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**Justice in the American Legal System: Challenges to the
Confrontation Clause in Criminal Child Sexual Abuse Cases**

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Justice in the American Legal System: Challenges to the Confrontation Clause in Criminal Child
Sexual Abuse Cases

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Criminology

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Introduction

The goal of the American criminal justice system is to ensure justice, equality, and fairness for all those who go through the system. In order to achieve this goal, the Founders wrote procedural protections into the Constitution. These procedural protections were created so that they could not be taken away with the changing of administrations. Their goal is to protect criminal defendants from unnecessary or overly intrusive government interference in their daily lives without merit or cause. More specifically, these rights help to ensure that American citizens are not deprived of life, liberty, or property without due process of the law. Thus, if a person is denied these rights and is convicted of a crime by the government, American justice fails. This failure becomes all the more problematic for those who are wrongfully convicted, where a conservative estimate provided by The Innocence Project suggests that 1% of all incarcerated persons are wrongfully convicted, and several academic and legal scholars argue the true number of wrongful convictions is likely much higher.¹

The Sixth Amendment of the U.S. Constitution thereby guarantees the rights of criminal defendants throughout the trial process to ensure the proper administration of justice; and includes explicit references to an impartial judge and jury and a speedy and public trial, the right to compel witnesses to testify on a defendant's behalf, and the right to confront witnesses against them. The importance of these rights for criminal defendants cannot be understated and the Founders were undoubtedly thorough in considering the ways those accused of violating the law might be wronged by various government actors during trial proceedings. Yet, the Founders may have lacked similar insight when considering the role of justice for victims. In particular, more

¹ Gross, S.R., & O'Brien, B. (2007). Frequency and predictors of false conviction: Why we know so little, and new data on capital cases. *2nd Annual Conference on Empirical Legal Studies Paper, U of Michigan Public Law Working Paper No. 93, MSU Legal Studies Research Paper No. 05-14,*

recent history has shown that the criminal justice system often fails to protect child victims of sexual abuse in the process of attempting to convict their abusers.

Arguably, when the Founders were writing the Constitution and subsequently the Bill of Rights, they were not thinking of the particulars of criminal charges of sexual abuse against children for two reasons. First, it wasn't until the late 19th century that society overall and the criminal justice system specifically began to understand that children are developmentally different than adults and thus may need additional protections in a variety of life domains, including the courtroom.² Second and related, it has only been in relatively recent history that the United States has recognized that interpersonal violence is not simply a personal matter, but also one which is criminal in nature and should be treated accordingly. For instance, it was only in 1974 that Congress established the minimum standards necessary for a definition of child maltreatment that states must incorporate into their statutory requirements.³ However, and importantly, there are processes within the Constitution that allow for changes to be made so that child sexual abuse victims can be granted protections in criminal trials moving forward. There are many cases of legal precedent indicating that amendments can be added to the Constitution or that new interpretations of standing Amendments can be made. We have seen this historically on issues of voting rights with the ratification of the 19th, 24th, and 26th Amendments and civil rights with the ratification of the 13th, 14th, and 15th Amendments, and many more. Thus, as time goes on and the country evolves, decisions made by the court have indicated that new legal

² Goodman, Gail & Quas, Jodi. (2011) Consequences of Criminal Court Involvement for Child Victims. *Psychology, Public Policy, and Law*

³ An Act to provide financial assistance for a demonstration program for the prevention, identification, and treatment of child abuse and neglect, to establish a National Center on Child Abuse and Neglect, and for other purposes. S. 1191. 93rd Cong. (1974).

precedent may need to be instituted to ensure justice is served for all where the Founders originally lacked such forethought.

If the goal of America is to ensure justice for all, then the criminal justice system must not leave out protections for victims and witnesses. It must find a balance between protecting the rights of defendants while also ensuring that victims and witnesses are not further harmed while helping the State prove their case against the accused. In finding this balance, one must also remember that justice cannot be simply procedural, but it also must be substantive. In other words, not only must we avoid harming individuals during the trial proceedings, but we must also ensure that we reduce the potential long-term negative effects of the trial process for those involved as much as possible as well. Those groups whose protections are most important in this regard are children who serve as witnesses and victims in criminal cases. Undoubtedly, serving as a witness for the prosecution against a defendant accused of harming them is difficult for any victim of violence; and research indicates witnesses often suffer from long-term negative effects after participating in the trial process.⁴ However, this situation may be all the more troubling for children. Due to children being less developed mentally and emotionally than adults, the effects of trials and the courtroom weigh heavier on their development and long-term well-being than their adult counterparts. When children are the victims of heinous crimes, the added trauma of reliving the experience for a trial greatly impacts the quality of the rest of their life.⁵ Thus, Sixth Amendment protections for criminal defendants may prevent child victims from receiving substantive justice from the courts. Moreover, because of children's lesser mental and emotional development, they are more vulnerable to pressure and influence from others. This creates a barrier to procedural justice for both witnesses and defendants when there exists an unfair power

⁴ Goodman. 2011.

⁵ Ibid.

balance when child witnesses are questioned by adult actors in the courtroom.

The question then becomes, is it possible to alter the way the court protects child sexual abuse victims while still holding true to the ideal of justice and protections for the accused that the Founders built this country on? The following thesis will look at the original intent of the Founders when the Sixth Amendment was written. It will then examine the challenges presented to justice both substantively and procedurally in cases of criminal child sexual abuse specifically, including the challenges faced by victims forced to testify during trial long after the trial is over. After establishing these challenges, this thesis will then examine legal precedent set by the courts that illustrates how exceptions have been made to traditional courtroom procedures over time, such as exceptions to the hearsay rule and in-person testimony on the witness stand, to allow for the particularities of a given case while also still upholding defendants' Sixth Amendment rights more broadly. Finally, bringing this research together, a Congressional bill will be drafted, providing a national standard for exceptions to the Confrontation Clause specifically, thereby providing a more streamlined and consistent way for courts to accommodate the special needs of child sexual abuse victims.

Theoretical Justice

Justice is in no way an easy concept to define. Many thinkers and scholars have attempted to find a complete definition, but ultimately concede that it is impossible to define perfectly what justice is. Despite this, key presuppositions and foundations of justice are used to build an understanding of good government and good laws, where justice is a dynamic idea that is seen mainly through its effects and not its individual prescriptions. An oversimplified understanding of justice then when applied to good government and good laws is an equal balance between right and wrong acts.

We can likewise look to well-known philosophers of justice to obtain a more in-depth understanding of how justice may be best applied when American citizens are involved in our criminal courtrooms as both perpetrators and victims. For instance, Aristotle details two types of justice in *Nicomachean Ethics*. These are justice in distribution and justice in rectification. Aristotle focuses specific attention on what justice looks like after wrongful acts have been committed and how to restore the balance of justice to the parties involved (both perpetrators and victims) in the wrongful act. Meanwhile, Thomas Hobbes believes acts to be unjust when they conflict with the previously agreed upon laws in a community. Aristotle and Hobbes together help provide an integrated view of justice and how such justice might be best applied in cases of criminal wrongdoing.

Distributive justice pairs two things or people and their actions or behaviors as they interact with one another. For perfect justice to exist between the things or people, there must be an equal distribution of right and wrong. This balance between the two is the intermediate between too much and too little justice. Aristotle remarks, “this way of being just is intermediate, whereas the unjust is contrary to the proportionate. For the proportionate is intermediate, and the just is proportionate.”⁶ Thus, distributive justice balances the actions between two things or people with the purpose of maintaining the intermediate between them. Importantly, in this sense, equality does not mean everyone is on an even playing field, but rather the circumstance behind an action determines the level of justice one person gets. In other words, because a criminal offender has violated principles of justice through their actions, the unequal distribution of punishments and rewards in the criminal courtroom should reflect these circumstances, whereby victims receive their proper share of justice and offenders get less.

⁶ Aristotle, *Nicomachean Ethics*, *Penguins Classic*. p. 72

Justice in rectification then is the idea that one gets what he deserves. Whereas Aristotle describes distributive justice as a geometrical proportion, he describes rectificatory justice as a numerical proportion. Unlike when two people and their actions are weighed in relation with each other, as is the case with distributive justice, this form of justice deals with equal people and evaluates only their actions. The person who delivers justice considers a cost-profit analysis because “the law looks only at differences in the harm [inflicted], and treats the people involved as equals, if one does injustice while the other suffers it, and one has done the harm while the other suffered it.”⁷ The judge has the ability to inflict a greater punishment on the person who harms another because they did the injustice. The judge tries to give something back to the harmed victim; but in many cases, the whole trauma cannot be rectified. The person harmed gains more justice than the perpetrator who has justice taken away. Despite not seeming so, the removal of justice from one stabilizes the proportional justice between the two individuals, resulting in a just intermediate.

Justice teaches in cases of harm that one person takes more from another individual than he deserves. This situation occurs in both distributive and rectificatory justice, thus leading us to believe the two types of justice can be taken together. Plainly, justice as a whole is potentially both distributive and rectificatory. Both deal with the proportionality of actions and thus, “the just, then, is the proportionate, and the unjust is the counter proportionate. Hence, [in an unjust action] one term becomes more and the other less; and this is indeed how it turns out in practice, since the one doing injustice has more of the good and the victim has less.”⁸ Justice’s goal then is to restore the balance between the just and the unjust by giving the victim back what the perpetrator stole.

⁷ Aristotle, *Nicomachean Ethics*, *Penguins Classic*, p.73

⁸ Aristotle, *Nicomachean Ethics*, *Penguins Classic*, p. 72

Yet, the concept of justice becomes harder to define when the goods stolen cannot be returned in their entirety to the victim. In these cases, the concept of justice may need to be looked at in other lights as well. Another way to analyze justice then is through its effects, meaning how it looks in practice and what outcomes are produced for the parties involved. Laws are an effect of justice; the creation and enforcement of laws ensures a proper balance in society. This balance is justice. One person does not get to take everything from someone else while still allowing justice to exist. Thus, society sets regulations on what they deem is fair and just, and society's laws keep people from violating these agreed upon standards. Aristotle explains, "the virtue of justice belongs to the city; for justice is an ordering of the political association, and the virtue of justice consists in the determination of what is just."⁹ In other words, the city, or in modern terms, society, determines what is just by forming an association to decide what the just will be. This association is seen through society's politics and government structures, which define the protections of rights for its citizens through legislation, with the goal of pursuing justice. A society's laws are so important to the concept of justice that modern thinkers, such as Thomas Hobbes, believe that laws of nature are a precondition for justice in society. In other words, the natural laws that bind us, that we essentially agree to follow when we sign the social contract, need to be set in place prior to any conception of just or unjust actions. In *Leviathan*, Hobbes writes, "and in this law of nature, consisteth the fountain and original justice. For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything; and consequently, no action be unjust. But when a covenant is made, then to break it is unjust."¹⁰ Through the laws of a community, justice only exists once people establish what those laws will be.

⁹ Aristotle, *Politics*, 1.2, *Penguins Classic*. p. 12

¹⁰ Thomas Hobbes, *Leviathan*, Part I, Chapter 15, *Penguins Classic*. p. 202

Upon first glance, Hobbes and Aristotle seem to fundamentally differ at their core on thoughts concerning the definition of justice and the processes by which justice develops. As but just one example, Aristotle believes justice comes before law whereas Hobbes believes the inverse. Despite this conflict between the two, the American Founders studied both their works, thus resulting in a framework that echoes both sentiments. While there are laws in America that are chosen specifically by the people and breaking them would be unjust, there are also laws that are created because justice is a precondition. America is unique in that the founders believed in nature and in individual choice. One of the reasons the American government has survived longer than other democracies and republics is due to the balance between Aristotelian justice and Hobbesian justice. The recognition of this balance is thus also essential when considering specific unjust acts that occur in American society. Specifically, when one person violates the privacy and humanity of another through sexual violence, we must recognize the justice of both parties involved as a precondition of the laws our society has established against sexual violence. Yet, in recognizing that laws against sexual violence were also created with society's ideas of what constitutes justice in the form of outcomes delivered by the government, adhering to justice likewise must mean that both a victim's and perpetrator's rights and protections are balanced against the respective actions and harm involved.

Justice in the Founding

The Founders avoided regulating many matters of the family because they believed the most sacred things in life should not be interfered with by the government. One exception to this was the Founders' regulations on legally recognized unions between citizens, including rules about marriage, infidelity, and divorce. These rules thus emphasized the importance of the family

as an institution in American life but allowed for governmental interference only insofar as two citizens wished to enter into a legally recognized marital union, engaged in misconduct that brought harm to the union (e.g., infidelity), or wished to dissolve their legally recognized relationship.

In addition to believing in the sacred right of privacy within the family, the Founders believed in people's virtuosity. Regarding the family specifically, Thomas G. West states in *Vindicating the Founders*, "the family was viewed as a basic element of a good society;"¹¹ thus the Founders believed adults capable and trusted to protect their rights and those of their family, including children. In other words, the Founders believed the institution of the family would be enough to protect children from unspeakable evils and outside violence, particularly in the context of legally recognized marriages where both biological parents would raise children. Thus, regulations related to children are absent in the Constitution, as children fall under the domain of the private life of the family, and because of the belief that virtuous people would not harm children.

The Founders' ideas were most certainly rooted in the historical context of which they lived and arguably did not account for changes in American life that would follow in the centuries to come. As one example, West speculates the Founders believed "a society dominated by intact families does a better job protecting women and children against crime, poverty and sadness."¹² Yet, due to the prevalence of divorce and out-of-wedlock childbearing in the centuries since the Constitution was written, there are less intact families today to protect women and children than when the Constitution was written 250 years ago. Such raises the risk that

¹¹ West Thomas G. 1997. *Vindicating the Founders: Race Sex Class and Justice in the Origins of America*. Lanham MD: Rowman & Littlefield.

¹² West. 246

other adults not biologically related to a child but who still act in a caretaker role within the household may harm them, especially including a biological parents' nonmarital romantic partners.

The Founders also likely did not envision the vast array of people who would be involved in the raising of children by the time of the 20th century when drafting the country's founding document. In modern times, children now spend large amounts of their life under the supervision of teachers, daycare providers, athletics coaches and more, due to compulsory education laws starting in the mid-19th century, paid labor outside the home with the advent of the Industrial Revolution, and the commonality of dual-earner households in the 21st century where both parents in even intact families work outside the home to provide for themselves financially. Thus, if the abuse children endured was only by the hands of family members, then regulating the institution of marriage as the Founders initially envisioned might serve to protect them; but today children face many harms outside the home as well, particularly when it comes to sexual abuse victimization.

The Founders thus admittedly ignored children during the framing of the Constitution, and understandably so due to the different climate and attitudes in America of the time. America in 1787 and America in 2023 might be the same country, but the inner workings of society are much different. The Founders looked to the family to protect children, but short of forcing heterosexual, male and female marriages onto society again (which is not advisable, and might not even work if attempted), today's children are not sufficiently protected from abuse. The result of this is a lack of justice for children. Specifically, as children's rights are absent from the Constitution, it is unclear what rights they are and are not afforded, and when the government might be able to intervene on their behalf, including in cases of childhood sexual abuse in

criminal courtrooms throughout America. Yet, because the Constitution is dedicated to the process and pursuit of justice, if children are thought to also be deserving of said justice, then justice can be correctly applied moving forward in areas of the government where it was formerly absent.

Article I of the Constitution establishes Congress as the law-making body of America. The purpose of the laws is to prevent injustice from occurring; or when it does occur, to achieve retribution for the violation. The Framers set forth the powers of Congress first because they were important for the success of the country. Article I of the Constitution supports justice because of the equal opportunity it gives everyone to be a part of making the laws that guide this country. Thus, in order for justice to thrive, the people need to have a say in their government and the government cannot take away their fundamental rights. Yet, not included in Article I or elsewhere are the rights of children separate from those which are provided to their parents or other legal guardians. This is not to say, however, that such rights could not be afforded in the future, as the Constitution's Bill of Rights and other amendments in the last 250 years illustrate.

During the fight for ratification, some of the Framers believed that while the original draft inhibited a dictatorship from forming by establishing thorough guidelines for the operation of government, there lacked protections for the rights of people. The drafters went back and added in the Bill of Rights, which became the foundation for the people's justice. As one example, the Fourth Amendment provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹³ Justice in this case is the protection of their property. It would be an injustice for someone's property to be taken without cause. The amendment seeks justice by making it illegal to take away someone's

¹³ US. Constitution. Bill of Rights. Amendment 4. 1791.

property unlawfully. Similarly, if Congress and American society writ large were to consider the lack of rights and protections afforded to children throughout the Constitution, particularly when they are involved in matters of a criminal nature, constitutional amendments could be passed to ensure the provision of such.

While the power of the Constitution and Congress's legislative duties cannot be understated, it can be argued that the heart of justice as envisioned by the Founders lies in the judicial branch of the American government. In the Harvard Law Review, Abram Chayes boldly states justice will never be achieved. Following this statement, Chayes further claims that "what the framers established was a process for seeking justice. It is a process in which judges, rightly I think, play a central role."¹⁴ In other words, the Constitution alone cannot be the beacon for justice in America. It was not constructed to achieve perfect justice, but to seek out its closest form. Thus, in considering whether and how the rights and protections of children might best be formulated in the Constitution, it is also important to look at the judicial branch's involvement in its interpretation and application of the rules as American society and the needs of its people, including children, become increasingly complex.

In summary, the Constitution at present does not protect its most vulnerable citizens: children. It can be argued that the Founders did not predict this vulnerability given the historical and social contexts of 18th-century America. As a result, we have at present a criminal justice system that provides rights and protections to adults, both plaintiff and defendant, but ignores such rights and protections in criminal matters involving children. The problem then is not absent justice in our system, but rather how and to whom justice is applied. The problem is not irreparable though; through the powers granted to Congress and the judicial branch of

¹⁴ Chayes Abram. 1988. *How Does the Constitution Establish Justice?* The Harvard Law Review. 1041

government, children involved in the criminal justice system can receive the same justice provided to adults through due process of law.

History of the 6th Amendment

Like most amendments, the 6th Amendment of the United States Constitution comes from British common law. Due to our close relations with England till our foundation, the American legal system adopted what it believed to be the good parts of British law. Broadly, the 6th Amendment guarantees the rights of defendants in criminal court to ensure that those accused of violating the law are not unduly punished by the State without a fair trial. One of the elements of the 6th Amendment that helps to provide such assurances is the Confrontation Clause. This clause states that a defendant on trial has the right to confront witnesses against them in the courtroom.

The importance of the adoption of the 6th Amendment is clear historically. Early common law in England provided no safeguards for defendants and more closely was related to tyranny by the government. Trials were a gross negligence for any regard of justice. In 16th-century England, those in government brutally interrogated all those believed to have information relevant to the commission of a crime prior to the trial even beginning. The interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present in the courtroom when attorneys presented the evidence from these interrogations.¹⁵ For many years, magistrates operated in this manner and there was no person or procedure in place for the protection of defendants. This began to change, however, in the 16th and 17th centuries as the maltreatment of defendants became better known.

Historians cite Sir Walter Raleigh as the inspiration behind the changes to English trials.

¹⁵ White v. Illinois, 502 U.S. 1992

In 1603, the King charged Sir Walter Raleigh with treason and the only evidence presented against him was obtained by interrogating an accomplice and presenting only his testimony in court. Jonakait, faculty from the New York School of Law writes, “the English right evolved as a response to the 16th century interrogations of prisoners and witnesses by magistrates, often in secret. Counsels admitted these depositions at trial without the witness testifying.”¹⁶ It is believed that the purpose for this change was to lessen the use of *ex parte* affidavits. Attorney’s use *ex parte* affidavits to make a motion for a proceeding or action that the court may grant without the other side getting a chance to respond. Therefore, one purpose for the 6th Amendment is to correct the injustices of defendants in the American court system.

Yet, two major court cases for 6th Amendment jurisprudence help understand the potentially broader aims of the Confrontation Clause. In *White v Illinois*, Chief Justice Rehnquist rejected the claim made by the United States that “the confrontation clause’s limited purpose is to prevent a particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced in trial.”¹⁷ In rejecting this argument, the Court stated that the declarant does not need to be produced at trial to introduce hearsay information as long as it falls under a solid hearsay exception. Therefore, the Court falls back and relies on their hearsay policies for admitted evidence. In another court case, *Dutton v. Evans*, Justice Stewart states, “the decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that “the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement. *California v. Green*,

¹⁶ Jonakait, Randolph, Rutgers Law Journal, Vol. 27, Issue 1 (Autumn 1995), pp. 79

¹⁷ *White v. Illinois*, 502 U.S. 1992

399 U.S., at 161.”¹⁸ Here, the Court clearly affirms the Confrontation Clause’s purpose is to seek truth in court trials.

In summary, the 6th Amendment, and more specifically the Confrontation Clause, seeks justice for the defendant through the search for truth during criminal trials. Americans feel that the system serves justice when everyone gets a fair trial, and the accused has the opportunity to defend themselves against their accusers. Part of this process entails allowing nothing but the truth, and therefore only what truly happens as evidence in the courtroom. To present these truthful facts, the law requires witnesses in a case to testify during trial, and the defendant is provided the opportunity of being present in the courtroom to hear such testimony in order to defend himself against it. Yet, while the Confrontation Clause no doubt serves to protect criminal defendants, its conception of justice does not concern itself with the witnesses or those providing testimony in trial. This poses a problem in trial for witnesses who must present their testimony, but then must live with the traumatic effects of trial. Specifically, this one-sided justice severely impacts child witnesses in court trials.

Procedural Challenges to Justice in the Case of Child Witnesses

Childhood and adolescence are critical stages of human development. As one example, from ages seven to eleven children are in what Jean Piaget describes as the concrete operational stage. During this stage of development, children begin to think logically about concrete events and begin to understand their existence in the world. They likewise begin to move away from thought processes focused primarily on egoism and develop thoughts and feelings about others, including how other people might think and feel.¹⁹ The concrete operational stage is important for child development because it is during this phase that, through proper experiences and

¹⁸ Dutton v. Evans, 400 U.S. 1970

¹⁹ Piaget, J. (1928). Judgment and reasoning in the child. Harcourt, Brace.

teaching, children build important psychosocial skills and successfully progress in their development. When this stage of development is disrupted, there can be detrimental effects to the child's overall development. Following the concrete operational stage is the formal operational stage, which begins at approximately twelve years of age, and is when children begin to learn more abstract ideas and concepts, such as considering potential outcomes of "what-if" scenarios and engaging in systematic planning regarding their experiences in the world.²⁰ Although this final stage of development lasts through adulthood, the earlier years are fundamental to proper development and formation; and trauma occurring between age seven and early adolescence may severely stunt the growth and development of children.

Research finds that trauma biologically affects the growth and development of the child brain, causing disruptions to its physiological structure and makeup. Moreover, scientists have discovered that various regions of the brain have a larger impact on development than others: "although a few parts of the brain are capable of making new neurons, in most brain regions growth and development occur through the selective loss or "pruning" of neurons based on their amount of use. Neurons that play important roles and are frequently activated are preserved, while those that are not used or are duplicative of other neurons tend to die."²¹ This process is known as apoptosis, or spontaneous cell death. Not only does trauma cause apoptosis of neurons in the brain, but trauma is stored in certain areas of the brain that stunt growth and inhibit basic human functions. Many people have heard stories about victims of trauma shutting down and being unable to talk; and research indicates this situation does in fact occur among child sexual abuse victims. In a research article focused on the need for developmentally-informed and trauma-sensitive criminal courtrooms, Van der Kolk notes that "children are silenced because

²⁰ Piaget, J. (1928).

²¹ Putnam, Frank W. (2006) The Impact of Trauma on Child Development. *Juvenile and Family Court Journal*, p. 3.

trauma and neuroscience researchers report that trauma is frequently encoded in regions of the brain not accessible to verbal expression.”²² In other words, childhood survivors of sexual abuse may be unable to describe their victimization to others due to the effects severe trauma experiences may have on the part of the brain that is responsible for verbal expression of thoughts and feelings. This inability to verbalize experiences of trauma thus presents a number of challenges in the courtroom, including a complete inability to speak or giving testimony that may include delays in speech and contradictory depictions of the trauma that was experienced. In turn, many may perceive child witnesses’ silence as a sign of lying about the abuse they experienced or emotional immaturity, rendering their testimony less reliable or completely inadmissible in the courtroom; but that is not the case. In many cases, even if child witnesses do wish to testify against their abusers in court, they are simply unable to do so in a matter that is compelling to judges, juries and other courtroom spectators due to the physiological impact trauma has on the regions of the brain responsible for verbal expression.

In addition to the impact trauma has on the regions of the brain responsible for verbal expression, the psychological trauma of childhood sexual abuse may prevent a child from providing testimony against their abuser in court, even if the verbal centers of their brain have not been physiologically stunted from such trauma. More specifically, childhood survivors of sexual abuse and other traumas often experience such mental health symptoms and disorders as post-traumatic stress disorder (PTSD), dissociation, conversion disorders, and somatoform disorders.²³ In turn, when confronted with explicit details of their past trauma in court, child witnesses may experience psychological effects while on the stand, such as PTSD or

²² Van der Kolk (2014) as cited in Crenshaw, David A. et al. (2019) Developmentally and Trauma-Sensitive Courtrooms. *Journal of Humanistic Psychology*. Vol 59(6), p. 780.

²³Diseth, Trond H. (2005). Dissociation in children and adolescents as reaction to trauma: An overview of conceptual issues and neurobiological factors. *Nordic Journal of Psychiatry*, 59, 79-91.

dissociation, that further render them unable to provide reliable testimony. The brain likewise works in mysterious ways that are not always well-understood, particularly by those who are not experts in the field of psychiatry and neuroscience, which would include most courtroom actors who do not possess such expertise. Thus, a child can seem perfectly fine to testify before a trial, but then seemingly all of a sudden and without obvious reason to those present in court, a switch flips and the child can no longer function once on the witness stand. More specifically, court officers very often assume that if a child can distinguish the truth from a lie, and presents themselves well in an initial interview, that they are prepared for trial. Although for some these standards may be a good indication of future reliable testimony, such assumptions fail to account for the volatile neurological systems of many child witnesses. In an article produced by the American Bar Association (ABA), Christina Rainville provides an anecdote about her experience with children on the witness stand that supports these ideas. She says:

Three times, I have witnessed children become catatonic and unresponsive after simply being asked: “What happened next?” One child remained catatonic for so long that she was taken to the emergency room. Children with PTSD may go from chatty to mute; from happy to despondent; from calm to volatile; from at-ease to running full speed off the witness stand— all while testifying. These are the children we thought were strong enough to handle court.²⁴

Similarly, in a journal article regarding criminal court involvement for child victims, Gail Goodman cites the following: “Models of development and risk (e.g., Keiley, Howe, Dodge, Bates & Pettit, 2001) suggest that traumas occurring early rather than later in

²⁴ Rainville, Christina (2012), Preparing Children with Post-Traumatic Stress Disorder for Court, *American Bar Association*

childhood have particularly deleterious effects on psychological functioning.”²⁵ Thus, the potential damaging effects of trauma on child witnesses’ ability to provide reliable and compelling testimony in court may be particularly severe for younger children. Together with Piaget’s model of human developmental stages, it can be concluded that children are extremely vulnerable both physiologically and psychologically when asked to testify about their trauma in court; and that courtroom officers and others involved in the trial must take any and all necessary steps to protect the child throughout this process.

Another detrimental effect of child maltreatment that may also impact children’s ability to testify in court manifests in the way they perceive the world. Specifically, “as a result of their experiences of abuse and neglect, maltreated children perceive the world differently and consequently will react differently to situations than their non-abused peers.”²⁶ These perceived differences may then have ramifications during trial. For instance, one ramification might be whether maltreated children are competent enough to stand trial when their perception of the world is altered. To date, most studies on children’s competencies to stand trial have been performed with an emphasis on their truth-telling ability and their ability to detect lies. In one such study in 1994, psychologists found “older children were more able to answer abstract questions about truth and lies than younger children; however, the majority of the younger children were also able to identify a hypothetical lie.”²⁷ The study does importantly show that many children can identify the truth, which is a main component to testing competency; but this study and others like it often fail to account for other factors that may negatively impact truth-

²⁵ Goodman, Gail S, et. al. (2012) Consequences of Criminal Court Involvement for Child Victims. *Psychology, Public Policy, and Law*, Vol 18, p. 401.

²⁶ Putnam, p. 5

²⁷ Pipe, Margaret-Ellen, et.al. (1994) Cues and Secrets: Influences on Children’s Event Reports, *Developmental Psychology*, Vol 30, p. 523

telling ability and lie detection, such as experiences of child maltreatment. If children perceive the world differently due to their maltreatment, combined with the physiological impacts of maltreatment on the brain and the psychological disorders that may result from maltreatment as previously discussed herein, is it safe to assume the accuracy of their truth telling ability is the same as their non-maltreated counterparts?

In addition to the doubt posed to testimonial accuracy raised by child maltreatment survivors' differing perception of the world, studies have shown that simply knowing what the truth is does not mean the child will tell the truth. Due to children's youth and emotional immaturity, they don't always tell the truth even when they know what the truth is, and the risk of this dishonesty may be even greater among those who are maltreated or sexually abused. Child Sexual Abuse Accommodation Syndrome (CSAAS) is a behavioral theory that explicitly speaks to the unique problems and behaviors of child sexual abuse victims. CSAAS helps to explain why children who have been abused may be unwilling or uncomfortable with reporting such abuse and therefore reporting their abuser. More fully, it is thought that after suffering from potentially repeated offenses and seemingly having no hope for an end to their victimization, child sexual abuse survivors may display secrecy surrounding their victimization. As noted by Kenneth Weiss, "the secrecy of child sexual abuse, the relative helplessness of the victims, children's eventual accommodation, and any consequent psychopathology are understood to be factors in delayed disclosure and unwillingness to disclose at all."²⁸ Specifically, this secrecy is thought to be a byproduct of the abuse breaking down the child's psyche to the point where all the mind wishes to do is save itself. In other words, by avoiding disclosing their abuse to others,

²⁸ Weiss, Kenneth J., et. al. (2013). Sex, Lies, and Statistics: Inferences from the Child Sexual Abuse Accommodation Syndrome, *The Journal of the American Academy of Psychiatry and the Law*, Vol 41, p. 414.

children may be able to deny to even themselves the reality of their victimization, which provides a sort of psychological protection in not having to confront the trauma they are experiencing. Researchers have also stated that children suffering from CSAAS are, “often reluctant to disclose abuse committed by individuals who are known, trusted, and loved,”²⁹ as admitting to themselves and others they are being harmed by an individual who is supposed to love and care for them may be even more psychologically damaging. Thus, children suffering from CSAAS may present as uncredible witnesses in court, jeopardizing the trial overall; and such effects are especially likely to be present among children who are sexually abused by someone they or their family knows and trusts. To summarize, although children might be able to identify the truth from a lie and thus be determined by the court to be competent for trial, judges and court officials must be careful in their competency assessments for child sexual abuse survivors specifically. Developments and research into CSAAS suggest that severely abused children are prone to secrecy and thus may be reluctant to report their abuse in the first place or be unwilling to share details later in the trial process.

In addition to CSAAS, the psychologically damaging effects of repeated victimization may also present themselves through Stockholm syndrome. Although commonly thought of as a syndrome seen in kidnapped adults, Stockholm syndrome may also present in child sexual abuse victims. As noted by Shirley Julich in a 2016 research article, “grooming techniques used by those who sexually abuse children facilitates the development of Stockholm Syndrome (traumatic bonding) which protects the abuse for decades.”³⁰ In other words, the grooming techniques that child sexual abusers often use with their victims result in the child feeling a sense

²⁹ Weiss, p. 414

³⁰ Julich, Shirley J. (2016). Does Grooming Facilitate the Development of Stockholm Syndrome, *Aotearoa New Zealand Social Work*, Vol 28, p. 48

of security with the abuser. This may lead child sexual abuse victims to deny their victimization or the fact that what they are experiencing is even abuse. In the event they are forced to confront the fact that what their perpetrator has done to them is wrong, rather than place blame on their abuser, the victims often instead come to feel guilty and ashamed and blame themselves. They likewise are often hesitant to disclose their abuse to others, fearing the abuser will find out they have been disloyal and will be upset with them or retaliate in some way.³¹ Therefore, any degree of Stockholm syndrome can inhibit the court's ability to maintain a just and fair trial, particularly through the presentation of victim testimony, because the child will often display a sense of loyalty to the perpetrator and be unwilling to say anything that may paint their perpetrator in a negative light.

Substantive Challenges to Justice in the Case of Child Witnesses

The danger with any lack of justice in earlier stages of the criminal justice system, including the trial process, is the overwhelming effect it often has on later stages of the system. If procedural justice is not followed and given the issues that may present in the courtroom with child witnesses, then substantive justice may also not be served. This may be seen in wrongful convictions of the accused when they are in fact innocent of the charges against them, as well as in not guilty verdicts or hung juries in cases where the defendant is in fact guilty. Most often, these inaccurate trial verdicts arise due to the jury's perception of child witness testimony as flawed or unconvincing.

The wrongful conviction of otherwise innocent defendants is a problem within the American criminal justice system. Usually, wrongful convictions occur when there is a breakdown of justice somewhere within the pretrial or trial procedures; for instance, if the trial

³¹ Julich, p. 53

lacks an impartial judge or jury who may be biased against the defendant due to the defendant's personal characteristics or the nature of the crime they're accused of committing. According to the Innocence Project, it is thought that about 1% of the prison population was wrongfully convicted, which equates to about 20,000 prisoners.³² Although the percentage does not seem high, any person who is wrongfully convicted unjustly has their right to life, liberty and property suspended and breached. Thus, careful attention must be devoted to any procedures within the criminal justice system that might increase bias against a defendant or otherwise deprive them of their due process rights to ensure against wrongful convictions.

Allowing defendants who are guilty of the crimes accused go free is just as problematic within the criminal justice system. As such, another potential substantive challenge to justice in cases of child witnesses are hung juries. Although not entirely common, an estimated 10.7% of all trials end in hung juries³³; this means about 10% of potentially guilty criminals are going back on the streets with an opportunity to commit another crime. For sexual assault cases specifically, whether the victims are minors or adults, 9.2% of trials end in hung juries.³ It can be disappointing for victims to go through the potential trauma of taking the stand and testifying against their abuser and have no verdict rendered. It can likewise be terrifying for these victims when their offender is put back on the streets with the potential to both re-harm the victim and harm another person. In the case of child victims specifically, who are still developmentally immature and arguably more emotionally and mentally fragile than adults, hung juries in their cases may be detrimental to their recovery process and overall mental health. Ultimately, in cases of hung juries, justice is not achieved.

³² Innocence Project

³³ Salmelainen, Pia, et. al. (1997) Hung Juries and Majority Verdicts. *Contemporary Issues in Crime and Justice*. No. 16, p.2

Juror perception can be a problem in any case; however, in the case of child witnesses, the way jurors perceive them, and the ways jurors think children should act when testifying against their alleged abusers may be more likely than in other kinds of criminal cases to impact the verdict they render against the accused. Children's emotional instability or, in some cases, their stability can negatively affect the outcomes of their cases. A study done by Alexia Cooper demonstrates this idea; she found, "those who perceived the child to be more emotional were more likely to render guilty verdicts, view the child as credible, and view the defendant as less credible. Moreover, and perhaps of even greater interest, these trends were especially robust when participants perceived the child who was shown as calm while testifying as being highly emotional."³⁴ When the juror believes a child should be emotional, and the child does display that emotion, studies show the chance of a guilty verdict is higher. Research also finds that the effects of jurors' perceptions about children's emotions when testifying becomes even more complex given the fact that while many children testify in-person in open court, others may testify via CCTV. In these cases, the child's testimony displays on a screen because the child cannot or does not wish to be in the room with the accused. Debra Whitcomb evaluated the effects of CCTV and discovered that CCTV sometimes has a negative effect on credibility: "Although the children's testimony was more accurate on CCTV than in open court, jurors perceived the children they observed via CCTV to be less credible than those who testified live."³⁵ It is likely this effect occurs because children's emotions when testifying may be less readily observable or felt by jurors when the child is visible only through technology, rather than being mere feet away from the jurors when providing their account of events on the witness

³⁴ Cooper, Alexia. et al. (2014). The Emotional Child Witness: Effects on Juror Decision-making. *Behavioral Sciences and the Law*. 32. p. 823

³⁵ Whitcomb, Debra. (2003) Legal Interventions for Child Victims. *Journal of Traumatic Stress*, Vol 16. P. 153

stand. In other words, by attempting to make the trial process easier on children given the re-traumatization that may occur for them when being forced to confront their alleged abusers in an open courtroom, jurors' perception in turn can be impacted by these accommodations, rendering a verdict that is less favorable to the child victim.

It is nonetheless important to note that empirical results are not conclusive regarding the relationship between child witnesses and juror perceptions, with findings ranging from negative to positive effects and even no effects whatsoever, at least to a statistically significant degree. However, it is important to keep in mind that these types of trials are unique and individualized; therefore, it is hard to truly understand the challenges presented in any given case. Yet, in an article by author J.M Golding as part of a larger bibliography published by The National Children's Advocacy Center regarding issues and concerns of children's testimony, it is stated:

The results showed that the teary condition led to more guilty verdicts and a greater belief in the alleged victim than the other demeanor conditions. Findings from this study indicate that demeanor can impact the perception of a child who is an alleged sexual assault victim in court. However, it is not simply the case that any display of demeanor will lead to a positive outcome for the alleged victim. Instead, it appears that too little or too much emotion from the alleged child victim negatively affected credibility in the eyes of the mock jurors.³⁶

In other words, one cannot predict the outcome of a case strictly from the demeanor of the child. While for some an emotional response or a lack of one may be an indication of a certain result, it is not enough as a standalone piece of evidence to assume that a child who acts "inappropriately"

³⁶ Golding, J. M., Fryman, H. M., Marsil, D. F., & Yozwiak, J. A. (2003). Big girls don't cry: The effect of child witness demeanor on juror decisions in a child sexual abuse trial. *Child Abuse & Neglect*, 27(11), 1311-1321. Retrieved from The National Children's Advocacy Center

on the witness stand will hurt or benefit the case. Similarly, and building upon the previous discussion herein on the negative impacts CCTV may have on jurors' perception of child witnesses, Whitcomb notes how CCTV may produce positive effects on guilty verdicts in child sexual assault cases in a different vein, which is through the increased likelihood of guilty pleas. Specifically, she notes, "Videotaping the child's statement, is another popular intervention directed, in part, at reducing the number of interviews. Reportedly, this procedure also encourages many defendants to enter guilty pleas when confronted with the compelling presentation of a child's story, which of course, obviates the need for the child to testify."³⁷ In this case, the videotaped testimony saved the child from experiencing the effects of trial and also did not result in a potential hung jury or wrongful conviction.

Challenges to Justice Outside of the Courtroom

The court experience may present many difficulties for crime survivors, but these problems are often exacerbated with child survivors. This is because the system was created largely with adults in mind, with little consideration of the effects on children, particularly as children were often viewed by society as simply miniature adults, with their developmental differences not fully recognized until after the Industrial Revolution.³⁸ As a result, there are often immediate and long-term damaging effects of child witnesses having to confront their abuser in the courtroom. The procedural and substantive challenges presented by child witnesses in court, as outlined previously in this thesis, also play a fundamental role in the perpetuation of challenges to justice beyond the courtroom. Specifically, the trauma of the court process in and of itself, combined with potentially negative court outcomes in cases of perpetrators being set free due to hung juries or not guilty verdicts, further compounds the long-term trauma that child

³⁷ Whitcomb. p. 156

³⁸ Feld, Barry. C (2017) *The Evolution of the Juvenile Court*. New York University Press. (p. 21. 30)

sexual abuse survivors may face. And while the Sixth Amendment's focus may be on ensuring justice in the courtroom, a common theme throughout the Constitution and one which is arguably foundational to ensuring justice is the right to life, liberty, and the pursuit of happiness. Thus, if participating in a trial produces long-term deleterious effects on children's wellbeing, then the government may arguably be failing at its duty to ensure justice for all. Outlined below then are the social, emotional, behavioral, and academic disparities arising from the effects of child sexual abuse and the necessary court trial these child survivors often endure.

Immediate damaging effects for child victims of sexual abuse alter their life course and set them on a potentially dangerous path; one of these damaging effects is poor academic performance. For example, a recent meta-analysis on child sexual abuse outcomes found that "studies included in this review show a negative impact of CSA on academic performance among female victims of CSA."³⁹ Academic performance may be further negatively impacted given the trial process's volatile nature. More specifically, given the adversarial nature of the court process, children may need to miss school to partake in interrogations and other preparatory procedures. There are likewise many working parts within the courts, often leading to delays and continuances in one's trial. This may lead to further absences from school, as the child and their parents or other legal guardians may need or wish to be present for every court proceeding. Authors Quas and Goodman note this in their 2011 article on consequences of criminal court involvement for children by stating, "trial dates are routinely changed, often last minute, making it difficult to emotionally prepare the child, who may show up at the courthouse only to be asked to return later, sometimes over and over again."⁴⁰ In other words, it becomes

³⁹ MacIntosh, Heather B & Menard, A. (2021). Where are We Now? A Consolidation of the Research on Long-term Impact of Child Sexual Abuse, *Journal of Child Sexual Abuse*. P. 254

⁴⁰ Goodman, Gail & Quas, Jodi. (2011) Consequences of Criminal Court Involvement for Child Victims. *Psychology, Public Policy, and Law*. p. 393

difficult to mentally prepare for a traumatic experience when you have to repeatedly go through it because the dates constantly change. Relatedly, beyond academic performance outcomes specifically, frequent court delays and continuances have been found to lead to more emotional trauma for the child. Specifically, delays and continuances keep children's anxiety at relatively high levels and slow their emotional recovery, especially for children who testify against the accused in court.⁴¹ Importantly, research also consistently links childhood sexual abuse, poor academic performance and poor mental health to lower socioeconomic status and higher rates of criminality in adulthood, indicating how these experiences may compound over time and produce cumulative life disadvantage.^{42 43}

In addition to poor academic performance and its associated outcomes, child sexual abuse survivors also have a higher likelihood of engaging in sexually risky behavior, including earlier rates of consensual intercourse and higher risk of teen pregnancy; substance abuse; deliberate self-harm and suicide attempts; and various physical health problems, such as chronic pain and gastro-intestinal symptoms.⁴⁴ Many of these long-term effects, in turn, arise from the variety and surplus of short-term effects childhood sexual abuse survivors were forced to endure at such a young age before their brain developed fully. Specifically, one of the most detrimental effects of childhood sexual abuse is post-traumatic stress disorder (PTSD), or what is often referred to as rape trauma syndrome specifically for sexual abuse survivors, which can be divided into two phases: the acute phase and the long-term phase.⁴⁵ The immediate response in rape trauma

⁴¹ Ibid.

⁴² Maniglio, R. (2009). The impact of child sexual abuse on health: A systematic review of reviews. *Clinical Psychology Review*, 29, 647-657.

⁴³ McGrath, S.A., Nilsen, A.A., & Kerley, K.R. (2011). Sexual victimization in childhood and the propensity for juvenile delinquency and adult criminal behavior: A systematic review. *Aggression and Violent Behavior*, 16, 485-492.

⁴⁴ Dunne, Michael & Legosz, Margot. (2000). The Consequences of Childhood Sexual Abuse. *Project Axis*.

⁴⁵ Ibid.

syndrome involves distortion and paralysis of the individual's coping mechanisms. Essentially, they lose control of their emotions and many mental faculties that control pain, eating and sleep.⁴⁶ The delayed phase, after a period of time occurs, encroaches, and hinders the individual's daily activities and work. Various symptoms of the delayed phase involve panic attacks, flashbacks, nightmares, and phobias.⁴⁷ The author of the study estimates that anywhere between 32-80% of victims suffer from PTSD.

Much of the research presented above involves general effects from the child sexual abuse alone and not much on the direct effect of the court process in further disadvantaging child sexual abuse survivors throughout the life course. Many researchers and authors attribute the lack of evidence and studies on this issue to the delicate subject matter and difficulty in accessing such vulnerable populations for research inquiries. However, there is research on the re-traumatization effects of the court process on adult survivors that can be extrapolated to children. In fact, re-traumatization experiences in the courtroom may be argued to be even more applicable to children since their brains are less developed than adults and thus they are more likely to be negatively affected by repeated trauma in their lives. One aspect of the court process that may retraumatize victims arises from the structural nature of the court system itself, where it has been argued that the right to confront your accuser afforded by the Sixth Amendment places the accused at an advantage over their victim. An Arizona Law Review article found that "abusers are better-positioned to use the intimate and personal information gained from the intimate partner relationship as a sword."⁴⁸ In other words, perpetrators of abuse have successfully abused their victims because of the power and control they have exerted over them

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Katirai, Negar. (2020). Retraumatized in Court. *Arizona Law Review Vol. 62:81*. p. 103

in their relationship, including threats of intimidation and other forms of verbal abuse used to intimidate and humiliate survivors. In this context, survivors taking the witness stand and confronting their abusers in court are often not empowered by doing so, but feel traumatized, humiliated, and afraid. Arguably, if these findings are to be extrapolated to child witnesses, the power differential between an adult abuser and a child survivor would be even more disparate than that between an adult abuser and adult survivor.

Another shortcoming of our legal system is its rigidity and strictness, which forces survivors to tell their story within the confines of what the court allows. Restricting how victims tell their story may solidify negative thoughts and feelings about their experiences and may make them feel responsible for their own abuse. Both adult intimate partner violence and sexual violence survivors have noted experiences of victim-blaming in the courtroom, where they were explicitly or implicitly accused of failing to prevent what happened to them; and felt blamed by both their perpetrator and their perpetrator's attorney for their experiences throughout the trial process.⁴⁹ And while it may be argued that experiences of victim-blaming are less frequent among children who are sexually abused by a more obviously powerful adult, the interrogative nature of the court process itself has been found to produce similar self-blaming attitudes among child survivors. Specifically, research has found that requiring children to continually repeat their stories of abuse reinforces their internalization of guilt and the shame they often experience as a result of sexual abuse.⁵⁰ Multiple actors in the criminal justice system, as well as social service professions, questioning the child about their abuse experience likewise elevates their trauma symptomology; and this is particularly the case for children who testify in court against their

⁴⁹ Ibid.

⁵⁰ Henry, J. (1997). System intervention trauma to child sexual abuse victims following disclosure. *Journal of Interpersonal Violence*, 12, 499-512.

abusers, many who state feeling as if they are the ones who are on trial. This is perhaps most likely because, as noted by authors Caprioli and Crenshaw, “The questioning process, particularly cross-examination does not take into consideration the child’s need for safety and sensitivity to timing, instead favoring an aggressive, interrogative approach that further intimidates children.”⁵¹

Alternatively, some researchers have found that the court trial does not affect the child; and with minimal considerations for the child victim, justice can be achieved. To support this point, they cite studies in which it is found that with a support system, and more importantly the support of their mothers, children can come out of the trial relatively unharmed. The National Institute of Justice found this to be true; maternal support is foundational to the child’s well-being and if they involved her in the court process as much as possible, then she will be able to provide for the child.⁵² Many others cite this information as argument for child involvement in the court process. Unfortunately, this argument fails to account for the fact that groomers and child abusers tend to pick their victims from more vulnerable populations, including those from single-parent households or where neither biological parent is involved in the child’s life. This limits the chance of noticing the behavior and thus makes the child an easier target.⁵³ Thus, while a child can go through the trial process relatively unscathed with the support of his mother, in cases where the mother is not present or is physically present but emotionally or otherwise unavailable, there is then no one in the child’s corner and no one to share the burden with them. With this being said, courts should not rely on a maternal figure as a fundamental method to

⁵¹ Caprioli, S., & Crenshaw, D.A. (2017). The culture of silencing child victims of sexual abuse: Implications for child witnesses in court. *Journal of Humanistic Psychology*, 57, 190-209.

⁵² Whitcomb, Debra, et. al. (1994). The Emotional Effects of Testifying on Sexually Abused Children, *The National Institute of Justice*, April, p. 6

⁵³ Julich, p. 50

support the child. Rather, the court should question more broadly how much re-traumatization it is willing to expose children to, whether with or without the support of a maternal figure, given both the short- and long-term deleterious effects of such repeated trauma exposure. Clearly, if the child must participate in a court trial of this nature, then trauma has already occurred, and the criminal justice system cannot repair those damages already inflicted. However, this leads to an important argument for less interviews, cross-examinations, and time at trial in order for a child to avoid repeated trauma exposure and to begin their healing process.

Legal Precedent

In the legal world, hearsay statements are statements that are made outside of court used as proof within the courtroom. For the most part, hearsay testimony is not allowed during trial due to the hearsay rule. The hearsay rule prohibits hearsay from being admitted in as evidence because the opposing counsel is not able to cross-examine the statement for truth and validity.⁵⁴ However, in previous years, the court has allowed for some exceptions to the hearsay rules in order to protect child witnesses during strenuous and traumatic court trials; however, the consistency and clarity of such exceptions is lacking across the country. Given the courts have demonstrated a willingness to ease the undue burden on children in the criminal justice system under at least circumstances in the past, it is now time to apply these standards evenly and consistently. Such a recommendation may be enacted in two different ways. The first is to keep children as far removed from the trial as we constitutionally can. The second is to make the process easier on the child by allowing for out-of-courtroom procedures in instances where the court may still desire for the child to be involved in the trial process in a more limited way. Regarding the first route, legal scholars have developed an exception to the Sixth Amendment's

⁵⁴ Cornell Law School. *Hearsay Rule*. Legal Information Institute.

Confrontation Clause that may be instrumental in the protection of children, known as the forfeiture-by-wrongdoing exception. This exception has opened the eyes of legalists and seeks to alter the interpretation of hearsay rules within the criminal justice system. There are two keystone cases to the forfeiture-by-wrongdoing theory, *Reynolds v. United States (1878)* and *Giles v. California (2008)*. Regarding the second route that may decrease the undue burden on child witnesses in criminal trials, that has been previously recognized by the courts, is the standardized use of CCTV technology for witness testimony.

The first case where the courts explored the theory of forfeiture-by-wrongdoing was *Reynolds v. United States (1878)*. In this case, defendant George Reynolds was charged with bigamy for marrying Amanda Schofield. Both Reynolds and Schofield evaded the sheriff's attempts to serve them with an order to appear in court on multiple occasions. Reynolds eventually received the order but would not help the court in locating Schofield, ultimately leading to Schofield never being served to participate in the trial. In this case, the court allowed for a previous testimonial statement made by Schofield to be admitted into the trial under the forfeiture-by-wrongdoing doctrine. Due to Reynolds's reluctance to help the sheriff locate Schofield, the court reasoned, "the Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts; it grants him the privilege of being confronted with the witness against him. But if he voluntarily keeps the witness away, he cannot insist on his privilege."⁵⁵ Ultimately, due to Reynolds's own actions, the court allowed otherwise unaccepted testimony into the trial.⁵⁶ Although this case operates under different facts, I believe the reasoning put forth in this case has weighty implications for hearsay testimony in child

⁵⁵ *Reynolds v. U.S (1878)*

⁵⁶ Lyon, Thomas D. and Dente, Julia. A. Child. (2014) Witnesses and the Confrontation Clause. *Juvenile Criminal Law Criminol 2012*

sexual abuse cases. The defendants in such cases are aware of the power struggle and hierarchy they create when they make the conscious choice to abuse a child. Established previously in this thesis was the legitimacy of the hierarchy between a child victim and an adult perpetrator of sexual abuse and the overall impact it can have in the courtroom. Byproducts such as intimidation, fear and emotional instability arise from this power dynamic. In the case of *Reynolds v. United States*, the court states that the defendant is not protected by the legitimate consequences of his own wrongful acts. Following from this reasoning allows the court to make the same decision in criminal cases of child sexual abuse on the grounds that the defendant has to face their own consequences of attacking an individual with much less power and continuing to assert the powers of intimidation long after the abuse has ended.⁵⁷ As research has shown, the effects of Stockholm Syndrome and Child Sexual Abuse Accommodation Syndrome continues well after the abuse and well into the duration of the trial.⁵⁸

Following from the Reynolds trials came *Giles v. California (2008)*. In this case, Dwayne Giles was charged with murdering his ex-girlfriend, Brenda Avie. He claimed self-defense due to previous acts of violence committed by Avie. To challenge this defense, the prosecution wished to admit testimonial hearsay made by Avie during a 911 call from three weeks prior. During this encounter, Avie claimed Giles accused her of having an affair, beat her and threatened to kill her with a knife if he found her cheating on him. In order to decide on this matter, the court looked at established common law, where they found hearsay could be used if the defendant attempted to keep the witness away from the trial. The court ultimately allowed the victim's previous statements to be admitted into court because "earlier abuse, or threats of abuse, intended to

⁵⁷ Katirai, Negar. (2020). Retraumatized in Court. *Arizona Law Review Vol. 62:81*.

⁵⁸ Julich, Shirley J. (2016). Does Grooming Facilitate the Development of Stockholm Syndrome, *Aotearoa New Zealand Social Work*, Vol 28, p. 48

dissuade the victim from resorting to outside help would be highly relevant to this inquiry.”⁵⁹ Scholars Thomas Lyon and Julia Dente conclude, “a majority of the Court thus based on the theory that repeated violence is motivated by a desire to exert control over the victim.”⁶⁰ Again, despite the content of this case being a matter of domestic violence and not child sexual abuse, the conclusions are still important to matters of child sexual abuse. Explicitly in the Giles case, the court cites a desire to exert control as a justification for the use of the forfeiture-by-wrongdoing exception. It’s evident that the perpetrators demonstrate an exertion of control over their juvenile victims who have little support behind them to fight or push back.

Extrapolating these evaluations of the forfeiture exception to cases of child sexual abuse, legal scholars and the courts can look into the exception and allow for consistent application across all cases. Further, lawmakers working with legalists have the ability to rewrite hearsay exceptions under the presumption that the work being done is to protect children whose well-being has too long been left out of the considerations of the legal system. In practice, this means that the testimony child sexual abuse victims previously provided to prosecutors, law enforcement officers, medical personnel, and mental health professionals could thus be used as evidence in the courtroom, opposed to making the child relive their trauma and face their perpetrator in an open criminal court by having to provide firsthand testimony during the trial process.

Should the hearsay testimony of children previously provided to legally relevant others prior to the beginning of the trial process not be allowed as admissible evidence in court for whatever reason, another procedure that would help alleviate the undue burden on child sexual abuse survivors that is currently inconsistently applied through courts in America is the use of

⁵⁹ Giles v. California (2008)

⁶⁰ Lyon, et. al.

CCTV. In 1990, the Supreme Court was brought the case of *Maryland v. Craig* (1990) that dealt with the use of CCTV in the case of alleged sexual abuse against a six-year-old child by defendant Craig. The State was allowed to invoke state statutory procedure permitting the use of one-way closed-circuit television during the trial. The Maryland State statute, "Section 9-102 of the Courts and Judicial Proceedings Article stated that the trial judge must first "determine[e] that the testimony by the child victim in the courtroom [would] result in the child suffering serious emotional distress such that the child [could not] reasonably communicate."(quoting Md. Cts. & Jud. Proc. Code Ann. § 9-102(a) (1)(ii) (1989))."⁶¹ This would mean that the child, prosecutor, and defense counsel go into another room while the child provides his statements, and the rest of the court officials stay in the courtroom. In the courtroom, they watch the transaction on a screen while the defendant maintains contact with his counsel, provided he wishes to raise objections or other concerns.⁶² Craig tried to argue that the use of this technology violated the Confrontation Clause of the Sixth Amendment. The prosecutor introduced expert testimony to prove that if the child testified in open court that there would be severe emotional distress and traumatic effects on the child. Ultimately, the court ruled in favor of the state and allowed for the child to testify in a separate room through CCTV. Craig appealed the decision to the State Court of Special Appeals, where they affirmed the lower court's decision. Next, she brought it to the State Court of Appeals, where they reversed the decision. Finally, when the case reached the Supreme Court, they reversed the decision of the State Court of Appeals against Craig and upheld the sentence she was given at the state court level for allegations of sexual child abuse.

⁶¹ Swain, Gregory J. (1990) Recent Developments: *Maryland v. Craig*: Maryland Statute Allowing One-Way Closed Circuit Television Testimony of Child Abuse Victims Did Not Violate the Confrontation Clause of the Sixth Amendment. *University of Baltimore Law Forum Volume 21, Article 9.*

⁶² Justia, *Maryland v. Craig* (1990)

Importantly, the highest courts in our country have acknowledged and allowed for special procedures when it comes to cases regarding child sexual abuse; nevertheless, the statutes providing these protections come from the state level, leading to inconsistency across the nation. According to an article by Elizabeth Murkley, in 2002 we tried to establish the Uniform Child Witness Testimony Act which would have addressed this fundamental issue. Despite the act taking the first step toward uniformity on this issue in our nation's courts, only several states adopted and opted to enact the act, therefore not fully solving the problem.⁶³ The act also did not explicitly state what procedures must be used in certain cases, but rather left that discretion up to the states. As Americans, we have a fear of too much government regulation within our procedures and regulations. While this is a valid fear, oftentimes I believe that it inhibits the Senate from being able to fully protect certain classes of people. Murkley profoundly states, "Prosecutors are reluctant to try even Craig-approved closed-circuit testimony. Exploiting legislative ambiguity is not a workable answer to the question of how to best protect the most vulnerable classes of child witnesses."⁶⁴ Due to fear of losing the case, prosecutors don't even attempt to protect the child. The unclear and gray areas of the law are at fault for the damage to our children. Consistency and a well-written law to guide the use of CCTV and other technology may thus be the best method to protect children from the long-lasting trauma of having to testify in open court while confronting their alleged abusers.

Introduction to Bill Proposal

To this point, the unintentional consequences, and ramifications of abused children's role in a criminal trial has been discussed and analyzed at great length. We have discussed

⁶³ Murkley, Elizabeth. (2015). Remote Testimony for Child Witnesses. *Vanderbilt Journal of Entertainment & Technology Law* Volume 17 Article 5.

⁶⁴ Murkley, p. 485

fundamental questions about the Confrontation Clause, including what sort of justice it aims at achieving, how is it interpreted, and whether there can be exceptions made to its enactment while still recognizing child victims' rights and achieving justice. We have also discussed the procedural and substantive challenges to justice in the case of child witnesses, the most notable being the long-lasting traumatic impacts to the child's psyche and well-being.

While there have been previous attempts to reform areas of the law regarding child witnesses' rights in courts and hearsay evidence more broadly, there is still much work to be done considering the numerous children each year who must play an active role in the court process. For too long children have been left out of considerations of justice under the pretense that the family should protect the children.⁶⁵ Importantly, there are ways to fix the issue that require thoughtful consideration by our nation's leaders and intellectuals. Together, we can successfully help our children while also maintaining our foundational view of justice. The courts have ruled that the right to confront your accuser is not an absolute right; therefore, a new bill can place limitations on the Confrontation Clause that maintain its purpose of upholding defendants' constitutional right to a fair trial without going too far and simultaneously denying victims their right to justice.

Several states in the United States have some sort of statutory regulation or guidelines on how to handle child witnesses, particularly in their own cases of sexual abuse. However, even in these instances where regulations and guidelines exist, the state often needs permission from each jurisdiction, court, and judge to allow for such statutes to be applied. This often results in tedious delays, differing viewpoints from each party involved, inconsistent rulings across cases which are similar in nature, and the potential of not providing justice to the victims. The

⁶⁵ West Thomas G. 1997. *Vindicating the Founders: Race Sex Class and Justice in the Origins of America*. Lanham MD: Rowman & Littlefield.

following section presents an example of a congressional bill aimed toward tightening gaps in the legal system and providing a more definitive approach where there currently exist many gray areas. The bill would provide a national standard for exceptions to the Confrontation Clause and would streamline the process for using the accommodation without the need for a long, drawn-out process, which ultimately only slows down the court system in its entirety.

While the task at hand is to improve the circumstances for child witnesses in their own sexual abuse cases, the passage of such a bill may also result in widespread applications to child witnesses in other types of criminal cases. In other words, simply because the present thesis seeks to address one gray area that exists for children involved in the criminal court process does not mean that there are not more problems out there that may also be addressed in due time. Eventually, we can create a legal system more accustomed to children and their special needs due to their intrinsic nature.

Proposed Bill on Following Page

To Protect Children from Additional Trauma Within the Court System During Trials of Sexual Abuse

In the House of Representatives

Date: April 12, 2023

Kelsey Savoy introduced the following bill: which was read twice and referred to the committee on Rules.

An Act

To Protect Children from Additional Trauma Within the Court System During Trials of Sexual Abuse

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled.

SEC. 1.

Protect Our Children Act

SEC. 2.

Hearsay statements are defined as statements that are made outside of court and used as evidence within the courtroom. The court has previously established numerous exceptions to the evidentiary rules of hearsay, as outlined by Rule 803 of the Federal Rules of Evidence.

SEC. 3.

The Protect Our Children Act requires judicial systems across the country to allow for hearsay exceptions to be applied in criminal trials where any child under the age of 18 is a witness to their own trials of sexual abuse. While any relevant hearsay exception may be applied, those most applicable to cases of sexual abuse involving minor children will include (1) Then Existing Mental, Emotional, or Physical Condition; (2) Statements for Purposes of Medical Diagnosis or Treatment; and (3) Recorded Recollection.

In addition to the application of hearsay exceptions in trials of sexual abuse involving any child under the age of 18, judicial officers are required to allow the widespread use of CCTV for child testimony during trial. This includes allowing children to go into another room with the Judge, the prosecutor, and their attorney to be cross-examined without subjecting them to the physical presence of their alleged abuser. The defendant and jury will be able to witness the testimony and any cross-examination that takes place through cameras and a television screen in the courtroom.

In cases of extreme abuse where it is established by a professional appointed by the court that a child providing testimony during trial will lead to irreparable mental or emotional harm, children may be allowed to be cross-examined outside of the courtroom and have his/her statements applied during trial. A licensed mental health care professional must evaluate the victim and determine if they are suited to participate in the trial with minimal risks to their wellbeing.

Statements made by children to health care professionals or teachers (including extended care teachers) may be allowed into evidence following that they are truly relevant to the case.

SEC. 4.

The Judicial Branch of the United States will be responsible for enforcing the administration of the Protect Our Children Act.

SEC. 5.

Any judge that does not follow the Protect Our Children Act will face a 30-day suspension from their duties on the bench for each violation. Continued violations of the Protect Our Children Act may result in impeachment and removal from office.

SEC. 6.

The law will go into effect immediately after the passage of the act.

Conclusion

One of our ultimate goals as a country is to protect and defend those who are unable to protect themselves. Yet, as a country founded on the notions of justice and liberty, we have often failed at protecting our nation's children, instead relying on the child's family to alone do this work.⁶⁶ The time is now that we take into consideration the mental and emotional ramifications of forcing children to directly participate as witnesses in their own trials of sexual abuse.

In this thesis, I began by briefly examining the conception of justice that the Founders embraced at the time of their drafting the Constitution. As noted, then, the American system heavily relies on distributive justice as the foundation for righting wrongs between people; thus, providing children with extra protections in the legal system is well within the philosophical parameters set forth by Aristotle's notion of distributive justice. I also noted that the Founders deliberately left specific mention of children out of the Constitution because it was at the time believed to be the family's responsibility to protect the child, a responsibility not to be interfered with by governmental overreach. Yet, as our society has since evolved exponentially, with children increasingly interacting with those outside the family domain, the family can no longer provide on its own sufficient protection for children.

Following the principle of applying justice in the courts, this thesis then examined the various procedural and substantive challenges to justice that occur within the current judicial system when child survivors of sexual abuse are asked to participate in their own criminal trials as witnesses. As developmental psychological and neuroscience research literatures indicate, children are emotionally and mentally different from adults; therefore, when you thrust children

⁶⁶ West Thomas G. 1997. *Vindicating the Founders: Race Sex Class and Justice in the Origins of America*. Lanham MD: Rowman & Littlefield.

into a system designed for adults, there will be serious ramifications for both the children and the court process itself.⁶⁷ Child survivors of sexual abuse experience higher rates of depression, suicide, substance abuse and unstable relationships; and these deleterious effects may become even more likely to occur when children are forced to deal with the additional trauma of having to testify in an open court against their alleged abuser.⁶⁸ Due to the impact trauma has on different regions of the brain, including those responsible for verbal expression, research likewise finds that children who are asked to testify in open court against their abusers may simply be unable to do so, leading to testimony that is viewed by judges and juries as less reliable and compelling.⁶⁹ Ultimately, while the courts have done well in providing justice for the defendant through the Sixth Amendment's Confrontation Clause, we have simultaneously forgotten about the justice needed for the child victim.

As then noted in the following sections of this thesis, the courts have previously made several rulings regarding trials involving minor children as witnesses, as well as other types of cases in which an alleged victim or witness is determined unable to provide testimony in open court. Specifically, the courts have looked at different hearsay exceptions that were determined necessary in order to admit various types of evidence into court, and has also allowed for the use of CCTV as a way for child witnesses to provide testimony without facing their alleged abuser. Yet, while the courts have acknowledged the intellectual and emotional differences between children and adults and have thus allowed for certain exceptions to take place in criminal trials involving child witnesses, there continues to exist a lack of consistency and many gray areas

⁶⁷ Piaget, J. (1928). *Judgment and reasoning in the child*. Harcourt, Brace.

⁶⁸ Diseth, Trond H. (2005). Dissociation in children and adolescents as reaction to trauma: An overview of conceptual issues and neurobiological factors. *Nordic Journal of Psychiatry*, 59, 79-91.

⁶⁹ Rainville, Christina (2012), *Preparing Children with Post-Traumatic Stress Disorder for Court*, American Bar Association

on when and how these exceptions should be applied. Whether it be due to judges not believing in these exceptions or differing jurisdictional policies preventing their application, our children's lives are left up to the fickle discretion of the men and women on the bench.

To overcome such inconsistency in the additional protections that may be provided to child witnesses in sexual abuse trials, I presented a congressional bill that would cement into legislation throughout the country the various exceptions the courts have already applied in previous cases, albeit in a somewhat haphazard way to this point in time. The benefit of a legislative bill on these matters guarantees consistency across the nation, ensuring that all our children are being protected in the same way. There is a certain peace of mind knowing that no matter where you are in the United States, your children will be protected by the courts after unspeakable evils have already plagued their young bodies.

The road to justice for victims of child sexual abuse is a long, dark path; it requires legislators, judges, attorneys, and the people at large to work together. This thesis has laid the foundation for the first step toward achieving that justice by ensuring the equal application of laws that our courts have already previously supported. Yet, even if such a Bill as the one proposed herein were to be passed, continued work is needed, for which there is plenty of opportunity. As just one example, an area of legal studies not yet examined thoroughly that may begin to provide justice to child sexual abuse survivors in criminal courts is the forfeiture-by-wrongdoing clause discovered by some attorneys. On paper, the clause seems like an excellent way to maintain the principles of the Constitution that provide for fair and just trials for the accused while also protecting our children. Regardless of the specific path taken, one thing is clear: America's children deserve to be protected; they are the future of our country, and we must do right by them.