided the court with a more comprehensive and reliable understanding of the anatomical and physiological aspects relevant to the case?

Overall, there is a sense that the absence of such expert input highlights a significant gap in the court's method of handling cases that hinge on intricate medical details, potentially impacting the fairness and correctness of the judicial outcome. These questions were in fact were in part raised in a news report that focused solely on “[w]hy Leonen dissented in SC’s latest ruling on rape?”⁵⁶

He added the [*ponencia*] also provided a ‘pseudo-medical analysis’ that lessens a rapist’s liability, adding that the ‘exhaustive and extensive’ description of vaginal parts to determine if rape is consummated limits the scope of the said crime ... By unnecessarily belaboring on the different physiological aspects of her vagina in the guise of protecting the accused’s rights from ‘the [considerable] difference[,] in the lengths of period of incarceration’ between the attempted and consummated rape of a minor, this Court takes a step back towards the previous heteronormative [—] and frankly, misogynistic [—] definitions of rape.⁵⁷

This Article is not structured to unpack or discuss the matter of “pseudo-medicine,” as it is best left to qualified forensic doctors, pediatricians, or gynecologists. However, while hopeful for research and articles from other disciplines that will demystify, if not altogether debunk, the “anatomical situs”⁵⁸ and “minimum threshold”⁵⁹ of rape, and the broader failings of the

56. Jairo Bolledo, *Why Leonen Dissented in SC’s Latest Ruling on Rape*, RAPPLER, Apr. 4, 2023, available at <https://www.rappler.com/philippines/why-justice-leonen-dissented-supreme-court-ruling-rape-2023> (last accessed Jan. 31, 2024) [<https://perma.cc/A3JY-BTJG>].

57. *Id.*

58. *Agao*, G.R. No. 248049, at 2.

59. *Id.* at 22.

Philippines' criminal justice system vis-à-vis the child protection system, the Author finds it necessary to surface another observation.⁶⁰

The Court articles from the book “The Vulva: Anatomy, Physiology, and Pathology” as sole reference for a section entitled “clarifying the parameters for appreciation of ‘slightest penetration’ in cases of rape by sexual intercourse through penile penetration.”⁶¹ According to WorldCat, the book has two editions, 2006 and 2017.⁶² The Author cannot help but wonder about the wisdom of the Court to solely use the 2006 edition instead of the 2017 edition. *Firstly*, considerations of access are paramount — does the Court have equal access to both editions, and if not, how might this impact the use insertion of a footnote to provide an illustration of an adult vulva lifted from the medical book for reference? *Secondly*, it also raises the question of the relevance of illustrating an adult vulva from a medical book in the context of statutory rape involving a girl child.⁶³ *Lastly*, while older editions of medical texts often retain valuable foundational information, is it not more prudent to rely on the most current edition, published in 2017, to ensure accuracy and alignment with contemporary medical practices and knowledge advancements? These questions underscore the critical need to prioritize updated resources in legal contexts where medical expertise plays a crucial role in shaping legal standards and outcomes.

The footnote provided the ratio and contextual backdrop for the illustration, as follows —

As suggested by Associate Justice Singh[,] and for ease of reference of members of the bench and bar who do not have sufficient medical backgrounds, consider below the illustration of the external appearance of

60. See generally Supreme Court of the Philippines, *supra* note 43.

61. *Agao*, G.R. No. 248049, at 22. The section cites two articles from Aikaterini Deliveliotou & George Creatsas: *Anatomy of the Vulva*, in *THE VULVA: ANATOMY, PHYSIOLOGY, AND PATHOLOGY* (Miranda A. Farage & Howard I. Maibach eds., 2006) and Aikaterini Deliveliotou & George Creatsas, *Changes in the Vulva and Vagina Throughout Life*, in *THE VULVA: ANATOMY, PHYSIOLOGY, AND PATHOLOGY* (Miranda A. Farage & Howard I. Maibach eds., 2006).

62. WorldCat, available at <https://search.worldcat.org> (last accessed Jan. 31, 2024) [<https://perma.cc/8U2H-YYXV>].

63. On surface level, the Court was establishing a doctrine by considering scenarios outside the facts of the case. The more nuanced answer to the question however merits a full volume or another journal or at least five Articles not just on legal feminism and violence against women and girls with many a varied complex and conflicted considerations.

the female genitalia, with the vulval cleft appearing as the fleshy external part of the vagina in the illustrated stages of female pubic hair development [...]”⁶⁴

In her separate concurring opinion Justice Singh, expressed her “full concurrence to the *ponencia*, as it now *provides clarity and guidance to the members of the bench and the bar in the prosecution of, and in the appreciation of the evidence in, rape cases.*”⁶⁵ They expounded upon the doctrine further, stating,

The (1) adoption of the esteemed ponente of the recommendations [that] have [been] made during the deliberations notwithstanding, particularly, the addition of an illustration of what the female genitalia looks like when a woman is standing up or lying prone, to supplement the illustrations included in the [*ponencia*]; and (2) the fine-tuning of my original recommendation, i.e., that, in cases of minor victims, the genital contact threshold for a finding of consummated rape through penile penetration is deemed already met once the entirety of the prosecution evidence establishes — ‘that there was repeated touching of the accused’s erect penis on the minor victim’s vagina,’ into ‘a clear physical indication of the inevitability of the minimum contact threshold as clarified here, if it were not for the physical immaturity and underdevelopment of the minor victim’s vagina,’ as suggested by Associate Justice Rodil V. Zalameda during deliberations [...]”⁶⁶

Before the proceeding, the Author notes that multi-disciplinary articles and reviews on this doctrine from medical experts and feminists with actual casework experience should be welcomed. After all, the complex landscape of rape discourse and persistent myths within Philippine jurisprudence demands careful examination.⁶⁷ However, returning to the main topic at hand —

64. *Agao*, G.R. No. 248049, n. 107 (citation omitted).

65. *Id.* at 1 (J. Singh, separate concurring opinion) (emphasis supplied).

66. *Id.* (citing Draft Decision, Sept. 6, 2022, at 31 & Draft Decision, Oct. 4, 2022, at 32).

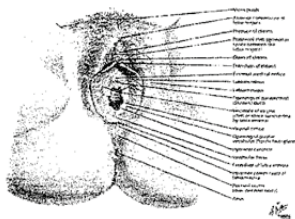
67. SUPREME COURT OF THE PHILIPPINES, LEGAL FEMINISM IN PHILIPPINE GENDER JURISPRUDENCE 127 (2023). The Supreme Court released a commissioned a report, Legal Feminism in Gender Jurisprudence under A.M. No. 22- 02-28-SC (Re: Proposed Study on Legal Feminism in the Philippine Jurisprudence) dated Mar. 1, 2022, the Court commissioned the Study through the CGRJ in cooperation with the Justice Sector Reform Programme: Governance in Justice II (GOJUST II) funded by the European Union. It was conducted by experts Damcille Torres-Cortes and Maricel Aguilar and was undertaken from Feb. to Nov. 2022. See Supreme Court of the Philippines, SC Shares Legal Feminism Study to UP College of Law, *available at* <https://sc.judiciary.gov.ph/sc-shares-legal-feminism-study-to-up-college-of-law> (last accessed Jan. 31, 2024). The Author notes that the commissioned study

despite Justice Leonen's strong dissent in many a varied aspects, he actually managed to describe the approach towards establishing the minimum threshold of rape as "a novel way to distinguish between the attempted and consummated stages of the crime (i.e.,] rape is consummated only when the penis touches the *vulval cleft of the labia majora*)" ⁶⁸

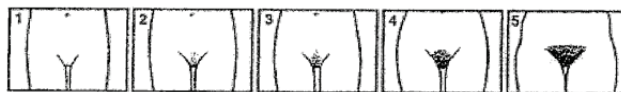
Below is a snapshot of Footnote 107 of the *ponencia*, introduced within the footnote as "the anatomy of the vulva is illustrated below as follows[:]" ⁶⁹

¹⁰⁶ Aikaterini Deliveliotou and George Creatsas, *Anatomy of the Vulva*, THE VULVA: ANATOMY, PHYSIOLOGY AND PATHOLOGY, *supra* note 15, at 1.

¹⁰⁷ *Id.* at 1-8. The anatomy of the vulva is illustrated below as follows.



(*Id.* at 2) As suggested by Associate Justice Singh and for ease of reference of members of the bench and bar who do not have sufficient medical backgrounds, consider below the illustration of the external appearance of the female genitalia, with the vulval cleft appearing as the fleshy external part of the vagina in the illustrated stages of female pubic hair development, as it appeared in Miranda A. Farage, Howard I. Maibach, Aikaterini Deliveliotou and George Creatsas, *Changes in the Vulva and Vagina Throughout Life*, THE VULVA: ANATOMY, PHYSIOLOGY AND PATHOLOGY (Eds. Farage, M. and Maibach, H.) (2006), p. 32:



Footnote 107 includes two pertinent figures from the medical book, highlighting crucial anatomical details.⁷⁰ The presence of the illustrations were

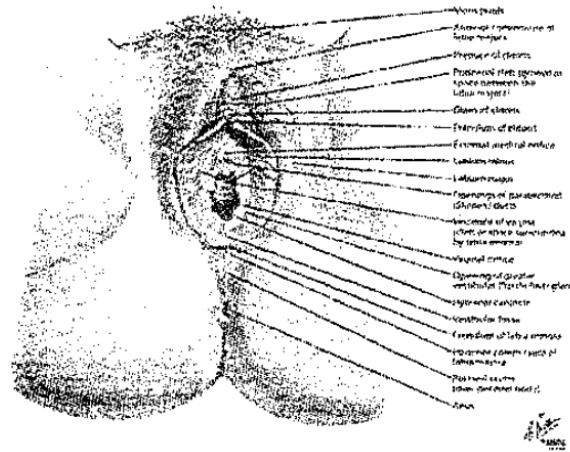
represents a cautious but positive step forward. We reckon that academics involved were required to adhere to the funding parameters and the study's purpose. Nonetheless, the study was able to state, "[h]owever, as demonstrated in several contentious rape decisions, there remains a large room for improving understanding of the gendered nature of this offense, as well as for revising the Anti-Rape Law and related legislation and their application." SUPREME COURT OF THE PHILIPPINES, *supra* note 67.

68. *Agao*, G.R. No. 248049, at 5 (J. Leonen, dissenting and concurring opinion).

69. *Id.* n. 107 (citing Deliveliotou & Creatsas, *supra* note 61, at 2).

70. *Agao*, G.R. No. 248049, n. 107 (citing Deliveliotou & Creatsas, *supra* note 61, at 2 fig. 1).

justified “for the ease of reference of members of the bench and bar who do not have sufficient medical backgrounds.”⁷¹ Ironically, despite the inclusion of anatomical figures meant to aid in identifying the parts of the external genitalia (pudendum or vulva), the corresponding labels are rendered too fine to be legible. While it is true that the full text of the Supreme Court decision is accessible online in portable document format (PDF), zooming in to 200% only provides readers insufficient medical backgrounds with a grainy and unclear graphic illustration, to wit:



Alas, the Author humbly asks, *vulval cleft of the labia majora*, where art thou?

The figure under Footnote 107 is immediately followed by what the footnote in the *ponencia* referred to as “the illustration of the external appearance of the female genitalia, with the vulval cleft appearing as the fleshy external part of the vagina in the illustrated stages of female pubic hair development.”⁷² Based on the information provided in the footnote and a comparison with the 2016 edition of the book, it can be confirmed that the

71. *Id.*

72. *Id.* Note further that the 2017 edition of the book of the same title and authors is *no longer using the illustration* of the vulva featured in the case. See Aikaterini Deliveliotou & George Creatsas, *Anatomy of the Vulva*, in *THE VULVA: ANATOMY, PHYSIOLOGY, AND PATHOLOGY* 3 fig. 1.1 (Miranda A. Farage & Howard I. Maibach eds., 2d ed. 2017) (citing Miranda A. Farage, et al., *Chronic Pain of the Vulva Without Dermatologic Manifestations: Distinguishing Among a Spectrum of Clinical Disorders*, 3 *CLINICAL MED. INSIGHTS: WOMEN’S HEALTH* 1, 3 fig. 1 (2010)).

figure credited as being sourced from Page 32 appears identical. The original source material, however, describes the figure as “Figure 3: Tanner stages of pubic hair development. Source: Adapted from Ref. 57.”⁷³ Below is a screenshot of Figure 3 along with the discussion on puberty from the 2006 edition of the book.⁷⁴

PUBERTY

Pubertal changes in the vulva and vagina are induced by adrenal and gonadal maturation. Puberty generally begins between ages 8 and 13 years. Physical changes associated with puberty are an accelerated growth rate, the appearance of pubic hair (*pubarche*), the appearance of axillary hair, breast development (*telarche*), and the onset of menstruation (*menarche*). The timing and stages of development of secondary sex characteristics were first defined in Marshall and Tanner’s seminal study of 192 girls in a British orphanage [].

Maturation of the adrenal glands and androgen secretion (*adrenarche*) begin at about age six, approximately two years before pituitary–gonadal maturation and the production of ovarian steroid hormones (*gonadarche*). Because *adrenarche* and *gonadarche* proceed independently, the appearance of pubic hair does not provide information about pituitary–ovarian maturation. Pubic hair development elicited by androgens proceeds in five stages as described by Tanner (Fig. 3) []:

- (1) No pubic hair.
- (2) Sparse hair appears on the *labia majora* and the *mons pubis* along the midline.
- (3) Thickness and coarseness of the hair increase, with coverage of the lobes of the *labia majora* and increased lateral growth from the midline of the *mons pubis*.
- (4) Hair growth increases such that only the upper lateral corners of the mature triangular configuration are deficient.
- (5) Adult pattern, attained between the ages of 12 and 17 years, with a characteristic horizontal upper margin on the *mons pubis*[,] just above the limit of the genitofemoral folds.

...

73. Deliveliotou & Creatsas, *supra* note 61, at 32 fig. 3.

74. *Id.*

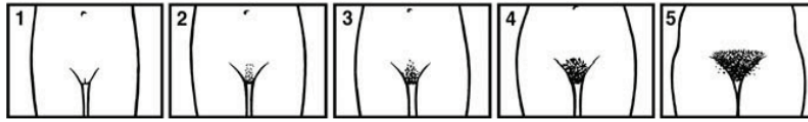


Figure 3 Tanner stages of pubic hair development. *Source:* Adapted from Ref. 57.

To outline the contrast between the original text and the current text, see the table below:

<i>Ponecia</i> , Footnote 107	The Vulva: Anatomy, Physiology, and Pathology
<p>As suggested by Associate Justice Singh, and for ease of reference of members of the bench and bar who do not have sufficient medical backgrounds, consider below the illustration of the external appearance of the female genitalia, with the vulval cleft appearing as the fleshy external part of the vagina in the illustrated stages of female pubic hair development.⁷⁵</p>	<p>Pubic hair development elicited by androgens proceeds in five stages as described by Tanner [as illustrated in Figure 3].</p> <p>The timing and stages of development of secondary sex characteristics were first defined in Marshall and Tanner’s seminal study of 192 girls in a British orphanage [].</p> <p>In most ethnic groups (<i>except for women of Asian or Native American heritage</i>), hair coverage extends from the <i>labia</i> to the upper aspects of the thighs.⁷⁶</p>

Tempting as it may overlook the contrasting description and to reconcile the text by stating that the *ponecia* prescribes the term vulval cleft or the cleft of the *labia majora*, it clearly pertains to what AAA described in her testimony, using the anatomically correct doll as, “*sa may hiwa po, sa gitna*”⁷⁷ — from a child protection standpoint the Author errs on the side of caution. Thereby ending the section with more questions than potential solutions:

- (1) How come the High Court did not call doctors as *amici curiae* to clarify complex medical issues related to rape and sexual assault? Gender

75. *Agao*, G.R. No. 248049, n. 107.

76. Deliveliotou & Creatsas, *supra* note 61, at 32–33.

77. *Agao*, G.R. No. 248049, at 37.

based violence on women and children by law are referred to multi-disciplinary teams.

- (2) How can a landmark decision where physiological details crucial to the court's understanding were all sourced from a single sourcebook? This approach raises questions about the thoroughness and accuracy of the medical information considered.
- (3) Could relying on medical experts have provided the court with a more comprehensive and reliable understanding of the anatomical and physiological aspects relevant to the case?
- (4) What about child participation or victim impact statements?

IV. CRITICAL RESPONSE FROM FEMINISTS, SURVIVORS, AND CIVIL SOCIETY TO THE SUPREME COURT'S LANDMARK DECISION: PRESS RELEASE AND MEDIA REACTIONS

The press release of the Philippine Supreme Court referred to the case as a landmark⁷⁸ case, “ushering in much needed straightforward language in judicial rape discourse to ‘ensure accuracy in court judgments.’”⁷⁹ The statement summarized the facts of the case as follows —

In 2014, Agao was charged with two counts of Statutory Rape of minor AAA, the daughter of Agao's live-in partner, BBB. Agao was convicted by Branch 172, Valenzuela City RTC, which ruled that while Agao's penis only merely touched the *labia* of AAA, the crime of rape was nevertheless consummated following the 2014 case of *People [vs.] Besmonte*, which held that carnal knowledge, as an element of rape, does not require full penetration of the female organ.

On appeal to the CA, Agao's conviction was affirmed, prompting him to bring his case to the Supreme Court. In ruling against Agao, the Supreme Court stressed the need to use unambiguous language in the resolution of rape cases.

The Court now recognizes that there is perhaps no other way to reconcile and refine the current jurisprudence on rape than to peel away the euphemistic shrouds that have been resorted to so far, and instead inform case law with the exact anatomical situs of the pertinent body parts referred to in jurisprudence, which, unlike other matters that attend the crime of rape, are uncolored, self-evident and inarguable in their precision.

78. A term used to describe a case of importance that it will establish a new law and set new precedents.

79. Supreme Court of the Philippines, *supra* note 43.

The Court noted that the use in jurisprudence on rape cases of ‘euphemistic[,] but largely inaccurate descriptions[,] have only[,] so far[,] convoluted matters regarding the act of rape that should have been kept unambiguous and definitive.’⁸⁰

Despite the spin, media coverage about the decision informed in part by the necessity of having “disconcerting conversation that must be had, if [the Court] is to dispense with honest justice”⁸¹ was more nuanced, if not bothered altogether. Michelle Abad of Rappler, a Filipino online news website based in Pasig, Metro Manila, the Philippines, reported that —

GABRIELA slammed the SC’s ‘fine-tuning’ of the definition of rape, since ‘the dignity of a woman does not rest on a vagina.’ They also said that the ruling favors rape perpetrators, and not victims. ‘We have no doubts that there would be even more rape victims forced into silence following this decision. Simply and frankly worded, this is a ruling that favors only perpetrators, not rape victims,’ said Palce.

By creating ‘gradations’ between ‘rape’ and ‘attempted rape’ on account of anatomical thresholds, the Supreme Court is effectively reducing the dignity of women to our body parts. It forgets that whether a woman is forced into acts of vaginal penetration, oral sex, or penetration through foreign objects, the point is that such acts constitute grave violation of the woman’s dignity,’ said Clarice Palce, secretary general of women’s alliance GABRIELA.

EnGenderRights executive director Clara Rita Padilla said she ‘fully subscribes’ to Leonen’s dissenting opinion. The lawyer pointed to the long line of SC cases that recognize rape as a crime against dignity, and state that a mere touch of the penis on the labia is rape.

Padilla also said that this ‘restrictive interpretation of the law’ benefits perpetrators of rape.

‘The countless rape survivors in the Philippines, the trauma they suffered and the violation of their rights calls for justice and the international human rights obligation of the Philippine state to address rape with due diligence where there is effective prevention, investigation, prosecution, and penalties imposed on rape perpetrators, where a rigid interpretation on where the penis touched the labia is insignificant,’ Padilla said.

‘We are talking about effective prosecution and justice system where rape perpetrators are held accountable. That is the only way our daughters, sisters, mothers, and female friends would be safe against perpetrators of rape,’ Padilla added.

80. *Id.* (citing, *Agao*, G.R. No. 248049, at 10-11).

81. *Id.* at 25.

A look at consent Sexual abuse survivor Erin, not her real name, said that using the specified definition of consummated rape puts the decision on whether rape occurred ‘in the hands of the man.’

Erin’s experience did not involve force, but the lack of informed consent. She believes that her sexual partner at the time lied about not sleeping with anyone else to persuade her to have sex with him. She said she would have not agreed had she known that he had other sexual partners.⁸²

The Philippine Star, an English-language newspaper in the Philippines, through the report of Marc Jayson Cayabyab, reported that the forty-paged decision — which described in graphic detail how raped is consummated — was penned by Justice Alfredo Benjamin Caguioa, concurred in by Chief Justice Alexander Gesmundo and Justices Maria Filomena Singh, Ramon Paul Hernando, Rodil Zalameda, Mario Lopez, Samuel Gaerlan, Ricardo Rosario, Japar Dimaampao, and Jose Midas Marquez.⁸³ While the report wrongly mentioned that three justices did not take part,⁸⁴ it did not miss the strong dissent of Senior Associate Justice Marvice Leonen, “saying that ‘rape is rape’ and warned against trivializing a rape survivor’s experience.”⁸⁵

The controversy gained enough noise online so much so that Rappler journalist Jairo Bolledo wrote a follow up report focusing on why Senior Associate Justice Marvic Leonen dissented on the *Agao* ruling —

The SC justice said people have full autonomy to decide who they can be intimate with, and rape is a crime because it violates that autonomy. *He added the ponencia also provided a ‘pseudo-medical analysis’ that lessens a rapist’s liability, adding that the ‘exhaustive and extensive’ description of vaginal parts to determine if rape is consummated limits the scope of the said crime.*

82. Michelle Abad, *Women’s Advocates: SC ‘Fine-Tuning’ Rape Consummation Favors Perpetrators*, RAPPLER, Apr. 5, 2023, available at <https://www.rappler.com/nation/women-advocates-supreme-court-fine-tuning-rape-consummation-favors-perpetrators> (last accessed Jan. 31, 2024) [<https://perma.cc/C45N-Q45V>].

83. Marc Jason Cayabyab, *SC Tackles Language to Describe Rape*, PHIL. STAR, Apr. 3, 2023, available at <https://www.philstar.com/headlines/2023/04/03/2256538/sc-tackles-language-describe-rape> (last accessed Jan. 31, 2024) [<https://perma.cc/24JX-P8K9>].

84. *See id. Contra Agao*, G.R. No. 248049, at 39. The case states that Associate Justice Amy Lazaro Javier took no part in the Decision, while Associate Justices Henri Jean Paul P. Inting, Jhosep Y. Lopez, and Antonio T. Kho were on official business.

85. Cayabyab, *supra* note 83 (citing *Agao*, G.R. No. 248049, at 2 (J. Leonen, dissenting and concurring opinion)).

‘To continue the discussion started by the [*ponencia*] would be to accept that the victim will now bear the burden to prove that the penis touched the ‘outer fleshy part’ of her vagina and not merely the muscular part of the pudendum,’ Leonen said.⁸⁶

The Court somehow anticipated the intense backlash, as evidenced by the diplomatic yet pointed dissenting opinion of Justice Leonen, and the cross-references within the *ponencia*. The Court in fact with great resolve stated, “[a]t the risk of testing its strength under the weight of its decisions, the Court must remain honest, clear-sighted[,] and unflinching, for to look away is violence.”⁸⁷

The critiques gathered by journalists from survivors, feminists, and advocates largely echoed the points made in Justice Leonen’s dissent, which stated that

[b]y unnecessarily belaboring on the different physiological aspects of her vagina in the guise of protecting the accused’s rights from ‘the [considerable] difference in the lengths of period of incarceration’ between the attempted and consummated rape of a minor, this Court takes a step back towards the previous heteronormative — and frankly, misogynistic — definitions of rape.⁸⁸

To set the stage for a synthesis of the preceding paragraphs on the case’s “backlash,” the Author will first introduce a brief exploration of an approach informed by legal feminism.⁸⁹ The Author locates tonality grounded on over

86. *Id.*

87. Supreme Court of the Philippines, *supra* note 43 (citing *Agao*, G.R. No. 248049, at 38).

88. Bolledo, *supra* note 56.

89. SUPREME COURT OF THE PHILIPPINES, *supra* note 67, at 55. In 2023, the Supreme Court commissioned a study on Legal Feminism in Philippine Gender Jurisprudence. Framework of Analysis, Standard decision elements of facts, law, or legal principles, issues, reasoning, ruling and remedies *guided* the text examination, while extracting latent meanings entailed attention to interpretive elements of language, framing of issues, contextual discussion, judicial logic, the nature of the discourse and rhetorics in a decision. The gender lens drew from feminist legal methods, philosophies, and themes identified in the review of literature which were also the concepts that jurisprudential analyses sought to surface. In other words, for this study feminist legal methods, theories and themes functioned both as tools and objects of analyses. This is represented by the overlap of the process arrow with the feminist concepts at the top of the figure.

decade long child protection work learning through and with the justice and healing journey of victim-survivors. Further shaped by Ms. Ashely Judd speaking for the #MeToo survivors reaction after a favorable retrial decision for Harvey Weinstein —

It is a hard day for survivors[,] [W]e live in our truth[,] we know what happened[,] and the truth is consistent. [] [Y]ou know when Harvey sexually harassed me and then defamed and then interfered with my economic and creative opportunities after I escaped him in that hotel room in 1996, I told anyone who would listen. I was filming ‘Kiss the Girls’ at that time I went straight to the set that night told Gary Fledger the director, told the screenplay writer, told my agent, and no one listened. And there are all these systems that just, not only tolerated, but enabled him. Both men and women at that time and part of what is so important about the Me Too movement is that not only do men stay silent about other men’s violence no longer tolerate that, but that we end impunity. And so, there are all these forces at play . . . You know, *often time[s], survivors say that betrayal and moral injury within the system is worse that the sexual body invasion we experienced in the first place.*⁹⁰

Taking into account the preceding premise, the Author asserts in the following sections that when the justice sector and its pillars fail to protect the well-being and dignity of victim-survivors as testifying witnesses — while ensuring the constitutional rights of the accused within an adversarial (and broken, corrupt, etc.) criminal justice system — constitutes a violation of the

Feminist legal methods served as the entry point for feminist analyses. The framework presents the spectrum of key feminist philosophies. The review of literature on how these can be manifested in adjudication guided the case review. While major feminist legal theories (including queer) have been identified and distinguished, the study is aware that each school of thought cannot be ‘boxed’ and therefore decisions may simultaneously reflect aspects on several perspectives. Moreover, feminist legal theories are not always present nor evident in the texts. The study is careful not to impose nor force the presence of a legal philosophy. Nonetheless, applying a gender lens surfaced common topics and issues in gender rights discourse. Hence, while the primary interest of the research is the application of feminist legal methods and philosophies, the findings naturally incorporated discussion of power relations, public and private divide, agency, autonomy, gender roles, division of labor, and stereotypes, among many others.

The framework is mindful that the study is situated within a gendered institutional, political, economic and socio-cultural context. As relevant, these are integrated in the analyses.

90. Interview by Caitriona Perry, BBC News, *with Ashley Judd, in London* (2024) (emphasis supplied).

United Nations Convention on the Rights of the Child (Article 3 (1)),⁹¹ the Code of Professional Responsibility (Canon II, Sections (4) and (6)),⁹² and the Guidelines on the Use of Gender-Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette.⁹³ The Author further asserts that the immediate activation of long-overlooked protective measures under the Child Witness Rule⁹⁴ and the formulation of grounding and founded Victim Sensitive Courts Guidelines⁹⁵ are imperative, given the traumatizing effects on rights holders and the ethical implications for duty bearers.

No one else was in the room where it happened.⁹⁶ The heated and polarized debates between the lone dissenter and the other justices present during the deliberations⁹⁷ remain palpable through their respective concurring

91. *See generally* Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

92. *See generally* CODE OF PROFESSIONAL RESPONSIBILITY AND ACCOUNTABILITY, A.M. No. 22-09-01-SC, §§ 4 & 6 (Apr. 11, 2023) [hereinafter CPRA].

93. *See generally* Guidelines on the Use of Gender-Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette, A.M. No. 21-11-25-SC, (Feb. 15, 2022).

94. *See generally* RULE ON EXAMINATION OF A CHILD WITNESS, A.M. No. 004-07-SC (Nov. 21, 2000).

95. *See* Supreme Court of the Philippines, JSCC Holds Presentation of Victim Sensitive Guidelines in the Justice System, *available at* <https://sc.judiciary.gov.ph/jsc-holds-presentation-of-victim-sensitive-guidelines-in-the-justice-system> (last accessed Jan. 31, 2024).

96. Lin-Manuel Miranda, *The Room Where It Happens, The Room Where It Happens*, on *Hamilton: An American Musical* (2015). *See also* Internal Rules of the Supreme Court, A.M. No. 10-4-20-SC, rule 10, § 2 (May 7, 2010) (as amended).

SEC. 2. Confidentiality of court sessions. - Court sessions are executive in character, with only the Members of the Court present. Court deliberations are confidential and shall not be disclosed to outside parties, except as may be provided herein or as Authorized by the Court.

The Chief Justice or the Division Chairperson shall record the action or actions taken in each case for transmittal to the Clerk of Court or Division Clerk of Court after each session. The notes of the Chief Justice and the Division Chairperson, which the Clerk of Court and the Division Clerks of Court must treat with strict confidentiality, shall be the bases of the minutes of the sessions.

Id.

97. The case states that Associate Justice Amy Lazaro Javier took no part in the Decision, while Associate Justices Henri Jean Paul P. Inting, Jhosep Y. Lopez, and Antonio T. Kho were on official business.

and dissenting opinions. Despite the formalities, we believe these cross-references captured the essence of the debate. Such that when Justice Singh said, “the [*ponencia*] articulated it best[;] there must be a balance that must be struck between the fundamental freedoms of the accused and the victim,”⁹⁸ Justice Leonen countered it with, “[c]ontinued male violence in our patriarchy hides within subtle legal distinctions which burden the victim disproportionately. In this case, the [*ponencia*] uses an *amorphous yet misguided application of the rights of the accused* without understanding the full patriarchal concept of rape.”⁹⁹

The argument this Article seeks to establish is clear. Rape law, by design, is imbalanced. On measure, the scales are — by default — tilted towards acquittal. Particularly so, from a standpoint of a terrified testifying child witness who is anxious about having to face their rapist in court. To illustrate, the Author lifts a quote from a witness preparation document.

Guilty means that the judge is 95% sure that the accused did something wrong. When an accused is found ‘not guilty,’ maybe the judge was 80% sure[,] but that is not enough. ‘Not guilty’ does not mean innocent and it does not mean that people didn’t believe you. And the fact that he or she was charged is remembered by the police. You told an adult what happened, which was probably very scary[,] so you were very brave. Lots of people believed you and you stuck up for yourself.¹⁰⁰

Advocates in the realms of frontline child protection work and trial advocacy are wired for almost a profound reverence to the presumption of innocence which stands as a fundamental constitutional doctrine, elaborated by procedural regulations that assign to the prosecution the task of demonstrating the accused’s guilt beyond any reasonable doubt. As a corollary, convictions should be founded on the prosecution’s evidentiary robustness rather than on any deficiency in the defense.¹⁰¹

Despite that deep regard for the normative framework and the formalities that accompany it, frontline criminal justice system actors are not immune to

98. *Agao*, G.R. No. 248049, at 2 (J. Singh, concurring opinion).

99. *Id.* at 2 (J. Leonen, dissenting and concurring opinion).

100. ALISON CUNNINGHAM & LYNDA STEVENS, *HELPING A CHILD BE A WITNESS IN COURT* 51 (2011).

101. *Agao*, G.R. No. 248049, at 2 (J. Singh, concurring opinion). See generally Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569 (2020) (citing *Coker v. Georgia*, 433 U.S. 584, 584 (1977) (holding that the death penalty for rape violates the Eighth Amendment’s ban on cruel and unusual punishment as grossly disproportionate to the crime)).

ethical tensions and heartbreaks when working with victim-survivors and child witnesses.

Key to understanding this issue is to see how “rape law is an illustration of sexism in criminal law.”¹⁰² In her seminal work, Susan Estrich provides a critical analysis of the legal framework surrounding rape, highlighting the pervasive influence of sexism within the criminal law tradition.¹⁰³ Furthermore, she examined the “connections between the law[,] as written by legislators, as understood by courts, as acted upon by the victims, and as enforced by prosecutors.”¹⁰⁴ Accordingly,

[t]o examine rape within the criminal law tradition is to expose fully the sexism of the law. Much that is striking about the crime of rape [—] and revealing of the sexism of the system [—] emerges only when rape is examined relative to other crimes, which the feminist literature by and large does not do. For example, rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish non-consent ... [.] Sexism in the law of rape is no matter of mere historical interest; it endures, even where some of the most blatant testaments to that sexism have disappeared. Corroboration requirements unique to rape may have been repealed, but they continue to be enforced as a matter of practice in many jurisdictions.¹⁰⁵

Estrich further pointed out that

[m]ost of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is ‘boys’ rules’ applied to a boys’ fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims.¹⁰⁶

As a lawyer and as rape survivor herself, Susan Estrich’s work on rape law can be seen as a form of legal feminism.¹⁰⁷ It combines theoretical critique

102. Estrich, *supra* note 50, at 1090.

103. *Id.* at 1089.

104. *Id.* at 1090.

105. *Id.* at 1090–91.

106. *Id.* at 1091.

107. *See generally id.* Susan Estrich (born Dec. 16, 1952) is an American lawyer, professor, Author, political operative, and political commentator. She is known for serving as the campaign manager for Michael Dukakis in 1988 (being the first woman to manage the presidential campaign of a major party nominee since Belle Moskowitz managed Al Smith’s campaign in 1928) and for serving in 2016 as legal counsel to the former Fox News chairman Roger Ailes. *Id.*

with practical advocacy to challenge and reform legal systems in ways that tackle sexism in criminal law, empower survivors, problematize systemic injustices, and gender inequality.¹⁰⁸ The Author is drawn to Estrich's legal critique and scholarship because of the survivor voice-perspective they bring.

Even the 'real rape' victim must bear the heavy weight of the silence that surrounds this crime. At first, it is something you simply do not talk about. Then[,] it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it all the time. *Rape is a much more serious crime. If it isn't my fault, why am I supposed to be ashamed? If I shouldn't be ashamed, if it wasn't 'personal,' why look askance when I mention it?*

As this introduction makes clear, I talk about it. I do so very consciously. Sometimes, I have been harassed as a result. More often, it leads women *I know to tell me that they too are victims, and I try to help them*. I cannot imagine anyone writing an article on prosecutorial discretion without disclosing that he or she had been a prosecutor. I cannot imagine myself writing on rape without disclosing how I learned my first lessons or why I care so much.¹⁰⁹

As early as 1986, Estrich already reviewed the limits and reach of rape reform,¹¹⁰ followed by the publication of their book *Real Rape* in 1987.¹¹¹ In 2023, her work was featured in a book — *Leading Works in Criminal*

108. *See generally* Estrich, *supra* note 50.

109. *Id.* at 1088-89.

110. *See generally* Estrich, *supra* note 50, at 1157-58. Many of the goals of rape law reform cannot easily be tested by statistical studies. The decision whether to focus on the actor or the victim may or may not have an impact on quantifiable events such as the reporting of rapes and conviction rates, but it almost certainly will have an impact on the experience of an individual victim as she proceeds through the system. Similarly, eliminating legal rules that are premised on a stereotype of women as vengeful liars or fantasizing cheats may or may not result in more convictions, but it is critical in any conception of the law as a force which seeks to reflect and even educate public sentiment. The rape reform effort has been both an occasion for women to exercise power in the legislative process and a part of a larger effort to change the way the law and our society think about women, sex and sexuality. The fact remains that both those who have favored and those who have opposed different models of reform have done so on the assumption that legislative changes would have some impact on the actual processing of cases. The conflicting models of reform discussed in this Section are clearly worthy of scrutiny as a theoretical matter. Whether and how much difference these provisions and others influenced by them have made on the system's operations is far from clear.

111. *See generally* SUSAN ESTRICH, *REAL RAPE* (1987).

Law.¹¹² Consequently, “*Real Rape* has had a lasting influence, particularly on rape myths scholarship over the last decade. Yet[,] questions raised by Estrich’s work — about the implementation of legal reforms and the uneven potential of legal change to bite — remain.”¹¹³

This portion of the study, however, will focus on their analysis of “[h]ow [t]he [c]riminal [j]ustice [s]ystem [u]nderstands [r]ape[.]”¹¹⁴ Accordingly,

[s]tatutes and appellate court opinions provide a background for the way rape is defined in practice within the criminal justice system. But on a day-to-day basis, the critical decisions are made not by the legislators or the appellate judges [—] but by the actors within the system[;] by the victims themselves, in reporting a crime; by police, in investigating it and making arrests; by prosecutors, in charging, dismissing, and plea bargaining; and by juries and judges, at trial and in sentencing.¹¹⁵

For Estrich’s article, she examined “the practical definition of the crime of rape which is produced by these decisions, focusing on the way in which both victims and officials distinguish between the traditional and the non-traditional rape-in effect, defining at least two crimes.”¹¹⁶

For purposes of *Agao*, this part of the Article will examine the critical decisions made by the victim AAA, in reporting a crime by police, and by prosecutor, in charging; by the judge during trial and sentencing, and on appeal by Supreme Court.

During her testimony, AAA narrated that *Agao* raped her three times in a week.¹¹⁷ With due respect to prosecutorial discretion, only two counts of statutory rape were filed.¹¹⁸ Concretely, this is an application of how critical decisions are made in this case of the prosecutor on the day to day basis. There is wisdom to his prosecutorial strategy — making the case build up and trial proper a little more manageable, instead of prosecuting additional 216 counts of rape.

112. Sharon Cowan, *Susan Estrich, Real Rape (1987)*, in *LEADING WORKS IN CRIMINAL LAW* (Chloë Kennedy & Lindsay Farmer eds. 2023).

113. *Id.* at 8.

114. Estrich, *supra* note 50.

115. *Id.* at 1161.

116. *Id.*

117. *Agao*, G.R. No. 248049, n. 19.

118. *See id.* at 3.

Groomed when she was nine, raped at the age of ten, until she turned 13, AAA managed to tell her story when she disclosed her abuse.¹¹⁹ Navigated PNP medico legal, police, and the prosecutor at age 14.¹²⁰ At the age of 16 AAA personally appeared in a designated family court to testify.¹²¹ AAA, as victim-survivor, knows more about criminal procedure, and perhaps even trial technique, than a fresh law graduate who is about to take the bar. In many respects, she knows more about the grounded realities of a broken criminal justice system than so-called experts in the field.

Outlined below are key decision points crucial for understanding the application of Estrich's criminal justice framework:

By AAA	2010	Disclosed abuse to her Aunt ¹²²
	2012	Reported to the police ¹²³
	2012	Examined by medico legal (PNP) ¹²⁴
	2016	Testified as child witness/victim-survivor ¹²⁵
By CCC	2012	Accompanied daughter to report ¹²⁶
By the local police	2012	Lodged compliant ¹²⁷
	2012	Referred to medico legal ¹²⁸
	2012	Filed case ¹²⁹
	2015	Testified in court ¹³⁰
By the Prosecutor	2014	Q: How many times did he do those things to you?

119. *Id.* at 6.

120. *Id.*

121. *Id.* n. 19.

122. *Id.* at 6.

123. *Agao*, G.R. No. 248049, at 6.

124. *Id.*

125. *Id.* n. 19.

126. *Id.* at 6.

127. *Id.*

128. *Id.*

129. *Agao*, G.R. No. 248049, at 3.

130. *Id.* n. 19.

		A: Three times in a week sir ¹³¹ (from 2010–2012) Charged with two counts of statutory rape ¹³²
	2016	Presented AAA as a child-victim survivor ¹³³
By the Social Worker		Provided protective custody ¹³⁴
Ruling of the RTC	2017	Found guilty beyond reasonable doubt of two counts of statutory rape ¹³⁵
Ruling of the Appellate Court	2019	Affirmed RTC decision but modified award of damages ¹³⁶
Ruling of the Supreme Court	2022	Background for the way rape is defined in practice within the criminal justice system. ¹³⁷

The table above, looks straightforward. In criminal law, only justiciable facts matter — “[g]iving evidence in criminal proceedings is a source of significant emotional stress for most witnesses. For victims of rape, the experience of testifying can be traumatic and is commonly characteri[z]ed as a ‘revictimi[z]ation’ or ‘second assault.’”¹³⁸

On balance however rights claimants are reduced as child victims within the trial process are primarily appreciated as: (1) complainant child victims; (2) child witnesses; and, following *Agao*, (3) expert witnesses to their pre-pubescent vaginas. Their bodies, objectively presented through their testimonies as necessary exhibits — of the scene of the crime and as objects of

131. *Id.*

132. *Id.* at 3.

133. *Id.* at 5 & n. 19.

134. *Id.* at 7.

135. *Agao*, G.R. No. 248049, at 7.

136. *Id.* at 8.

137. *See generally id.*

138. Louise Ellison, *Witness Preparation and the Prosecution of Rape*, 27 BLACKWELL PUBLISHING 171, 171 (2007).

violence. To convict, the criminal justice process practically asks the child witness to walk through the necessary process of practically being raped and re-traumatized yet again on direct and cross examination.

V. RETRACING AGAO'S ABUSIVE BEHAVIORS, DYNAMICS OF CSA AND GROOMING

AAA's mother and biological father, CCC, separated when she was a baby.¹³⁹ Agao served as the influential male figure in her life.¹⁴⁰ AAA's home life also indicate dysfunctions and disruptions.¹⁴¹ The first overlooked red flag on the dynamics of child sexual exploitation and statutory rape is the 2009 incident.¹⁴² Pre-pubescent ten-year olds even in urban poor settings, with limited water supply and little privacy, are normally expected to take shower on their own.¹⁴³ Agao started sexual grooming tactics on AAA early on. He sent her to school.¹⁴⁴ Despite indications that AAA's mother was at work at the time of the abuse, she was likewise aware of her mother's economic dependence from the man she considered, at least at the time, as her stepfather.¹⁴⁵ By July 2010 Agao decided that he has groomed her enough —

AAA further testified that appellant first raped her in July 2010, at around 7:00 in the morning. During her direct examination, she recalled that while she was sleeping, she woke up to find appellant touching her breasts and vagina, and later on trying to insert his penis into her vagina. AAA specifically testified that appellant undressed her and then mounted her. She said that she both felt and saw appellant's [hard penis] against her, as the appellant kept

139. *Agao*, G.R. No. 248049, at 4.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* n. 19.

144. *Id.*

145. *Agao*, G.R. No. 248049, n. 19.

Q: How did he react when you kick him?

A: He get angry, sir.

Q: What did he say to you?

A: *Wag na daw po ako lalapit sa kanya. Ako na din daw po bahala sa pag-aaral ko.*

Q: How did you feel at that time?

A: I was afraid, sir.

Id.

trying to insert it into her vagina, thereafter managing to introduce the same into the outer fold, also called the *labia majora* of AAA's vagina. Appellant was allegedly unable to fully penetrate AAA's vagina because she kept fighting back.

She further testified that appellant continued to molest her, including another time in January 2012, when appellant raped her while she was sleeping. AAA testified that during the latter incident, she woke up to find appellant touching her breast and then, later, trying to insert his penis into her vagina. She added that similar to the incident in 2010, appellant was also unable to fully penetrate her vagina as she also put up a fight.

Throughout all this time, despite the repeated assaults, she continued not to tell anyone, not even her own mother BBB, for fear that BBB would not believe her, and that she would only be humiliated. On cross-examination, it was further established that AAA chose not to tell anyone about appellant's abuse because she was afraid that appellant might harm her and BBB. It was also shown that up until the beginning of appellant's chronic abuse of AAA, the latter did not harbor any ill feelings towards appellant.¹⁴⁶

Employing intersectionality as a critical lens, we interrupt the *ponencia's* narration of AAA's struggle to pick up from the last line, "[i]t was also shown that up until the beginning of appellant's chronic abuse of AAA, the latter did not harbor any ill feelings towards appellant."¹⁴⁷ This is so because Agao, groomed AAA; he also treated her like a daughter, and she referred to him as her stepfather.¹⁴⁸ Here, the intersections of power, relationships, age, and the impact of gender-based violence in the form of child sexual abuse (CSA)¹⁴⁹ come into play.

The evident layers of intersectionality in AAA's case include the following: household gender role dynamics and dysfunctions, power relations between AAA and her mother, and Agao and AAA. Central to their power relations is control. This is evidenced by the fact that Agao sent her to school

146. *Id.* at 4-5.

147. *Id.* at 5.

148. *Id.* at 4.

149. CSA collectively refers to: (1) Acts of Lasciviousness committed against children exploited in prostitution or other sexual abuse; (2) Sexual Assault committed against children exploited in prostitution or other sexual abuse; (3) Sexual Intercourse committed against children exploited in prostitution or other sexual abuse; (4) Rape by carnal knowledge; and (5) Rape by sexual assault. See *People v. Tulagan*, G.R. No. 227363, Mar. 12, 2019, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020> (last accessed Jan. 31, 2024).

and that he provided for them.¹⁵⁰ The Court is silent on the matter, the defense did not play it up either. And in view of gendered nature of intersectionality, the Author views the mother's absence in AAA's access to justice journey and the fact she missed the red flags as an indicator of unreported domestic violence.

Based on the decision, as captured from available court records, the inappropriate touching and red flags to grooming started sometime in 2009.¹⁵¹ AAA disclosed to her aunt four years after the first consummated rape.¹⁵² From a trauma-informed standpoint, AAA felt safe enough to divulge and report statutory rape only when her mother was no longer living with Agao.¹⁵³ Worth noting as well is the relationship between AAA and her mother. AAA confided in her aunt — the aunt, and not the mother, reached out to a friend who happened to be a police officer.¹⁵⁴ While the narrative started noting the absence of AAA's biological father in her life as a baby, the father makes up for it at this stage.¹⁵⁵ He accompanied AAA to the police station to a lodge a complaint against Agao.¹⁵⁶

Coming from that vein, we interrogate further a key defense strategy that was conveniently used during cross, that happens to be a rape myth, shaped the court's perception of AAA's precipitative behavior — AAA did not harbor any ill feelings toward Agao.¹⁵⁷ To support his claim, Agao testified that AAA even visited him several times during his detention, until she was taken by the City Social Welfare Development Office.¹⁵⁸ Victim precipitation to perpetrator predation is an overused and abused paradigm in criminology that simply shifts the blame to the victim.¹⁵⁹ While the theory has been debunked

150. *Agao*, G.R. No. 248049, n. 19.

151. *Id.* at 4.

152. *Id.*

153. *See id.*

154. *Id.*

155. *Id.*

156. *Agao*, G.R. No. 248049, at. 4.

157. *Id.* at 7.

158. *Id.*

159. *See generally* Lilia M. Cortina, From Victim Precipitation to Perpetrator Predation: Towards a New Paradigm for Understanding Workplace Aggression, available at <https://sites.lsa.umich.edu/liliacortina-lab/wp-content/uploads/sites/970/2021/12/Cortina-L.M.-in-press-From-victim-precipitation-to-perpetrator-predation.pdf> (last accessed Jan. 31, 2024) [<https://perma.cc/4LZL-NRHG>].

and has gained notoriety through the years, a local variant within the criminal justice system prevails, i.e., myths and stereotypes around the so-called willing victim.¹⁶⁰

While not categorically stated, AAA, per defendant's testimony, "was taken by the City Social Welfare Development Office."¹⁶¹ Without the benefit of full case record access, we continue to trace the interplay of fragmented criminal justice vis-à-vis child protection system. Under the DOJ Protocol for Case Management of Child Victims of Neglect, Abuse, and Exploitation,¹⁶² the Department of Social Welfare and Development, through the SWAD or SWO II, shall enforce protective custody when disclosure involves sexual abuse, serious physical injury, or life-threatening neglect.¹⁶³ In the context of the best interest of the child, involuntary commitment, and assumption of protective custody are almost always the last resort.

The fact that AAA was taken by the DSWD indicates that the Social Worker who prepared the case study report deemed it necessary to take her away from her mother. The next of kin mentioned in the case, i.e., father and aunt who supported her in reporting and filing the case assessed as unfit for safeguarding purposes during the pendency of the case, as such "[i]n the absence of a relative, the child may be placed in a DSWD-managed facility, an accredited child-caring institution, or a foster home."¹⁶⁴

Is this then the part where we say, AAA safe at last? Yes, in the sense that Agao, during the pendency of the case, was detained.¹⁶⁵ Her healing journey, however, is interrupted in many ways. Knowing that neither of her biological parents are deemed capable of looking after her, AAA survives with other CSA survivors in a highly structured environment, which has its pros and cons. The waiting game begins and, in AAA's case, she waits two years for her day in court.¹⁶⁶ Through AAA's direct testimony and cross-examination, she tells her story.

160. Department of Justice, Protocol for Case Management of Child Victims of Abuse, Neglect, and Exploitation (2011).

161. *Agao*, G.R. No. 248049, at 7.

162. *See generally* Department of Justice, *supra* note 160.

163. *Agao*, G.R. No. 248049, at 23.

164. *Id.*

165. *See id.* at 7.

166. *See id.* at 6 (The incidents were reported in 2014, but the trial only took place in 2016).

A lot were not seen on appeal. After all, the focus really is this stage is really all about the accused. Muted are the hardships child witnesses go through while waiting to be heard. There seems to be no room for emotions in criminal law.

VI. SUFFERING IN SILENCE: STRUGGLES OF RAPE VICTIMS IN PRE-REPORTING AND TRIAL STAGES

A. The Elephant in the Room: Underreported Rape Cases

To provide some background, the 2015 National Baseline Study on Violence Against Children and Youth (NBS-VAC) conducted a study which aimed to provide a comprehensive estimate of violence, capturing a broad range of experiences at home, school, workplace, and the community.¹⁶⁷ The findings are striking — revealing 80% of the respondents reported experiencing some form of violence (physical, psychological, peer-related, or sexual).¹⁶⁸ More than 60% of the respondents faced physical, psychological, and peer violence, while 22.4% were victims of sexual abuse, underscoring the widespread and multifaceted nature of the problem.¹⁶⁹ However, despite the high prevalence, the study revealed alarming trends regarding underreporting and low disclosure rates. Less than 10% of respondents ever disclosed their experiences of abuse, primarily to close social circles like friends and parents, rather than to formal authorities and “[a]bout one in 10 ever sought help from a professional.”¹⁷⁰

167. Laurie S. Ramiro, et al., *National Baseline Study on Violence Against Children and Youth (NBS-VAC) in the Philippines*, 56 ACTA MEDICA PHILIPPINA 19, 19 (2015). See also CHILD PROTECTION NETWORK, 2022 ANNUAL REPORT 41 (2022). According to the 2022 Annual Report, sexual abuse remains the most commonly reported form of child abuse in the Philippine General Hospital Child Protection Unit (PGH-CPU) and Women and Child Protection Units (WCPUs) nationwide. The primary perpetrators of child sexual abuse are neighbors, followed by boyfriends and various relatives. Adolescents aged 13 to 15 comprise the most frequently seen age group for sexual abuse cases. However, only 30% of cases reported to WCPUs are assessed within 72 hours of the incident, suggesting that many cases involve either first-time, non-acute abuse or ongoing, chronic abuse. While middle adolescence is a high-risk period, abuse in some cases may have begun much earlier in childhood. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

A rape victim's hesitation to report is aptly explained by Estrich as follows

—
The underreporting of rapes has been a subject of substantial controversy. It is often cited as one of the primary effects of the unfair rules of law and the hostile attitudes that penalize and denigrate rape victims. *Victims do not report rapes, it is said, because the traumas associated with pursuing a complaint and the difficulties of securing a conviction are daunting.*¹⁷¹

Further, Estrich relates the underreporting of rape cases to low rates of arrest, prosecution, and conviction.

The future of a rape complaint, if it is reported, is determined in part by luck (as in finding the perpetrator) and in part by discretion (of police, prosecutors, judges, and juries). As with reporting, the debate over the handling of rape cases has raged with intensity at the rhetorical level. *The institutional sexism of the criminal justice system has been pointed to by some commentators as the prime cause of what are characterized as appallingly low rates of arrest, prosecution, and conviction.*¹⁷²

On top of the struggle victims face in reporting the rape committed against them and having the perpetrator prosecuted, they must overcome another hurdle during the trial, particularly during cross-examinations where rape victims go through the process of testifying in court to prove the commission of the rape. This is commonly referred to as the “victim-centered approach.” Thus, during cross-examinations

[m]any child sexual abuse complainants find the adversarial trial process so distressing that they say they would never report abuse again. Their concerns stem largely from cross-examination, in which the lawyer acting for the accused attempts to discredit their evidence. ... Despite the intervening law reforms designed to improve complainants' experience in court, [it is] found that, relative to their historical counterparts, contemporary child complainants of sexual abuse are subjected to far lengthier cross-examinations involving a much broader range of strategies and associated tactics. These

171. Estrich, *supra* note 50, at 1162. “[A]mong crimes of violence, rape may be the one least often reported to Authorities.” (emphasis supplied). See also Gerald D. Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQUENCY 136, 137 (1977). “Police brutalization of the victim is responsible for the failure of women to report the crime.” *Id.*

172. Estrich, *supra* note 50, at 1169.

findings have important implications for future legal practice and reform, and for the way in which these are evaluated.¹⁷³

The consequences of a “victim-centered approach” is discussed in the Supreme Court-commissioned study, *Legal Feminism*.

The Court’s victim-centered approach seems misplaced by making a conviction for rape rest heavily on the credibility of the victim. The onus of proving rape or sexual harassment has been placed on the victim yet the female perspective is easily trumped by privileging the masculine vista. For instance, in *Advincula [vs.] Macabata*, a case involving a male lawyer who forcibly kissed his female client, the Court labelled the victim’s cry of sexual harassment to be ‘subjective.’ This conclusion effectively disregards the crux of the offense which is the *unwelcome* and *offensive* nature of sexual advances from the perspective of the victim. Similarly, the dismissal of rape charges in *People [vs.] Caoili* and *People [vs.] Agao* relied on a painstaking assessment of the technical or anatomical elements of the perpetrator’s acts. The victim-centered adjudication envisioned by legal feminism surfaced only in the dissenting opinion in these two decisions.¹⁷⁴

The Court’s approach in *People vs. Agao* highlights a systemic issue within the criminal justice system, where the burden of proving rape or sexual harassment often falls heavily on the victim, putting the female perspective at a disadvantage. The case focused extensively on technical and anatomical details of the perpetrator’s actions, highlighting a legal framework that lacks a victim-centered adjudication as advocated by legal feminism.¹⁷⁵ Dissenting opinions, rooted in legal feminism, emphasized understanding rape from the victim’s perspective, viewing it as a violation of personal autonomy and intimate choice.¹⁷⁶ These perspectives challenge patriarchal norms within the judicial system, advocating for a more balanced and equitable approach to addressing sexual violence.

At this stage and as the Article transitions to the next chapter, the Author builds on Carol Smart’s argument, which the rape trial is illustrative of, on this matter of the “law’s juridogenic potential; that is, frequently the harms produced by the so-called remedy are as negative as the original abuse.”¹⁷⁷

173. Rachel Zajac, et al., *A Historical Comparison of Australian Lawyers’ Strategies for Cross-Examining Child Sexual Abuse Complainants*, 72 CHILD ABUSE & NEGLECT 236, 236 (2017).

174. SUPREME COURT OF THE PHILIPPINES, *supra* note 67, at 148.

175. *See Agao*, G.R. No. 248049, at 22-26.

176. *Id.* at 10 (J. Leonen, dissenting and concurring opinion).

177. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 161 (1989).

While it is true that “the credibility of girl-children in rape and sexual assault cases has been facilitated by jurisprudence developed and applied consistently in courts”¹⁷⁸ these girl-children as victim-survivors and child witnesses are subjected to rigorous proceedings. The fact is that “[t]he hidden nature of child sexual abuse ... has always made it notoriously difficult to prosecute. The absence of physical evidence and independent witnesses means these cases often come down to one piece of evidence — that of the child complainant.”¹⁷⁹ In criminal cases, the constitutional rights guaranteed by the bill of rights are logically and naturally afforded to the accused.¹⁸⁰ The system is designed that way.

B. How the Legal Framework Can Inadvertently Perpetuate Harmful Stereotypes and Misconceptions About Sexual Violence

While interventions available in courts, such as in-chambers sessions and the presence of support persons aim to protect child victims, they are primarily implemented during the actual trial. These measures ensure the respondent is not directly seen by the child. However, they are limited to the day of the trial itself. There is a significant gap in programmatic and accessible support for victim-survivors who are called to testify as victim witnesses. This gap fails to address anticipatory anxiety, PTSD-like symptoms, and other psychological repercussions that arise well before the trial date. The lack of pre-trial support

178. Amparita D. Sta. Maria & Patrick Edward L. Balisong, *Finding Maria Clara — The Doctrine and the Filipina*, 63 ATENEO L.J. 317, 328 (2018). Although marital rape has been firmly established and the credibility of girl children in rape and sexual assault cases has been facilitated by jurisprudence developed and applied consistently by courts, the stereotypes embedded in these decisions has had a negative impact on mature women. Non-consent as an element of rape and its required manifestation which is usually the degree or extent of resistance is getting to be difficult to prove especially for these women, unless force or intimidation is patently present, or unless they are rendered unconscious. Absent these factors, resistance by mature women is expected to be tenacious and reporting of the rape prompt. Further, if courts require that non-consent be signified ‘before the rape is consummated,’ i.e., at the beginning of the sexual intercourse, are women now precluded from changing their minds after the beginning? Is there no rape when this happens? The recent cases of [*People v. Tionuloc*] and *Amarela* perpetuate the stereotype that men cannot control their biological urges and therefore, women should already refuse and clearly manifest this at the beginning. If they do not do so, then rape is off the table because it would be unfair to men to expect them to stop. *Id.*

179. Zajac, et al., *supra* note 173, at 237.

180. See PHIL. CONST. art III, § 14.

mechanisms highlights the need for a more comprehensive approach to victim care that extends beyond courtroom interventions, ensuring holistic support throughout the entire judicial process.

The decision was promulgated on 4 October 2022,¹⁸¹ *exactly four months after the enactment of the law raising the age of sexual consent*, officially known as An Act Providing for Stronger Protection Against Rape and Sexual Exploitation and Abuse, Increasing the Age for Determining the Commission of Statutory Rape, Amending for the Purpose Act No. 3815, as Amended, Otherwise Known as “The Revised Penal Code,” Republic Act No. 8353, Also Known as “The Anti-Rape Law of 1997,” and Republic Act No. 7610, as Amended, Otherwise Known as the “Special Protection of Children Against Abuse, Exploitation and Discrimination Act” (Republic Act No. 116481).¹⁸²

In his concurring opinion, Chief Justice Gesmundo emphasized that *Agao*, as a landmark decision, solely applies to cases of rape by sexual intercourse or “through penile penetration against a woman,” pursuant to Art. 266 (a) of the RPC, as amended by the Anti-Rape Law of 1997, which then defined rape by sexual intercourse as committed by a “man” having “carnal knowledge of a woman.”¹⁸³ Mindful of the passage of Republic Act No. 116481, Chief Justice Gesmundo pointed out that the law did not simply raise the age of sexual consent to 16 years old, noting further that the amendment redefined the first type of rape as that committed by “by a *person* who shall have carnal knowledge of *another person*.”¹⁸⁴

By going back to the legislative intent of the law, Chief Justice Gesmundo understood that “the shift in language was done to make the crime gender-

181. Uploaded March 3, 2022, five months after the *en banc* promulgation.

182. *See generally* An Act Promoting For Stronger Protection Against Rape and Sexual Exploitation and Abuse, Increasing the Age for Determining the Commission of Statutory Rape, Amending for the Purpose Act No. 3815, as Amended, Otherwise Known as “The Revised Penal Code,” Republic Act No. 8353, Also Known as “The Anti-Rape Law Of 1997,” and Republic Act No. 7610, as Amended, Otherwise Known as the “Special Protection of Children Against Abuse, Exploitation and Discrimination Act”, Republic Act No. 11648 (2022).

183. *Agao*, G.R. No. 248049, at 8 (C.J. Gesmundo, concurring opinion).

184. *Id.*

neutral or ‘gender-friendly.’”¹⁸⁵ In the same concurring opinion, the chief magistrate likewise provided an insight to Republic Act No. 11648.

While this is a welcome development in the nation’s criminal law, it opens a new dimension to develop in jurisprudence, thus[,] what would legally constitute carnal knowledge between non-heterosexual individuals? In the meantime, suffice it to say that the disposition in this case relates only to penile penetration against a woman. The repercussions of these statutory changes, i.e., of the accused from ‘man’ to ‘person’ and of the victim from ‘woman’ to ‘another person,’ can be scrutinized in proper future cases.¹⁸⁶

In a Supreme Court commissioned study on Legal Feminism in Gender Jurisprudence published in 2023, the report tried to align the decision with the ideals of legal feminism by hanging on to well intention of the Court, “to protect victims from recounting their ordeal in repeated and detailed questioning, as well the accused from being held liable for an incorrect crime.”¹⁸⁷ The study recalled how

[i]n the 2022 ruling in *People v[s]. Agao*, the Court found the Child Witness Rule to be ‘insufficiently applicable’ and ‘under-inclusive.’ While the rule provides ‘a generic accommodation for child witnesses,’ it does ‘not squarely consider the needs of child witnesses in rape cases, because they remain largely unmindful of the linguistic descriptive ability and limitations of an abused child.’ This statement came after the Court’s painstaking anatomical discussion of when rape is considered attempted or consummated. ... Ultimately, in its recent pronouncement in *Agao*, the Court recognized the inconsistencies in its handling of child sexual abuse cases. There is more to improve in making the judiciary more gender and child-sensitive, including in the way remedies are provided.¹⁸⁸

To repeat what is stated in the last sentence, indeed “[t]here is more to improve in making the judiciary more gender and child-sensitive, including in the way remedies are provided.”¹⁸⁹ While it is comforting to see that a commissioned study of the Philippine Supreme Court, at this point, can state such findings, this too is where the conundrum begins. In what ways will *Agao* protect child victims of rape and child sexual assault from recounting their

185. *Id.* (citing Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2332 and House Bill No. 7836 (Increasing the Age for Statutory Rape), Nov. 24, 2021, at 32-33).

186. *Id.* at 8-9.

187. SUPREME COURT OF THE PHILIPPINES, *supra* note 67, at 70.

188. *Id.* at 136-37.

189. *Id.*

ordeal in repeated and detailed questioning if the lower courts as trier of facts are enjoined to:

- (1) to be circumspect in their appreciation of the entire body of evidence submitted before them, including the testimonial evidence offered by the minor victims in cases involving them;
- (2) take into full account the jurisprudential guideposts which depict the nature and degree of genital contact when not explicitly described through the testimony of the victim, minor or otherwise; and
- (3) particularly with respect to minor victims, give due regard to their inherent linguistic limitations as witnesses, in order to avoid demanding the highest exacting level of linguistic accuracy as they have been jurisprudentially demonstrated to have required in the past.

VII. INTERSECTIONALITY: A HELPFUL GUIDE IN UNPACKING CSA DYNAMICS

Mindful of the challenge to better surface legal feminism in analyzing gender jurisprudence in the Philippines, including but not limited to violence against children, the Author draws on the key tenets of intersectionality. As a critical lens, it will be employed to interrogate the ways that age, in lieu of race, gender, and class, notably relationality vis-à-vis the rapist, inequality, power, and social context interact within the lived experience of a girl child's lived experience. From thereon and using the case sample, the Author surfaces the experiences of victim-witnesses of child sexual exploitation and rape trials.

Kimberlé Crenshaw broadly conceptualized “intersectionality” as the interplay between various forms of oppression that affect the lived experiences of black women and the resulting injustice.¹⁹⁰ In the process, the Author, through this approach, investigates tensions and issues that shaped the justice journey and experiences of a girl child. Intersectionality overlooked dynamics of CSA, in the process, fortify how jurisprudential guideposts are reified versions of rape myths — and thru trial, specifically direct and cross examination, child witnesses are assaulted anew insofar as they are: (1) graphic

190. UN Women, *Intersectional Feminism: What It Means and Why It Matters Right Now*, available at <https://www.unwomen.org/en/news/stories/2020/6/explain-intersectional-feminism-what-it-means-and-why-it-matters> (last accessed Jan. 31, 2024).

from the get-go; (2) humiliating from the get-go; and (3) rape myths – examine acquittals.

By revisiting the child sexual abuse rape cases of children featured in Legal Feminism on Gender Jurisprudence¹⁹¹, this Section illustrates that the issue of double victimization and re-traumatization is not exclusive to victim-survivors of legal age. Girl-children — despite the ‘wrongly perceived’ benefits of “enjoying several presumptions in favor of the victims of sexual assault cases have been jurisprudentially settled”¹⁹² — are practically verbally assaulted if not symbolically raped yet again just to make a case.

For the purposes of the present investigation, the Author revisited 59 rape cases.¹⁹³ This sample includes the controversial *Agao* case. Note further that the case list source builds on the systematic sampling of Legal Feminism on Philippine Jurisprudence. While the main source considered 60 cases, the Author manually excluded the 60th case in the list because it is not an actual

191. See SUPREME COURT OF THE PHILIPPINES, *supra* note 67.

192. *Agao*, G.R. No. 248049, at 3 (J. Singh, separate concurring opinion). See also *People v. Campaner*, 391 Phil. 324, 388 (2000).

The Court affirmed the conviction of the accused, taking into consideration the factual circumstances of the case that involved a minor victim: As we have said time and again, no woman, especially one who is of tender age such as complainant, would concoct a story of defloration against a virtual stepfather, allow an examination of her private parts and subject herself to risk ridicule and the humiliation, rigors, trouble, and inconvenience of a public trial unless in fact she was raped and her only motive in bringing the cases is to see to it that justice is done.

Id.

193. SUPREME COURT OF THE PHILIPPINES, *supra* note 67, at 58. Selection of cases for analysis was purposive, not random. Narrowing down relevant jurisprudence for review involved several rounds of database search and manual exclusion procedures. Round 1 or initial keyword search yielded raw case results. These were then sifted further through an advanced database search and sorted manually through cursory reading to identify relevant cases or those with a significant gender dimension. Decisions that merely mentioned the search term without reference to gender relations were excluded. Remaining cases underwent Round 2 of selection which involved preliminary screening or a closer reading to confirm relevance. Cases were categorized into broad topics which were later refined to the seven categories of language and representation, marriage and family, LGBTQIA+, labor, violence against women and children, rape, and sexual harassment. Some cases have multiple facets and traverse more than one category (e.g., a decision on rape includes an aspect of gender-fair language).

rape case.¹⁹⁴ Of the 59 cases, 71.19% involved minor victims of child sexual abuse rape cases. Of the 17 cases with female victims of legal age, four were persons with disability.

Classification	COUNTA of Classification	COUNTA of Classification (%)
Adult	17	28.81
Minor	42	71.19
Grand Total	59%	100%

At the time of the offense, the children ranged in age from four to 17 years old. 100% of the sample cases involved girl-children as victims. Of the 42 child victims, 61.90% or 26 ranged in age 10 to 14 years old. Within that age range, two cases involved 14-year-old child victims with a mental age of five. Girl-children aged four to nine years old were 21.43% or nine and young girls aged 14 – 17 years old were 16.67% or seven.

Age	COUNTA of Age	COUNTA of Age (%)
4	1	2.38
5	2	4.76
6	2	4.76
7	2	4.76
8	2	4.76
9	5	11.90
10	1	2.38
11	6	14.29
12	7	16.67
13	7	16.67
14	2	4.76
15	3	7.14

194. See generally *Imbong v. Ochoa*, 732 Phil. 1 (2014).

17	2	4.76
<i>Grand Total</i>	<i>42</i>	<i>100</i>

Defendants, all male, were the girl-child's parent, step-parent, or, like *Agao*, common law partner of the victim's mother 27.90% of the time; they are another family member or relative by affinity within the 3d degree 23.25% of the time; they are a family friend or other familiar adult (e.g., brother's *barkada*, neighbor, boyfriend) 46.51% of the time; and they are a stranger 2.32% of the time. In 93.02% of cases, there is a conviction of at least one charge. Further, 97.61% of the time, the prosecutor presented the child witness in court to testify to secure conviction and/or to help the prosecution make a case. Out of the 42 cases with the total of 43 defendants, three or 6.97% of them were acquitted.

A. Consent vis-à-vis Positional and Situational Inequality

With the enactment of the law raising the age of sexual consent to 16 years old (Republic Act No. 11648), it can be said that, by law, consent is generally not a legitimate defense in CSA cases.¹⁹⁵ In other jurisdictions, scholars observed that “jurors may perceive older children and teenagers as more autonomous or consenting to sexual acts, particularly if abuse involves grooming and seduction, no force or resistance, multiple incidents, and a positive child–perpetrator relationship.”¹⁹⁶ The Author notes these perceptions — if not gender blindness on the nature of rape as violence against children — are visible in the sample cases covered in section. This can be gleaned from the three acquittals out of the 42 CSA cases.

In *Bangayan vs. People*¹⁹⁷ the Court practically chose to look the other way by acquitting Bangayan and justifying the case as an exceptional situation,¹⁹⁸ to wit:

We are not prepared to punish two individuals and deprive their children from having a normal family life simply because of the minority of AAA at the time she began dating Bangayan. The benefits of living in a nuclear family to AAA and their two (2) children outweigh any perceived dangers of the

195. See generally Republic Act No. 11648.

196. Emily Denne, et al., *Developmental Considerations in How Defense Attorneys Employ Child Sexual Abuse and Rape Myths When Questioning Alleged Victims of Child Sexual Abuse*, 38 J. INTERPERSONAL VIOLENCE 11914, 11918 (2023).

197. See generally *Banagayan v. People*, 885 Phil. 405 (2020).

198. *Id.* at 439.

on-going romantic relationship Bangayan has with AAA[,] who is 15 years younger than him. This arrangement is more favorable to the welfare of both parties as they are planning to get married. We verified from the records that Bangayan was single at the time he gave his personal circumstances when he testified in court. This is more consistent with the principle of upholding the best interests of children as it gives Bangayan an opportunity to perform his essential parental obligations and be present for their two [] children.¹⁹⁹

The decision, in effect, considered a subsequent cohabitation and a second child as consent and pardon.²⁰⁰ It overlooked the Social Case Study Report in part reproduced in the dissenting opinion of Justice Leonen.²⁰¹ The testimony of the Municipal Health Officer where the child victim alleged that “Bangayan would kill her if she refused to have sex with him.”²⁰² We digress, at the same time, point that this is an aspect of intersectionality as well. As a child protection advocate, the Author could not help but compare and contrast how the child victim, despite the aunt’s referral to the police, fell through the cracks of a child protection system that was, at best, underdeveloped or barely functional. It seems that none of the justice system actors in the area activated protective interventions of the child. The interplay between various forms of oppression that affect the lived experiences of black women and the resulting injustice — by falling through the cracks of the developing, if not barely there, local child protection system vis-à-vis a bare minimum criminal justice system.

Bangayan is an example of a legal narrative shaped by age stereotypes, rape myths, and in intersectional dimensions of power and the reproduction of social status. Positional and situational inequalities intersect in complex ways.²⁰³

VIII. EXPLORATION OF POTENTIAL EFFECTS ON SURVIVORS’ ACCESS TO JUSTICE AND REPORTING RATES

It will take time before the potential negative effects of *Agao* on survivors’ access to justice and reporting have yet to be measured. Secretary General Clarice Palce of progressive women’s group Gabriela slammed the decision, calling it a ruling for rapists, not victims. She warned that “[w]e have no doubts that there would be even more rape victims forced into silence

199. *Id.*

200. *See generally id.*

201. *Id.*

202. *Id.* at 449 (J. Leonen, dissenting opinion).

203. *See generally Banagayan*, 885 Phil. 405.

following this decision.”²⁰⁴ EnGendeRights executive director Clara Rita Padilla also said that

[t]he countless rape survivors in the Philippines, the trauma they suffered, and the violation of their rights calls for justice and the international human rights obligation of the Philippine state to address rape with due diligence where there is effective prevention, investigation, prosecution, and penalties imposed on rape perpetrators, where a rigid interpretation on where the penis touched the *labia* is insignificant. We are talking about effective prosecution and justice system where rape perpetrators are held accountable. That is the only way our daughters, sisters, mothers, and female friends would be safe against perpetrators of rape.²⁰⁵

If the sample size of rape jurisprudence covered by Legal Feminism in the Philippines is any indication, it already reveals a gap between rape cases involving women victim-survivors and those involving girl-children. As pointed out by Sta. Maria and Balisong in an Article titled, “Finding Maria Clara” —

The Philippine Supreme Court has come up with doctrinal pronouncements which facilitate the establishment of a rape or sexual abuse victim’s credibility. However, before the court is able to rely on said doctrine, the victim must still meet certain criteria for her testimony to become credible. She must be young; she must appear innocent; she must not have ill motives against the rapist or abuser; and/or she must have been chaste prior to the incident.²⁰⁶

This is where it gets even more complicated and conflicting because while doctrinally speaking the credibility of girl-children who are young, innocent-looking, with no ill motives against the rapist or abuse, and chaste prior the abuse, the Supreme Court, even prior to *Agao*, subscribed specific guideposts that the trial prosecutor and trial court must be aware of. These judicial guideposts as pronounced in the controversial landmark ruling are the following:

204. Anne Marxze Umil, ‘A Ruling for Rapists,’ *Gabriela on SC Ruling*, BULATLAT, Apr. 5, 2023 available at <https://www.bulatlat.com/2023/04/05/a-ruling-for-rapists-gabriela-on-sc-ruling> (last accessed Jan. 31, 2024) [<https://perma.cc/5GW3-TRRU>].

205. Michelle Abad, *Women’s Advocates: SC ‘Fine-tuning’ Rape Consummation Favors Perpetrators*, RAPPLER, Apr. 5, 2023, available at <https://www.rappler.com/philippines/women-advocates-supreme-court-fine-tuning-rape-consummation-favors-perpetrators> (last accessed Jan. 31, 2024) [<https://perma.cc/GGV5-7UCY>].

206. Sta. Maria & Balisong, *supra* note 178, at 321.

- (1) when the victim testifies that she felt pain in her genitals;²⁰⁷
- (2) when there is bleeding in the same;²⁰⁸
- (3) when the *labia minora* was observed to be gaping or has redness²⁰⁹ otherwise discolored;²¹⁰
- (4) when the hymenal tags are no longer visible;²¹¹ or
- (5) when the sex organ of the victim has sustained any other type of injury.²¹²

Accordingly, “[o]nce the testimony of the victim and/or the above attendant circumstances reveal that the threshold genital contact occurred, the courts have sufficient basis to find for consummation.”²¹³ In *Agao*, the Court found it necessary to reiterate the jurisprudential guideposts because

as Chief Justice Alexander G. Gesmundo (Chief Justice Gesmundo) astutely adds, the Court further reiterates the jurisprudential guideposts which provide that *when the necessary genital contact is not explicitly described through the testimony of the victim, whether minor or otherwise, courts can anchor their findings and appreciation of the genital contact on other aspects that would similarly depict the occurrence and circumstance of penile penetration.* Which are appreciable in all rape cases may reasonably find sharper import with respect to cases of rape involving minor victims, especially in view of the inherent limitations of the testimony of child witnesses. *The courts are, therefore, enjoined to exercise circumspection in their appreciation, with the use of these surrounding or attendant circumstances which can aid the courts in their appreciation of penile penetration.*²¹⁴

From a trauma-informed standpoint, going over the so-called jurisprudential guidepost, plus what the dissent referred to as pseudo-medicine with accompanying visuals can be triggering. The Author suggests moving to the next Section of the Article — Innocent Until Proven Guilty vs. Best Interests of the Child.

207. *People v. Campuhan*, 385 Phil. 912 (2000).

208. *People v. Grande*, 461 Phil.403, 419 (2003).

209. *People v. De la Pena*, 342 Phil. 526 (1997).

210. *Id.*

211. *Campuhan*, 385 Phil. at 926.

212. *See People v. Talan*, 591 Phil. 812 (2008).

213. *Agao*, G.R. No. 248049, at 27.

214. *Id.* (citing *Agao*, G.R. No. 248049, at 3 (C.J. Gesmundo, concurring opinion)) (emphases supplied).

IX. BROADER IMPLICATIONS OF *AGAO* ON LEGAL STANDARDS FOR PROSECUTING CSA CASES

For the highly cerebral and the philosophical, the demands it seeks to exact out of the prosecution witness are justified. While the Supreme Court is very much aware that it is not a trier of facts, in *Agao*, the *ponencia* is convinced that “[t]he Court must be able to interrogate the darkest corners of crimes ... At the risk of testing its strength under the weight of its decisions, the Court must remain honest, clear-sighted and unflinching, for to look away is violence.”²¹⁵ The *ponencia* dedicated a section labeled as “[n]ature of child testimonies in adversarial trials must be taken into account in the context of rape,”²¹⁶ accordingly —

Moving forward, therefore, in the specific context of trying cases of rape, the Court enjoins the courts: (i) to be circumspect in their appreciation of the entire body of evidence submitted before them, including the testimonial evidence offered by the minor victims in cases involving them; (ii) take into full account the jurisprudential guideposts which depict the nature and degree of genital contact when not explicitly described through the testimony of the victim, minor or otherwise; and (iii) particularly with respect to *minor victims*, *give due regard to their inherent linguistic limitations as witnesses, in order to avoid demanding the highest exacting level of linguistic accuracy as they have been jurisprudentially demonstrated to have required in the past.*²¹⁷

The jurisprudential guideposts are not entirely new. *Agao*, in many respects, simply added another guidepost or layer. The ruling accordingly seeks to “ensure that the deserved conviction and the appropriate penalty are not withheld because of perceived uncertainty, and to guarantee that no victim of rape ever has to face the tallest task of recounting the assault at the level of specificity of detail that are both sordid and unnecessary.”²¹⁸ The ruling provided a qualification that when the victims are minors, it is not necessary to demand the highest level of linguistic accuracy.

A. Adversarial Nature of CSA Trials, i.e., “One Judicial Rape Then He Goes to Jail”

In this Section, the Author argues that the burden of truth-telling remains. To access justice, child sexual abuse victims must endure the rape of the second kind or judicial rape in the form of testifying. Rape trials, even with the

²¹⁵ *Id.* at 38.

²¹⁶ *Id.* at 29-33.

²¹⁷ *Id.* at 33 (emphasis supplied).

²¹⁸ *Id.* at 2.

accommodations provided by the Rule on Examination of Child Witness,²¹⁹ is illustrative of the law's juridogenic potential; that is, frequently the harms produced by the so-called remedy are as negative as the original abuse.²²⁰ In practice, the law dictates that the remedy for a child sexual abuse and rape victim is to file a case against the alleged rapist. However, given the nature of the crime, along with the dynamics of victimization and the complexity of claiming rights, uneven and traumatic challenges will inevitably arise. To access justice and redress, they must testify. To seek justice, the child witness must be psychologically prepared for the rape of the second kind (also referred to by legal theorists as "judicial rape").²²¹ In everyday justice and as experienced by an alleged victim navigating her justice and healing journey — as a child witness and victim-survivor at the same time, testifying in court in the interest of the administration can be terrifying and triggering at the same time.

The rights of the accused are normative. Appeals, even for defendants of rape cases, are a matter of right.²²² For the accused, the constitutionally guaranteed assumption of innocence until proven guilty beyond reasonable doubt is their last chance at freedom.²²³ "To ensure that the deserved conviction and the appropriate penalty are not withheld because of perceived uncertainty,"²²⁴ the Court scrutinizes that records and on review should "bear out the convincing manner by which private complainant testified with candor and consistency in recounting the material points of the criminal incidents."²²⁵ In the case of *People of the Philippines vs. XXX*,²²⁶ the Court affirmed the conviction only when "[t]he prosecution substantially proved that private complainant's own father had carnal knowledge of her through force, threat, and intimidation when she was only 12 and 14 years old,

219. See generally RULE ON EXAMINATION OF A CHILD WITNESS.

220. SMART, *supra* note 177, at 161.

221. See, e.g., Sue Lees, *Judicial Rape*, WOMEN'S STUD. INT'L FORUM, Volume No. 16, Issue 1 (1993) & Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 J. CRIM. L. 367 (2017).

222. See RULES OF CRIMINAL PROCEDURE, rule 122, § 1.

223. See PHIL. CONST. art. III, § 14 (2).

224. *Agao*, G.R. No. 248049, at 2.

225. *People of the Philippines v. XXX*, G.R. No. 253284, Aug. 31, 2022, at 7, available at <https://sc.judiciary.gov.ph/wp-content/uploads/2022/11/253284.pdf> (last accessed Jan. 31, 2024) [hereinafter *XXX (2022)*].

226. *Id.*

respectively ... She vividly narrated the sexual ordeal that she suffered at the hands of her own father.”²²⁷

PROS. BAUTISTA

Q: *Noong binaba na niya ang shorts at panty mo, ano ang sunod niyang ginawa?*

A: *Sinimulan na niya po.*

Q: *Pwede mo bang sabihin sa amin kung paano niya sinimulan? Kaya mo ba?*

COURT

Q: *Paano niya ginawa?*

A: *Hinawakan niya po muna.*

Q: *Hinawakan ka niya sa ...*

A: (no answer)²²⁸

For clarity, in this scenario, “A” represents the child witness, AAA, testifying about the CSA on 13 May 2015.²²⁹ AAA was approximately halfway through her testimony already.²³⁰ The Author highlights this portion of AAA’s testimony to reexamine what the Court appreciated as a testimony that “vividly narrated the sexual ordeal that she suffered at the hands of her own father.”²³¹ Here, the Author invites the reader not to just hover but to reflect on the toll it takes to establish prescribed jurisprudential guideposts through the testimony of a child witness. Intersectionality will still be used, drawing elements from the interplay of “connections between the law as written by legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors.”²³²

AAA was only 12 years when her father raped her.²³³ Her mother was at work when it happened.²³⁴ The abuse went on almost every month per AAA’s

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. XXX (2022), G.R. No. 253284, at 7.

232. Estrich, *supra* note 50, at 1090. These elements’ connections were used by Susan Estrich to examine rape within the criminal law tradition in order to expose and understand that tradition’s attitude toward women.

233. XXX (2022), G.R. No. 253284, at 2.

234. *Id.*

recollection and prosecution record.²³⁵ Based on the narration of facts, “[i]n all those incidents, her father repeatedly threatened her that he would kill her mother if she would report to her what he did. Whenever she resisted, accused-appellant hurt her by punching her thighs.”²³⁶ Until 13 May 2015, her brother, BBB caught them *in flagrante*.²³⁷ Despite the threats leveled against AAA’s brother, he was able to call and report to their mother.²³⁸ Interventions and referrals between and among local child protection and justice system actors followed.²³⁹

After 11 months, she was in court to testify.²⁴⁰ Even if a year has almost passed, it is not surprising to surmise based that she still found it difficult to testify.²⁴¹ With limited side notes from the stenographer, AAA’s discomfort to say least is best captured by how the public prosecutor asked the question with a follow up question. “*Pwede mo bang sabihin sa amin kung paano niya sinimulan? Kaya mo ba?*”²⁴² The court helped prod a little more by asking, “[p]aano niya ginawa.”²⁴³

The rest of the testimonial excerpt is a masterclass on trial technique. It is also a rich reference material on how to interview child witnesses. The interplay between and amongst the child witness, the court, and the prosecutor reveals palpable tensions within the intersections of power and AAA’s fears (if not trauma).²⁴⁴ The “connections between the law as written by legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors.”²⁴⁵ The court and the prosecutor worked together through trauma-triggering albeit probing questions, to surface elements of the crime along with additional applicable jurisprudential guideposts²⁴⁶ —

235. *Id.* at 3.

236. *Id.*

237. *Id.*

238. *Id.* at 4.

239. XXX (2022), G.R. No. 253284, at 4.

240. *Id.* n. 17.

241. *See id.* at 8.

242. *Id.* at 9.

243. *Id.*

244. *See id.* at 7–9.

245. Estrich, *supra* note 50, at 1090. These elements’ connections were used by Susan Estrich to examine rape within the criminal law tradition in order to expose and understand that tradition’s attitude toward women.

246. XXX (2022), G.R. No. 253284, at 7–9.

without which the burden of proof necessary to convict XXX beyond reasonable doubt would crumble.

Q: *Yung private part mo?*

A: *Opo.*

Q: *Tapos?*

A: *Tapos pinasok niya po.*

Q: *Alin ang pinasok niya?*

A: *Y[u]ng ano niya po.*

PROS. BAUTISTA

Q: *[Yung] kanya bang pagkalalaki, yon kanyang daliri[,] or ibang bagay?*

A: *Y[u]ng ari niya po.*²⁴⁷

The Author examines the connections and contradictions of rape law as written as legislators and as understood by the courts through case law. Per jurisprudence, the elements of Qualified Rape are: “(1) sexual congress; (2) with a woman; (3) done by force and without consent; (4) the victim is under [eighteen] years of age at the time of the rape; (5) the offender is a parent (whether legitimate, illegitimate or adopted) of the victim.”²⁴⁸ Next to a tight lipped child-witness, the people through the prosecutor demands to know —

Q: *Tapos noong pinasok na niya, ano ang sunod niyang ginawa?*

A: (no answer)

Q: *Ilang beses niyang pinasok ang ari niya?*

A: *Marami po.*

COURT

Q: *Gaano katagal yong pangyayari na yon? Masasabi mo ba ilang minute[s]?*

A: *Matagal po.*²⁴⁹

In the brief testimonial above, the crucial facts were established. Mandated roles for the purposes of prosecution and adjudication are satisfied for the time being. However, the intricate interplay of contradictions and connections within rape law, as enforced by prosecutors and experienced by victims,

247. *Id.* at 9.

248. *People v. XXX*, 889 Phil. 359, 373 (2020) (citing *People v. Salaver*, 839 Phil. 90, 102) (2018) (citing *People v. Colentava*, 753 Phil. 361, 372-73 (2015)).

249. *XXX* (2022), G.R. No. 253284, at 9.

persists. Unsaid and unseen within AAA's layers of identity as a child witness, victim-survivor, and daughter to the defendant. Absent the benefit of an interview or a victim impact statement,²⁵⁰ a core script from a social worker trained to prepare and debrief a child-witness hopefully provides a little more perspective —

Sa kasong ito hindi ikaw ang may kasalanan. Hindi rin ikaw ang magpapasya kung makuku[']ong ang tatay mo. Trabaho iyon ng judge. Ikaw, ang mahalagang papel mo ay [']yong magsabi sa loob ng court sa harap ng judge kung an[o] ang totoong nangyari. Ang kabilang lawyer ay nagtatanong din [sa'yo], ang tawag [doon] ay cross-examination. Kung an[o] lang ang tanong [niya] iyon ang sasagutin mo. Kapag sa tingin mo nahihirapan ka o naiiyak andi[ya]n lang ako sa malapit or pag sa chamber naman, katabi mo lang ako.²⁵¹

The core script represents many varied moral, legal, and practical questions that runs through the mind of a child witness. Without breaking confidentiality, it also provides a glimpse to the burden of truth telling. The Author has worked with art therapists, forensic psychologists, and social workers in support of a victim-survivor's justice journey. The days and nights leading to their direct and cross-examinations are the hardest. Nightmares often consist of vivid scenes involving fathers-defendants actualizing the very threats often at the time of the abuse to silence them. Recounting the details of a traumatic event like child sexual assault and rape, often causes the victim-survivor to relive them. Scholars of the emotional impact of the court process have found a correlation between empowering court experiences and positive court-related outcomes and satisfaction. On balance, the anticipatory anxiety and emotional distress may be minimized if with properly resourced professional support and social services — “empowering and disempowering court experiences can impact how individuals impacted by interpersonal violence feel about the court system and their health and well-being.”²⁵²

In this context, we address the challenges posed by legal and justice reform, formidable barriers that impede access to justice. Through a critical

250. Victim Impact Statement common in jurisdictions such as but not limited to the United States, Canada, etc. See U.S. Department of Justice, Victim Impact Statements, available at <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements> (last accessed Jan. 31, 2024) & Department of Justice Canada, Victim Impact Statement, available at <https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/victim-victime.html> (last accessed Jan. 31, 2024).

251. Interview with Olaño, *supra* note 26.

252. Angela Cartwright, The Court Experiences of Survivors of Interpersonal Violence, at 82 (2023) (published Ph.D. dissertation, Walden University).

lens of intersectionality, shaped by the intricate interplay of various factors within criminal proceedings, we explore the connections between legislation crafted by legislators, interpretation by courts, actions taken by victims, and enforcement by prosecutors.

B. Amendment of the Code of Professional Responsibility: Use of Gender- and Child-Sensitive Language

More than three decades since the enactment of the Code of Professional Responsibility, the Supreme Court pushed for an upgrade mindful that

there have been significant developments in our laws and socioeconomic life as a people, as well as the rapid technological advancements around Notice of Resolution A.M. No. 22-09-01-SC, 11 April 2023, the world which have shaped the way lawyers interact with society, the legal profession, the courts, and their clients.²⁵³

As such, the old Code was replaced when the Court unveiled the Code of Professional Responsibility and Accountability (CPRA).²⁵⁴ In his keynote address, Chief Justice Alexander Gesmundo introduced the new code as that which “captures the virtues that all in the legal profession must live up to, and tackles the use of social media, formation, definition of lawyer-client relationship, conduct of non-legal staff, among other intricacies experience by practitioners today.”²⁵⁵

The CPRA and its guidelines produce legal limits that give rise to ethical obligations, in and out of court, including trial, especially when a child witness vulnerable victim is on the stand be it for direct examination and cross. Given the power of these social assumptions to distort the truth-seeking process, the provision of this wide latitude to defense counsel demands a concomitant ethical obligation on these lawyers not to trigger these legally rejected social assumptions.²⁵⁶

253. CPRA, whereas cl. para. 4.

254. *See generally id.* The Court, through the Strategic Plan for Judicial Innovations (SPJI) 2022-2027, identified the revision of the Code of Professional Responsibility as a component of its campaign for ethical responsibility under the Outcome of Efficiency.

255. *See* Supreme Court of the Philippines, Supreme Court Official Launches the Code of Professional Responsibility and Accountability (Press Release), available at <https://sc.judiciary.gov.ph/supreme-court-officially-launchesthe-code-of-professional-responsibility-and-accountability> (last accessed Jan. 31, 2024).

256. Elaine Craig, *The Ethical Obligations of Defence Counsel in Sexual Assault Cases*, 51 OSGOOD HALL L.J. 427, 459 (2014).

Advocates are the ones who know (or should know) whether the lines of questioning they pursue or the arguments they advance have a legitimate purpose. This is a function that the law and courts alone cannot perform adequately. Rulings of inadmissibility, admonishments to the jury, and sustained Crown objections may function retroactively and impotently.²⁵⁷

Certainly, the Court, in establishing a good faith/reasonable hypothesis basis as the standard for permissible cross-examination, discussed the issue in both legal and ethical terms. Alice Woolley, who describes herself as a proponent of zealous advocacy, also couches the issue in ethical terms. In discussing the ethics of advocacy, she maintains that ‘a lawyer should cross-examine witnesses within the rules established by the law of evidence.’²⁵⁸

Relevant to the issue of the Article herein are two sections under Canon II. Canon II, Section 4 of the newly minted CPRA²⁵⁹ ordains that “[a] lawyer shall use only dignified, gender-fair, child- and culturally-sensitive language in all personal and professional dealings.”²⁶⁰ Section 6 likewise provides that, “[a] lawyer shall not harass or threaten a fellow lawyer, the latter’s client or principal, a witness or any official or employee of a court, tribunal, or other government agency.”²⁶¹ The standards set forth on the use of dignified, gender-fair, child- and culturally-sensitive language and the prohibition on harassing and threatening conduct as worded endeavors to better articulate Canon 8 of the previous Code of Professional Responsibility.²⁶² The previous iteration focused solely on the ideal that a lawyer shall conduct himself with courtesy, fairness, and candor towards professional colleagues.²⁶³ The provision about avoiding harassing tactics, on the other hand, only specifically

257. *Id.* at 460.

258. *Id.* at 456.

259. *See* CPRA, canon II, § 4.

260. *Id.*

261. *Id.* canon II, § 6.

262. *See* 1988 CODE OF PROFESSIONAL RESPONSIBILITY, canon VIII (superseded in 2023).

263. *See generally id.*

referred to the opposing counsel.²⁶⁴ Despite the narrow focus of Canon 8, lawyers have been suspended²⁶⁵ and disbarred²⁶⁶ based on those grounds.

In establishing the applicability of Canon 8 in the case of *Fernandez vs. Diño*, the Court held that

Rule 138, Section 20, [P]aragraph (f) of the Rules of Court ordains that it is the duty of an attorney ‘to abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged. Such duty is underscored in Canons 8 and 11 of the CPR.’”²⁶⁷

Citing a string of cases recognizing the limits of an advocate’s license to defend a client’s cause even in adversarial settings, the Court emphasized that

[t]o be sure, this Court recognizes the adversarial nature of our legal system which has necessitated lawyers to use strong language in the advancement of the interest of their clients. However, while one may defend his or her client’s cause with utmost zeal, *such enthusiasm does not justify the use of offensive and abusive language*. Every lawyer is mandated to carry out his duty as an agent in the administration of justice with courtesy, dignity, and respect, not only towards his clients, the court, and judicial officers, but equally towards his colleagues in the legal profession.²⁶⁸

By examining the language and tone employed by respondent Diño in the Verified Omnibus Motion (to reconsider, reverse, and set aside the IBP Board’s Resolution) it was shown beyond doubt how Diño violated Canon 8²⁶⁹ of the old Code. In *Fernandez*, the Court persistently ascribed discourteous and unsupported imputations against the complainant, the complainant’s counsel, and even against the Investigating Commission Atty.

264. See 1988 CODE OF PROFESSIONAL RESPONSIBILITY, canon II, § 6.

265. See, e.g., Atty. Fernandez v. Atty. Diño, A.C. No. 13365, Sept. 27, 2022, available at https://elibrary.judiciary.gov.ph/assets/dtSearch/dtSearch_system_files/dtisap16.dll?cmd=getdoc&DocId=68122&Index=%2a4aeb4dbdceeda9b59b85ae3fb22ceco&HitCount=2&hits=4+d+&SearchForm=C%3a%5celibrev2%5csearch%5csearch%5fform (last accessed Jan. 31, 2024).

266. See, e.g., Atty. Nava v. Atty. Artuz, 871 Phil. 1 (2020).

267. *Fernandez*, A.C. No. 13365.

268. *Id.* (citing Sanchez v. Atty. Aguilos, 783 Phil. 393, (2016) & Malabed v. Atty. Dela Peña, 780 Phil. 462, 467 (2016) (citing Saberon v. Larong 574 Phil. 510, 517 (2008))) (emphasis supplied).

269. *Fernandez*, A.C. No. 13365 & 1988 CODE OF PROFESSIONAL RESPONSIBILITY, canon VIII.

Randall Tabayoyong.²⁷⁰ The duty of a lawyer “to conduct himself with courtesy, fairness, and candor toward his professional colleagues, and shall avoid harassing tactics against opposing counsel”²⁷¹ is not limited to the written medium. Ethical conduct must be observed, not only in administrative and disciplinary proceedings, but in all forms of judicial forum, including in trials, despite the adversarial nature of court proceedings.

In the case of *Atty. Nava II vs. Atty. Artuz*,²⁷² the latter was disbarred on the grounds of violating several Canons of the old code and the Canons of Professional Ethics including Canon 8.²⁷³ The Court decided that

the acts of calling Atty. Nava II and his father ‘barbaric, nomadic, and outrageous’ and baselessly imputing to Atty. Nava II the use of his alleged influence as the godson of the City Prosecutor who, by virtue thereof, allegedly had the audacity to display ‘his bad manners and wrong conduct and arrogance’ in an official pleading falls short of the conduct being exhorted by Canon 8 to all members of the Bar. Verily, such use of intemperate language and aspersions has no place in the dignity of judicial forum.²⁷⁴

However, according to the Code of Ethics, their overriding duty is not to their client’s interests but to the Court (Rule 8.1).²⁷⁵

One might ask how these ethical obligations are to be instantiated. The relationship between ethical norms and rules, formal and informal sanctions, reputational harm, judicial regulation of lawyers, and professional disciplinary measures is the subject of a rich body of literature and fervid debate that is beyond the scope of this discussion. The purpose of this discussion is to demonstrate that these ethical obligations exist.²⁷⁶

Do lawyers’ duties and responsibilities that extend beyond the interests of their clients include a broader ethical duty not to invoke discriminatory beliefs or biases? Presumably they do.²⁷⁷

270. *Fernandez*, A.C. No. 13365.

271. 1988 CODE OF PROFESSIONAL RESPONSIBILITY, canon VIII.

272. *See generally* *Atty. Nava v. Atty. Artuz*, 871 Phil. 1 (2020).

273. *Id.* at 13.

274. *Id.* at 12 (citing *Buenviaje v. Jubay*, 817 Phil. 1, 6 (2017)).

275. Emma Davies, et al., *In the Interests of Justice – The Cross-Examination of Child Complainants of Sexual Abuse in Criminal Proceedings*, 4 PSYCHIATRY PSYCHOL. & L. 217, 227-28 (1997).

276. Craige, *supra* note 256, 461.

277. *Id.* at 467.

Appeals that perpetuate gender discrimination and sexist beliefs bring the profession into disrepute. Should this be thrown out?

Far from performing his duty as a good father to his child, Atty. Ruiz even had the audacity to exploit his knowledge of the law in an attempt to circumvent the PPO. Clearly, is the one at fault here. Yet, when complainant sought to have the PPO executed in 2015 after not receiving anything from Atty. Ruiz, he turned the table around, making it appear as if he had done nothing wrong and it was complainant's fault why he did not provide support for seven [] long years. This is detestable *victim-blaming* ... But more than his abusive refusal to give economic support, Atty. Ruiz also caused complainant psychological and emotional suffering, giving the Court more reason to believe that he deserved to be sanctioned.²⁷⁸

The remainder of this discussion demonstrates why even the most zealous advocates should agree that the law reforms described in Section II give rise to ethical obligations not to trigger the social assumptions that unchaste women are untrustworthy and indiscriminate, that passivity communicates consent, and that delayed disclosure suggests false allegations.

The treatment of sexual assault complainants by defen[s]e counsel has been the site of significant debate for legal ethicists. Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants. The issue is often characterized as one of particular concern in circumstances where the defen[s]e lawyer knows that the complainant is telling the truth. One of the most contentious issues in this debate pertains to the use of bias, stereotypes, and discriminatory tactics to advance the position of one's client.²⁷⁹

The landmark case of *People vs. Agao* is a cautionary tale of projected gender or Gender Equality, Disability, and Social Inclusion (GEDSI) expertise gone wrong. It is ironic, even disturbing to see, how a prescribed intervention in the name of gender responsiveness through gender-sensitive language such as but not limited to anatomical *situs* of rape, minimum threshold of penile-vaginal penetration, and the cleft of the *labia majora*, end up being the very instrument that will further perpetuate rape myths in judicial processes within a broken child protection system.²⁸⁰

278. Atty. Altobano-Ruiz v. Atty. Ruiz, et al., A.C. No. 13132, Jan. 31 2023, *available at* https://elibrary.judiciary.gov.ph/assets/dtSearch/dtSearch_system_files/dtisap16.dll?cmd=getdoc&DocId=68510&Index=%2a4aeb4dbdceeda9b59b85ae3fb22ceco&HitCount=2&hits=4+d+&SearchForm=C%3a%5celibrev2%5csearch%5csearch%5fform (last accessed Jan. 31, 2024).

279. Craig, *supra* note 256, at 426.

280. *See generally* *Agao*, G.R. No. 248049.

The separate concurring opinion of Chief Justice Gesmundo provides an honest insight into the Court's well-meaning commitment, yet untethered if not confused, curiosity on what jurisprudence can and will make of it. Reflections on the limits of law reforms in CPS, GEDSI, WAV-VAC uncomfortable as this may be ought to start from the chief magistrate query.²⁸¹

Lastly, it is necessary to stress that the disposition in the [*ponencia*] is relevant as regards rape by sexual intercourse or through penile penetration against a woman, pursuant to Art. 266 (a) of the RPC, as amended by the Anti-Rape Law of 1997,²⁸² which then defined rape by sexual intercourse as committed by a 'man' having 'carnal knowledge of a woman.'²⁸³

Notably, Republic Act No. 11648 has recently amended this RPC provision and has redefined this first type of rape as that committed 'by a person who shall have carnal knowledge of another person.'²⁸⁴ The legislative deliberations show that the shift in language was done to make the crime gender-neutral or 'gender-friendly.'²⁸⁵ *While this is a welcome development in the nation's criminal law, it opens a new dimension to develop in jurisprudence, thus [—] what would legally constitute carnal knowledge between non-heterosexual individuals? In the meantime, suffice it to say that the disposition in this case relates only to penile penetration against a woman.* The repercussions of these statutory changes, i.e., of the accused from 'man' to 'person' and of the victim from 'woman' to 'another person,' can be scrutinized in proper future cases.²⁸⁶

X. INNOCENT UNTIL PROVEN GUILTY VS. BEST INTERESTS OF THE CHILD

In 2019, the combined fifth and sixth periodic reports submitted by the Philippines under Article 44 of the Convention, due in 2017, reported that "[s]tate jurisprudence upholds the 'best interests of the child,' even as the Supreme Court reminds judges to take into consideration the child's interests

281. *See generally id.* (C.J. Gesmundo, concurring opinion).

282. *Id.*

283. *See* An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, § 266 (a) (1930).

284. *Agao*, G.R. No. 248049 (C.J. Gesmundo, concurring opinion).

285. *Id.* at 8 (citing Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2332 and House Bill No. 7836 (Increasing the Age for Statutory Rape), Nov. 24, 2021, at 32-33).

286. *Id.* (emphasis supplied).

not only in decisions, but also in the conduct of proceedings.”²⁸⁷ The Philippine report likewise claimed that:

- (a) Under the Child Witness Rule of 2000 and reiterated in the Rule on Juveniles in Conflict with the Law enacted in 2009, the State defines the ‘best interest of the child’ as ‘the totality of the circumstances and conditions that are most congenial to the survival, protection, and feelings of security of the child and most encouraging to his physical, psychological, and emotional development[.]’ as well as ‘the least detrimental available alternative for safeguarding the growth and development of the child.’
- (b) In keeping with the Child Witness Rule, the State provides an environment that will allow children to give reliable and complete evidence, minimize their traumatic stress, encourage them to testify in legal proceedings, and facilitate the ascertainment of truth.²⁸⁸

The NGO Alternative Report submitted by the Civil Society Coalition on the Convention on the Rights of the Child (CRC Coalition) belied the claims.²⁸⁹ While it acknowledged that the Rule on the Examination of the Child Witness has been around, it revealed that

[w]hile Philippine courts are required to follow child-friendly procedures in securing the testimony of a child under the Supreme Court’s Rule on Examination of Child Witnesses, these processes are often not followed. Moreover, very few court rooms use video conferencing technology that allows the testimony of the child to be collected in a place outside the courtroom, which can alleviate the trauma brought by testifying in a traditional court room setting. Presently, there are 121 designated family courts in the country. Not all of them are filled. Moreover, judges need further training to properly handle cases of child sexual abuse.²⁹⁰

287. Convention on the Rights of the Child, Combined Fifth and Sixth Periodic Reports Submitted by the Philippines Under Article 44 of the Convention, due in 2017, ¶ 48, U.N. Doc. CRC/C/PHL/5-6 (Mar. 1, 2019) (citing *Grande v. Antonio*, 727 Phil. 448, (2014); *Becket v. Oligario, A.M.* RTJ-12-2326, (2013); *In re Adoption of Stephanie Nathy Astorga Garcia*, 494 Phil. 515, (2005); *In re Petition for Change of Name and/or Correction/Cancellation of Entry in Civil Registry of Juilian Lin Carulusan Wang*, 494 Phil. 149, (2005); *Bagtas v. Santos*, 621 Phil. 94, (2009); *Gualberto v. Gualberto*, 500 Phil. 226, (2005); & *Bondagjy v. Bondagjy*, 423 Phil. 127 (2001)).

288. *Id.*

289. *See generally* CIVIL SOCIETY COALITION ON THE CONVENTION ON THE RIGHTS OF THE CHILD, STILL IN THE SIDELINES: CHILDREN’S RIGHTS IN THE PHILIPPINES I (2019).

290. *Id.* ¶ 222.

The CRC Coalition Report further reported that as of 2019 —

Under the Rape Victim Assistance and Protection Act of 1998 (i.e., Republic Act No. 8505), DSWD, together with DOH, DILG, DOJ[,] and NGOs are mandated to establish Rape Crisis Centers (RCC) in every province and city. These RCCs are to provide psychological counselling, medical & health services, and legal aid to rape victims. Sadly, many provinces and cities still do not have RCCs.²⁹¹

In 2013, the DOH issued Administrative Order No. 2013-0011 instructing all government hospitals to establish Woman and Child Protection Units (WCPUs) to provide aid to abused women and children. The WCPU is a child-friendly and gender-sensitive facility manned by a multidisciplinary team that provides comprehensive services for victims of sexual violence. As of date, there are 106 WCPUs in 55 provinces and 10 cities in the country. [Twenty six] provinces still do not have WCPUs.²⁹²

The Philippines and its claims are true in the sense that the Rule exists. The cases cited, although accurate, the report did *not* mention, however, the there is no established doctrine specifically tailored to cases within the criminal justice system in the Philippines. The existing jurisprudence primarily focuses on custody-related cases, such as adoption and child support. The alternative report likewise dedicated a section on rape, incest, and sexual harassment where it claimed that

[t]he Philippines has one of the lowest age to determine statutory rape in the world. Perpetrators of sexual violence escape from prosecution because evidentiary requirements to prove rape are quite complex that victims often decide to drop their cases or not press charges for fear of stigma and the disruption that long arduous court proceedings will cause in their lives ...²⁹³

Many child sexual abuse victims choose not to report their harrowing ordeal to proper Authorities due to social stigma, fear of revenge from perpetrators, apprehensions of being blamed for the offense, and feelings of indebtedness to their offenders. There is also the ‘secondary victimization’ often experienced by victims in reporting to law enforcement agencies that are not trained to handle cases of sexual abuse. The process of testifying in court can

291. *Id.* ¶ 220. See also Clara Rita Padilla, *Dangerous Times for Women in a Culture of Rape in the PH*, RAPPLER, Aug. 4, 2017 available at <https://www.rappler.com/voices/thought-leaders/177403-dangerous-times-women-philippine-culture-rape> (last accessed Jan. 31, 2024) [<https://perma.cc/T7RD-GLN8>].

292. CIVIL SOCIETY COALITION ON THE CONVENTION ON THE RIGHTS OF THE CHILD ¶¶ 220 & 221.

293. *Id.* ¶ 218.

also be extremely traumatic to a child, since he or she is forced to recount the assault done against him/her in a public setting.²⁹⁴

The grounded feedback on the ordeals of victim-survivors and child witnesses overlooked one established fact which Robinson clearly pointed in their Article — “The Experience of the Child Witness: Legal and Psychological Issues.”²⁹⁵ Accordingly,

[w]hile all involved undoubtedly wish to prevent additional harm to child victim-witnesses, *it is important to bear in mind that the primary goal and function of the criminal justice system is to determine whether a defendant is guilty.* In seeking to achieve that goal, the *central purpose of witnesses* is to obtain the accurate, relevant information needed to reach the truth of the matter. *The safeguarding of child witnesses’ welfare must play a secondary — though not entirely insignificant — role.*²⁹⁶

While it is true that there is a need to use unambiguous language in the resolution of rape cases²⁹⁷ that lofty goal was lost to both to survivors of sexual violence and to those who advocate for their rights. The dissent from Justice Leonen, the media attention it got, and the succeeding Supreme Court-sanctioned study, Legal Feminism, has covered more than enough arguments against the landmark decision.

This Article contributes to that. Specifically this section, the Article further establishes why the imbalance between the primacy of constitutionally

294. *Id.* ¶ 222.

295. Jana Robinson, *The Experience of the Child Witness: Legal and Psychological Issues*, 42 INT’L. J.L. & PSYCHIATRY 168 (2015).

296. *Id.* at 169 (emphases supplied).

297. Supreme Court of the Philippines, *supra* note 43. The Press Release quoting excerpts from the *ponencia* emphasized that —

The Court now recognizes that there is perhaps no other way to reconcile and refine the current jurisprudence on rape than to peel away the euphemistic shrouds that have been resorted to so far, and instead inform case law with the exact anatomical situs of the pertinent body parts referred to in jurisprudence, which, unlike other matters that attend the crime of rape, are uncolored, self-evident and inarguable in their precision.

Id. (citing *Agao*, G.R. No. 248049, at 1-2).

The Press Release also pointed out that “[t]he Court noted that the use in jurisprudence on rape cases of ‘euphemistic but largely inaccurate descriptions’ have only so far convoluted matters regarding the act of rape that should have been kept unambiguous and definitive.” *Id.* (citing *Agao*, G.R. No. 248049, at 10).

protected rights of the accused, absent the properly funded and implemented accommodations for the child witness/victim survivor, are in fact at the expense of the best interests of the child. To be clear, this is not solely brought about by one case. *Agao*, however, was triggering. While it is true that the landmark decision seemingly made accommodations for child witnesses and victims, the discussion under the section entitled “Circumspection Required in Appreciating Testimonies of Child Victims in Rape Cases,” overall, unfortunately, reified rape myths and misogynistic misconceptions that further expose the child witness to further revictimization.²⁹⁸

CSA trials, like other criminal trials, are characterized by the adversarial criminal procedures[;] children are required to testify in the presence of the accused (albeit in-camera now) and to be cross-examined to verify the credibility of their testimony. Since adversarial criminal procedures do not take into account children’s (developmental) capacities, they tend to be perceived as being insensitive to the physical and psychological needs of child victims. This also results in violating the rights of CSA victims to participation and protection in CSA trial processes as stipulated by the United Nations Convention on the Rights of the Child, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime.²⁹⁹

Aside from this very recent study from India, as early as 1997, a study — arguing that “the current cross-examination practices in the criminal courts may often breach the New Zealand Law Society Rules of Professional Conduct for Banisters and Solicitors (Rules 8.1, 8.5 and 10.5), and the United

298. See David Butt, *Courts Are Failing Victims of Sex Assault: Here’s How to Fix a Broken System*, THE GLOBE AND MAIL, available at <https://www.theglobeandmail.com/opinion/sexual-assault-and-the-courts-one-way-to-fix-a-broken-system/article14720321> (last accessed Jan. 31, 2024) [<https://perma.cc/D9WV-QGDX>]. (“Feels abused again during cross – then feels tossed aside by the judge who has a reasonable doubt. No wonder victims stay away in droves.”).

299. Sheila Ramaswamy, et al., ‘*When an Elephant Has Its Foot on the Tail of a Mouse ...*’ *Trauma-Focused Court Preparation Interventions for Sexually Abused Child Witnesses*. 19-3 J. OF INDIAN ASS’N FOR CHILD & ADOLESCENT MENTAL HEALTH 273, 274 (2023) (citing Omondi Scholastica Awino Ollando, *Implications of the Adversarial Legal System’s Procedures to the Special Needs of Child Victims of Sexual Abuse: Balancing the Rights of Accused Persons and Child Victims of Sexual Abuse in Kenya*, (2013) (published thesis, University of Nairobi) (on file with University of Nairobi) & Convention on the Rights of the Child, art. 12, adopted Nov. 20, 1989, 1577 U.N.T.S. 3).

Nations Convention on the Rights of the Child (Articles 3(1) and 39)”³⁰⁰ — was conducted. Although decades apart, the relevance and the need for the states to see it from this light is long overdue.

According to Article 3 (1) of the United Nations Convention on the Rights of the Child, the best interests of the child have to be a primary consideration in all cases concerning children. The Committee on the Rights of the Child understands Article 3 (1) as a ‘threefold concept:’ a substantive right, an interpretive principle[,] and a rule of procedure. This article argues that the provision is best understood as a procedural obligation. Understanding Article 3 (1) as a procedural obligation remedies key problems that originate from interpreting the provision as a substantive right.³⁰¹

Here in the Philippines, Ralph Catedral noted that “upholding the best interest of the child is a legal obligation which follows from national and international laws”³⁰² further explaining that

[a]ccording to the UNCRC Comment No. 14 (2013)[,] the best interest of the child is not simply an articulation of a general principle often found in the preamble of laws; it is self-executing. As Candelaria and Rayco noted, it should be possible to go to court and seek redress based on this standard. Moreover the best interest of the child is a substantive right, an interpretive principle and a procedural standard. As a substantive right, the best interest of the child is a primary consideration in every decision that affects them. As an interpretive principle, the scales should be tipped in [favor] of the best interest of the child in situations where there is ambiguity in an interpretation of a legal provision. And finally as a procedural standard, the impact of every decision that affects children should be evaluated and articulated clearly.

300. Emma Davies, et al., *In the Interests of Justice? The Cross Examination of Child Complainants of Sexual Abuse in Criminal Proceedings* PSYCHOL., CRIME & LAW, 1997. See also Katherine Lorenz, et al., *A Qualitative Study of Sexual Assault Survivors’ Post-assault Legal System Experiences*, 20 J. TRAUMA & DISSOCIATION 263 (2019). (“Many survivors who had interactions with the police and legal system experienced secondary victimization, while a few survivors had positive experiences, despite their expectations. We recommend improved access to survivor advocates and suggest directions for future research stemming from findings.”). The Philippines’ adversarial system of justice is based on the fundamental premise that criminal trials engage only two parties, namely: the State acting in the public interest and the accused.

301. Milka Sormunen, *Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights*, HUM. RTS. L. REV., Volume No. 20, Issue No. 4, at 1.

302. Ralph Vincent G. Catedral, *The Best Interest of the Child in the Philippines: Lessons from Supreme Court Decisions and Their Potential Application in Online Sexual Exploitation of Children Cases*, 3 QUEEN MARY L. J. 28, 28 (2022).

These same principles, which have been applied by the Supreme Court primarily in custody and custody-related cases, can likewise apply in OSEC cases.³⁰³

The CRC Coalitions report about the limited number of facilities that can provide support for victim-witnesses and the absence of the Rape Crisis Centers is also tangentially complimented by a pronouncement in *Agao*, “the jurisprudence and existing Rule on child witness examination are under-inclusive, and do not squarely consider the needs of child witnesses in rape cases, because they remain largely unmindful of the linguistic descriptive ability and limitations of an abused child.”³⁰⁴ The discussion was hyper-focused on the “intrinsic limitations of a child witness’ testimony”.³⁰⁵ In the process, the analysis may have overlooked that

[t]his Rule mainly covers the facilitation of the testifying of minor witnesses, with the goal of creating a court environment that minimizes the possible trauma on the child witnesses, and assists in enabling them to deliver the most credible testimonies possible. Among other adjustments made in the configuration of a witness examination, this Rule allows for the appointment of a facilitator to pose questions to the child, the involvement of support persons, the employment of testimonial aids such as anatomically correct dolls, and emotional security items. The Rule further modifies the mode of question, and permits the asking of leading questions, and the narrative form of testimony.³⁰⁶

If it were properly funded and the Family Courts as envisioned fully established a few years after the enactment of the law in 1997 — then the system of a fully functioning and established child protection system would have been complete along with the missing Rape Crisis Centers and WCPUs.³⁰⁷ The Rule on the Examination of Child Witness³⁰⁸ includes features, such as, but not limited to, Sections 5 (Guardian *ad litem*), 12 (Waiting area for child witnesses), 13 (Courtroom environment), 25 (Live-link television testimony in criminal cases where the child is a victim or a witness), 7 (Videotaped deposition), and 29 (Admissibility of videotaped and audiotaped in-depth investigative or disclosure interviews in child abuse cases).³⁰⁹ While

303. *Id.* at 32.

304. *Agao*, G.R. No. 248049, at 30.

305. *Id.*

306. *Id.* at 29.

307. See generally CRC Coalition Alternative Report, *supra* note 289.

308. See generally RULE ON EXAMINATION OF A CHILD WITNESS.

309. See *id.* §§ 5, 12-13, 25, 27, & 29.

the Rule existed as early as 2000, the enabling environment that should have facilitated options that will better honor and observe the best interests of the child has yet to be fully realized.

While the Author made a big fuss (and rightly so) over the lost opportunity of an *amici curiae* that could have better informed the Court on what they call “anatomical *situs*” of rape,³¹⁰ in many respects, that too, is the reality on the ground. Frontline child protection service providers are being forced to make do, assuming roles that they were not trained simply because the system’s absorptive capacity is practically depleted. Considering that the “primary function of the criminal justice system — i.e., determining the guilt or innocence of the accused[,]” accommodating the needs of the child victims becomes secondary.

Within the context of adversarial trials specifically, victims are prone to aggressive cross-examination spurred by outdated myths of rape and sexuality by, or on behalf of, the very person from whom they are seeking protection. Such questioning aims to test ‘the credibility and the veracity of the witness’, and to elicit probative evidence that will assist in determining the accused’s []. Although cross-examination is a distinctive feature of adversarial systems, questions have been raised as to whether this fair trial principle ‘is the best way to establish the truth.’

Blackstone’s aphorism is gendered in nature and has often been cited to refer to criminal trials where alleged victims of sexual violence are called upon to testify as witnesses in support of the prosecution’s case. Indeed, research has long documented the ways in which victims of sexual violence perceive testifying in court, and cross-examination in particular, to be equally, if not more, traumatic than the crime itself.³¹¹

XI. A FINAL NOTE TO THE FINAL NOTE

Harvey Weinstein and Romeo Jalosjos spent millions on legal fees. Efren Agao y Anonuevo is — for indeed every accused-appellee with or without millions in legal fees is — worthy of quality review and attention. Truly, the assumption of innocence until proven guilty — especially in a criminal justice system ranked 120th over 132 countries³¹² — is non-negotiable. As argued in Susan Estrich’s Article, the led to the book *Real Rape*, however,

310. See *Agao*, G.R. No. 248049, at 22.

311. MARY ILIADIS, *ADVERSARIAL JUSTICE AND VICTIMS’ RIGHTS: RECONCEPTUALISING THE ROLE OF SEXUAL ASSAULT VICTIMS* 6 (2020).

312. World Justice Project, *Criminal Justice Philippine, 2023 (Statistics)*, available at <https://worldjusticeproject.org/rule-of-law-index/country/2023/Philippines/>

[t]he message of the *substantive law must be distinguished from the constitutional standards of proof*... The requirement of proof beyond a reasonable doubt rests on the premise that it is better than [10] guilty should go free than that one innocent man should be punished. *But if we should acquit ten, let us be clear that the we are acquitting them not because they have an entitlement to ignore a woman's words, not because what they allegedly did was right or macho or manly, but because we live in a system that errs on the side of freeing the guilty.*³¹³

After all, no one else was in the room where it happened. Not when convicted rapist Agao abused AAA over and over again. No one else was in the room when the Supreme Court *en banc* poured over the 2006 edition of *The Vulva: Anatomy, Physiology, and Pathology*. Despite the layers of dissonance, this Article concludes by holding on to the ideals of the *ponencia's* final note —

The irreversibility of the crime of rape is not lost on the Court, and the rape myths that persist, the ambient sexism that color the moral imaginations, and the stigma that hounds its victims must all be examined under the light, unvarnished, if society is to meet around the central, shared values of human dignity and life. The Court must be able to interrogate the darkest corners of crimes as closely as possible to ask how justice can be truly served in these spaces, lest it betray a mere artifice of its civilities. Perhaps no truer than in crimes that are too confronting, the Court must be able to put a human face to the suffering and refuse to be too offended to call things for what they are. At the risk of testing its strength under the weight of its decisions, the Court must remain honest, clear-sighted and unflinching, for to look away is violence.³¹⁴

To repeat for emphasis, indeed the “Court must be able to interrogate the darkest corners of crimes as closely as possible to ask how justice can be truly served in these spaces, lest it betray a mere artifice of its civilities.”³¹⁵ The Courts, however, should likewise fill the spaces where child witnesses can be properly accommodated. The Family Courts, to fulfill such a mandate, should have long been properly equipped. The Courts, as part of the justice sector, should have access to doctors, social workers, and psychologists.

Criminal%20Justice (last accessed Jan. 31, 2024) [<https://perma.cc/7DKL-VGEB>]. The 2023 WJP Rule of Law Index evaluates 142 countries and jurisdictions around the world. For the sixth year in a row, the rule of law has declined in most countries.

313. Estrich, *supra* note 50, at 1090 (emphases supplied).

314. *Agao*, G.R. No. 248049, at 38.

315. *Id.*

And when, in the interest of justice, the court “interrogates the darkest corners of crimes as closely as possible to be able to ‘put a human face to the suffering’” it must ensure that such confrontation within an adversarial criminal justice is *not* inimical to the best interests of the child. If and when the courts, “ask how justice can be truly served”³¹⁶ may survivor voices who endured institutional betrayals and risked revictimization to be able to testify — be truly heard while minimizing re-traumatization.

Undoubtedly, it should “refuse to be too offended to call things for what they are.”³¹⁷ AAA’s “*hiwa*”³¹⁸ does not translate to the cleft of the *labia majora*. The Court indeed must “remain honest, clear-sighted, and unflinching, for to look away”³¹⁹ and deny that a landmark doctrine unwittingly referred to an outdated medical sourcebook — is violence.

Nevertheless, amidst “the rape myths that persist, the ambient sexism that colors the moral imaginations, and the stigma that hounds its victims,”³²⁰ there are promising developments in the form of new guidelines and initiatives aimed at tackling these entrenched issues. Efforts such as enhanced victim support services, reforms in evidentiary standards, and the phased implementation of the Family Courts Act of 1997³²¹ signify significant strides towards achieving a more victim-sensitive court process and safeguarding the best interests of the child.

316. *Id.*

317. *Id.*

318. *Id.* n. 19.

319. Supreme Court of the Philippines, *supra* note 43.

320. *Agao*, G.R. No. 248049, at 38.

321. *See generally* Implementing Rules and Regulations of the Social Aspects of Republic Act No. 8369, Otherwise Known as the Family Courts Act of 1997, A.M. No. 22-04-06-SC, (June 2, 2022).